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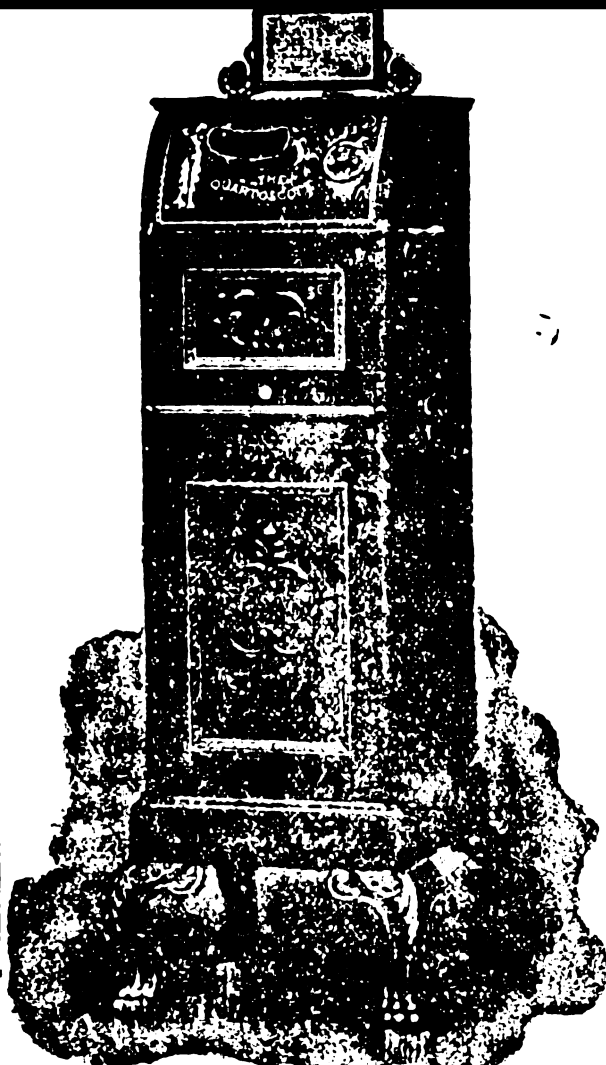
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ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

VIRGINIA-CAROLINA CHEMICAL CO. v. HOME INS. CO. OF NEW
YORK et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 415.

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP—ANCILLARY SUIT.

Several insurance companies separately issued policies on the same property of V., providing for proportional liability only for any loss, and V. brought separate actions at law thereon against them in a state court. The state court refused a motion to transfer the cases to the federal court; but in all of them, except one, in which there was involved less than \$2,000, the amount necessary to give the federal court jurisdiction, complete records were seasonably filed in the federal court, which refused motions to remand. *Held*, that a bill in the federal court to enjoin further prosecution of the actions at law there or elsewhere, and to have the liability of the insurers determined and adjusted in equity under such bill, was ancillary to the actions at law, so as to be maintained without regard to the citizenship of the parties.¹

2. EQUITY JURISDICTION.

Equity has jurisdiction, on the ground of inadequacy of remedy at law, to enjoin separate actions by insured against several insurers, and have their liabilities determined under the bill; their defenses being the same, and their liabilities, if any, proportional.

3. EQUITY—MULTIFARIOUSNESS.

A bill by certain insurers to restrain separate actions at law by insured against them and other insurers on their policies, under which their liability, if any, is proportional, and to which actions the same defense is interposed, and to have their liabilities determined in equity under the bill, is not multifarious; all the insurers having a common interest in defeating the claims of the insured.

4. FEDERAL COURTS—JURISDICTION—AMOUNT INVOLVED.

Where separate actions at law by insured against insurers on policies to which the same defense is interposed, and under which the liability, if any, is proportional, are removed to the federal court, with the exception of one in which the amount involved is not enough to give it jurisdiction, prosecution of this action, as well as of the others, may be

¹ Supplementary and ancillary proceedings and relief in federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 38 C. C. A. 195.

enjoined by a bill in the federal court to have the liabilities of insurers determined and adjusted by such court as a court of equity under such bill.²

Appeal from the Circuit Court of the United States for the District of South Carolina, at Charleston.

H. A. M. Smith, for appellant.

Augustine T. Smythe and Alexander C. King, for appellees.

Before GOFF, Circuit Judge, and JACKSON and PURNELL, District Judges.

JACKSON, District Judge. This case is now heard upon an appeal from the circuit court of the United States for the district of South Carolina. 109 Fed. 681. A bill was filed by the Home Insurance Company of New York and the German-American Insurance Company of New York against the Virginia-Carolina Chemical Company and 14 insurance companies, who were made defendants to the bill. The defendant the Virginia-Carolina Chemical Company had prior to the filing of this bill instituted actions at law in the court of common pleas of Charleston county, S. C., against each and all of its codefendants. Motions were made in each case before that court to transfer the several cases to the circuit court of the United States for the district of South Carolina, which were overruled, and the court retained the cases. Notwithstanding the refusal of the court of common pleas to transfer the several cases, the plaintiffs in this action, under the act of congress, seasonably took out the records in each case and filed them in the clerk's office of the United States court for the district of South Carolina, to be further proceeded therein before the circuit court of the United States. The object and purpose of this bill is to restrain the defendant insurance companies from the prosecution of these suits on the law side of the United States court, as well as elsewhere, to avoid a multiplicity of suits, and to have the cases all heard before the federal tribunal. The validity of these various policies of insurance is assailed for the reason that they were procured by fraud, misrepresentation, and concealment of the true value of the property insured; that the representations of the insured as to the value of the property were largely in excess of its value; that the various insurance companies, relying upon the good faith of the Virginia-Carolina Chemical Company, issued the policies upon the representation made by the defendant company. Various other grounds of relief are set up in the bill, which we deem it unnecessary to consider at this time, for the reason that the issues raised by the plea and demurrer of the defendants refer largely to so much of the bill as we now have under consideration.

The plea raises the question of jurisdiction, and the right of the plaintiffs in this action to maintain this case in the circuit court of the United States for the district of South Carolina, for the reason

²Jurisdiction of circuit courts as determined by amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75, and *Shoe Co. v. Roper*, 36 C. C. A. 459.

that the plaintiffs are citizens of New York, and the defendant the Virginia-Carolina Chemical Company is a corporation of the state of New Jersey. If this were an independent and original bill, the ground raised by the plea, possibly, would be fatal to the maintenance of this action; but it is not an original bill. It is an ancillary proceeding to the actions at law pending on the law side of the court. It is, however, claimed that, inasmuch as this is an ancillary proceeding, the circuit court of the United States has full jurisdiction, without regard to citizenship, to furnish relief in the controversies on the law side of the court. The supreme court, in the case of *Freeman v. Howe*, 24 How. 460, 16 L. Ed. 752, held that:

"A bill on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit out of which it has arisen, and maintained without reference to the citizenship or residence of the parties."

In this case there are 14 original suits on the law side of this court, which the bill seeks to restrain and regulate, and to prevent any action that might work injustice to these defendants in the law actions. In the case of *Dewey v. Coal Co.*, 123 U. S. 329, 8 Sup. Ct. 148, 31 L. Ed. 179, which was tried before the writer of this opinion, a suit was brought in the state court on the law side thereof, and removed to the United States court. After the removal of the case a cross bill was filed, raising certain questions to be litigated in the chancery proceedings. Objection was made that the court had no jurisdiction of the case, for the want of diverse citizenship, as appeared from the face of the bill. This objection was overruled by the court below, and the supreme court held that the objection was not well taken; the equity suit being the exercise of jurisdiction by the circuit court ancillary to that which it had already acquired in the action at law, which it might well entertain according to the rule in *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Pacific R. Co. v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498; *Dewey v. Coal Co.*, 123 U. S. 329, 8 Sup. Ct. 148, 31 L. Ed. 179. Without further discussing the question of jurisdiction, we are of the opinion that the cases already cited dispose of that question, and that the bill filed in this case is properly an ancillary proceeding to the law actions, and for this reason we overrule the exceptions taken by the appellants to the jurisdiction of the court.

The main object and purpose of this bill is to prevent a multiplicity of suits, all involving the same legal questions, founded upon similar issues of fact; and for this reason in its nature it is ancillary to the actions at law. All the suits brought by the Virginia-Carolina Chemical Company against the various defendants seek to litigate the same legal right, and the legal liability of the defendant companies, if any there be, is the same; the only difference being the amounts involved in the various policies. The plaintiff, the Virginia-Carolina Chemical Company, in the actions at law sets up a common demand against all the defendants. The object and pur-

pose of this bill is to determine the liability of the different defendants in a court of conscience, and, if the court should reach the conclusion that there is a liability on each of the policies mentioned, then the question would be, what is the extent of the liability? It is apparent from the policies in this case that, if there is any liability at all, then under the condition of the various policies the same must be apportioned, and in order to do that a reference should be made to a master to ascertain the amount of liability upon each policy. But, if the court should reach the conclusion that these policies were issued upon a false state of facts as to the value of the property insured, and that the insured could not recover upon them, then, under the terms and conditions of the policies, a court of equity, in the exercise of its powers, would enjoin the plaintiff on the law side of the court from the further prosecution of its demands.

This action might seem to savor of proceedings upon an original bill. Yet it is not an original bill; but, as we have said, it is an ancillary proceeding, founded upon proceedings at law, and, in fact, is but a mere continuation of them. If the cases at law were properly removed and transferred to the federal tribunal, then the bill, being an ancillary proceeding founded upon the pending law cases, derives its jurisdiction from the existence of those cases. It is claimed, however, that the proceedings are still pending in the state court. It is a matter of no importance whether they are or not, so far as this question is concerned. It is conceded that the motions to remove these cases were made, and that complete records in each case were filed in time in the federal court. It appears that motions to remand were made in the several cases before that tribunal, and that the court overruled the same. The judgments of the court in the several cases are still in full force and not appealed from, leaving all the cases to be tried before that tribunal; but, even if the orders refusing to remand the cases were appealed from, the only effect of the appeal would be to suspend all action in the court below until the appeals could be heard. The act of congress has been fully complied with in the transfer of the cases, and, the court having refused to remand them, they are by operation of law pending in the United States court, and any effort upon the part of the Virginia-Carolina Chemical Company to prosecute these suits in the federal or state courts is a violation of the injunction under the circumstances of this case. This court does not seek, nor does it claim the right, to restrain the state court itself from hearing the case of the Virginia-Carolina Chemical Company against the various defendants; but it holds that where the cases have been legally and properly removed from the state court to a federal court, which refused to remand the cases, the federal court has a right to restrain the defendant the Virginia-Carolina Chemical Company from the further prosecution of its actions at law in any court until the questions can be heard and determined in the ancillary proceeding. The cases removed are now pending and wholly within the jurisdiction of the federal court, and the state court has lost its jurisdiction. So far, then, as the question of the

jurisdiction of the court is raised and presented by the pleadings in this case, we reach the conclusion that this bill can be maintained, for the reason that the remedy at law is inadequate and incomplete, and that the action of the court below in overruling all the exceptions to the jurisdiction must be sustained.

But exceptions are taken to the bill on the ground that it is multifarious. If we look to any general rule to determine whether or not a bill is multifarious, we answer that there is no inflexible rule or test by which to determine that question. It depends entirely upon the allegations of the bill and the facts set up in it. If it appears from the face of the bill that the defendants have the same defense, arising from a common interest in the matter of litigation, and that by one comprehensive suit in equity all the rights and interest of the defendants can be determined as between them and the Virginia-Carolina Chemical Company, then a bill in equity can be maintained. *De Forest v. Thompson* (C. C.) 40 Fed. 375; 1 Pom. Eq. Jur. pars. 245-269, inclusive; *Jones v. Andrews*, 10 Wall. 327-333, 19 L. Ed. 935. There are a number of authorities cited in the brief of the appellee to sustain this position, but we deem it unnecessary to discuss them. It appears from the face of the bill that there are 14 different actions brought by the Virginia-Carolina Chemical Company against these defendants. Equity has jurisdiction to prevent a multiplicity of suits, and to protect the defendants from unnecessary expense, though the Virginia-Carolina Company, so far as it is concerned, has an adequate remedy at law.

The question presented by the demurrer in this case is whether or not all the defendants can be joined in one suit. This bill upon its face alleges that the defendants have a common interest in the questions involved, though their liability may be different. If it appeared from the face of the bill that there was not a common interest in the subject of litigation, and that there was no connection the one with the other, then the exception taken to the bill should be sustained. But, as we have seen, all the defendant insurance companies have a common interest in defeating the claims of one party, the plaintiff in the actions at law. On one side is the Virginia-Carolina Chemical Company, the plaintiff in the actions at law, while on the other side are the 14 insurance companies, who deny their liability to the Virginia-Carolina Chemical Company upon their policies of insurance.

Another exception taken to the bill is that the allegations made in it are inconsistent, having a double aspect. In the view that we take of this bill we must dissent from that position. It is true that there is a prayer in the alternative, and it is equally true that the prayer of the bill may be considered as to whether it is multifarious or not. It is a well-settled principle that, when the pleader is in doubt as to the kind of relief that the complainant should have upon the bill, he may frame the prayer in the alternative, so that the court may grant whatever relief he is entitled to upon the facts stated. *Story, Eq. Pl. par. 42*. There are a number of authorities cited in the brief of the appellee to sustain this position, but we deem it unnecessary to refer to or discuss them. To support this

position we find in 3 Enc. Pl. & Prac. 364, a number of cases cited, which sustain the principle as laid down by Judge Story in his Equity Pleading. Mr. Justice Harlan, of the supreme court, announced in *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. Ed. 1141, "that the ends of justice must not be sacrificed to mere form or by too rigid an adherence to technical rules of practice."

It will be observed that we have so far disposed of all the errors assigned by the appellant, except the third, which states that the circuit court of the United States for the district of South Carolina can take no jurisdiction, either by original process or by removal, of the London Assurance Corporation, for the reason that the amount involved is less than \$2,000, the jurisdictional amount of the United States court. It appears from the allegations of the bill that the London Assurance Corporation is one of 16 companies that issued policies of insurance upon the property of the Virginia-Carolina Chemical Company to the amount of \$78,210. The twelfth paragraph of the bill alleges that by the terms of each of the insurance policies issued by the various companies upon the property described it was provided no company shall be liable under its policy for a greater proportion of any loss on the described property than the amount insured by each policy should bear to the whole insurance. This allegation of the bill, upon a demurrer to it, must be admitted as true; and, if true, it establishes such a relation between the 16 companies that insured this property as creates a liability, if the policies are valid, which can be better and more readily ascertained by a reference to a master to fix. For this reason it was proper that the London Assurance Corporation should be made a defendant to this bill, not only that the plaintiffs in this action, but all of the insurance companies who insured this property, should be protected in their rights from unjust and vexatious suits at law. It is a well-recognized principle in equity that a court of equity will entertain jurisdiction to prevent an unjust and unfair use of a resort to a court at law by a party which would deprive other parties of their just rights or subject them to vexatious suits. We are of the opinion that there is no error in the court below in awarding this injunction against the London Assurance Corporation.

We have now considered and disposed of all the assignments of error to the judgment of the court below. We fully concur in the able and exhaustive opinion of the learned judge of the court below, and find no error presented in the record.

Affirmed.

DAVIS v. MARTIN, U. S. Marshal, et al.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1902.)

No. 1,018.

1. JURISDICTION OF FEDERAL COURTS—ANCILLARY SUITS.

Where a circuit court of the United States, in a suit for the foreclosure of a mortgage, has actually seized the property through its marshal, for the purpose of selling the same under the provisions of the mortgage, such court has jurisdiction of a suit by a third person, claiming

ownership of the property, to enjoin its sale, as ancillary to the original suit, and regardless of the citizenship of the parties.¹

2 ADMINISTRATORS—SALE OF REALTY—EFFECT ON MORTGAGES UNDER LAW OF LOUISIANA.

Under the law of Louisiana, as settled by the decisions of its supreme court, a sale of real property of a decedent to pay debts of the succession, under a warrant duly issued therefor by the probate court having jurisdiction, extinguishes mortgages given by the deceased on the property, leaving mortgage creditors to look to the proceeds in the hands of the administrator.

3 SAME—VALIDITY OF SALE—COLLATERAL ATTACK.

Under the law of Louisiana, which requires land of a succession to be appraised by experts within one year prior to its sale under the warrant of a probate court, the failure to make such appraisal does not render the sale an absolute nullity, but is an irregularity only, which cannot be made the basis of a collateral attack upon the validity of the sale.

4 SAME—FAILURE TO RECORD DEED.

The fact that a deed to lands of a succession, executed by a sheriff on a sale made by him under a warrant from a probate court, is not filed for record until after the institution of proceedings by a mortgagee of the deceased to subject the land to his mortgage, does not affect the validity or effect of such deed as against the mortgagee, where it is left for record before he has actually seized the land; the law of Louisiana making it effective, as against third persons, from the time of filing, and not from its actual record.

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

On the 1st of October, 1888, W. L. Wooten, describing himself as a resident of Caldwell parish, state of Louisiana, executed an act of mortgage upon the property herein in controversy, in favor of Henry Dickinson, of New York, to secure the payment of an indebtedness of \$5,000, with interest thereon from that date at 8 per cent. per annum until paid; the indebtedness thus secured being liquidated by the execution of a bond of even date, for the sum of \$5,000, due October 1, 1893, to which were attached interest coupons, payable semiannually on the 1st days of April and October. This act was acknowledged by the maker before A. B. Hundley, clerk of the district court of Caldwell parish, on October 13, 1888, and the same was duly recorded in the mortgage records of Caldwell parish on same day. W. L. Wooten having died, his widow was appointed administratrix of his estate on December 23, 1893. On July 17, 1894, the court granted an order, on application of this administratrix, filed same day, directing that a writ of sale issue as prayed for, directing the sale of all the property (consisting entirely of real estate) of the succession of W. L. Wooten, deceased, after 30 days' advertisement according to law. On September 8, 1894, the sheriff of Caldwell parish, by virtue of a commission issued to him pursuant to above order, exposed the property in controversy for sale at the court house door in Caldwell parish, and, the same failing to sell for cash, it was readvertised, to be sold on credit of 12 months, on 29th of December, 1894; at which last date it was adjudicated to I. I. Davis, complainant, for the sum of \$2,000, for which he executed bond and security. On 3d of July, 1897, J. B. Watkins, M. Summerfield, and T. H. Chalkley filed their bill of complaint in the United States circuit court for the Western district of Louisiana, alleging themselves to be owners of the bond and interest coupons, heretofore recited; that all of them were due and unpaid; that Wooten had died; that his widow was administratrix of his estate, and tutrix of his minor children; prayed for the issuance of a writ of seizure and sale, and that the property be sold in accordance with the terms of the mortgage. On same day the order was

¹Supplementary and ancillary proceedings and relief in federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 185.

granted, and on the 7th of July, 1897, notice issued to Mrs. Mattie A. Wooten, widow, in her own behalf, administratrix of the succession of W. L. Wooten, and as tutrix to Zenobia Wooten, minor, to pay the debt specified within three days, in default whereof the mortgaged property would be sold in satisfaction of the writ. On July 7, 1897, a writ of seizure and sale issued, and on August 18, 1897, was executed by seizure of the property. On September 14, 1897, the appellant filed his petition in the court below, therein asserting title to the property in controversy, through the succession sale heretofore recited, and that he had been in peaceable and undisturbed possession since the date of adjudication; that the marshal had seized it under a writ of seizure and sale issued at the instance of J. B. Watkins, and advertised the same for sale; that this would be in gross violation of his rights; that he was entitled to damages for the alleged tortious seizure; and that an injunction was necessary to arrest the sale. The petition was verified, and the judge granted the order of injunction on the 22d of September, 1897. The petitioner prayed for a citation, a writ of injunction pendente lite, a final injunction, a decree of restitution, and for judgment against the marshal and the plaintiffs in the case of Watkins et al. against Mrs. Mattie A. Wooten, in solido, for the sum of \$650 damages, and all costs of suit. Thereafter the defendants in the petition appeared, and filed a demurrer, and for cause of demurrer set forth that the complainant had not by his bill made or stated a cause entitling him to relief, and that the bill was multifarious, in that some of the matters alleged were cognizant in equity and some were cognizant at law. On hearing this demurrer, the following entry was made: "As per assignment, the demurrer filed herein came on to be heard after argument by counsel for the respective parties, the same was overruled, and counsel for plaintiff elected to proceed on the equity side of the court. Case continued." Thereafter all the defendants joined in an unsworn answer admitting the issuance of the writ of seizure and sale, the seizure and advertisement for sale of the property described, but denying that Ivy I. Davis owns the property so seized and advertised, and aver the same belongs to the succession of W. L. Wooten. The answer further alleged that the pretended sale from the succession of Wooten to Ivy I. Davis, set up in the bill of complaint, is an absolute nullity, because the court under whose orders and decrees such sale was made was without jurisdiction over or of the succession of W. L. Wooten, and that its orders and decrees were absolute nullities, because said Wooten, at the time of his death, resided and had his domicile in the city of New Orleans, parish of Orleans, state of Louisiana. The case thereupon was continued from term to term, until the April term in 1900, when the defendants below filed the following as an amended answer, to wit: "Defendants, with leave of court, for further answer to bill of complaint, say and aver that plaintiff is not, and never was, owner of the lands," etc., "described in bill of complaint, and has not, and never had, any right, title, or interest therein or thereto. Defendants say and aver that the pretended sale set up by plaintiff is fraudulent, and has no legal or real existence. They aver that the recitals in pretended deed under which plaintiff claims are false; that the sheriff of Caldwell did not sell said land to plaintiff, or to any one else, and never offered same for sale under any writ on day stated in said pretended deed or at any other time. Adopting all allegations of answer, they pray that plaintiff's bill be dismissed, at his costs." Without further pleadings, the record shows that evidence was taken substantially establishing the facts alleged in appellant's petition, and thereafter a decree was rendered dissolving the preliminary injunction, denying the prayer for an injunction, and dismissing the plaintiff's bill. Solicitors for the appellants put in a motion for a new trial on the ground that the decree of the court is contrary to law and the evidence. This motion for a new trial being overruled, this appeal was taken, assigning errors as follows: "(1) That plaintiff is bona fide owner and possessor of the property described in his bill in this cause. (2) That he acquired said property by purchase at administrator's sale of the succession of W. L. Wooten, through the sheriff as auctioneer, on December 31, 1894, and since that date has been in quiet, peaceable, and undisturbed possession thereof, exercising all the acts of ownership, to the knowl-

edge of Jabez B. Watkins et al., seizing creditors and defendants in this suit. (3) That defendant, marshal of this court and of the Western district of Louisiana, acting under and by virtue of an order of seizure and sale and writ of sale, which issued from this honorable court in the cause, entitled 'Jabez B. Watkins et al. v. Mrs. Mattie A. Wooten, Widow, Administratrix, et al.,' and No. 203 on the docket of this court, and at the instigation of the plaintiff in said cause, seized, took possession of, and advertised for sale plaintiff's property, and described in the bill of complaint in this cause. (4) That a writ of injunction is necessary to prevent the sale of plaintiff's property for the debts of another. (5) That the succession sale at which plaintiff purchased property described in his bill divested said property of all mortgages placed upon it by the deceased, and especially divested said property of the mortgage now sought to be executed against it, and transferred said mortgages to the proceeds paid by plaintiff in the hands of the administratrix. (6) That the circuit court of the United States for the Western district of Louisiana erred in denying plaintiff's title and refusing the injunction prayed for."

Geo. E. Dodd and F. G. Henderson, for appellant.
A. H. Leonard, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). As there was an actual, physical seizure and custody of the property in controversy in the suit of Watkins et al. against Wooten, in the circuit court, that court had jurisdiction to hear and determine the controversy inaugurated by the petition filed by appellant and the proceedings thereunder, irrespective of the citizenship of the parties. *Morgan's L. & T. Ry. v. Texas Cent. R. Co.*, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625, and cases there cited. The record shows that the proceedings on the appellant's petition have been carried on and conducted under the liberal rules of procedure as laid down in the Louisiana Code of Practice, and in total disregard of the equity rules which control equitable proceedings in the courts of the United States. Although this has been done without objection in the circuit court, and with the apparent sanction of the judge, and no errors are assigned thereon in this court, it is with hesitation we deal with the case on the merits, and as if the proceedings were in all respects regular.

The case shows that the succession of W. L. Wooten was regularly opened in the district court of Caldwell parish, and that thereon proceedings were had that resulted in a sale and transfer of the property in question to pay debts. According to the laws of Louisiana, as expounded by the supreme court of the state, it is well settled that such a sale, when perfected, has the effect of extinguishing mortgages given by the deceased upon the property, leaving the mortgage creditors to look to proceeds in the hands of the administrator. *Lafon's Ex'rs v. Phillips*, 2 Mart. N. S. 231; *De Ende v. Moore*, Id. 336; *Joyce v. Poydras de la Lande*, 6 La. 283; *Hoey v. Cunningham*, 14 La. 86; *French v. Prieur*, 6 Rob. 299; *Leverich v. Same*, 8 Rob. 97; *Lewis v. Labauve*, 13 La. Ann. 382; and see *Succession of Thompson*, 42 La. Ann. 122, 7 South. 477.

The alleged answers in this case deny the validity of the sale made under the authority of the district court of Caldwell parish in

the succession of W. L. Wooten, on the ground that said Wooten, at the time of his death, resided and had his domicile in the city of New Orleans, parish of Orleans, state of Louisiana, and not in the parish of Caldwell, of said state. If we understand the law of Louisiana, only the probate court of the parish of the domicile of the deceased has jurisdiction to open the succession and conduct succession proceedings, and if, in fact, at the time of his death, the said Wooten was a citizen of the city of New Orleans, parish of Orleans, the district court of Caldwell parish was without jurisdiction, and its judgment and proceedings were nullities. But we fail to find in the evidence any proof whatever that the said Wooten at the time of his death was a citizen of the city of New Orleans, parish of Orleans, but find abundant evidence to the effect that at the time of granting and acknowledging the mortgage to Henry Dickinson said Wooten was a citizen of Caldwell parish. The amended answer alleges that the sale by the sheriff, under the orders of the district court of Caldwell parish, was a simulation and a sham, and had no legal and real existence; that the recitals in appellant's deed are false; that the sheriff of Caldwell parish did not sell said land to the plaintiff or any one else, and never offered the same for sale under any writ.

Assuming that this is a sufficient averment that the sale by the sheriff of Caldwell parish, under the alleged order of the district court of Caldwell parish, was a nullity, still we fail to find any evidence whatever in the record showing, or even tending to show, that the proceedings were not valid and regular. Certainly Wooten was dead, his last domicile as far as the record goes was in Caldwell parish, and apparently the district court of Caldwell parish was seized of jurisdiction, and it unquestionably issued the order of sale under which the sheriff acted. It is a well-settled rule in Louisiana that in a matter of judicial sales a purchaser need not look beyond the jurisdiction of the court and the sufficiency of the order to warrant the sale. *Webb v. Keller*, 39 La. Ann. 55, 67, 1 South. 423, 431, and cases there cited.

Several objections are made in the brief of the learned counsel for appellee, which we consider in order:

(1) It is contended that the sheriff's deed is invalid because the decree directing the sale of succession property should be according to law, and that according to law succession property cannot be sold, unless within 12 months preceding it has been duly appraised, and that according to the deed executed by the sheriff to the appellant, the sheriff made an appraisal of the property instead of having the property appraised in the succession proceedings. The record apparently shows that the sale took place more than a year after the appraisal made by the experts appointed by the judge. Counsel cites *Webb v. Keller*, *supra*, to the effect that it was the duty of the judge to cause the property to be estimated by experts before proceeding to the sale thereof, if it was such property as had remained unsold for more than one year after the appointment of the executrix or administrators; and cites *Elliott v. Labarre*, 2 La. 328, to the effect that if the forms of law be omitted a succession

sale will be annulled. Conceding all this to be as counsel claims, we are of opinion that the irregularity suggested was a relative nullity, and whatever its value may be in a suit to annul the sale brought in the district court of Caldwell parish it is insufficient here to affect appellant's title.

(2) It is further contended that the deed does not show a sheriff's sale because it is signed by the sheriff and two witnesses, and is not signed by the purchaser, and therefore is not an authentic act, but a mere private act. The sheriff's deed, as evidence of title, seems to have been proved and presented in evidence without any question, and we find no motion to suppress the same, either in the court below or in this court.

(3) It is further complained that the sheriff's deed was not recorded at the time of the issuance and execution of the writ in the main case of *Watkins et al. against Wooten*, and the marshal, therefore, had the right to seize. The certificate shows that the deed was deposited for record in the proper parish on July 21, 1897, about a month prior to the actual seizure made in this case. We understand the law of Louisiana to be that a record of a conveyance of lands takes effect against third persons from the date of deposit and filing by the proper officer of the deed or other instrument, and that the time the officer actually spreads the conveyance on the records is immaterial as affecting the rights of parties. *Payne v. Pavey*, 29 La. Ann. 116; *State v. Rojillio*, 30 La. Ann. 883; *Way v. Levy*, 41 La. Ann. 454, 6 South. 661.

Counsel for appellees calls the attention of the court to alleged suspicious facts appearing on the face of the evidence, to wit:

"The deed, a copy of which is in evidence, recites: 'Before me, M. L. Micom, clerk 4th district court and ex officio recorder and notary public, came and appeared J. J. Meredith, sheriff,' etc. But the clerk does not sign the deed. The deed is dated December 31, 1894. It was not offered for record for more than two years. It is signed 'Jack J. Meredith, Sheriff,' and J. J. Meredith is one of the two witnesses to his own signature. The tax receipts offered in evidence show that the land was not assessed to complainant, but was assessed to W. L. Wooten during the years 1895, 1896, and 1897, and paid to this same sheriff, Jack J. Meredith, by the mortgagees, Watkins and others."

Under the law of Louisiana, it was not necessary for the clerk to sign the sheriff's deed. The statute makes the sheriff's deed authentic when signed by him. See Code Prac. La. arts. 692-698. The deed was recorded before the seizure in the suit of *Watkins v. Wooten*. And in this connection we may notice the fact that, as the mortgage debt on which appellees brought executory process was long past due, the appellees were not very diligent themselves. The transcript shows that the sheriff's deed is signed by Jack J. Meredith, sheriff, and witnessed by C. M. Jarrell and I. I. Meredith. The tax receipts show that the land was assessed during 1896 and 1897 to W. L. Wooten, but do not show that the same land was not assessed to appellant.

On the record and case as made before the lower court, we are clear that the appellant shows a sufficient title to the land in controversy, and that by the sale made under the decrees of the dis-

strict court of Caldwell parish the said land has been divested of any lien arising under the mortgage which is the basis of the seizure and sale in the main suit, and we are clear that on the record and evidence as submitted the appellant was entitled to a decree in his favor.

The cause will be remanded to the circuit court, with directions to enter a decree in favor of the petitioner, granting a perpetual injunction against the marshal and the complainants in the suit of Watkins et al. against Wooten et al., forbidding and enjoining them from further proceedings to subject the property described in the plaintiff's petition to the mortgage granted by W. L. Wooten in his lifetime to Henry Dickinson, which mortgage is fully set forth in the record, and to further decree the release of the seizure of said property and the restitution of the same.

In re BISSERT.

(Circuit Court, S. D. New York. . October 8, 1901.)

ADMISSION TO BAIL—JURISDICTION.

Where appeal has been taken from decision of a federal court discharging writ of habeas corpus, and pending it the prisoner has been remanded to the custody of state officers, as authorized by Supreme Court Rule 34, such federal court has no jurisdiction to entertain motion to admit to bail.¹

Roger U. Sherman, for writ.
Harvard S. Gans, opposed.

LACOMBE, Circuit Judge. The writ of habeas corpus is dismissed, and prisoner remanded to custody from whence he came.

(October 26, 1901.)

Rule 34 of the supreme court provides:

"Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance," etc.

Appeal has been taken from the decision of this court, and in conformity with the above rule the prisoner has been remanded to the custody, not of the United States marshal, but of the state officers. Inasmuch as the appeal removed the cause from this court, and the remand removed the prisoner, the court would seem to be functus officii. Whatever tribunal may or may not now have power to entertain motion to admit to bail, it certainly is not the United States circuit court for the Southern district of New York, which no longer holds either the cause or the prisoner.

Application denied.

¹ Conflicting jurisdiction of state and federal courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.

PAGE v. PROVIDENT SAVINGS LIFE ASSUR. SOC.

(Circuit Court of Appeals, Fifth Circuit. January 14, 1902.)

No. 1,083.

LIFE INSURANCE—CONTRACT—HOW CREATED.

A receipt given by an agent of a life insurance company for the first premium on a policy cannot be held to have effected a contract of insurance contrary to a provision of the application, taken contemporaneously, that no contract should be created unless the application was accepted by the company.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi.

J. R. Byrd & Olin C. Hunt, for plaintiff in error.

Edw. Mayes and J. B. Harris, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The receipt for first premium, which is the basis of this suit, does not appear to have been given or issued by a duly-authorized agent of the Provident Life Assurance Society. If considered as issued by a duly-authorized agent, and to be a binding receipt of the company, still it must be construed in connection with the application and the statements therein, and held to effect insurance upon the life of the applicant only in case the application was thereafter accepted by the society.

The decree of the circuit court seems to be in accordance with the law and the facts of the case, and it is affirmed.

LA DOW v. NORTH AMERICAN TRUST CO. et al.

(Circuit Court, D. Oregon. December 28, 1901.)

1. GUARDIAN AND WARD—ILLEGAL SALE—NOTICE—RECORD—PRINCIPAL AND AGENT.

While plaintiff was a minor, owning the undivided one-half of certain land, his mother, who was his guardian, his brother (owning the other half), and another, conspired to raise money by mortgaging such land. The guardian petitioned to sell plaintiff's property, and a few days thereafter she, with the brother and third party, joined in a mortgage of such land. Nearly two months thereafter a pretended guardian's sale of plaintiff's interest was made to such third party, subsequently confirmed, and a guardian's deed to him made. He paid no consideration, and subsequently he, with plaintiff's mother and brother, without consideration, conveyed to another, who conveyed to defendant's son, who was her attorney in fact, and assumed a part of the mortgage, and afterwards conveyed to her. The evidence was indefinite as to what, if any, consideration was paid by defendant's son, and also conflicting as to whether he was fully informed as to the nature of the transactions and of plaintiff's rights. The mortgage was subsequently adjudged invalid by the supreme court of the state. *Held*, that defendant's son and grantor was charged with notice that the pretended purchaser at the guardian's sale had joined in the mortgage before the sale, and that there was no necessity for both the mortgage and sale to meet the minor's requirements, as shown by the petition for the sale, and that

by his assumption of the mortgage he became a party to the illegal transaction.

2. SAME—PRINCIPAL AND AGENT—KNOWLEDGE OF AGENT.

Defendant, being the grantee of her attorney in fact, is bound with notice of all he knew relating to the fraudulent character of the guardian's sale, and of plaintiff's right, and hence such sale and subsequent conveyance should be set aside.

On Rehearing.

1. GUARDIAN'S SALE—MORTGAGE PRIOR TO PURCHASE—INFERENCE OF FRAUD—RECORD—NOTICE.

Where a pretended purchaser at a guardian's sale, pursuant to a scheme to raise money on the property, executes a mortgage thereon before the sale,—it being understood that he will reconvey the property to the ward, but, instead, conveys to another,—the transaction is so unusual that a subsequent grantee cannot rely on the record as rebutting the inference of fraud arising from the mortgage being so executed.

2. SAME—FRAUD—ABANDONMENT OF PART OF SCHEME.

Where a pretended purchaser at a guardian's sale, pursuant to a scheme to raise money on the property, executes a mortgage thereon before the sale, agreeing to reconvey, the fact that, instead of so reconveying, he conveys to another person, does not purge the sale of its fraudulent character.

3. SAME—EVIDENCE—NOTICE.

Evidence leaves no room to doubt that a subsequent grantee claiming title through a fraudulent guardian's sale had full notice of the character of the sale, and of the existing rights of the ward in the property.

John J. Balleray and Carter & Raley, for complainant.

Raleigh Stott, for defendant Letitia Lombard.

Geo. W. Hazen, for defendant North American Trust Co.

BELLINGER, District Judge. Certain property, including that in dispute, belonged to Geo. A. La Dow in his lifetime. La Dow died about May 1, 1873, intestate, leaving a widow and two children, Frank La Dow and the plaintiff, Lewis McArthur La Dow, then about 4 months of age. Thereafter, and on September 12, 1889, the widow, Mattie La Dow, as guardian of Lewis, who was then in his seventeenth year, petitioned the county court for an order authorizing the sale of certain property, including that in dispute. The petition alleged the minority of Lewis, stating his age to be 14 years or thereabout; and it alleged facts showing the necessity for such sale, which was authorized by the county court. Thereafter, and on November 14, 1889, the property of said minor, consisting of the undivided half of lots 3 to 10, inclusive, in block 8 in the town of Pendleton, was sold to one Charles B. Isaacs for the sum of \$15,000, which sale was afterwards, and on January 8, 1890, confirmed by the county court. On the 11th of the same month the widow, as guardian, executed her deed for the property sold to Isaacs. Prior to this sale, and on September 27, 1889, Mattie A. La Dow (the widow and guardian), Frank La Dow, and Isaacs executed a mortgage to the Conklin Trust Company upon said lots 3 to 10, inclusive, in said block 8, for \$17,350. This mortgage was dated September 1, 1889. On March 13, 1894, the same parties (Mattie A. La Dow, Frank La Dow, and Isaacs) conveyed the mortgaged property to one James A. Howard for the consideration stated in

the deed, of \$40,000. On the 21st of January, 1895, Howard and wife conveyed an undivided half interest in lots 5, 6, 7, and 8 in said block 8, including the premises in dispute, to B. M. Lombard, for the expressed consideration of \$17,500. This sale was subject to one-half of the Conklin mortgage. Thereafter B. M. Lombard conveyed the interest so acquired to Letitia Lombard, defendant herein. Howard and Letitia Lombard divided the property so held in common; the latter taking the west 27 feet of lots 7 and 8, the premises in dispute, and assuming \$1,500 of the Conklin mortgage. It is conceded, or at least not disputed, that the guardian's sale was an expedient to secure a loan upon the property by means of a mortgage executed by the purchaser, who did not pay any consideration for the guardian's deed to him. Neither did Howard pay anything for the property. His interest in what was done grew out of an understanding by which he was to have some interest in the property for services in collecting rents, paying taxes, and interest on the mortgage. Both Isaacs and Howard understood that a mortgage on the property was the thing to be effected by the guardian's sale. The purchaser at the sale was to mortgage the property, and then reconvey to the parties in interest. Instead of doing this, the property was conveyed to Howard to manage; and thereafter a portion of it was conveyed to Lombard, in the expectation that Lewis McArthur La Dow's equity could be satisfied by the transfer to him of certain "back lots." At least, this is the effect of Howard's testimony. Howard testifies that he thinks he talked to Lombard before the latter's purchase about his understanding that the guardian's sale was a step towards mortgaging the property, and that Lombard said the record of the property was all right. B. M. Lombard denies explicitly any conversation with Howard such as is detailed, and he denies any knowledge of the so-called equities of young La Dow, and states that his knowledge of the title was derived from his examination of the record. He knew of the Conklin mortgage, and assumed one-half of it. He is charged, therefore, with notice that Isaacs, through whom he claimed, had joined in the mortgage before he became a purchaser at the guardian's sale. It was apparent that there was no necessity for both a mortgage and a sale. The necessity for money to meet the minor's requirements, as shown by the petition upon which the order of sale was made, was met by the loan which the mortgage secured. This fact, and the fact that Isaacs' mortgage anticipated his title, tend to show that the sale was a mere device to effect the mortgage. Lombard assumed a part of the mortgage debt. To the extent of the minor's interest, an illegal claim was, in effect, paid by him out of the minor's property. He thus voluntarily became a party to the mortgage transaction, by which a lien forbidden by law was attempted to be fastened on complainant's property. The mortgage has since been adjudged invalid by the supreme court of the state; and the defendant Lombard, in the briefs filed in her behalf, seems to assume that the obligation to pay a part of the mortgage debt, which was a consideration in the purchase relied upon, has been discharged by the adjudication, so that she is, upon the contention made in her behalf,

benefited by the illegal mortgage at complainant's expense, since it must be presumed that the consideration in the purchase was diminished by the amount of the illegal lien assumed by the purchaser. The defendant Lombard is the mother of B. M. Lombard, and was represented by the latter as her attorney in fact, and she knew all that her attorney knew. The parties to the transaction in question may have intended nothing wrong, in point of morals. They did, however, attempt a legal wrong, in attempting to accomplish by indirection a thing which the law does not permit. Moreover, what was done does not appear to have been of advantage to the interest affected. Lombard testifies that he paid \$1,000 and conveyed some 50 or 60 suburban town lots in consideration of the purchase in question. Howard hesitates to say that anything was paid. To the direct question as to whether Lombard paid any money, Howard says:

"Well, that is a hard question to answer. In one way he did. In another way he did not."

And when requested to explain, he says:

"Well, Judge, I would have to detail a trade here that would take me a half a day to explain it. * * * We made so many settlements and trades back and forth, that it would be hard to say whether he paid anything of value or not, and, if he did, how much."

Howard finally admits, however, that he thinks he got \$1,000. He received 50 or 60 suburban lots, which he mortgaged for \$500 through Lombard, and whether he gave them all up for the mortgage, or got a small equity out of them, he cannot state. Howard further testifies that there was \$660 in the bank in his name, which had been deposited under the contract with the mortgage company; that one-half of this sum was turned over to Lombard to pay interest on the Conklin mortgage and insurance on the La Dow Block.

I am convinced that the interests of the complainant were not advanced, but were prejudiced, by the mortgage-sale transaction, and that there are no equities in favor of Lombard or his grantor in the premises, and it is against equity that Lombard should be permitted to profit at the expense of complainant by reason of the illegal mortgage which the sale was intended to effect.

The complainant is entitled to the relief prayed for, and it is decreed accordingly.

On Rehearing.

(January 29, 1902.)

J. J. Balleray and Charles Carter, for plaintiff.

George Stout and Pipes & Tift, for defendants.

BELLINGER, District Judge. The facts in this case are stated in the opinion heretofore rendered on the final hearing. The petition for rehearing argues the legal questions involved in the case, about which there is no controversy, at some length. As to the fact that Isaacs executed the mortgage to the minor's property before the guardian's sale at which he pretended to get title, and that Lombard assumed a part of the mortgage in the purchase of the

minor's interest, it is argued that no other inference can be drawn than that Isaacs meant to procure title, and may have had an understanding or agreement with the guardian that he would bid for the property at the guardian's sale when it should occur, and that, if such inference should be held sufficient to put Lombard on inquiry, the inquiry, if followed, would only lead to the record. It is claimed that the record was examined by Lombard, and rebutted whatever inference of fraud there may have been arising from the mortgage, and that this was as far as Lombard was required to go, and that there was no other source of information to which he could go; that the existence of a device to mortgage the property through the means of a sale was rebutted by the fact that Isaacs did not deed the property back after the mortgage, as he had agreed to do; that the conveyance by Isaacs to a third person was an abandonment of the device in question; and that the possession of Howard, Isaacs' grantee, points away from the fraud to bona fides in the transaction. The petition then discusses the inferences drawn by the court from the facts stated, and argues from the testimony that Lombard bought the property in question in good faith and for a valuable consideration. It may be that the record facts in the case are not sufficient to charge Lombard with notice of a scheme to circumvent the law and incumber the minor's property; but if, as seems to be conceded, these facts might warrant an inference that Isaacs meant to procure title, and perhaps that he had an agreement with the guardian that he would bid the property in at the guardian's sale, then the unusual circumstances so inferred were suggestive, at least, of the truth in the premises. It is needless to say that there can be no such assurances of title at a future guardian's sale as will authorize a mortgage in advance of the sale. It is quite true that a grantor's covenant of warranty will operate to convey an after-acquired title, but it is not true that the practice obtains of mortgaging or selling land that the grantor does not claim to own. Such a transaction would be unusual, and, if it has occurred in a case that admitted of some binding agreement for a title in advance, I doubt if it has ever been heard of where the title was to come through a judicial sale. Concede, then, that there was enough to suggest to Lombard that Isaacs mortgaged the plaintiff's property under an agreement with the guardian that the property was to be sold at guardian's sale, and that he (Isaacs) should become the purchaser; does this lead to nothing, or, as is argued in the petition, does it lead away from the truth? If it does not conclusively prove, at least does it not warrant the inference of, concerted action between Isaacs and the guardian to effect a mortgage by the means of a sale? The argument that if there was such a device the failure of Isaacs to deed the property back, as he had agreed to do, and his conveyance to another, was an abandonment of the device, assumes that what would otherwise be a fraudulent expedient is made proper and lawful by the bad faith of one of the parties to the transaction; that Isaacs, having gone into a scheme to effect an illegal mortgage by a guardian's sale upon an agreement to reconvey, could purge the sale of its fraudulent character by keeping the property, instead of keeping his word to restore it. If it is not

conceded, it is conclusively proven, that the sale in question was a mere device to effect a mortgage; that Isaacs paid nothing for the property, and was to reconvey it, the mortgage scheme being consummated. Isaacs testifies that he purchased the property in question at the guardian's sale at the request of complainant's uncle and mother, the latter being his guardian; that the guardian's sale was a mere form; that he did not purchase the property, but went through the form of a purchase, "just for the purpose of putting that mortgage on it"; that it was understood beforehand that he was not to pay anything, and that he did not pay anything,—“never paid a cent”; that he was to turn the property back to the complainant after the mortgage was made, and he does not remember just how it was fixed up. Isaacs, as a matter of fact, joined Mrs. La Dow in a conveyance to Howard, from whom B. M. Lombard acquired it. Howard does not appear to have paid anything for the property. His relation to it seems to have been that of a mere agent or trustee, to manage the property, and pay for it out of the proceeds of a sale when he should make one. His testimony is important as to B. M. Lombard's knowledge of all facts affecting the title he was acquiring, and of the character of payments made by him for the property. Howard says that, if he remembers correctly, the whole matter of title was talked over with B. M. Lombard, and especially the matter of Lewis La Dow's having some equity in the property, or possible equity; that he thinks the character of the equity was discussed; that he (the witness) knew that the object of the guardian's sale was to mortgage the property, and he thinks he talked to Lombard about that, and his recollection is that Lombard said the record of the property was all right; that he (the witness) had received some back lots, and he talked with Lombard about fixing the matter with complainant by giving him those back lots; that witness and Lombard discussed the matter, and concluded that when complainant became of age he (complainant) would be willing to quitclaim the property if he received those back lots. Howard seems to be as well disposed toward one side as the other. His statements with reference to conversations with Lombard are cautious, but they are explicit enough to make it clear that B. M. Lombard knew all there was to know about the title he was dealing with, and I have no doubt of the truthfulness of the witness. B. M. Lombard is by profession a lawyer, and he is a real estate dealer. He was impressed with the binding character of the record. He relied upon that. But his eyes were open. He saw and heard and knew the facts out of which the record grew. He could not ignore the information he received from Howard in their many conversations on the subject. If B. M. Lombard was relying on the probate record, he was also hoping to extinguish complainant's right or “equity,” and to get his deed. What did he want this deed for? What was Lewis' equity, which had been so fully talked over between Howard and B. M. Lombard? Moreover, consider what Howard says as to what B. M. Lombard paid for this property. The transaction is so involved in the ramifications of a trade that the witness cannot tell whether, as a net result, he got anything or not. He ad-

mits that Lombard paid him \$1,000, and that he got something out of 64 outside town lots traded to him by Lombard, and handled and disposed of by the latter. The story of these suburban lots, six miles from Portland and two miles from the Willamette river, and of Lombard's connection with them after the sale, shows the complaisance of Howard, and makes it easy to understand his inability to tell whether he finally, at the end of a trade with Lombard that it would take him a half a day to explain, got anything or not. B. M. Lombard denies the statements of Howard as to conversations respecting Lewis La Dow's rights and equities. Mr. Wade, cashier of the First National Bank at Pendleton, testifies to conversations had with B. M. Lombard and Howard together, in which they said "that a part of the consideration and trade, and the understanding throughout, was that, when this had been settled up, that Lewis La Dow was to get the back lots, but they felt very confident that they were getting the property cheap at that." This witness further testifies that he would not be "real positive," but that he is "morally certain," that Lombard told him "that he was fully acquainted with all the conditions that existed." This testimony is strongly corroborative of Howard's testimony, and it leaves no room to doubt that Lombard knew all about the rights of Lewis La Dow in the premises, and that he relied on his ability to get the latter's deed by the transfer of the back lots; that he had traded to Howard a lot of worthless so-called town lots, and could afford to take chances as to complainant's interests. He felt, as Wade testifies, "very confident that they were getting the property cheap at that." John D. Wilcox corroborates Lombard, but there are portions of his testimony which show that his memory is indistinct in important particulars. He sold out or traded out his interest to Lombard, but so long a time had intervened, and the matter was so involved in "forty trades" that the witness testifies he had had with the latter, that he does not remember whether he got any cash out of it or not.

The petition for rehearing criticises the statement contained in the opinion heretofore rendered that the assumption by Lombard of the illegal mortgage was at complainant's expense. That statement was made upon the theory that Howard intended to account to the complainant for the property held by him, and for which he (Howard) appears not to have paid anything at the time the Lombard deal was entered into. Upon this theory, Lombard's agreement to pay an illegal demand against complainant as a part of the consideration for the property taken—an agreement which he subsequently escaped through an adjudication that the debt was illegal—was at the expense of complainant's interest. If those concerned in the transaction did not intend to restore the fee of this property to the owner, then it must be admitted that, so far as he was concerned, it made no difference whether Lombard paid anything for it or not. And yet the fact remains that this property was conveyed, not sold, in order to effect a mortgage upon it, which the law did not permit; and the party taking the title, with the understanding that he should reconvey it after the mortgage was exe-

cuted, conveyed it to a third person without consideration outside of the mortgage, and manifestly to protect the mortgage. There was no other consideration for these conveyances than the mortgage. So that what Lombard assumed of the mortgage for which complainant was not liable was at the expense of the property and of complainant's interests. There are no disguises that can conceal the fact that when a man takes property upon an agreement to pay, and thereafter avoids payment, he gets to that extent something for nothing, and when he does this it is usually at the expense of the owner of the property so acquired.

The petition for a rehearing is denied.

BROWN v. WORSTER.

(Circuit Court, E. D. Pennsylvania. February 7, 1902.)

1. TIME OF TAKING TESTIMONY—ENFORCEMENT OF RULE.

Rule 69, limiting the time wherein testimony may be taken to three months after the case is issued, will be enforced unless by a written stipulation the parties agree to a longer period, or, if no such agreement can be reached, unless the court has extended the time on a proper application.

2. CROSS-EXAMINATION—OBJECTIONS.

Where, in the taking of testimony for use at a trial, irrelevant or otherwise improper cross-examination is indulged in, the questions should ordinarily be answered, and the error dealt with as a question of costs.

In Equity.

Henry E. Everding, for complainant.

George J. Harding, for respondent.

J. B. McPHERSON, District Judge. Applications to extend the time for taking testimony in patent cases are so often made that it seems desirable both to Judge DALLAS and myself to express our views briefly on the general subject. Rule 69, limiting the time wherein testimony may be taken to three months after the case is at issue, is habitually disregarded,—frequently, no doubt, by express or tacit agreement between the opposing counsel,—and this irregular practice often results in difficulties from which the court is asked to extricate one or both of the offenders. We try to make an allowance for the pressure that a large practice entails upon a busy lawyer, and have, therefore, been liberal in our treatment of these applications. But, when such motions are opposed, it is very difficult indeed for the court to decide what ought to be done, without taking up a great deal of time in going over the whole case in order to reach the proper point of view. We therefore ask the bar, especially in patent cases, to comply strictly with rule 69, unless it is clear to both sides that three months is too short a time. If this period is too short, we suggest that counsel by written stipulation—which we will recognize and adopt—agree to a longer period. If no such agreement can be reached, the court will then act upon a proper application for extension. When time has been apportioned under rule 67, we shall ex-

pect diligence, and further time will not be granted unless diligence appears.

The present application would be refused if it were not for the looseness of practice that has heretofore prevailed. The complainant has certainly not been diligent, and has not explained his delay; but I do not wish to be strict without notice, and he is therefore allowed 10 days more (including February 17th) to complete his *prima facie* case.

The motion to expunge or compel defendant to print the cross-examination as part of his own testimony is refused. The witness must answer cross-question 41. If irrelevant or otherwise improper cross-examination is indulged in, it can ordinarily be dealt with satisfactorily as a question of costs. In doubtful cases this, I think, is the proper course. Where the offense is clear, the court has ample power to stop it summarily.

SLAUGHTER et al. v. LA COMPAGNIE FRANCAISE DES CABLES TELEGRAPHIQUES.

(Circuit Court, S. D. New York. January 4, 1902.)

1. CONTRACTS—BREACH—NOMINAL DAMAGES—SPECIFIC PERFORMANCE—FORMER JUDGMENT—BAR.

Where, in an action for specific performance of a contract to lease telegraph lines, the bill alleges that an action at law was brought on the contract, which resulted in a judgment for plaintiffs against defendant sustaining the contract and for nominal damages, such judgment is not necessarily an absolute bar to a decree for specific performance, though a judgment for substantial damages might be.

2. SAME—SPECIFIC PERFORMANCE—OBJECT OF CONTRACT—MUTUAL BENEFIT.

A contract recited that defendant owned an Atlantic cable and certain land telegraph lines, and desired to obtain a larger percentage of the telegraph traffic between the United States and Europe, and that plaintiffs intended to establish a new telegraphic system throughout the United States, and desired to obtain control of defendant's land lines. It then provided for a lease of such land lines to plaintiffs on certain work being done within a specified time, and an interchange of business and office facilities, there being no other consideration for the lease. *Held* that, in the absence of a showing that plaintiffs have established any lines or offices in the United States, and are in a position to receive or confer any benefits from the interchange of traffic contemplated by the lease, specific performance should not be decreed.

In Equity.

C. Walter Artz, for plaintiffs.

Edward K. Jones, for defendant.

WHEELER, District Judge. This bill is brought for specific performance of a contract dated July 14, 1896, between the plaintiff Slaughter and others to be thereafter associated with him, called "parties of the second part," and the defendant, called the "party of the first part," for a lease of its land lines between New York, New Haven, Hartford, Providence, Taunton, and the landing place of its cable for 99 years, which recites:

"Whereas, the Compagnie Francaise des Cables Telegraphiques, hereinafter designated as 'party of the first part,' desires to obtain a larger percentage

of the telegraph traffic between the United States and Europe; whereas, certain persons hereafter designated as 'parties of the second part' intend to establish a new telegraphic system throughout the United States; whereas, the said parties of the second part are desirous of obtaining control of the land lines and franchises, rights, etc., as now in possession of the Compagnie Francaise des Cables Telegraphiques, party of the first part; whereas, it will be to the mutual advantage of the parties hereto to so agree that the cables and franchises and European offices of the party of the first part may be used in connection with the land lines, franchises, and American offices of the parties of the second part: Therefore it is agreed between the parties hereto, as follows."

—And provides for the execution of the lease upon the fulfillment of either of these conditions:

"That the said parties of the second part shall within forty-five (45) days from the date of the execution of this agreement begin work on the repairs necessary to place the telegraphic lines which are the subject of this agreement in condition to be used during the coming fall and winter months, and vigorously prosecute the said work to its completion, said work to be performed under the direction of the party of the first part, and not to cost more than ten thousand dollars. Upon the termination of the said work to the satisfaction of the party of the first part, the condition required shall be considered fulfilled, and the lease herein mentioned shall be executed and delivered. At the option of the parties of the second part they may pay the sum of ten thousand (\$10,000) dollars to the party of the first part, which sum shall be expended by the said party of the first part in making the said repairs. On payment of the above mentioned sum of ten thousand dollars (\$10,000) the conditions required shall be fulfilled, and the lease herein mentioned shall be executed and delivered."

And the contract further provided:

"Fifth. That this agreement shall be null and void unless within forty-five (45) days from the date of its execution the parties of the second part commence the work of repairs as herein provided, and within forty-five (45) days from its execution pay to the party of the first part any sum expended or agreed to be expended not to exceed the sum of five thousand (\$5,000) dollars in the repairs herein contemplated."

The lease was to provide:

"That when the parties of the second part shall be duly established with lines and offices throughout the United States they will give exclusively to the party of the first part the messages coming to its offices from Europe or elsewhere, which can reach their destination over the cables of the party of the first part; and the party of the first part will reciprocally give to the parties of the second part all traffic coming by its cables for points reached by the lines of the parties of the second part."

No rent was, or was to be, provided for, and the advantages to accrue to the parties respectively were such as might arise from this interchange of traffic. The bill sets out the option, and alleges:

"(4) That subsequent to said 14th day of July, 1896, the said William H. Slaughter associated with himself individuals, your orators herein, and on information and belief that on or about the 28th day of August, 1896, duly tendered the sum of ten thousand dollars (\$10,000) to the defendant in conformity with the provisions of said contract, and in the exercise of the option above referred to."

—without alleging that the plaintiffs had commenced the work of reconstruction, or that the defendant had done so for them under the contract, or that this tender was made within the 45 days, or that the plaintiffs have in any manner become established with lines

and offices throughout the United States, or any part thereof, from which any advantages by the interchange of traffic contemplated could accrue to the defendant. The bill alleges that an action at law was brought in this court upon the contract, which resulted in a judgment on a verdict for the plaintiffs against the defendant sustaining the contract, and for nominal damages. This may conclusively show that the contract was not avoided by the failure to begin work or to exercise the option and pay or tender the \$10,000 within the 45 days; but, if so, it also shows that the plaintiffs suffered no appreciable actual damages from the failure of performance that could be compensated for in money. The defendant relies upon this as an absolute bar to a decree for specific performance. The recovery of substantial damages for a breach of the contract might operate as such a bar to enforcing it as a whole, but the recovery of nominal damages might not. However that may be, that judgment covers all damages at law accrued to that time. Specific performance is not a matter of strict right, but of sound discretion; the contract should be one that can reasonably be carried out, and the party seeking that it be carried out capable of carrying it out. *Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955. Without any lines and offices in the United States to receive or confer any benefits from the interchange of traffic contemplated by the lease, the plaintiffs do not appear to be so situated as to be capable of carrying out the lease, or to have any ground, in equity, for asking that the making of the lease be compelled.

Demurrer sustained.

COLUMBIAN EQUIPMENT CO. v. MERCANTILE TRUST & DEPOSIT CO.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1902.)

No. 1,004.

1. EQUITY—REFERENCE FOR ACCOUNTING.

A complainant is not entitled to a reference for an accounting, where the allegations of the bill are denied in the answer, until there is at least sufficient evidence to show the right to an accounting. An order for an accounting will not be made to enable him to make out his case before the master.

2. CONTRACTS—RIGHT TO RESCISSION—CONTRACT WITH TRUSTEE.

Complainant corporation purchased a street railroad from defendant, which held it as trustee for certain bondholders. Some time after complainant had made its first payment, and had gone into possession of the property, its board of directors passed a resolution assenting to the distribution by defendant of the payment made, and complainant subsequently made another payment. *Held* that, in the absence of evidence that defendant still had in its possession any of the money, which it received solely as trustee, it was not subject to a suit by complainant to rescind the contract and recover the money paid thereon.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

This is a suit in equity by the appellant, a corporation under the laws of West Virginia, against the appellee, a corporation under the laws of Maryland. In the year of 1888 the East Birmingham Land Company executed a

mortgage on its property to the appellee, as trustee, to secure \$50,000 of bonds. In 1891 the same land company, after changing its name under an act of the legislature, executed a second mortgage, covering its railway property, to secure an indebtedness of \$37,500, subject, however, to the first mortgage. Default was made in the payment of the second mortgage, and the trustee therein named sold the property in July, 1891. Webb and Tompkins became the purchasers, and under an act of the legislature of Alabama they organized a corporation known as the "Birmingham & Gate City Street Railway Company." The latter company then held the property subject to the first mortgage. The Birmingham & Gate City Street Railway Company made a contract with the appellee whereby the former company, in consideration of the appellee's refraining from making a sale of the property for default under the first mortgage, agreed to convey its railway property to the trust company on the 1st day of August, 1894. On the 29th of October, 1894, the appellant and appellee made an agreement by which the appellant purchased the said property from the appellee for the sum of \$51,000. This agreement was made by the appellee with the consent and for the benefit of the bondholders under the first mortgage. Later, on February 11, 1895, the appellant and appellee made a more formal agreement of purchase and sale, and the appellant thereupon went into possession of the property. The sale, as stated in the first agreement, was on the following terms: Cash payable November 15, 1894, \$3,000; cash payable February 15, 1895, \$3,000; and cash payable within 18 months from November 15, 1894, \$45,000,—in all, \$51,000; the deferred payments to bear interest at the rate of 6 per cent. from November 15, 1894. The entire purchase money was not in excess of a sum sufficient to pay off the bonds with interest secured by the first mortgage. The appellant paid \$6,000 of the purchase money. When the last payment of the purchase money became due, amounting to \$45,000, the appellant failed to pay it. It claimed to have discovered defects in appellee's title, and that it had been deceived, etc. The appellee filed its original bill to foreclose the first mortgage, and caused the property to be placed in the hands of a receiver. The appellant, the Columbian Equipment Company, was made a party defendant to the bill. A final decree was rendered foreclosing the mortgage, and the property was sold under that decree. In the meantime the cross bill under consideration had been filed, and the decree on the original bill foreclosing the mortgage was without prejudice to the rights asserted in the cross bill. The claims asserted in the cross bill were left for future consideration. The cross bill sought a rescission of the agreement between the parties whereby it purchased the property, because the contract was void as beyond the corporate powers of the contracting parties and upon allegations of fraud. The appellee, as defendant to the cross bill, filed an answer thereto admitting the contract of sale, but denying the other averments of the bill. The case was tried on its merits, and on May 28, 1901, a final decree was rendered dismissing the cross bill. Thereupon the Columbian Equipment Company appealed to this court, and assigns nine errors, all based on the action of the court in dismissing the cross bill, and asserting that, the agreements between the appellee and appellant having been ultra vires, the cross complainant was entitled to relief.

H. D. Hotchkiss (John F. Martin, on the brief), for appellant.

A. H. Taylor (Albert Latady and J. Peirce Bruns, on the brief), for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The cross complainant and appellant asserts two claims against the appellee: (1) A claim for \$6,000 purchase money, which it paid on the contract of purchase; and (2) \$3,500, which it alleges it expended in improvements and betterments on the property. We first consider the latter claim.

It is alleged in the cross bill that "while in possession of said railway property" the cross complainant "expended in improvements and betterments thereon the sum of \$3,500." The answer of the appellee denies this averment. No evidence is offered on the subject. It prayed that a lien may be declared on the property mentioned in the cross bill for the amount so expended, and for a reference to a master to ascertain the amount, and for a personal decree against the appellee. The bill does not show how the \$3,500 was spent; that is, what improvements were made, or what investment of it was made. Conceding that it is sufficiently alleged that it was used in "improvements or betterments" without stating the facts, there should have been some evidence offered to sustain the averment. A reference will not be made to state an account without some evidence to show the necessity for the accounting. An order for an accounting is not made to enable the complainant to make out his case before the master. There must be, at least, sufficient evidence to show the right to demand the accounting. *Railroad Co. v. Williams*, 94 Va. 422, 26 S. E. 841. There not being sufficient evidence as to this claim to require the court to make a reference, there was certainly not enough to authorize a decree for this sum in favor of the cross complainants.

The other claim in the cross bill is for the sum of \$6,000 paid on the purchase money. Three thousand dollars, it is alleged, was paid "at or about the date of said contract, and the further sum of \$3,000 principal, with interest accrued, upon the 15th day of February, 1895." A written agreement is in evidence that the cross complainant "earned \$5,604 through the operation of the property while in its possession." It is not stated in the agreement whether these earnings were gross or net. Allowing a credit on the \$6,000 for these earnings would leave a balance of \$396.

The appellee received this purchase money in trust for distribution. It had no claim to the money except as trustee. The board of directors of the appellant, at an adjourned meeting on February 9, 1895, "resolved that the Mercantile Trust & Deposit Company are hereby authorized to make such disposition of \$3,000 heretofore paid by this company as a part purchase price upon said property, and held in trust by them, as they may see fit in accordance with said agreement." It is not shown that the appellee has not made a legal disposition of the money. It is not shown that it retained any part of the \$6,000 of purchase money. The appellee, we think, was authorized by the conduct of the appellant to distribute the funds. On the pleadings and evidence we could not presume that it was holding the money at the time this litigation began. These considerations would dispose of the case, we think, even if it be conceded that the contract was *ultra vires*,—a question we do not decide.

After a careful consideration of the oral and printed arguments in behalf of the appellant, we are of opinion that the circuit court did not err in dismissing the cross bill. The decree is affirmed.

SPOOR v. BOARD OF SUP'RS OF RIVERSIDE COUNTY et al.

(Circuit Court, S. D. California. January 6, 1902.)

COSTS—TAXATION—TIME FOR FILING MEMORANDUM.

Under the rule of the circuit court for the Ninth circuit which requires a party in whose favor a judgment or decree is rendered, and who claims costs, to file and serve a memorandum of his costs and disbursements within five days after rendition of the verdict, or "after notice of the decision of the court," and which further provides that "notice of a decision may be by the presence of the attorney or solicitor at its announcement, or by written notice from the clerk of the court, or the attorney or solicitor of the adverse party," the five days do not begin to run in an equity case until notice has been received in one of the three ways specified. It is not sufficient that the solicitor had actual knowledge of the decision, or that his clerk or representative was present at its announcement.

In Equity.

Wm. J. Hunsaker, for complainant.

R. H. F. Variel and Otis & Gregg, for defendants.

ROSS, Circuit Judge. This is an appeal from the refusal of the clerk to disallow and strike from the files the defendants' memorandum of costs. The suit was one in equity, the decision of which was announced by the court in a written opinion delivered and filed on the 26th day of August, 1901,—being a day of the July term, 1901, of the court,—an entry of which decision was on that day entered by the clerk in the minutes. The facts in respect to the matter are agreed to by the respective parties, and are as follows: On August 22, 1901, the clerk mailed a letter addressed to Mr. R. H. F. Variel, one of the solicitors for the defendants, stating that the court would on August 26, 1901, at 10:30 o'clock a. m., render its decision. At the time of the mailing of the letter and of the rendition of the court's decision, Mr. Variel was absent from the city where the court is held; but his clerk, Mr. Mellette, who was in charge of his office and business, opened the letter, attended court at the time therein mentioned, as the representative of Mr. Variel, for the purpose of hearing, and did hear, the decision of the court. Mr. Mellette thereupon wrote Mr. Variel, informing him of the rendition of the decision, which letter was received during Mr. Variel's absence. The latter returned to the city about September 15, 1901. The final decree in the suit was filed and entered September 28, 1901, and the memorandum of costs in question was served and filed October 2, 1901.

The contention on the part of the complainant is that the defendants waived and lost their right to costs because of their failure to serve and file the memorandum within the time required by rule 17 of this court, which is as follows:

"The party in whose favor a judgment at law or decree in equity is rendered, and who claims his costs, shall, within five days after the rendition of the verdict, or after notice of the decision of the court, referee, or commissioner—or, if the entry of judgment or decree on the verdict or decision is delayed by order of the court, then before such entry is made—deliver to the clerk of the court, and serve on the attorney or solicitor of

the adverse party, a copy thereof, together with a notice of application to have the same taxed, a memorandum of his costs and necessary disbursements in the action or proceeding. * * * Notice of a decision may be by the presence of the attorney or solicitor at its announcement, or by written notice from the clerk of the court, or the attorney or solicitor of the adverse party."

It will be noticed that the time of the party in whose favor a decree is rendered begins to run, not from the date of the entry of the decree, but from "notice of the decision of the court." It is not denied that the decision in a suit in equity, within the meaning of the rule, consists of the written opinion of the court and the entry in the minutes; and, did the rule of the court not specify the manner in which the notice of the decision may be given, it would be very clear that actual notice thereof by the solicitor for the party in whose favor the decree was rendered would be, as held by the supreme court of California in *Mullally v. Society*, 69 Cal. 559, 11 Pac. 215, and other cases cited by complainant's counsel, sufficient. But rule 17 of this court, unlike the provisions of the statute of California referred to in the California cases cited, does provide how the notice may be given, to wit, "by the presence of the attorney or solicitor at its announcement, or by written notice from the clerk of the court, or the attorney or solicitor of the adverse party." Prescribing, *ex industria*, as the rule does, how the notice may be given, it is not reasonable to conclude that it was thereby intended that any other method shall be sufficient. Otherwise, there would be no occasion for any specific provision in respect to notice at all. Without it, the requirements of the rule would have been substantially similar to the California statute upon the subject, under which actual notice, however derived, would be sufficient to start the time running. As the rule stands, I think that one of the three methods prescribed is essential for that purpose. As it is conceded that no written notice of the decision was given, this view disposes of the matter, unless it be, as is contended on behalf of the complainant, that Mellette's presence was that of the solicitor in whose employment he was. The rule does not say that the notice may be by the presence of the solicitor or his clerk or other representative, but by the presence of the solicitor, whose presence at the time of the announcement of the decision the rule treats as the equivalent of a written notice, but does not, I think, under a fair reading of its language, attribute that effect to the presence of any one else.

The order appealed from is affirmed.

UNITED STATES SAVINGS & LOAN CO. v. HARRIS et al.

(Circuit Court, E. D. Kentucky. January 27, 1902.)

1. BUILDING AND LOAN ASSOCIATION—LOAN IN ONE STATE TO A CORPORATION OF ANOTHER—PLACE OF PAYMENT—CONTRACT—LAW WHICH GOVERNS.

Where a building and loan association incorporated in Minnesota makes a loan to a member residing in Kentucky, secured by a mortgage on his real estate in the latter state, all payments of interest and principal

to be made at the home office of the association in the former state, the contract is governed by the laws of Minnesota.

3. SAME—USURY—EVASION OF LAW.

Where a contract of loan made between a building and loan association of one state and a resident of another state, and secured by mortgage on his real estate therein, is valid under the laws of the former state, but usurious under the laws of the latter state, the fact that the place of payment is fixed at the home office of the association should not be construed as an evasion of the usury laws of the state where the property is situated.

3. SAME—FEDERAL COURTS—LAWS OF STATE—DECISIONS OF STATE COURT.

Under Rev. St. U. S. § 721, requiring the federal courts to be bound by and enforce the laws of the state in which the court is sitting, such a court is not bound, against its own judgment, to follow the decisions of the highest court of such state, in determining the question as to what law governs a contract of loan between a building and loan association of one state and a member residing in the state in which the court is sitting, secured by mortgage on land in the latter state; the adjudications of the state court on the subject not being based on any local statute, or constituting a rule of property situated within the state, which the federal court is bound to follow.¹

4. SAME—CONTRACT MADE PRIOR TO DECISION OF STATE COURT.

Where a building and loan association makes a loan and takes a mortgage on land in another state, the contract being valid in the state of the domicile of the corporation, and after the loan is made the supreme court of the state in which the land is situated decides, in a suit between other parties, that such contracts cannot be enforced in such state because usurious, a federal court in that state, in an action to foreclose such mortgage, is not required to follow such decision when it believes the decision to be wrong.

Beckner & Jonett, for complainant.

Geo. B. Kinkead and Morton & Darnall, for defendants.

COCHRAN, District Judge. Plaintiff is a Minnesota corporation, authorized to transact the business of a mutual building and loan association according to the usual plan of operating such institutions. July 30, 1892, defendants, residents of Kentucky, subscribed for 60 shares of stock, of par value of \$100 each, to be paid for in monthly installments of 60 cents per share. August 30, 1892, they borrowed \$3,000, and gave their note therefor, bearing 6 per cent. interest, payable monthly, secured by mortgage on certain real estate, and by collateral assignment of 30 shares of said stock. The other 30 they assigned to it absolutely, as premium for the loan, and thereupon those shares ceased to exist, save as a measure of the monthly installments of premium. To the extent of the 30 shares assigned as collateral security, they were entitled to participate, proportionately with the other stockholders, in the net earnings of the company. Their portion thereof was not payable to them in cash, but was to be applied in maturing the stock, and upon its maturity they had a right to have their loan canceled and mortgage released. All other borrowers were upon the same footing exactly, and the only difference, as to nonborrowers, was that upon maturity of their stock, they were entitled to payment of same in cash. After lapse of three

¹ State laws as rules of decision in federal courts, see notes to *Griffin v. Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 20 C. C. A. 553.

years from date of loan, defendants had the option to pay it and acquire the status of a nonborrower, and, if they failed to meet installments of dues, premiums, or interest for three months continuously, plaintiff had the option to close their account on a stipulated basis, and sue for balance due. Defendants paid the installments of dues, premium, and interest as they became due, with more or less regularity, and some fines for tardiness, until June, 1896, when they ceased paying entirely. Plaintiff admits that up to that time defendants paid in all \$1,797. Defendants contend that they paid \$1,899. December 3, 1896, plaintiff exercised its option to close the account, and on December 8, 1896, ascertained the amount due it to be \$3,158.90, for which, with interest from that date, this suit was brought. If the transaction had been a loan of money, and nothing more, and the payments made had been applied on the loan in accordance with the principle in partial payments, it would have been reduced to an amount under \$2,000, instead of having \$158.90 added to it. This bad showing is attributed by plaintiff to losses caused by shrinkage in value of real estate taken in satisfaction of loans, by the refusal of the courts of certain states, including Kentucky, to enforce its contracts as made, and by legal expenses in foreclosure suits. The defense is that the real nature of the transaction between plaintiff and defendants was a loan of money, pure and simple, and all else in its form, other than that, was an artifice to cover usury, and that therefore the amount due from defendants to plaintiff should be ascertained on that basis. This defense presents a question in the choice of laws. It does so because the transaction involved herein contains elements belonging to two separate jurisdictions, to wit, the states of Kentucky and Minnesota, and the laws of those jurisdictions as to transactions of a similar character, entirely local, are different. The real estate mortgaged is situated in Lexington, Ky. Possibly defendants' contract was made there. The supreme court of Tennessee, however, has held that an exactly similar contract of another with plaintiff, made under somewhat the same circumstances, was made in Minnesota. *Loan Co. v. Miller* (Tenn. Ch. App.) 47 S. W. 17. And certain of the federal circuit courts have held that similar contracts of others with other associations, made under somewhat the same circumstances, were made in the states where the offices of those associations were located. *Association v. Bedford* (C. C.) 88 Fed. 7, 12; *McIlwaine v. Iseley* (C. C.) 96 Fed. 62, 68; *Investment Co. v. Alexander* (C. C.) 96 Fed. 870, 872, 873. But it is not essential to dispose of this question in this case. On the other hand, defendants' contract was to be performed in Minnesota by the payment of the installments of dues, premium, and interest at its office in St. Paul, or at that of its trustee in Minneapolis. The difference in the laws of these two jurisdictions is this: By the law of Minnesota, as to such a transaction entirely local, its real nature and form square, and the contract, as made, is valid in all its parts. In the case of *Association v. Lampson*, 60 Minn. 424, 62 N. W. 545, Start, C. J., said:

"The respondent, then, upon this appeal, is to be regarded as a mutual building and loan association, doing a local business, and as such it is not

subject to the usury laws of this state by reason of excess of premiums contracted to be paid by its members to it on a loan to them over the rate of interest permitted by law. * * * But to entitle mutual building and loan associations to the benefit of this exemption from the usury laws, they must conduct their business in good faith, and loan their funds only to bona fide members. They cannot loan their funds to strangers upon usurious terms, practically exclude them from participating in the advantages and profits of the mutual system in which outlay and return are intimately blended, and then claim the benefit of the statute as a cover for the transaction. Otherwise they would become simply associations of legalized usurers, availing themselves of the privileges and exemptions of the statute intended only for strictly mutual building and loan associations."

This is in accordance with the law of a large majority of the jurisdictions of this country. By the law of Kentucky, as to such a transaction entirely local, it is nothing more than a loan of money at a usurious rate of interest, and the contract as made is not enforceable. Authorities which may be cited as so holding are as follows, to wit: *Herbert v. Association*, 11 Bush, 296; *Gordon v. Association*, 12 Bush, 110, 23 Am. Rep. 713; *Association v. Johnson*, 88 Ky. 191, 10 S. W. 787, 3 L. R. A. 289; *Simpson v. Association*, 101 Ky. 496, 41 S. W. 570, 42 S. W. 834. In the *Herbert Case* the loan was to a member of the association, but upon its being made he ceased to be such, and his sole relation thereto thereafter was that of a debtor. In the *Gordon Case* the loan was to a stranger. In the *Johnson and Simpson Cases* the loans were to members who continued to be such after becoming borrowers, and borrowers and nonborrowers shared alike in the earnings and losses of the institution. The decisions in the two former cases, though not relevant, had much to do with shaping the decisions in the two latter. In the *Johnson Case*, Pryor, J., said:

"A loan to members at the legal rate of interest, with reasonable dues for the maintenance of the organization, could not be held usurious; but such power as is conferred on the corporation in this case, or upon its members, in the loan of money evidenced by the transaction in question, divests the appellant of its benevolent character, and converts it into an organization under the forms of law for the purpose of filling its treasury by imposing oppressive burdens on its members, who have been solicited to become the objects of its benevolence."

And in the *Simpson Case*, Hazelrigg, J., said:

"This court has had under consideration the relation of the member who had obtained money on his stock in these associations bore to the association, and we have invariably held that relation to be a borrower of money, merely."

As before stated, this distribution of the elements of the transaction involved herein between the two states named, and this difference between their laws as to transactions of a similar character, entirely local, necessitates a choice by this court between those laws, as to which shall control it in disposing of the defense made herein. Before making such choice, however, it has to be considered whether the court is free to act in accordance with its own judgment, and, if so, which law should be chosen. The latter consideration will receive attention first. If this were a case of an ordinary obligation to pay money and interest thereon, made in Kentucky, but payable in Minnesota, and without any mortgage to secure it, the interest

agreed to be paid would be upheld, if valid under the law of Minnesota. In the case of *Andrews v. Pond*, 13 Pet. 65, 78, 10 L. Ed. 61, Mr. Chief Justice Taney said:

"The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance, and, if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for higher interest without incurring the penalties of usury."

In the case of *Miller v. Tiffany*, 1 Wall. 298, 17 L. Ed. 540, Mr. Justice Swayne quotes this language with approval, and adds:

"The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case, also, for the higher rate."

And in the case of *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 20 L. Ed. 385, Mr. Justice Bradley said:

"With regard to the question what law is to decide whether a contract is or is not usurious, the general rule is the law of the place where the money is made payable, although it is also held that the parties may stipulate in accordance with the law of the place where the contract is made."

To the same effect are the cases of *Scotland Co. v. Hill*, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261; *Coghlan v. Railroad Co.*, 142 U. S. 111, 12 Sup. Ct. 150, 35 L. Ed. 951.

The fact that it was secured by mortgage on real estate in Kentucky would not make any difference. In the case of *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343, suit was brought in Kentucky to enforce a mortgage on real estate therein, given to secure a note executed, and perhaps payable, in that state. It was set up as a defense that the note was a renewal of another note, containing usury. That note had been made and was payable in Rhode Island, but when given it was stipulated that it should be secured by conveyances of land in Kentucky, which seem never to have been made. The question was as to which state's law should govern in determining the effect of usury in that note. Mr. Justice Johnson said:

"With regard to the locality of the contract of 1815, we have no doubt that it must be governed by the law of Rhode Island. There is nothing that can raise a question but the circumstance of its making a part of the contract that it should be secured by conveyances of Kentucky land. But the point is established that the mere taking of foreign security does not alter the locality of the contract with regard to the legal interest. Taking foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract of loan on the part of the borrower is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrowed, unless another place of payment be expressly designated by the contract. No tender would have been effectual to discharge the mortgage, unless made in Rhode Island. On a bill to redeem, a court of equity would not have listened to the idea of calling the mortgagee to Kentucky in order to receive a tender."

The case of *Miller v. Tiffany*, supra, was a suit in the circuit court of the United States for the district of Indiana to enforce a

mortgage on real estate in that state given to secure a note signed there, but delivered, upon receipt of consideration, in New York, and payable in Ohio. The interest stipulated for was usurious, according to the law of New York, but not according to the law of Ohio. It did not appear how it was as to the law of Indiana. It was held that the validity of the stipulation was to be determined by the law of Ohio, where the note was made payable.

Mr. Minor, in his work on Conflict of Laws (page 31), thus states the law:

"So, also, with respect to mortgages of land, though the mortgage itself must be such as will constitute a transfer of title under the *lex situs*, the question as to whether the debt secured thereby (if contracted in another state) is a valid consideration to support the mortgage (for instance, whether it is usurious) is to be determined by the law which governs the validity of the debt."

This would seem to be correct on principle. If a court will enforce an unsecured contract to pay interest because valid according to a foreign law, and thus render the obligor's real estate located within its jurisdiction liable to be subjected by execution or otherwise to the payment of such contract, there would seem to be no reason why it should not subject same to the payment thereof in pursuance of a mortgage, if the mortgage has been properly executed. The only significance that can be attached to a mortgage on real estate, in disposing of a question as to usury in the obligation to secure which it has been given, is as an aid in determining the place of performance when the obligation is silent on that point. Minor, *Conf. Laws*, p. 390; 2 Jones, *Mortg.* § 660. A limit, however, must be put upon what has been said as to upholding a contract to pay interest if authorized by the law of the place where the contract is to be performed. It will not be upheld if the fixing of the place of performance is a device to evade the usury laws of the place where made. But it is not such merely because by fixing that place the law of the place where made is in fact evaded. In the case of *Van Vleet v. Sledge* (C. C.) 45 Fed. 743, Judge Jackson said:

"McCollum states the matter too strongly when he says it was intended to evade the law of Tennessee. It was certainly intended to obtain the Arkansas, rather than the Tennessee, rate of interest. That intention was no violation or evasion of the law of Tennessee."

In order for the fixing of the place of performance in another jurisdiction than where the contract is made to be such a device, it is essential that the fixing of that place be a pretense and not bona fide. This is well brought out in Minor, *Conf. Laws* (page 379). He says:

"Paradoxical as it may seem, there is often more difficulty in determining the locus solutionis of a contract which expressly designates a place of performance, than where none is named. The reason is that the parties sometimes attempt to cover their real intentions touching the place of performance by falsely naming a place which they do not really intend to be the true locus solutionis. This is done in order to evade the law of the real place of performance, when it would condemn the contract. In such cases, where the locus solutionis is of importance, it is the duty of the court to disregard the false witness of the parties' contract, and to ascer-

tain the place of performance really intended. For though the parties have the right to choose bona fide the place where their contract is to be performed, they have not the right, in order to evade the law of the place they have really chosen, to pretend that they have selected a different place. Thus it has been held, by courts which take the view that the validity of usurious contracts is dependent upon the *lex solutionis*, that a debt falsely pretended to be made or payable in a particular state, so that usurious interest may be exacted under its law, will not be enforced. But the mere fact that the motive for selecting a particular place as the *locus celebrationis* or *locus solutionis* of a contract is to evade the law of another state is immaterial, if the choice is bona fide. The important point is that the parties have the right to select the *locus*. This being conceded, the reasons which induce them to make a particular choice are not open to inquiry."

The principles thus laid down as to ordinary obligations for the payment of money and interest thereon have been applied by the federal courts in a number of cases quite recently to transactions similar to that involved herein, and it has been uniformly held, with possibly one exception, that the nature and validity of the contract of the borrowing member is to be determined by the law of the state under which the association was organized, and at whose office in that state that contract was to be performed. The cases in the inferior federal courts so holding are as follows, to wit: *Association v. Logan*, 14 C. C. A. 133, 66 Fed. 827; *Association v. Bedford* (C. C.) 88 Fed. 7; *Andruss v. Association*, 36 C. C. A. 336, 94 Fed. 575; *Investment Co. v. Alexander* (C. C.) 96 Fed. 870; *Association v. Rector*, 38 C. C. A. 686, 98 Fed. 171; *Hieronymus v. Association* (C. C.) 101 Fed. 12; *MacMurray v. Gosney* (C. C.) 106 Fed. 11; *Hieronymus v. Association*, 46 C. C. A. 684, 107 Fed. 1005; *Man-ship v. Association* (C. C.) 110 Fed. 845; *McIlwaine v. Ellington* (C. C. A.) 111 Fed. 578. The case of *Association v. Bedford* was carried to the supreme court of the United States, and affirmed by it, in the case of *Bedford v. Association*, 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834. In a number of these cases, as above indicated, it was held that the contracts sued on were made, as well as to be performed, at the office of the association.

In the following cases the question as to the fixing of the place of performance in the foreign state being a device to evade the usury laws of the state where the real estate mortgaged was situated, and the suit to enforce the mortgage had been brought, was expressly referred to, and it was held that it was not, to wit: *Association v. Logan*, 14 C. C. A. 133, 66 Fed. 830; *Hieronymus v. Association* (C. C.) 101 Fed. 14. The fact is that in such transactions not only is the fixing of the place of performance at the office of the association in accordance with the real intention of the parties, but it is reasonable that that place should be so fixed. Thereby uniformity and equality amongst the borrowing members scattered through many states are secured, and the convenience of the association itself subserved. In none of these cases was the mortgage feature of the transaction considered as having any bearing upon the question as to which law was to govern. Indeed, it is rarely, if ever, referred to in that connection.

The sole possible exception to these cases is that of *McIlwaine v. Iseley* (C. C.) 96 Fed. 62. It arose in North Carolina, and was a

suit to enforce a mortgage on real estate in that state, given by a resident thereof, whose contract was made and to be performed, as the court held, at the office of the association, in Tennessee. The supreme court of North Carolina had theretofore held that such a transaction should be governed by its law as to similar transactions entirely local, and not by the law of Tennessee in relation thereto. Judge Simonton in that case held likewise. It is questionable whether he so held because the law of North Carolina was the proper law, or because he felt bound by the decisions of the state court that it was. Inasmuch as in the case of *Investment Co. v. Alexander* (C. C.) 96 Fed. 870, which arose in South Carolina, where there was no such obstruction,—the supreme court of that state having theretofore held in a similar case that the foreign law was the proper law,—he followed the decisions of that court, it would seem that the ground of his decision in the other case was that he felt bound by the North Carolina decisions.

We conclude, therefore, that if this court is free to make choice between the law of Kentucky and that of Minnesota in regard to similar transactions entirely local, as to which shall govern the one involved herein, the latter is the proper law. In reaching this conclusion, we have left out of consideration the fact, not heretofore stated, that it was expressly stipulated in the note and mortgage herein that they were "made with reference to and under the laws of Minnesota," the exact effect and significance of which we do not feel it necessary to determine. How, then, is it as to this court's freedom to make choice? The necessity for determining this question in this case arises out of the fact that the court of appeals of Kentucky, in the following cases, to wit: *Association v. Harris*, 98 Ky. 41, 32 S. W. 261; *Loan Co. v. Scott*, 98 Ky. 695, 34 S. W. 235,—has heretofore decided that the law of Kentucky as to similar transactions entirely local is the proper law to govern a transaction like the one involved herein. The plaintiff herein was the association in the latter of those two cases, and the transaction there involved was the same as here. In the *Harris Case*, *Grace, J.*, said:

"This loan, however, was made not directly and in a straightforward, business manner, but with much circumlocution." And again: "And yet, in the face of these figures, which are incontrovertible, appellant insists that its contract is all legitimate and fair; that there is no fraud, no deception, and, stranger still, no usury; and this latter proposition he upholds by an elaborate brief, and by the citation of many authorities."

He characterizes the place of operation as a "cunningly devised scheme," and states that the usurious interest in it is "covertly concealed by the literal terms of the contract." On the question of the choice of laws he says:

"And by the adoption of many fictions he [appellant] says that, in any event, this transaction does not violate the usury laws of Kentucky. Among these fictions, he says this contract was made in Tennessee, although it was in fact made in Lexington, Ky.; and, so far as this record discloses, appellee was never in Knoxville, Tenn., in his life. The subscription for the stock (being the corner stone of this scheme) was made in Kentucky; the application for the loan written and signed here; the note dated, written, and signed here, and the mortgage made to secure the payment for this stock; and thus the payment of the loan made was written, dated, and executed,

acknowledged and recorded, in Fayette county, Ky. Yet appellant, by counsel, says that by intendment of law this contract was made at Knoxville, Tenn., and is a Tennessee contract, and that under and by the laws of Tennessee, as adjudged by the supreme court of that state, this transaction is not usurious. And, further, appellant contends that, by comity between the states, this contract, being valid and free from usury in Tennessee, must be enforced in Kentucky. * * * On this question of comity, and on the assertion that this contract is all valid, and not usurious, by the laws of Tennessee, we desire again to submit the views of this court in reference to these transactions, as was set forth and announced in the case of *Association v. Johnson*, 88 Ky. 191, 10 S. W. 787, 3 L. R. A. 289. * * * In that case the court held that transactions of that character were in violation of the fundamental law of the land."

On the same subject, Hazelrigg, J., in the *Scott Case*, said:

"A foreign building and loan association engaged in doing business in Kentucky will be permitted to charge no higher rate of interest than is chargeable under the laws of this state, and while, by the laws of comity, the charter of such a corporation will be recognized here as the law of its existence, it is the charter alone which is recognized, and not the general legislation of the country of its domicile with reference thereto, or the constructions of its charter provisions by the foreign courts. Moreover, when such a corporation employs the usual agencies to solicit and transact business in this state, and contracts for the payment of premiums and interest in excess of the rate authorized here, the transaction will be denounced as an attempted evasion of our laws, whatever may be the nominal rate specified or artifice adopted; and this though it be specifically provided that the contract is made with reference to the laws of the foreign state. Such a provision only makes the intent to evade more manifest. The principles underlying these conclusions are fundamental, and require no citation of authority."

Is this court, then, bound to set aside its own judgment in the matter, and the decisions of the federal courts hereinbefore referred to, and to follow these decisions of the state court? The embarrassment due to this situation is augmented by the consideration that, if the transaction involved herein were entirely local, the court would feel bound to follow the decisions of the state court in relation to such transactions. The jurisdiction of this court is limited to the state of Kentucky, and it may be stated as a general rule that it is bound by and must enforce the laws of that jurisdiction whenever cases calling for their enforcement are properly before it. It is so provided by section 721, Rev. St. U. S. But the decisions of the highest court of a state are not the laws of that jurisdiction. As said by Mr. Justice Story in the case of *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865:

"In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves whenever they are found to be either defective, ill founded, or otherwise incorrect."

And further, as said by Mr. Justice Bradley in the case of *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359:

"The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts."

It would seem to be a corollary to these two propositions that in no case are the federal courts bound, in strictness, to follow the

decisions of the highest court of the state. But as said further by Mr. Justice Bradley in the case of *Burgess v. Seligman*:

"The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference."

To avoid these results, and from "comity and good sense," the federal courts show their respect for, and deference to, the settled decisions of the highest court of the state, so far as to follow them blindly, as it were, in two well-recognized classes of cases. One class is where the matter decided relates to the interpretation or validity of the written or statutory laws of the state, if the federal constitution is not involved. The other class is where the matter decided relates to the acquisition, or not, of rights to, interests in, or liens upon property located within the state, even though the acquisition, or not, depends solely upon the unwritten law of the state. Often the cases which arise belong to both classes; the acquisition, or not, of such rights, interests, or liens depending upon the interpretation or validity of some statute. In cases outside of these two classes, where the matter to be decided is one of commercial law, or general jurisprudence, as it is generally put, the federal courts refuse to be bound by the decisions of the highest state court, and exercise their own independent judgment. Does this case, then, come within either one of those two classes, or does it lie on the outside? It certainly does not come within the first class. There is no statute in Kentucky providing that such contracts as the one involved herein are against that state's public policy and nonenforceable within it, and those decisions of the court of appeals as to choice of laws to govern the transactions involved therein were not based upon any statute. Nor does this case belong to the other class. Those decisions cannot be said to have established a "rule of property," within the meaning of that phrase as used by the federal courts. It is true that they hold that the foreign associations were not entitled to a lien by virtue of their mortgages on the real estate in Kentucky covered by them for more than was due on the basis that the transactions were loans of money, pure and simple. This, however, was not because of any invalidity in the mortgages themselves. It was because of the nature and invalidity of the personal contracts secured by the mortgages, as determined by them under the law of Kentucky, as to similar transactions entirely local, which they made choice of. If those decisions had related to personal contracts simply,—i. e., to contracts unsecured by mortgage,—they would not be considered as establishing a rule of property. The mere fact that they related to such contracts secured by mortgage on real estate in Kentucky can make no difference. Certainly not as to the personal contract herein. And if not as to it, why as to the mortgage to secure it? The case of *Edwards v. Davenport* (C. C.) 20 Fed. 756, is in point. By the settled decisions of the supreme court of Iowa, the deed or mortgage of a lunatic is valid if the grantee or mortgagee, as the case may be, is ignorant of his lunacy when he accepts it. In that case suit was brought to enforce the bond and mortgage

of a lunatic. It was the court's own judgment (and it had been so ruled by the supreme court of the United States) that the bond and mortgage were invalid, though the mortgagee was ignorant of the lunacy of the mortgagor when he accepted them. The question was whether, notwithstanding this, this court was bound to follow the decision of the state court. It was held that it was not. McCrary, J., said:

"It is only necessary in the present case to determine the validity of the bonds executed by George A. Davenport. If these are held invalid as to him, the mortgage, which is a mere incident, falls with them. Can it be said that a rule respecting the validity, force, and effect of a contract entered into by a person of unsound mind is a rule of property? It is a rule which may, indirectly, in a certain class of cases, affect the title to property, but the same may be said of any ruling of the state courts respecting contracts. If the sum claimed as due upon a contract is sought to be fastened as a lien upon real estate, either by mortgage or attachment, a decision of the question of its validity will undoubtedly affect the title to such property. But it has never been claimed that for this reason the decisions of the state courts upon the validity of any class of contracts can be regarded as a rule of property. If the complainant had sued at law upon the bonds, it would not have been claimed that the state decisions in question were binding on this court. It is difficult to see upon what principle we can apply one rule to the bonds when suit is brought upon them at law, and another when suit is brought upon them in equity. The decisions of the highest court of a state may be said to constitute a rule of property when they relate to and settle some principle of local law directly applicable to titles. A rule of property is one thing; a rule respecting the validity of a class of contracts which may or may not affect titles to property is another and a different thing."

It must be held, therefore, that this case lies outside of both classes of cases where the federal courts follow the decisions of the state courts. The question involved is one of general jurisprudence. It has been intimated above that, if the transactions involved herein were entirely local to Kentucky, the court would feel bound to follow the decisions of the court of appeals in relation to such transactions. This is because such a case would become within the first class named. Those decisions were based upon a construction and determination of the validity of the legislation of Kentucky in pursuance of which the transactions involved therein were had. The conclusion we have reached finds support in the decisions by the federal courts in the building association cases cited above. In several, if not in most, of them, the decision of the federal court did not run counter to the decision of the state court, but was in accordance with them. This was so in the case of *Bedford v. Association*, decided by the supreme court, carried there from the circuit court, Western district, of Tennessee, through the circuit court of appeals for the Sixth circuit. The supreme court of that state had theretofore decided that in a transaction like the one in hand the foreign law should govern. These cases, therefore, are not in point in the matter now under consideration. The case of *McIlwaine v. Iseley*, decided by the circuit court of North Carolina, above indicated, is perhaps in point here, and so is adverse to the position taken herein. The cases, however, of *Manship v. Association* and *McIlwaine v. Ellington* are both in point, and in accord with that position. The *Manship Case* was de-

cided by the circuit court, Southern district, of Mississippi. It distinctly refused to follow a prior decision of the supreme court of Mississippi to the effect that in a transaction such as here the domestic law should govern. The Ellington Case was decided by the circuit court of appeals for the Fourth circuit on appeal from a decision of circuit court, Western district, of North Carolina, reported in 96 Fed. 1007, to the same effect as that in the Iseley Case. That court of appeals refused to be bound by the decisions of the supreme court of North Carolina, and reversed the decision of the lower court. This must be taken as overthrowing the Iseley Case, also, if, indeed, that was not done by direct appeal.

But in addition to this there is another reason why this court is not bound to, and should not, follow the decisions of the state court. The relation between the plaintiff and defendants, out of which this suit has grown, was entered into in August, 1892. The Harris Case (the first of the two cases from the Kentucky court of appeals referred to above) was decided by that court more than three years afterwards,—October 1, 1895. This feature brings this case within a recognized exception to the rule that the federal court should follow the settled decisions of the highest court of a state when the case comes within either of the two classes stated above. That exception is thus stated in oft-quoted language of Mr. Justice Bradley in the case of *Burgess v. Seligman*, *supra*, to wit:

"When contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

This exception has found frequent recognition in recent years by the federal courts. The following are some of the cases: *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 334, 76 Fed. 296; *Bartholomew v. City of Austin*, 29 C. C. A. 568, 85 Fed. 359; *Jones v. Hotel Co.*, 30 C. C. A. 108, 86 Fed. 375; *Speer v. Board*, 32 C. C. A. 101, 88 Fed. 749; *Clapp v. Otoe Co.*, 45 C. C. A. 579, 104 Fed. 473; *Pine Co. v. Hall*, 44 C. C. A. 363, 105 Fed. 84.

It is true that, before the making of the contract sought to be enforced herein, the court of appeals of Kentucky had taken its position as to transactions entirely local. This it did for the first time in a relevant case in the *Johnson Case*, decided in February, 1889. But it did not follow from this that the rule thus laid down would be applied to a transaction containing such foreign elements as this one does. Indeed, the settled rule in this state as to ordinary contracts for the payment of money made here and payable elsewhere had a tendency, at least, to indicate that it would not be so applied. In the case of *Goddin v. Shipley*, 7 B. Mon. 575, Judge Marshall said:

"The general principle that a contract referring by its own terms to a particular place where it is to be performed is to receive its construction and legal character and effect from the laws of the place thus referred to is in itself so obviously reasonable, and on the score of authority so well established, as to preclude all discussion of its correctness."

This rule has received recognition recently in the case of *Glass Co. v. Taylor*, 99 Ky. 24, 34 S. W. 711. Judge Pryor said:

"It is a question of intention, and all the facts must be considered in order to determine what law the parties looked to as controlling their rights under the contract,—whether the law of the place where the contract was entered into, or the law of the place where it was to be performed; nor is the rule here recognized in conflict with the cases heretofore decided by this court in *Goddin v. Shipley*, 7 B. Mon. 575; *Hyatt v. Bank*, 8 Bush, 193; *Young v. Harris*, 14 B. Mon. 556, 61 Am. Dec. 170. Ordinarily the place of performance fixes the nature and interpretation to be given the contract."

And in the case of *Brown v. Todd's Adm'r*, 29 S. W. 621, the court upheld a judgment enforcing a mortgage on real estate in Kentucky to secure a note given and payable in Indiana, which stipulated for 8 per cent. interest and attorney's fee, though, according to the settled law of this state, that stipulation was usurious and illegal. Judge Guffy said:

"The law of the place where the contract was made and where it was to be performed must govern in this case, and the proof in the cause establishes the fact that such a contract, as to interest and attorney's fee, was enforceable under the laws of the state of Indiana."

It follows from these considerations that this court is not bound to follow the state decisions, and is at liberty to make choice of that law which it deems is the proper law of this case. That law, as we have already shown, is the law of Minnesota, and the transaction between plaintiff and defendant must therefore be upheld as made. This conflict between the state and federal court in this jurisdiction is unfortunate. We can only say, as was said by Mr. Justice Swayne in the case of *Butz v. Muscatine*, 8 Wall. 575, 19 L. Ed. 490, where a similar condition existed:

"There are several adjudications of the highest court of the state more or less adverse to the views we have expressed. Entertaining the highest respect for those by whom they were made, we have yet been unable to concur in the conclusion which they announce. It is alike the duty of that court and of this to decide the questions involved in this class of cases, as in all others, when presented for decision. This duty carries with it investigation, reflection, and the exercise of judgment. It cannot be performed on our part by blindly following the footsteps of others, and substituting their judgment for our own. Were we to accept such a solution, we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge, and defeat the wise and provident policy of the constitution which called this court into existence."

The books of the defendants show the payments made by them on account of interest and stock installments to have been \$1,836. It is admitted that \$63 were paid on account of fines. This makes a total of \$1,899.00, the amount claimed by defendants. This must therefore be adjudged to be the correct amount. Counsel for plaintiff will restate accounts on this basis, and draw decree for balance due as thus ascertained, with 6 per cent. interest thereon from December 8, 1896, until paid.

JOHNSTON v. CITY OF PHILADELPHIA.

(Circuit Court, E. D. Pennsylvania. January 22, 1902.)

No. 5.

1. MUNICIPAL CONTRACTS—EXECUTION.

A contract with a city for work on a school building is void, and the contractor doing work thereunder is a volunteer, it not having been countersigned by the controller, and filed and registered, as required by Act June 1, 1885 (P. L. 51) art. 14, and not having designated any appropriation on which it was founded, as required by article 7, § 1, subd. 7.

2. SAME.

Failure of a contract with a city for completing work on a building to be countersigned by the controller and to designate an appropriation on which it is founded, as required by Act June 1, 1885, art. 14, and Id. art. 7, § 1, subd. 7, is not cured or excused by the fact that the contractor's bid for the entire work had been accepted by the city, and in a prior, duly-executed contract with him for part of the work it was recited that he contracted and agreed, when requested so to do, to enter into a contract to finish the building, subject to a further appropriation of a certain sum, being the balance required to pay for the remaining work.

Motion for Judgment on Reserved Point N. O. V.

Frederick A. Sobernheimer and John G. Johnson, for plaintiff.

J. W. Catharine, Asst. City Sol., Ernest Lowengrund, Asst. City Sol., and John L. Kinsey, City Sol., for defendant.

J. B. McPHERSON, District Judge. The facts upon which the reserved question arises are not in dispute, and appear mainly in the written evidence. They are briefly these: In July, 1896, the board of education of the city of Philadelphia asked for proposals to finish the new building for the Boys' High School, upon which some work had already been done under a separate contract. Upon July 7 the plaintiff put in a bid, offering to finish the building in accordance with the plans and specifications for certain specified sums. On September 8 the committee on property of the board reported in favor of awarding the contract to the plaintiff for the sum of \$324,405.50, and upon the same day the board adopted the report of the committee. At that time, no money had been appropriated by councils for the purpose of finishing the building, but in spite of that fact Johnston went on and did certain work upon the building, amounting to \$100,000. On July 14, 1897, councils appropriated \$100,000 for the purpose of paying for this work; and on September 8 of that year a contract was entered into between the plaintiff and the city, in which he agreed to

"Furnish and deliver all the materials and perform all the labor requisite in erecting and building the granite portion of the tower, and in installing and placing in position certain iron work, air ducts, area walls, metal ceilings, and mill work, including painting and glazing, and in doing such concreting, plastering, tiling, painting, and carpenter work, including the flooring of the fifth floor, as may be directed by the architect and supervisor of the board of public education, under the authority of the committee on property of said board, being appurtenant and necessary to the completion of the main building of the new high school for boys. * * * Said work to be performed in strict and exact accordance with the detailed drawings

and plans on file in the office of said board and the specifications hereto attached, which said plans and specifications are hereby made a part of this agreement as fully to all intents and purposes as though herein set out at length, and as authorized by ordinance of councils of said city approved July 14, 1897."

This is the ordinance already referred to that appropriated \$100,000 toward the completion of the building; and the fact that the contract was limited to this part of the work further appears from a later clause of the agreement in these words:

"It is further distinctly understood and agreed that the total amount to be paid for the materials and supplies to be furnished and work done under this contract shall in no event exceed the sum of \$100,000."

This money was duly paid to the plaintiff, and some time thereafter, again without contract or appropriation, he did further work upon the building, amounting to \$144,500. This work was done during the years 1897 and 1898, and upon December 28 of the latter year councils appropriated, to pay for this second installment, and for one or two other small items, the sum of \$150,000. Thereupon a second contract was entered into on January 13, 1899, containing the same provisions as are found in the first contract, with one or two unimportant differences. The amount to be paid under the second agreement was expressly limited to the sum of \$144,500, and this sum was in due course paid to the plaintiff. He again went forward with the work, once more without contract or appropriation, and (with some exceptions) did what was necessary to carry out his bid. A third contract was then drawn up, dated June 30, 1899, in which the plaintiff agreed

"To furnish all the materials and perform all the labor necessary for the erection and completion of the addition to the tower, rebuilding the transit room, and making alterations, including gratings, bars, and such other work as may be required for the completion of the building of the new high school for boys."

These, apparently, were the matters comprised in the final installment of the operation. The amount specified in the contract to be paid was the remainder of his bid, namely, \$90,762.50. This sum is the subject of the present suit. The work called for by the plaintiff's bid has been finished, except certain items, for which an allowance has been made by the verdict, and the building has been taken possession of and is now being used by the city.

The defense is that no legally binding contract was ever executed for the third installment of the work, and therefore that under the statutes of Pennsylvania, the ordinances of the city, and the decisions of the courts, the plaintiff was a mere volunteer, and cannot recover. Further facts bearing upon this question are as follows: The paper dated June 30, 1899, which was signed by the plaintiff, was not signed by the mayor on behalf of the city, but purports to be approved by the chairman of the committee on finance on July 6, 1899, who was acting in reliance upon a resolution of select and common councils passed on June 15, 1899, that authorized the chairman of that committee to approve contracts and sureties during the summer vacation. The paper was not countersigned by the con-

troller, nor filed and registered by number and date and contents in the mayor's office, and an attested copy was not furnished to the controller or to the department charged with the work. The act of June 1, 1885 (P. L. 51), relating to the city of Philadelphia, provides in article 14, § 1, as follows:

"All contracts relating to city affairs shall be in writing, signed and executed in the name of the city by the officer authorized to make the same after due notice, and, in cases not otherwise directed by law or ordinance, such contracts shall be made and entered into by the mayor. No contract shall be entered into or executed directly by the city councils or their committees, but some officer shall be designated by ordinance to enter into and execute the same. All contracts shall be countersigned by the controller and filed and registered by number, date and contents in the mayor's office, and attested copies furnished to the controller and to the department charged with the work."

In article 7, § 1, subd. 7 (page 46), the following provision will be found:

"Every contract involving an appropriation of money shall designate the item of appropriation on which it is founded, and shall be numbered by the controller in the order of its date and charged as numbered against such item, and so certified by him before it shall take effect as a contract, and shall not be payable out of any other fund, and if he shall certify any contract in excess of the appropriation properly applicable thereto, the city shall not be liable for such excess, but the controller and his sureties shall be liable in damages for an amount not exceeding such excess, which may be recovered in an action on the case for negligence by the contracting party aggrieved."

The requirements thus specified were also not complied with in the paper now being considered. It was a proposed contract involving an appropriation of money, but it did not designate the item of appropriation upon which it was founded; neither was it numbered, or charged, or certified by the controller.

It seems clear to me that because of the foregoing defects the paper in controversy never took effect as a contract (to use the words of the act). It would be a waste of time to discuss this proposition, because the precise question has already been several times decided both by the supreme court and by the superior court of the state. The act of 1889 relating to cities of the third class contains a provision (article 9, § 5) concerning the duty of the controller to certify contracts that differs only verbally from article 7 of the act of 1885. For present purposes the meaning is identical. In *City of Erie v. A Piece of Land on Eighteenth St.*, 176 Pa. 478, 35 Atl. 136, the supreme court declared in direct and positive terms that:

"This requirement [of the act of 1889] is a condition precedent to the legal efficacy of the contract, and without it there is no efficacious force in the attempted contract as to any one. As this requirement is entirely absent from the controller's certificate, the conclusion follows that there never was a lawful contract for the paving in question, and hence there can be no recovery. * * * It results that the paving company has no contract upon which it can recover, and it is therefore to be regarded as a mere volunteer, having no lawful claim against this defendant."

This decision was followed in *City of Harrisburg v. Shepler*, 7 Pa. Super. Ct. 491, affirmed by the supreme court in 190 Pa. 374, 42 Atl. 893, and also in *Same v. Mish*, 14 Pa. Super. Ct. 496. Moreover, article 14 of the act of 1885 relating to Philadelphia was itself before

the supreme court in *Hepburn v. City of Philadelphia*, 149 Pa. 335, 24 Atl. 279, and it was there declared that:

"These clear and explicit requirements of the city's organic law are not merely directory. On principle as well as authority they are mandatory. To hold otherwise would defeat the very object that the legislature had in view in thus specifically describing the manner in which all contracts relating to city affairs shall be executed, and expose the public funds to raids of every conceivable form. * * * We have no doubt that the requirements of the organic act above quoted are mandatory, and must be strictly pursued. * * * When plaintiff was injured, and her cause of action arose, the relation of independent contractor between the city and Kane had not been created. There was no independent contractor in the case. The papers referred to—the advertisement, the bid, and the letter of acceptance—set forth the terms upon which the city was willing to enter into a contract with him; but neither singly nor altogether do they constitute a valid contract, nor in fact any contract. They are merely negotiations preparatory thereto. The contemplated contract was not executed or evidenced in the only way in which it could become effective to make Kane an independent contractor until after the accident."

This language applies with equal force to the foregoing requirements of article 7.

It is, I think, conceded, but, at all events, it cannot be successfully denied, that, if these decisions apply, the paper of June 30, 1899, never took effect as a contract, and therefore the city was never bound thereby. To avoid the force of these authorities, the plaintiff relies upon the following clause, contained in the first and second contracts, both of which were legally executed and certified:

"The said party of the second part further contracts and agrees that he will, when requested so to do, enter into a contract with the said party of the first part to finish and complete the entire work necessary to fully complete and finish the said building in accordance with the said plans and specifications, for the total of \$324,405.50, subject to a further appropriation by said councils of the sum of [in the first contract, \$224,405.50, and in the second contract, \$90,762.50], that being the balance required to pay for the said work remaining unfinished."

The argument is that, because these two lawfully executed and certified contracts contained this provision, the plaintiff was relieved from the necessity of entering into another formal contract, and that no further signing by the proper officer of the city or certification by the controller was required. To this argument I cannot agree. The very language of the provision relied upon by the plaintiff seems to me to be fatal. He agrees to "enter into a contract" to finish the entire work, subject to a further appropriation by councils, and these words contemplate action in the future. The plaintiff's bid had been accepted, but, as was said in *Hepburn v. City of Philadelphia*, this was not the contract. The bid and acceptance merely set forth the terms upon which the city was willing to enter into a contract, but they did not constitute a valid contract, nor in fact any contract. Neither can the first and second contracts be so construed as to constitute a contract for the whole work. They are expressly limited to parts only; and, moreover, they could not lawfully cover more of the work than such portions as had already been provided for by appropriations made by councils. It must be admitted that there is an apparent hardship in the conclusion that the plaintiff has put his

labor and materials into a building which the city is using but declines to pay for. Nevertheless, the positive command of the statute must be enforced. The plaintiff took all the risks that were visible in the transaction. He was willing to do the work without a contract and without an appropriation, trusting to the disposition of councils to pay for it afterwards, and to the approval of the proper municipal authorities; and, now that the risk has fallen out against him, while it may be regretted that he has lost a large sum of money, it can only be said that he has lost it by his own folly.

Judgment will be entered for the defendant upon the reserved point, notwithstanding the verdict.

HILL et al. v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court, D. Washington, N. D. January 23, 1902.)

APPEAL—REVERSAL ON SINGLE POINT—RETRIAL—LAW OF CASE.

On the trial of an action in a United States circuit court, after a judgment of the same court in favor of the plaintiffs on the pleadings has been affirmed by the circuit court of appeals, and then reversed by the supreme court, on the ground that the answer raises a material issue, said issue is the only issue to be tried, and the decision of the circuit court of appeals as to all other questions must be considered as the law of the case.

Action upon a life insurance policy issued to George Dana Hill, father of the plaintiffs. Tried before the court and a jury, resulting in a verdict in favor of the plaintiffs. Heard on a motion for judgment in favor of the defendant non obstante veredicto. Motion denied.

Stanton Warburton, Preston, Carr & Gilman, and Eben Smith, for plaintiffs.

Struve, Allen, Hughes & McMicken and R. C. Strudwick, for defendant.

HANFORD, District Judge. Upon the facts alleged and admitted by the pleadings, a judgment in favor of the plaintiffs was rendered by this court, which was affirmed by the circuit court of appeals. Thereupon the case was removed to the supreme court of the United States by a writ of certiorari, and by that court the judgment was reversed, and the case was certified back to this court, with a mandate for further proceedings in accordance with the opinion delivered by Mr. Justice BREWER. For a complete statement of the case, reference is made to the decisions of the supreme court, reported in 178 U. S. 347-350, 20 Sup. Ct. 914, 44 L. Ed. 1097, and of the circuit court of appeals for the Ninth circuit, reported in 38 C. C. A. 159, 97 Fed. 263-270, 49 L. R. A. 127. The ground upon which the decisions of the two lower courts were reversed is stated in the opinion of the supreme court as follows:

'Here, as in the last two cases, is disclosed a distinct agreement on the part of the insured and the company to waive and abandon the policy, and

all rights and obligations on the part of the parties thereto. But it is said that the insured was not the beneficiary,—his wife, and, in case of her death, their children, being named as such,—and that it was not in his power, by nonpayment or waiver or abandonment, to relinquish or cancel her or their rights in the policy. It is doubtless an interesting question how far the action of the insured can affect or bind the beneficiaries in a life insurance policy. If the answer in this case contained simply the allegation in respect to the insured's agreement with the company, we should be compelled to enter into an examination of that question; but it is alleged not only that the insured and the company agreed to abandon the contract, but also that the beneficiary, his wife, and the plaintiffs, their children, 'failed, neglected, and refused' to pay the premium. So we have a case in which not only did the insured and the company abandon the contract, but also the beneficiaries neglected and refused to do that which was essential to keep the policy in life. The allegation in the answer does not disclose a mere omission, for it is 'neglected and refused,' and, of course, there can be no refusal unless with knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge, or notice. The case, therefore, is one in which the beneficiaries refused to continue the policy, while the insured and the company abandoned it."

After being reinstated in this court, the case was brought to a trial, and was submitted to a jury for decision of one issue only, which the supreme court of the United States held to be a material issue raised by the defendant's answer. The parties were permitted to introduce evidence relating to other facts which were not seriously disputed, for the purpose of developing the case fully and fairly, and to make a record which would enable the attorneys to argue the legal questions to their own satisfaction. The evidence bearing upon the material issue was all in favor of the plaintiffs, and the jury rendered a verdict accordingly. The court afterwards declined to hear arguments on a motion for a new trial, for the reason that a new trial would be a useless proceeding, for, if the plaintiffs are not entitled to a judgment upon the verdict, they can never prevail, and the law applicable to the conceded facts exonerates the defendant from any liability whatever under the policy sued upon. The defendant then interposed the motion now under consideration, and upon that motion counsel on both sides have argued the case, earnestly and elaborately, as if the decision of the supreme court had completely expunged the previous determinations of this court and of the circuit court of appeals, and returned the case here, to be again considered with respect to the primary question whether the policy lapsed, and was rightfully canceled by the defendant for nonpayment of the annual premiums which accrued in the lifetime of George Dana Hill.

In behalf of the plaintiffs it is alleged that by a stipulation in the contract the parties have explicitly and conclusively determined that the contract was made at the defendant's home office, in the state of New York, and as, by its terms, the contract is to be performed in New York, all questions as to the validity of every one of its provisions, and as to the rights and liabilities of the parties under the contract, must be determined in accordance with the laws of the state of New York; that in form the policy is not for a single term of one year, with a right of renewal extending the insurance

from year to year, but is a continuing policy, subject to forfeiture and cancellation for nonpayment of annual premiums to become due as specified; therefore the company had no power to cancel this policy or claim a forfeiture without complying with the statute of New York which prescribes that a specified notice must be given in a manner specified, and, for failure on the part of the company to give the statutory notice, the premiums did not become due, and there was no default. Against this contention the defendant's attorneys have argued, with ingenuity and force, that the contract did not have vitality until the policy was delivered, and the first annual premium paid, in the state of Washington; that the policy contains an express declaration that the annual premiums are to become due on a specified date in each year, of which notice is given and accepted by the policy itself, and the right to any other notice expressly waived, and that, in case of failure to make the payments to accrue as specified, the policy should lapse, and the right of the insured under it should be absolutely terminated; that this stipulation is not contrary to any law in force in the state of Washington; that the laws peculiar to the state of New York cannot apply to this contract so as to affect its validity, or limit the rights or obligations of the parties under it, by force of the legislative power of the state of New York; that the statutes of New York may be considered as controlling the contract only so far as the parties by their own agreement have adopted the same, and the particular statute which the plaintiffs have invoked cannot be deemed to have been adopted by the parties contrary to their solemn agreement, although as to matters concerning which the contract is otherwise silent the laws of the state of New York are made controlling. On the trial it was shown by uncontradicted evidence that a local collecting agent of the defendant company presented to George Dana Hill the company's official receipt for the second annual premium when it became due, and requested payment, and also held the receipt for a time, and made several demands for payment, and afterwards time for payment was extended, by special direction of the Pacific Coast manager of the company, so as to give ample opportunity to keep the policy alive by payment of the premium; but, notwithstanding the efforts to collect the premium, it never was paid. And upon the argument it was insisted that the company dealt only with George Dana Hill; that in all the transactions relating to the policy he represented the beneficiaries; that the company had the right to regard him as being fully authorized to act for the beneficiaries in the matter, and whether the failure to pay the premium was due to his inability to obtain the amount of money required, or any other cause, the mere fact of nonpayment, under the circumstances, constitutes neglect and refusal on the part of the plaintiffs to pay the premium, as alleged by the defendant in the plea referred to in that part of the opinion of the supreme court above quoted.

After a great deal of deliberation, I feel constrained to hold that as the main questions above outlined were fully considered by this court and by the circuit court of appeals, and decided in favor of the plaintiffs, and as the decisions of these questions are left undis-

turbed by the supreme court, they must now be regarded as the law of this case. A cluster of cases involving the same or kindred questions were brought before the supreme court by this defendant, and argued by eminent lawyers in connection with this case; and it is fair to assume that all the different phases of the questions were pressed upon the attention of the court. See *Mutual Life Ins. Co. Cases*, 178 U. S. 327-353, 20 Sup. Ct. 906-915, 44 L. Ed. 1088-1099; *Insurance Co. v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181. It appears that both questions did receive attention, and there was a fair opportunity to decide them finally, so as to terminate the litigation, if the decision sustained the defendant in either of its contentions; but the supreme court refrained from giving any instructions to the court to which the case was remanded, unless an inference unfavorable to the defendant may be drawn from the fact that this case was distinguished from the *Cohen Case*. If the lower courts erred in holding that this policy could not be canceled for nonpayment of premiums, without compliance on the part of the defendant with the New York statute, the special plea which contained the allegation that these plaintiffs failed, neglected, and refused to pay the second premium is complete, and sufficient to constitute a valid defense, without that allegation, and the particular matter which the supreme court adjudged to be a valid defense is superfluous, or else the preceding allegations as to the place where the contract was actually made, and as to nonpayment by the father of the plaintiffs, tendered only an immaterial issue; for if the statute of New York prescribing that a particular notice must be given, and that any agreement contained in the policy waiving that prescribed notice shall be void, is not applicable, and if the stipulations contained in the policy and the laws in force in the state of Washington are controlling, then the right of the company to cancel the policy became absolute when the time had passed for the payment of the second annual premium, and the refusal of these children to pay that premium after the policy was already dead is very much like skinning a dead body, but could have no effect on the legal rights of the parties. The opinion of the supreme court, and the references therein made to its decisions in the other cases, show that it was adjudged by that court that an agreement by competent parties to abandon a policy of insurance would constitute a complete bar to any action upon the policy, and it was shown that the answer contained allegations amounting to a plea of express abandonment by agreement between the defendant and George Dana Hill; but instead of reversing the judgment for error in not giving effect to the plea of abandonment by George Dana Hill, as it should have done, if he was authorized to terminate the rights of the plaintiffs, the court intentionally refrained from expressing any opinion on the question as to the binding effect on the rights of the plaintiffs of his acts and omissions alleged in the answer. The opinion points out that the defendant by its answer raised an issue as to the intentional conduct of the plaintiffs themselves in refusing to pay the premium, distinct from the alleged agreement made by their father to abandon the policy,

and it is obvious that the decision of the supreme court is hinged upon this issue as to the individual conduct of the plaintiffs themselves. That is made a material issue, and I think that it is the only issue which, under the mandate from the supreme court, was reopened for adjudication in this court.

The motion must be denied.

DEXTER v. KELLAS.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 40.

1. WRIT OF ERROR—REVIEW—DISCRETION.

The refusal to postpone a trial is within the discretion of the court, and will not be reviewed on error unless the discretion has been abused.

2. SAME.

A refusal to reinstate a cause after dismissal is in the discretion of the court, and not reviewable on writ of error.

In Error to the Circuit Court of the United States for the Northern District of New York.

William A. Sutherland, for plaintiff in error.

Charles W. Mathewson, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. This is a writ of error by the plaintiff in the court below to review a judgment for the defendant taken by default because of the failure of the plaintiff to appear at the time the cause was moved for trial. The assignments of error challenge the action of the court below in refusing the application of the plaintiff to postpone the cause, and denying a motion made by him subsequently to the dismissal of the complaint to open his default.

A writ of error will not reach rulings involving an exercise of discretion unless the discretion has been abused. The refusal to postpone a trial is within the rule. *Means v. Bank*, 146 U. S. 620, 13 Sup. Ct. 186, 36 L. Ed. 1107; *Isaacs v. U. S.*, 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229; *Goldsby v. U. S.*, 160 U. S. 70, 16 Sup. Ct. 216, 40 L. Ed. 343. So, also, is the refusal to reinstate a cause. *Welch v. Mandeville*, 7 Cranch, 152, 3 L. Ed. 299. Upon the facts in the record, so far from there having been an abuse of sound discretion by the court below, its rulings were amply justified.

The judgment is affirmed, with costs.

JACK et al. v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1902.)

No. 1,091.

1. EVIDENCE—DECLARATIONS OF PERSON DECEASED—RES GESTÆ.

The modern tendency is to extend, rather than to narrow, the rule as to the admission of declarations as part of the *res gestæ*, especially in view of the fact that the parties are now generally permitted to testify in their own behalf, and to consider the grounds which formerly excluded such declarations as affecting their weight only.

2. SAME.

In an action on a life insurance policy by one Jack, as assignee, it was shown that the insured was a young man, recently married, and poor, who had been employed as a laborer by plaintiff for a number of years; that within a few months prior to his death his life had been insured in all for \$21,000, all the policies having been assigned to plaintiff, who paid the premiums thereon; that he died from poison, and one Dr. Lipscomb had been convicted of his murder, for which offense also plaintiff had been tried and acquitted; that on the day preceding his death he was in town, and in and around plaintiff's store, as was also Dr. Lipscomb, who had conversations with plaintiff; that about 4 in the afternoon the doctor gave deceased a box, containing a single capsule, and told him to take it before going to bed, which he did; that within a few minutes thereafter he began to have convulsions, which followed each other at short intervals, and in the third of which he died; that between the second and third convulsions, with the consciousness of impending death, he made to his wife the following statement: "I am going to die." * * * Dr. Lipscomb killed me with a capsule he gave me to-night, and Guy Jack had my life insured, and hired Dr. Lipscomb to kill me." *Held*, that such statement as a whole, and each part of it, was admissible in evidence on the part of defendant, under the circumstances shown and as against the objections made, as a part of the *res gestæ*.

3. SAME—GENERAL SCHEME TO DEFRAUD—PROOF OF OTHER GENERAL ACTS.

Defendant in such action, in support of a defense that plaintiff had fraudulently procured the insurance and had murdered the insured, and for the purpose of connecting plaintiff with the acts of Lipscomb, was entitled to prove any fact which tended to show that they were acting in concert; and evidence that they had been engaged together in obtaining fraudulent insurance on the lives of others was not inadmissible because it tended to show the commission of other crimes by plaintiff.

4. SAME—PROOF OF CONSPIRACY—DECLARATIONS OR ACTS OF CONSPIRATOR.

In support of an allegation of a conspiracy between plaintiff and another to defraud a life insurance company by procuring the issuance of the policy sued on on the life of the insured and then murdering him, statements, declarations, or acts of the co-conspirator are not inadmissible because made or occurring after the death of the insured, on the ground that the object of the conspiracy had been accomplished, since it was not in fact accomplished, under such allegations, until the collection of the insurance.

5. TRIAL—INSTRUCTIONS—SUFFICIENCY OF EXCEPTIONS.

A general exception to the charge of the court, covering many matters and issues, is insufficient to raise any question thereon which can be considered in an appellate court.

6. APPEAL—REVIEW—INSUFFICIENCY OF RECORD.

An appellate court cannot consider statements of fact in the assignments of error not shown by the bill of exceptions.

7. EVIDENCE—MEASURE OF PROOF—ALLEGATION OF CRIME IN CIVIL ACTION.

In an action on a life insurance policy, a defense that the plaintiff aided and abetted or procured another to murder the insured need not

be proved beyond a reasonable doubt; but it is sufficient if the jury, by all the evidence, are satisfied and convinced that the plea is true.

8. APPEAL—REVIEW—INSTRUCTIONS.

The failure of the trial court to give instructions requested cannot be assigned for error or considered by the appellate court unless it appears from the bill of exceptions that such instructions were requested and refused, and exceptions to such refusal were duly taken.

9. LIFE INSURANCE—ACTION ON POLICY—PARTIES.

The widow of an insured has no interest in a policy made payable to his legal representatives, and which had also been assigned by him to another, which will enable her to maintain an action thereon, where it appears that the deceased owed debts at the time of his death, and that his estate has not been settled.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

W. E. Baskin and T. W. Brame (C. C. Miller, on the brief), for plaintiffs in error.

R. F. Cochran, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and BOARMAN, District Judge.

SHELBY, Circuit Judge. This is an action on a life insurance policy. It was brought in the circuit court of Noxubee county, Miss., and duly removed to the court below. Plaintiff Guy Jack sued as the assignee of the policy, and Lillie A. Stewart, the other plaintiff, sued as the widow and sole surviving heir of Charles T. Stewart, the insured. The policy was for \$10,000, and had been issued by the defendant in error on the life of Charles T. Stewart. It was made payable to the executors or administrators of the insured. It had been assigned to Guy Jack with the consent of the defendant. After the case had been removed to the United States court, the defendant filed a plea denying the allegations of the declarations,—a plea of a general issue. Defendant, under the Mississippi practice, gave notice of special defenses that would be made. One of these defenses was that Guy Jack, designing to cheat and defraud, induced Charles T. Stewart to apply to the Mutual Benefit Life Insurance Company for a policy of insurance on his life for the sum of \$10,000; and that he also induced Charles T. Stewart to make an application to the defendant, the Mutual Reserve Fund Life Association, for another policy of insurance on his life for \$10,000; and that, when both of these policies had been issued, he persuaded Charles T. Stewart to assign them to him; and that, after the assignments were made, Guy Jack employed Dr. W. H. Lipscomb to kill Charles T. Stewart, and that Lipscomb did murder Stewart. Notice of other defenses was given, which it is not necessary to mention. Plaintiffs offered in evidence the policy of insurance on which the suit was brought and the assignment thereof to Guy Jack, and proved that Charles T. Stewart was dead. It was admitted in open court by the plaintiffs that Charles T. Stewart was poisoned, and that Lipscomb had been convicted of his murder. The evidence offered by the defendant tended to show that Lipscomb forged three applications for insurance on the life of Mrs.

Alice V. Hart, a widow in delicate health. These policies amounted to \$12,500. One of them was made payable directly to Jack, and the others assigned to him. Lipscomb witnessed the assignment of both policies. These policies were issued without the knowledge of Mrs. Hart. When she learned of their existence, she had them canceled. Jack also held a large amount of insurance on the lives of other persons. In obtaining this insurance, Lipscomb was the medical examiner. Charles T. Stewart's life was insured in all for \$21,000. The entire amount was held by Jack, as assignee, at the time of Stewart's death. Twenty thousand dollars of it had been in force for less than eight months. The policy sued on was assigned to Jack to secure the payment of a note for \$10,000, payable one day after date, and of even date with the assignment. Stewart had signed his name to this note in the presence of three witnesses. Jack paid the premiums on these policies. He paid part in money and part in lumber. At this time Jack was insolvent. There were many unpaid judgments on record against him, and his property was mortgaged. There was some evidence tending to show that Jack and Lipscomb held themselves out as being unfriendly, when in fact they were friendly. While Jack was in jail, held to answer an indictment for the murder of Stewart, he wrote the following letter:

"Sept. 8, 1899. De Kalb, Miss., 3/3/97.

"Mr. Chas. W. Camp, Mutual Reserve Fund Life Ass'n, New York, N. Y.—
Dear Sir: From a pleasant conversation had with you in your office last November I learned you first saw the light in our state, and that you are a Mason. Yr. assn. certainly feel kindly towards me for my letters to yr. pres. That no doubt caused you not to issue more insurance on life of W. B. Davis a short time before his death. What is needed is more light, that the innocent may be vindicated, and all the guilty punished,—an electric light thrown in the homes of people at Scooba, and skeletons brought from the closets. I have labored hard for years to obtain the facts that I now possess. I'm worth more to the state of Mississippi and insurance companies than a dozen lawyers or detectives. I don't want your attorney or mine to know anything about my knowledge of affairs. It might cause my death, and then justice would be cheated of her reward. All I demand is that the insurance companies back me, and the state of Mississippi protect me. A word from insurance companies will let me out on bail. On yr. command I'll visit your city, and we will have conference, and arrange matters satisfactory. Let me hear from you at your earliest some way, and oblige

"Yours very resp.,

Guy Jack."

There was other evidence offered by the defendant, which will be referred to in discussing the various objections and exceptions. The plaintiffs offered evidence explanatory of these various circumstances. There was a verdict and judgment for the defendant, and the plaintiffs sued out a writ of error.

Objections to the Declarations of Charles T. Stewart.

Charles T. Stewart, the insured, was a young man, and had been married about a year before his death. He was poor, and had never owned his own home; the total value of his property being about \$210. He had been almost continuously in the service of Guy Jack for about 15 years as a log hauler and helper in Jack's sawmills.

At the time of Stewart's death, Jack held \$21,000 of insurance on his life, including the policy involved in this suit. Charles T. Stewart spent the whole of the 21st of January, 1897, in the town of Scooba, Miss. About 4 o'clock in the afternoon, on that day, Dr. W. H. Lipscomb wrote for him a prescription, and carried it to the drug store of Dr. J. G. Mooney to be filled. Dr. Mooney was absent, and Lipscomb left the prescription at the drug store. Later both Lipscomb and Mooney returned to the drug store, and Lipscomb called Mooney's attention to the prescription. The prescription called for ten grains of bromide quinine, ten grains of antikamnia, and three-sixtieths of a grain of strychnine, to be made into three capsules. Dr. Mooney filled the prescription, making the three capsules as prescribed. Dr. Lipscomb suggested at the time that Mooney should use the crystal or powdered strychnine instead of the tablets. Mooney placed the three capsules in a small red paper box, and wrote thereon, as directed in the prescription, "Take one at night." He gave the box to Lipscomb, who paid for the prescription. Lipscomb left the drug store with the box containing the three capsules, and soon met Charles T. Stewart and his father, J. M. Stewart, at the northeast corner of Guy Jack's store. Lipscomb took Charles T. Stewart aside, and said to him, "Bathe your feet and legs to your knees to-night, and take that capsule." He handed Stewart the red paper box. The box was opened, and it contained only one capsule. Charles T. Stewart then went home, getting there "about dark." He seemed cheerful and happy. He put up his horse, and fed him, and ate supper. He bathed his feet, and took the capsule, as directed by Lipscomb. In 10 or 15 minutes after taking the medicine he became very ill, and was seized with convulsions. Between the second and third convulsion he made declarations, which were proved by the evidence of his wife, and which were the subject of exceptions to be now considered. In the third convulsion he died. Only a few minutes intervened between the convulsions. He had taken only one capsule. The red box was examined immediately after his death, and it contained no other capsules. An autopsy of the body of Stewart showed that the cause of his death was poison by strychnine. One and one-half grains of strychnine were found in his stomach. Lipscomb and Jack were jointly indicted for the murder of Stewart, and, after a severance, Lipscomb was tried and convicted. On appeal to the supreme court of Mississippi the conviction was reversed. 75 Miss. 559, 23 South. 210, 230. He was again convicted, and on appeal the conviction was affirmed. 76 Miss. 225, 25 South. 158. Guy Jack was tried and acquitted. The circumstantial evidence in the record tends to connect Guy Jack with Lipscomb in causing the death of Stewart. The following excerpt from the evidence of Lillie A. Stewart, his widow, will show the declarations of Charles T. Stewart and the questions raised about them:

"Mr. Miller (attorney for the plaintiffs): We desire to submit this matter to the court out of the presence of the jury. (Jury sent out of court.) Q. Now, if Charley made any statement to you at that time, tell the court what he said. A. Well, he told me he was going to die; that he had been dead; and that the good Lord had sent him back to tell me that Dr. Lipscomb had

killed him with a capsule he had given him that night; and that Guy Jack had his life insured, and that he had hired Dr. Lipscomb to kill him. (Plaintiff objects to the statement of the witness: (1) 'That he was going to die,' and separately to that part (2) 'that he had been dead,' and (3) 'that the good Lord had sent him back to tell me that Dr. Lipscomb had killed him with a capsule he had given him that night'; (4) 'that Guy Jack had his life insured, etc.'; and (5) plaintiff objects to the entire statement, as a whole, making each of said objections separately and severally, upon the ground that said statement, and the separate parts objected to, are each irrelevant, immaterial, and incompetent.) The Court: I am going to sustain the objection to this part: 'That he had been dead, and the good Lord had sent him back to tell me;' and will not permit it to go before the jury. The other, taken in connection with all of the facts in the case, * * * I will overrule the objection to, and the jury will consider it, subject to the instructions of the court. (Plaintiff excepted separately. The jury were returned into the court.) Mr. Miller: Our objection is not confined to the language that you strike out, but we object to the whole statement. * * * The Court: Yes, you object to each part specifically, and then as a whole. Mr. Miller: We withdraw our objection to that part of the statement 'that the good Lord had sent him back,' and let her make the statement in full, but our objection will stand to all the balance, except that part 'that the good Lord had sent him back.' The Court: I don't think it is proper for that part to go before the jury, however. Mr. Bozeman (attorney for the defendant): We would prefer that just that part go to the jury that is competent. * * * Q. Mrs. Stewart, if Charley Stewart made any statement to you at the time referred to when your examination was interrupted, tell the court and jury what Charley Stewart said to you. A. Tell it like I did before? Q. Just tell the jury— The Court: Tell what he said. A. Well, he said: 'I am going to die, and I have been dead;' that 'Dr. Lipscomb killed me with a capsule he gave me to-night; and Guy Jack had my life insured, and hired Dr. Lipscomb to kill me.' Q. Now, how long did he live, Mrs. Stewart, after he said that? A. I don't know, sir, exactly. It was not very long. Q. Well, about how long did he live, Mrs. Stewart? A. I couldn't tell exactly. Q. A few moments, or an hour or two, or what? A. Well, I don't know. It was not very long, because I know I left the bed, and went and sat down on some wood that was put in there to make a fire with, and Mr. Duran stepped over to the bed, and told me he was dead, and I don't think it had been very long. Q. I believe you stated that he made that statement to you after the second convulsion? A. Yes, sir; he died in the third convulsion."

Before making this statement, Stewart had called on a negro man present to pray for him, and it clearly appeared otherwise that he was conscious of impending death. This being a civil case, however, these declarations are not offered as dying declarations. Dying declarations, as such, are admitted only in the case of a trial for the homicide of the declarant, and then on the ground that they were made in extremis. 1 Greenl. Ev. § 156. And Wharton says: "We may conclude, therefore, that such declarations are limited to criminal prosecutions when the subject-matter of the investigation is the declarant's death." Whart. Cr. Ev. (9th Ed.) § 288. But declarations made in extremis are often legal evidence in civil cases, for where they constitute part of the *res gestæ*, or come within the exceptions of declarations against interest, or the like, they are admissible, as in other cases, irrespective of the fact that the declarant was under apprehension of death. 1 Greenl. Ev. § 156. It is, of course, a general rule that the declarations of no man are admitted in evidence without the sanction of an oath and opportunity for cross-examination. But exceptions to the hearsay rule

are as well established as the rule itself. There is much difficulty and much conflicting authority in the application of the exceptions. The declarations in this case are accompanied by the circumstances that usually accompany such declarations when admitted. The declarant is dead, and cannot be produced as a witness. The declarations were made without opportunity or cause for wariness or falsehood, and, besides, they were made under the sense of impending death; and, while not admissible, as we have said, as dying declarations, the fact that the declarant knew he was dying is looked on in the law in graver cases than this as dispensing with the necessity of an oath. The declarations of the individual made at the moment of a particular occurrence, where the circumstances are such that we may assume that his mind is controlled by the event, are received in evidence as a part of the *res gestæ* because they are supposed to be involuntarily forced out of him by the particular event, and thus have an element of truthfulness which they might not otherwise have. They must be undesigned declarations incident to a particular litigated act, and illustrative of such act. If one, immediately upon being shot, cries out, "I am shot! I am killed!" and names his assailant, these declarations would, without question, be admitted as a part of the *res gestæ*. In *Com. v. Hackett*, 2 Allen, 136, the victim was heard to cry out: "I am stabbed!" The witness at once went to him, and within 20 seconds after that heard him say: "I am stabbed. I am gone. Dan. Hackett has stabbed me." This evidence was held competent as a part of the *res gestæ*. While it is said that the declarations must be contemporaneous with the main fact, no rule can be formulated by which to determine how near, in point of time, they must be. No two cases are exactly alike, and the determination of this question is always inseparable from the circumstances of the case at bar. The transaction in question may be such that the *res gestæ* would extend over a day, or a week, or "a month." *Rawson v. Haigh*, 2 Bing. 99; *Insurance Co. v. Mosley*, 8 Wall. 397, 407, 19 L. Ed. 437; *People v. Vernon*, 95 Am. Dec. 58, note, and cases there cited. In this case the fatal capsule was handed to the victim in the afternoon, but not taken till bedtime. If Lipscomb, instead of giving him the capsule and prescription on the streets in the afternoon, had called at his house, and given it to him, and left a minute before it was swallowed, the declarations would have been brought nearer in point of time to the moment that Lipscomb had handed Stewart the medicine; but we cannot see that the rule as to the admissibility of Stewart's declarations would have been different. If one threw a bomb, which immediately exploded, and killed another, the declaration of the dying man as to who threw it would be a part of the *res gestæ*. If the assailant, instead of throwing the bomb, had placed it concealed, and fixed to explode in an hour or in 10 hours, when it exploded, the involuntary exclamation of the fatally wounded man, naming the person who had placed the bomb near him, would be, we think, a part of the *res gestæ*. So we do not think that these objections gain any weight from the length of time which elapsed between Lipscomb's act of handing the capsule to Stewart and his declarations.

The declarations were made while Stewart was suffering from the effect of Lipscomb's act. The objection to the whole declaration, we think, was properly overruled.

That part of Stewart's declaration, "That he had been dead, and the good Lord had sent him back to tell me," was excluded by the court, and no question as to its admissibility is before us. Separate objections to other portions of the declarations were overruled, and exceptions reserved. The statement "that he was going to die, which is separately objected to, made 10 or 15 minutes before he died, was admissible as showing his physical condition. Such declarations are always received. Besides, it could not injure the plaintiffs. The statement "that Dr. Lipscomb had killed him with the capsule he had given him that night" is, we think, clearly admissible.

The next objection, as it appears in both the printed and original transcripts, is addressed to the statement "that Guy Jack had his life insured, etc." That Jack had insurance on Stewart's life is not a disputed question. This suit is to collect such insurance, and Jack admitted as a witness that he had \$21,000 of insurance on Stewart's life when he died. Again, the part of the declaration reciting "that Guy Jack had his life insured" is unobjectionable. The court was justified in overruling the objection, even construing it to embrace the words "and that he hired Lipscomb to kill him," because the objection included evidence to which no objection could be well taken; for, if an objection covers any admissible evidence, it is properly overruled. *U. S. v. McMasters*, 4 Wall. 680, 18 L. Ed. 311. The only material part of the sentence to which it is claimed that this objection is addressed is "that he [Jack] had hired Dr. Lipscomb to kill him." If we are to treat this part of this sentence as covered by the objection, and as separately objected to, as it has been treated by counsel, though it is not set out in the objection, it presents a question difficult of solution. The words we have just quoted are not embraced in the objection, unless they are included by the addition, "etc.," to the objection. The objection is made that the declaration is "irrelevant, immaterial and incompetent." It may be doubted if these objections are sufficiently specific to require us to review the ruling on them. We learn from the argument for the plaintiffs in error that the objections to this statement, "That Jack had his life insured; that he had hired Lipscomb to kill him,"—are that it narrates a past transaction; that the declarant could have had no knowledge of the fact stated; that it is mere opinion; in short, that it is hearsay,—does not come properly within the exception as to the *res gestæ*. In *Insurance Co. v. Mosley*, 8 Wall. 397, 19 L. Ed. 437, the action was on an accident policy. The insured accidentally fell downstairs, receiving injuries from which he died. The circumstances of the accident were proved only by the declarations of the insured made to his wife and son. He was sleeping upstairs, and went down. When he came back, he told his wife he had fallen down the back stairs, and received injuries. He made similar declarations to his son. The supreme court held these declarations admissible as a part of the *res gestæ*. "To bring such declarations within the principle," said the court, "generally, they must be contemporaneous with

the main fact to which they relate. But this rule is by no means of universal application." The court then quoted approvingly Baron Park in *Rawson v. Haigh*, 2 Bing. 99, as saying:

"It is impossible to tie down to time the rule as to the declarations. We must judge from all the circumstances of the case. We need not go to the length of saying that a declaration made a month after the fact would, of itself, be admissible; but if, as in the present case, there are connecting circumstances, it may, even at that time, form a part of the whole *res gestæ*."

After quoting other cases, the court said:

"Here the principal fact is the bodily injury. The *res gestæ* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. * * * Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. We think it was properly applied in the court below. In the ordinary concerns of life no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence, equally cogent for all the purposes of moral conviction, they have the sanction of law as well as of reason. The want of this concurrence in the law is often deeply to be regretted. The weight of this reflection, in reference to the case under consideration, is increased by the fact that what was said could not be received as 'dying declarations,' although the person who made them was dead, and hence could not be called as a witness."

State v. Thompson, 132 Mo. 301, 34 S. W. 31, was a trial for murder, by poison contained in a luncheon claimed to have been handed deceased by the defendant. It was held that the statements of deceased, while eating the luncheon, as to how and from whom he received it, were admissible as a part of the *res gestæ*.

It cannot be said that Stewart certainly had no knowledge of the fact stated. He, Jack, and Lipscomb were at the rear end of Jack's store, talking, the afternoon that Lipscomb gave Stewart the capsule. Lipscomb was in Jack's store that afternoon. What knowledge Stewart had as to what occurred we cannot know. It is enough that he makes the statement as a fact. The jury were, of course, not bound to believe the statement. If the circumstances indicated a want of knowledge in the declarant on the subject of the declarations, that would be considered as lessening or destroying the weight of the declarations. That would be for the jury. 1 Greenl. Ev. 160; *People v. Taylor*, 59 Cal. 640, 645. In *Insurance Co. v. Mosley*, supra, the court said, referring to the doctrine of *res gestæ*: "The tendency of recent adjudications is to extend, rather than to narrow, the doctrine." And Lord Chief Justice Cockburn said: "People were formerly frightened out of their wits about admitting evidence, lest juries should go wrong. In modern times we admit the evidence, and discuss its weight." *Reg. v. Churchwardens, etc., of Parish of Birmingham*, 1 Best & S. 763; *State v. Thompson*, 132 Mo. 321, 34 S. W. 31. The fact that the defendant now is allowed to testify has greatly tended to liberalize the rule as to declarations claimed to be part of the *res gestæ*.

The case has been argued as if a specific objection had been made separately to that part of the declaration that Jack had hired Lips-

comb to kill the declarant, and we have examined the case as if such objection had been made, and we are of opinion that, in view of all the circumstances, this case should not be reversed, because this declaration was admitted.

Other Objections to Evidence.

To make Lipscomb's acts evidence against Jack, it was necessary to show that they had conspired to defraud the defendant. It is not often that direct proof of such a conspiracy can be made. Usually it must be proved by a variety of circumstances. One circumstance, standing alone, may seem trivial; but, if it is relevant, it is evidence, and many circumstances may be convincing proof. It was admissible to prove Jack's relations to Lipscomb,—that they appeared to be unfriendly, but were in fact on good terms, and that they were connected in securing other fraudulent insurance. Jack's declarations that Lipscomb was a "very handy man for him to use in getting out bad insurance risks," and in fact any circumstance, were admissible that tended to show they were acting in concert. Objections to such evidence were all properly overruled. It is, of course, true that evidence of another and distinct crime committed by a defendant, in no way connected with the one for which he is on trial, is inadmissible. If, however, the evidence is relevant, if it tends to prove the commission of the offense for which the defendant is on trial, it must not be excluded because it also shows that the defendant has committed another offense. *Wood v. U. S.*, 16 Pet. 342, 10 L. Ed 987; *Wallace v. State*, 41 Fla. 547, 26 South. 713; *Barnett v. Insurance Co.*, 115 Mich. 247, 73 N. W. 372.

One of the issues submitted to the jury was whether Jack secured the insurance on the life of Stewart in good faith to secure a debt Stewart owed him, or did he procure it for improper purposes, and with criminal motives. On such issue it was admissible, considering the evidence of Lipscomb's connection with Stewart's death, for the defendant to show that Jack and Lipscomb were engaged in the business of procuring fraudulent insurance, and that the insurance on Stewart's life was a part of such scheme. *State v. Brady* (Iowa) 69 N. W. 290, 36 L. R. A. 693; *Beberstein v. Territory* (Okla.) 58 Pac. 641; *People v. Summers*, 115 Mich. 537, 73 N. W. 818; *Carroll v. Com.*, 84 Pa. 107; *Whart. Cr. Ev.* (9th Ed.) 31; 3 Greenl. Ev. 15.

After Stewart's death, Jack made proof to secure the insurance money on his life by sending a statement to Lipscomb, to be signed by him. Lipscomb was at that time in jail, charged with Stewart's murder. The record also shows that incidents occurring between Jack and Lipscomb, and statements and declarations made by Lipscomb after Stewart's death, were received in evidence. It is urged here that there was error in receiving this evidence, because, if a conspiracy had been established to kill Charles T. Stewart, the same had been accomplished, and that no declarations or conduct of Lipscomb could be admissible in evidence against Guy Jack after the accomplishment of the conspiracy. The fallacy of this position is that the conspiracy did not have for its aim and end the killing of

Stewart. The purpose of the conspiracy was to get the insurance on his life. If this could have been accomplished without Stewart's death, he probably would not have been poisoned. His death was an incident, but not the end, of the conspiracy. If, after his death, part of the insurance money had been collected, and divided between Jack and Lipscomb, can any one doubt that such evidence would have been admissible as tending to show the conspiracy and its purpose? The court did not err, we think, in admitting proof of the conduct of Lipscomb, after the death of Stewart. *Holt v. State* (Tex. Cr. App.) 46 S. W. 829; *State v. Byers* (Mont.) 41 Pac. 708.

Charge of the Court.

The entire charge of the court is in the bill of exceptions. The bill of exceptions shows that plaintiffs reserved an exception to the whole charge. Such exception to the entire charge, consisting, as in this case, of several closely printed pages, cannot avail to secure a reversal.

This exception is also reserved: "We also except to the language read by your honor from the book." The bill of exceptions does not show what language was read from the book. The assignment of error following this exception purports to set out what was read by the trial judge as a part of his charge. But we cannot consider statements of fact in the assignment of errors not based on the bill of exceptions. Unless the bill of exceptions certified by the judge showed what was read as a part of his charge, and the exception thereto, the question is not before this court for review.

The court was requested by the plaintiff to charge the jury that they "must be satisfied beyond a reasonable doubt arising from the evidence that Guy Jack was implicated in the murder." The court said, "I do not think that is the law, and I decline to give the instruction." This is a civil case. The defendant, by plea, averred that Guy Jack, the plaintiff, aided and abetted Lipscomb or procured him to murder Stewart, the insured. The burden was on the defendant to prove its plea, but it was not required to prove it beyond a reasonable doubt. If the jury was, by all the evidence, satisfied and convinced that the plea was true, that was sufficient.

Written Instructions Requested.

It appears from the printed transcript that during the progress of the trial the judge presiding requested the attorneys for the parties to present to the court written instructions, so that the court might be advised as to their respective theories of the case. The attorneys for the plaintiffs handed to the court before the argument began 30 separate written charges, numbered from 1 to 30, inclusive. Some of these charges were marked, "Given for the convenience of the court in charging the jury." "The remaining instructions," the transcript states, were not passed upon by the court, nor were any exceptions taken by the plaintiff on account of the failure of the court to give the instruction to the jury, or to mark them "Given" or "Refused." It is assigned as error that the court did not give these 30 charges. These charges do not even appear in the bill of

exceptions. The bill of exceptions does not show that any exceptions were reserved to the refusal of the court to give them. On the contrary, the statement which follows the copy of the charges in the transcript shows affirmatively no exceptions were taken to the failure of the court to give the charges. Unless it appears in the bill of exceptions that a charge was requested, and refused by the court, and an exception duly reserved, no question is presented in regard to such charge for decision by this court. These charges are embodied a second time in the transcript, being set out in a motion for a new trial, the refusal to give them being assigned as one of many grounds for a new trial. The refusal of the court to grant a new trial is assigned as error. We have often held that the granting or refusing a new trial is in the discretion of the trial court, and that its decision cannot be reviewed by this court. Such is the unvarying rule of the federal courts.

Mrs. Stewart's Alleged Interest.

Lillie A. Stewart, widow of the insured, was joined as plaintiff in the suit. In rulings on the admission of evidence and in the charge to the jury the trial court held that on the undisputed evidence she had no interest in the action. The policy in suit was made payable, not to his wife, but to the executors or administrators of the insured. Charles T. Stewart, the insured, assigned the policy, with the consent of the insurance company, to Guy Jack. No other assignment of it had been made. The declaration filed by both of the plaintiffs states these facts. For the purpose of showing an interest in Mrs. Stewart, it is alleged in the declaration that she "furnished proofs claiming the proceeds of said policy as the widow and only heir at law of said Charles T. Stewart," and that Guy Jack had furnished proofs claiming the proceeds of the policy under the assignment from the insured. Then follows the statement that "plaintiffs have adjusted their respective claims to the proceeds of said policy of insurance, and agreed on a basis of settlement of the same." There is evidence in the record that Charles T. Stewart owed debts at his death. If the assignment is to be regarded, Jack alone, as assignee, owns the policy; if the assignment be ignored, the policy being payable to the executors or administrators of the insured, they alone could sue on it. In *Insurance Co. v. Jack*, 76 Miss. 788, 25 South. 871, an action was brought by Jack and Mrs. Stewart on a life insurance policy assigned to Jack, which was payable to the executors or administrators of the insured. The court held—properly, we think—that Mrs. Stewart was a stranger to the contract; that, if she had made an agreement with Jack as to a division of the proceeds, that was a contract with which the insurance company had no concern. We concur in this view. The record in this case shows affirmatively that Mrs. Stewart had no right of action on the policy. In this case, by her pleading, she is affirming that the policy was assigned to Jack.

The judgment of the circuit court is affirmed.

thereof, and for the appropriation of the same, when collected, to the payment of the principal and interest of the bonds issued by the town. An act of the legislature of Minnesota approved February 27, 1869, amends the act of March 6, 1868, in certain particulars unnecessary now to be referred to.

It is contended by plaintiff in error that the provisions of Gen. St. 1866, c. 11, § 78, are applicable to and control the present case, and that the limit of indebtedness there fixed, namely, such as shall not exceed 10 mills on the dollar of taxable property of the town, exhausted the power of the town. It is admitted that \$15,000, the aggregate of the bonds issued, exceed that limit. It is contended, on the other hand, by the defendant in error, that the provisions of the General Statutes already quoted are not applicable to the creation of the bonded indebtedness in question, but that the Special Acts of 1868 and 1869 conferred ample authority upon any town to incur an indebtedness in aid of the construction of railroads through the county, in any amount which might be agreed upon by a majority of the qualified voters of the town. The trial court adopted the latter view, and ruled accordingly. The correctness of this ruling only is brought to our attention by the assignment of errors.

The general statutes relating to township organization (section 107, c. 10, Gen. St. 1866) place no limit upon the power of towns to create debts, the only condition thereto being an authorization by a majority of the voters of the town; but chapter 11, § 78, relating to the levy of taxes, fixes a limit of taxation for township purposes not exceeding 10 mills on the dollar of the taxable property of the township, but contains a very significant proviso, as follows:

"And provided further that nothing in this section shall be construed to prevent the county commissioners, township supervisors, or corporate authorities of any city, town or village from levying any tax which by any special law they are authorized to levy."

Section 79 of the same chapter contains a prohibition against contracting any debt or incurring any pecuniary liability by a town which will render necessary the levy of a higher rate of tax than the maximum rate prescribed by section 78, namely, 10 mills on the dollar of the taxable property of the town, but this last-mentioned prohibition contains a very significant exception. It reads as follows:

"It shall be unlawful for the corporate authorities of any * * * township, * * * unless specially and expressly authorized by law, to contract any debt * * * for the payment of either principal or interest of which * * * it will be necessary to levy * * * a higher rate of tax than the maximum rate prescribed by this chapter."

From the foregoing provisions of the general laws relating to township organization and taxes, it is, we think, very obvious that the legislature of Minnesota first adopted a general rule prohibiting the creation of any debt by a town in excess of 10 mills on the dollar of the valuation of its taxable property, and at the same time made provision for exceptional cases when it could, by the passage of a special law, permit a town to create an indebtedness in excess of

that limit, provided only it secured the consent of a majority of the voters of the town thereto. In other words, the legislature seems to have thought that its own legislative wisdom and discretion and the will of the majority of the voters of the town, taken together, would afford adequate safeguards against improvidence when any special occasion should arise suggesting the advisability of contracting indebtedness in excess of the limit fixed by the general law.

We are now brought to the inquiry whether the legislature enacted any special law authorizing the plaintiff in error to contract the indebtedness in question. Attention has already been called to the act approved March 6, 1868. Section 1 of that act expressly authorizes each town in the counties of Filmore, Mower, Freeborn, Faribault, Martin, and Jackson "to issue bonds *as hereinafter provided*, to aid in the construction of any railroad running into or proposed to be built through either or all of the counties aforesaid." No limit is there placed upon the amount of bonds to be issued except such as is comprehended in the words underscored, "*as hereinafter provided*." Section 2 prescribes the minimum face value of the bonds, the rate of interest they shall bear, and how they shall be executed. Section 3 is as follows: "Any town in either of the aforesaid counties may at any annual or regularly called special meeting by vote of the majority of the legal voters of such town, present and voting, fix the amount and size of bonds to be issued by such town, the rate of interest," etc. Section 4 provides a complete scheme for levying a tax upon the real and personal property of the town in an amount "not less than the principal and interest upon such bonds," and to "apportion the same upon such years as may be deemed expedient," and also for the collection and payment of such tax to the town treasurer, to be by him applied "in payment of the principal and interest of the bonds issued by the town." It thus appears that this act is complete in itself, and requires no resort to the general law for its enforcement. It authorizes the issuing of bonds, and provides a full scheme of taxation to secure funds for their payment.

But it is contended by the plaintiff in error that the words found in section 3, authorizing the majority of the legal voters to "fix the amount and size of bonds," must be read in connection with the general law, and be supplemented by the words found in that law, namely, "not exceeding ten mills on the dollar on the taxable property of the township." We are unable to agree with this contention of counsel, for the following reasons: First, the legislature, as already observed, undertook to provide a complete scheme to accomplish the desired purpose, and we should not presume, in the absence of a plain and clear intent to the contrary, that it meant what it did not say; second, the act in question is obviously the exercise of a power reserved to the legislature by the general law (sections 78, 79, c. 11, Gen. St. 1866) to permit, by special law, in exceptional cases, the creation of debts by towns in excess of the limit prescribed by the general law; third, the act of 1868, by clear and unmistakable language, authorizes each town in Freeborn county, among others, to issue bonds "*as hereinafter provided*,"

and then provides for an election, conferring upon the majority of the legal voters of the town power to "fix the amount of bonds * * * to be issued." In other words, the legislature, being satisfied that the best interests of the towns justified them in extending aid to railroad construction in their counties, left it to the judgment of the majority of the legal voters to determine whether the towns should grant any aid, and, if so, to fix the amount of such aid. The whole matter relative to the amount of bonds to be issued was relegated to the judgment of the legal voters of the town, who, by self-imposed taxation, were required to make provision for the payment of the same.

The foregoing conclusions are in harmony with the views expressed by the supreme court of Minnesota in the case of *State v. Town of Clark*, 23 Minn. 422. The town of Clark was one of the towns in Faribault county which issued bonds in aid of a railroad, under the provisions of the act of March 6, 1868. In 1872 the constitution of Minnesota was amended so as to create an effectual inhibition against contracting any indebtedness by towns in excess of 10 per cent. of the value of their taxable property. It was contended by the town that the constitutional amendment abrogated the act of 1868, so that no authority to issue bonds thereunder existed after the adoption of the constitutional amendment. The court in its opinion takes occasion to say:

"By Sp. Laws 1868, c. 24, as amended by Sp. Laws 1869, c. 44, and Sp. Laws 1870, c. 49, any town in the county of Faribault was authorized to issue bonds to aid in the construction of any railroad running into such county. No limit was placed upon the amount of bonds which might be issued by any town upon the determination of its voters. * * * Prior to the taking effect of this [constitutional] amendment, the power of the legislature to authorize the issuing of bonds or the incurring of indebtedness [in aid of railroads] by any of the municipal corporations mentioned was unlimited as respected the amount of bonds and indebtedness. * * * At the time when the amendment was made [in 1872], the laws under which the town of Clark was authorized to issue the bonds in question had been enacted and were in full force. They placed no limit upon the amount of bonds issuable, save such as might be fixed by the voters."

While it may be said that the real question now under consideration was not necessarily involved in that case, and therefore that the opinion expressed by the supreme court is not such an interpretation of local law as, under recognized principles, should control our judgment, it is nevertheless true that the supreme court in that case had the general subject before it, and expressed views in harmony with reason, and which commend themselves to our judgment.

In the case of *State v. Routh*, 61 Minn. 205, 206, 63 N. W. 621, 622, the supreme court had under consideration the rule governing the construction of statutes of Minnesota, and announced its conclusion as follows:

"When a general intention is expressed, and also a particular one which is inconsistent with the general one, the particular intention will be considered an exception to the general one; that is, where a special law which applies to a limited district, as a city, conflicts with a previous general law, the latter yields to the former."

In the case of Board of Com'rs of Seward Co., Kan., v. *Ætna Life Ins. Co.*, 32 C. C. A. 585, 590, 90 Fed. 222, 227, the rule was laid down by this court thus:

"Privileges granted by special act are not affected by inconsistent general legislation on the same subject, but the special act and the general laws must stand together, the one as the law of the particular case, and the other as the general law of the land."

To the same effect also are the following authorities: *Townsend v. Little*, 109 U. S. 504, 512, 3 Sup. Ct. 357, 27 L. Ed. 1012; *Gowen v. Harley*, 6 C. C. A. 190, 56 Fed. 973; *Felt v. Felt*, 19 Wis. 193, 196; *Ex parte Smith*, 40 Cal. 419; *Crane v. Reeder*, 22 Mich. 322; *Suth. St. Const.* §§ 158, 159.

For the reasons hereinbefore stated, and on the authorities cited, we entertain no doubt that the trial court correctly ruled that the special act of 1868 conferred ample authority upon the town of Alden to incur the indebtedness represented by the bonds in question.

Our attention was called in the argument to several acts of the legislature of Minnesota passed in 1871, 1875, 1881, and 1883, recognizing the validity of the bonds in question, and also to the fact that the town of Alden had levied taxes to pay the interest on the bonds from year to year, beginning with 1871 and ending with 1897, and had actually paid the same without objection, and without any claim that the bonds were invalid; and it was argued with much force and persuasiveness that the acts of the legislature in question constitute a legislative recognition of the validity of the bonds, and that the acts of the town in levying taxes and paying the interest on the bonds for a period of nearly 30 years evince a construction of the statutes by the parties in interest in harmony with the contention of the defendant in error, and that these acts of the state and of the parties should be given force in the determination of the question now involved.

It is certainly true that, in cases of doubt concerning the true interpretation to be placed upon legislative enactments, resort may be had to contemporaneous, and even subsequent, legislation, to ascertain the true intent and meaning of that in question; and it has been held by this court in the cases of *County of Washington v. Williams and Blair* v. *County of Washington* (decided at its last May term; C. C. A.) 111 Fed. 801, that, even in cases involving the power of a municipality to aid in the construction of a railroad, a liberal interpretation should be placed upon the act claimed to confer the power when first brought in question after the lapse of many years of continuous recognition of the validity of the bonds issued thereunder. But, in the view we have taken of the legislation involved in this case, we find no occasion to resort to these extraneous aids. The act of March 6, 1868, for the reasons hereinbefore stated, conferred adequate power upon the town of Alden to issue the series of bonds in question.

Some other questions were discussed by counsel at the argument and in their briefs, but, as they are not based upon any assignment of error, they require no consideration at our hands.

The judgment of the circuit court is affirmed.

CANNEY v. WALKER.

(Circuit Court of Appeals, First Circuit. June 14, 1901.)

No 379.

MASTER AND SERVANT—INJURY THROUGH NEGLIGENCE OF SUPERINTENDENT—MASSACHUSETTS STATUTE.

The provision of the Massachusetts employers' liability act which gives a right of action against an employer for a personal injury caused to an employé "by reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence," is remedial in character, and not to be so artificially and narrowly construed that the fact, alone, that one given authority of superintendence works with his hands the greater part of the time, necessarily excludes him from being one whose "principal business is that of superintendence," nor do the decisions of the supreme judicial court of the state thereon require such a construction; and where a superintendent, although so working himself, is also during the same time that he is working actively exercising the duty of superintendence, that may be found, in a proper case, to be such "principal business."

In Error to the Circuit Court of the United States for the District of Massachusetts.

Walter T. Badger (Solomon Lincoln, on the brief), for plaintiff in error.

William A. Pew, Jr., for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

PUTNAM, Circuit Judge. In this case there were a verdict and a judgment for the plaintiff below, and the defendant below sued out this writ of error. It will be convenient to use the word "plaintiff" as indicating the plaintiff below, and "defendant" as indicating the defendant below.

The action rests on the provision in the employer's liability act of Massachusetts which gives a right of action for a personal injury caused to an employé, "by reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence." The defendant's proposition is as follows: One who labors the "most of the time with his hands" is not a superintendent, within the meaning of the statute. He puts it to the effect that the statutory word "principal" means principal in point of time, and that the idea that it means principal in point of importance has been expressly negated. He maintains that this is an arbitrary rule applied by the supreme judicial court of Massachusetts to the construction of this statute, with reference to the circumstances which he claims the jury would have been justified in finding to have existed in the case before us, and he asked an instruction to the jury accordingly. This was not given.

The plaintiff was engaged in drilling in the defendant's granite quarry. While so employed he was struck from behind by a rope,

and was thrown down and injured. The rope was in use to hold down the blocks of a derrick in the same quarry, and it was being tightened by the alleged orders of one Anderson when it struck the plaintiff. There was evidence tending to show that Anderson was negligent, and that his negligence caused the injury.

Anderson was employed by the defendant with the gang in which the plaintiff was working. The defendant testified that he had a man under him who acted for him when he was away,—one Edward Dyer; that he was sometimes there himself, and “then Dyer was there”; that he had four gangs of men (that is, one for each derrick); that there was one man to take charge of each of these gangs; that Anderson had charge of one of them, consisting of from six to seven men; that Anderson would go into the quarry in the morning, and put on the chalk line, and tell the men to cut that line; that he would see that the stone was all right; that, if he (the defendant) had an order for any particular dimension of stone, he would write it off on a card and give it to Anderson; that Anderson would get it out and hoist it up; that, when Anderson was not otherwise engaged, he would take his hammer and go to work with the rest of the gang,—“just the same as the rest of them”; and that he (the defendant) paid the quarryman from 14 to 17 cents an hour, and Anderson about 25 or 30 cents. Anderson testified that the superintendent told him what kind of stone he wanted, and that he did the rest; that he would make up his mind where he would get out stones, and took them wherever he pleased from the ledge on which he was directed to work; that he laid out the lines; that, after the stones were split and blown out, they were hoisted up on the bank, and were there put on a railroad train or wagons; that he had charge of the stones from the time they were started in the pit until they left the quarry; that the man in charge of the derrick was under him, and also the engineer, the tool boy, and the signalman; and that he told them what he wanted done, and they did it. This evidence leaves it entirely plain that, although the plaintiff worked with Anderson and Anderson worked with the plaintiff, they were not wholly employed in the same class of labor, and that Anderson had under his charge men not engaged in drilling, and therefore men not engaged in precisely the same labor in which the plaintiff was engaged, although in the common work and in the same gang. It is not questioned that Anderson was the “boss” of the gang, in the way in which that expression is commonly used, nor that the jury might properly have found that he was engaged, at least to some extent, in superintendence, within the meaning of the statute.

The plaintiff, referring to Anderson, testified, among other things, as follows:

“Q. What was he doing when you were at work? A. Bossed the men.

“Q. Was he doing that all the time? A. All the time.

“Q. Was he present during every hour of the day, looking after the men and watching them? A. Yes.”

It was testimony of this character to which the court referred when it said to the jury: “There is some evidence in this case that the man [Anderson], while at work, was also engaged in the line of

superintendence; that, even if working with his hands, he was engaged in keeping an outlook upon the work, and giving directions to the men."

At the outset the court said to the jury:

"There is no arbitrary rule by which you can determine, or, rather, which I can state to you as a rule which should govern your determination of this question. I cannot say to you, and the statute does not mean, that because a man is engaged a fourth of the time in giving orders or directions or planning the work, or because he is engaged a half of the time in manual labor, the question should turn one way or the other, or three-fourths of the time or nine-tenths of the time, as has been stated in one of the decisions of the supreme court of Massachusetts. So it is an open and fair question for you to determine, upon your experience and understanding as to the way things are done, and upon the evidence, whether it was either the sole or principal duty of the man Anderson to superintend and direct."

Thereupon the defendant made the following request:

"I would want your honor to charge that, if the jury find that Anderson did labor most of the time with his hands, he was not a superintendent, within the meaning of the statute."

The court replied to this, "I should have to deny that, in that abstract form," but it reinstructed the jury as follows:

"There seems to be some misunderstanding, gentlemen, as to just what I said with respect to the consideration to be given to the situation if Anderson worked with his hands a fourth of the time, a half of the time, or three-fourths of the time, or nine-tenths of the time. I did not intend to say to you that such expressions on the part of the witnesses would control, or, if you should find he did actually work a large portion of the time that the question of superintendence would necessarily turn upon that fact alone, for the reason that there is some evidence in this case that the man, while at work, was also engaged in the line of superintendence; that, even if working with his hands, he was engaged in keeping an outlook upon the work and giving directions to the men. Of course, if a man was engaged nine-tenths of the time, or perhaps three-fourths of the time, or more than half the time, in actual manual labor, giving up entirely during that period all idea of superintendence or direction, throwing off his responsibility and becoming altogether a common laborer, and having no reference to the direction of the work or outlook upon what was going on, then it probably would follow that he was not a superintendent, or not a superintendent whose chief duty was superintendence. But if at the same time that he was laboring he was giving directions, and adhering to his right to direct and superintend, and was actually keeping an outlook and directing, then it would become a question for you to determine, notwithstanding the fact of manual labor for a greater or less portion of the time; it would be a question for you to settle upon all the evidence, taking into consideration all the evidence, the amount of labor, the importance of superintendence, the extent of direction,—all together,—for you to determine whether his chief duty was that of superintendence."

If the instructions had rested where the court first left them, the charge would, perhaps, have been deficient. It cannot, however, be doubted that what the court added after the defendant made the request which we have cited materially modified what it had before said. In making this modification, the court so fully expressed itself to the jury that there is no question that whatever detrimental impressions the first instructions may have made were removed. Therefore the case fairly turns on the question whether or not the final instructions were correct, and sufficiently full, in view of the request made by the defendant.

We will consider in their chronological order the various decisions of the supreme judicial court of Massachusetts, cited to us by either party.

In *Malcolm v. Fuller*, 152 Mass. 160, 25 N. E. 83, the nisi prius court, in charging the jury, used these expressions with reference to the person claimed to have been intrusted with superintendence:

"If generally or principally he is at work manually with his hands, then he is not a man whose sole or principal duty is that of superintendence." "That is, if Stewart was set to work with a gang of men, and expected to do his share, either of holding or pounding the drill, and was generally engaged in that employment, or in manual employments about the quarry, then he is not a man whose sole or principal duty is that of superintendence."

These instructions, however, were not passed on by the court in bench, for the case turned on the proposition that the act which caused the injury was not an act of superintendence. The same is true as to *Cashman v. Chase*, 156 Mass. 342, 31 N. E. 4, in which the court found that it was evident that in operating the engine the person who was alleged to be in superintendence "was doing the work of a laborer, acting upon the directions of others, and not directing them." Also, in *Shepard v. Railroad*, 158 Mass. 174, 33 N. E. 508, the court failed to state why it held that the section foreman in that case was not charged with superintendence, within the meaning of the statute, and the question of the meaning of the word "principal" in the statute was not specifically raised. *Prendible v. Manufacturing Co.*, 160 Mass. 131, 35 N. E. 675, also fails as an authority for either party before us.

In *O'Brien v. Rideout*, 161 Mass. 170, 36 N. E. 792, the substance of all the evidence was reported in the bill of exceptions. The court below ordered a verdict for the defendant, and the plaintiff excepted. The court in bench overruled this exception. The foreman stood in similar relations to his co-employés as Anderson in the case at bar, because, while the plaintiff was at work with a circular saw, sawing butternut wood, the foreman, while employed with the same gang, was giving orders, attending to grinding tools, piling lumber, and keeping busy generally. The court said that the evidence would not justify a finding that the foreman came within the statute, and added what was said by one of the witnesses, to the effect that the foreman was "at work pretty much all the time in getting out lumber, or piling it up, or arranging it, or in operating saws." While it is quite possible that this case would have justified us in sustaining a verdict for the defendant, if it had been ordered by the court below, and all the evidence were before us, it fails to state specifically anything by which it can be understood whether or not it intended to lay down an arbitrary rule by which the statute is to be construed, or whether it only referred to the testimony which it quoted as a leading fact, which, under the circumstances, brought it to the conclusion which it reached.

Dowd v. Railroad Co., 162 Mass. 185, 38 N. E. 440, so far as the specific point which we have before us is concerned, is subject to the same observation as *Prendible v. Manufacturing Co.*

A case which is thought to give much support to the defendant's

position is *O'Neil v. O'Leary*, 164 Mass. 387, 41 N. E. 662. This came up on exceptions to a refusal at nisi prius to give the following instruction requested by the defendant, appearing at page 389, 164 Mass., and page 662, 41 N. E.:

"There is no evidence that McDonald was employed as a superintendent, whose sole or principal duty was that of superintendence, so that the defendant can be held liable for the negligence of McDonald."

The court in bench, considering only the evidence for the plaintiffs, held that this instruction should have been given. It abstracts that evidence at page 390, 164 Mass., and page 663, 41 N. E., and then proceeds as follows:

"In a sense, it is undoubtedly true that superintendence is more important than manual labor; and so, if superintendence is intrusted to a man who also works with his hands, it may be said that his principal duty is that of superintendence. But if the statute had intended that every person exercising superintendence should not be considered a fellow servant with a person injured, there would have been no need of the words 'whose sole or principal duty is that of superintendence.' These words must have a reasonable interpretation given to them; and a majority of the court is of opinion that it cannot be said of a person who works at manual labor, to the extent shown in this case, that his principal duty is that of superintendence."

It is to be observed that the plaintiff's case contained no proof like that referred to in the charge in the case at bar, to the effect that while the alleged superintendent was at work he "was also engaged in the line of superintendence," and that, "even if working with his hands, he was engaged in keeping an outlook upon the work, and giving directions to the men." In other words, the charge before us went on the ground that, even if the labor performed by Anderson was continuous, the jury might find, on the evidence, that it was of such a character as did not prevent him from also at the same time giving superintendence to the work, and, further, that he did give such superintendence continuously, or substantially so. Of course, we cannot say judicially that this proposition involves any inconsistency. Therefore the precise circumstances under which the case at bar was left to the jury were not brought to the attention of the court in *O'Neil v. O'Leary*.

Geloneck v. Pump Co., 165 Mass. 202, 216, 43 N. E. 85, is too indefinite to be of use. *Crowley v. Cutting*, 165 Mass. 436, 43 N. E. 197, by implication, reaffirms the conclusion in *O'Neil v. O'Leary*; but it had no occasion to pass precisely on the particular question before us. *Reynolds v. Barnard*, 168 Mass. 226, 46 N. E. 703, is not of importance, except that it again recognizes the conclusion in *O'Neil v. O'Leary*. The case turned on the fact that the proofs were conflicting, and that therefore the issue was properly submitted to the jury. It again failed to propound the precise question which the evidence and the charge in the case at bar raise.

In *Gardner v. Telegraph Co.*, 170 Mass. 156, 48 N. E. 937, there was a verdict for the defendant; and the sole question was on the admissibility of certain evidence offered by the plaintiff and excluded. The court held that it was admissible on the question of superintendence; using this expression, which we will refer to again: "This" (that is, the evidence excluded) "would have justified the jury

in finding that he" (that is, the alleged superintendent) "was something more than a mere laborer in charge of a gang." *Riou v. Granite Co.*, 171 Mass. 162, 50 N. E. 525, turned on the fact that the act out of which the injury arose was not an act of superintendence. The court, by referring to *Reynolds v. Barnard*, 168 Mass. 226, 46 N. E. 703, reaffirmed whatever there is in *O'Neil v. O'Leary*, 164 Mass. 387, 41 N. E. 662. *Eaves v. Manufacturing Co.*, 176 Mass. 369, 373, 57 N. E. 669, is wholly indefinite, so far as concerns the question which we have to determine.

The result of these decisions undoubtedly establishes as a general rule what is restated in *Reynolds v. Barnard*, 168 Mass., at page 228, 46 N. E. 704,—that, when an employé works with his hands the greater portion of the time, he cannot superintend; within the purview of the statute; but they do not compel us to the conclusion that this rule is absolute, and to be applied without qualification under exceptional circumstances. When, as said in what we have already quoted from *Gardner v. Telegraph Co.*, the alleged superintendent is only "a mere laborer in charge of the gang," this general rule might well be applied, if not as a rule of law, at least as a rule of presumption of fact so forcible that the court would not allow a jury to disregard it. To go further, however, than to state it ordinarily as illustrative for the guidance of juries, would give an artificial construction to a statute which seems simple, plain on its face, and reasonable in its purpose; and it would also hold that the court could assume to know that a man cannot work constantly with his hands, and yet exercise superintendence in such manner that that is his principal duty. Such an assumption would be so forced as to exclude the possibility, which the common mind knows to exist,—that not only may an employé be engaged at all times in labor with his hands, and yet exercise superintendence under such circumstances that that is his principal duty, but that, also, he may be so engaged under such peculiar circumstances that quite continuous laboring with his hands is a necessary part of the duty of superintendence. Since none of the decisions which have come to our observation were rendered under circumstances which brought to the attention of the court the exceptional facts in support of which the plaintiff produced evidence in the case at bar, and since, therefore, we are not concluded thereby with reference to such exceptional facts, and since, moreover, the defendant's proposition would compel us to give an artificial and narrow construction to a remedial statute, contrary to the just and reasonable rules ordinarily applicable, and since, also, the alleged superintendent in this case was, as we have shown, "something more than a mere laborer in charge of a gang," we are unable to determine that the instructions given the jury were not suitable and sufficient.

The judgment of the circuit court is affirmed, with interest, and the defendant in error recovers the costs of appeal.

DE FORD et al. v. MARYLAND STEEL CO.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 416.

1. BREACH OF CONTRACT—DAMAGES—EXPENSE INCURRED—LOST PROFITS.

Damages based on the estimated expenses incurred and losses of profits sustained by reason of defendant's failure to complete and deliver certain vessels within a specified time are not recoverable in an action for breach of a contract to complete and deliver the vessels within the specified time, though the purpose for which the vessels were intended was understood by the parties, such damages being entirely conjectural.

2. SAME—REMOTENESS OF DAMAGES.

Damages based on the loss of vessels in a hurricane are too speculative to be recoverable in an action for breach of a contract to construct and deliver the vessels within a specified time at a designated place, their destruction occurring at another place.

3. SAME—MEASURE OF DAMAGES.

In the absence of special circumstances, a party failing to complete and deliver vessels within a specified time is liable only to the amount of the interest on the payments made prior to their delivery for the time of the delay.

In Error to the Circuit Court of the United States for the District of Maryland.

Charles Morris Howard, for plaintiffs in error.

Alexander Preston (J. Alexander Preston and Robert Ludlow Preston, on the brief), for defendant in error.

Heard by GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

GOFF, Circuit Judge. The defendant below, also the defendant in error, contracted with the plaintiffs below, who are also the plaintiffs in error, under a written contract dated September 6, 1899, to build for them, in accordance with certain specifications, one steel screw tug, and to complete and deliver the same to said plaintiffs on or before the 1st day of January, 1900, unless prevented by providential occurrence, fire, strikes of workmen, or other obstacles beyond their power to control, for the sum of \$15,750. The defendant also contracted with plaintiffs, by written contract dated December 6, 1899, to construct for them, in accordance with certain described plans, two barges, and to endeavor to complete and deliver said barges to the plaintiffs on or before the 1st day of February, 1900, unless prevented by providential occurrences, fires, strikes of workmen, or obstacles beyond their power to control, for the sum of \$11,500. The vessels so contracted for were to be delivered at Sparrow's Point, in the state of Maryland. For various reasons, not necessary to be here set forth in full, the tug and barges were not actually delivered to the plaintiffs until July 21, 1900. The last installment of pay for said vessels was made by the plaintiffs to the defendant on the day the same were so delivered, and the plaintiffs on that day duly served on the defendant a protest in writing, reserving to themselves all rights and claims that they might be entitled to

because of said delay. The plaintiffs were engaged in the business of manufacturing and selling sugars, having places of business in Boston and Porto Rico, and the vessels so contracted for and delivered were intended to be used during the sugar season of 1900. The tug and barges left for Porto Rico under the tow of a larger tug on the day they were delivered to the plaintiffs, and, after having experienced tempestuous weather off of and south of Cape Hatteras, both of the barges were lost; one of them on July 26th, and the other on the following day. The tug was compelled to return to Norfolk, but afterwards went to Porto Rico under her own steam. On the 5th day of January, 1901, the plaintiffs instituted an action at law in the circuit court of the United States for the district of Maryland, claiming damages from the defendant because of its failure to complete and deliver said vessels according to the terms of the contract mentioned. It is alleged in the declaration that the failure to complete and deliver said vessels was not caused by providential occurrences, fires, strikes of workmen, or other obstacles beyond the defendant's power to control, but was owing to the negligence of the defendant; and it was further alleged that said vessels were intended by the plaintiffs for use in connection with their sugar business in Porto Rico, and that they were known to be so intended by both parties to said contract, and that by the failure of the defendant to deliver the vessels within the time stipulated, the plaintiffs were subjected to great expense for freight and for lighterage, and that they were deprived of the profits of valuable contracts in connection with such vessels, which profits they would otherwise have made, and that by reason of the delay and of the failure of the defendant to complete and deliver said vessels in accordance with the terms of the contract, the plaintiffs were subjected to great additional expense; and the plaintiffs also alleged that the 21st day of July in every year is the beginning of the hurricane season in the locality for which said vessels were intended, and that by reason of the delay in sailing, caused by the defendant's negligence, the vessels encountered a violent hurricane on the voyage to Porto Rico, by which all of said vessels were severely injured, and the two barges totally lost, to the great damage of the plaintiffs. The case was matured and came on to be heard on the 16th day of April, 1901, when, by agreement of the parties, the matters in issue were tried by the court without a jury. On the 6th day of May, 1901, the rulings and findings of the court, on the matters so submitted to it, were duly made and filed, and on the 27th day of May, 1901, judgment was entered for the plaintiffs for the sum found by the court in their favor. From such judgment the said plaintiffs sued out the writ of error we are now to dispose of. The court below found that the tug should have been completed for delivery on February 1, 1900, and the barges on April 1, 1900; that there was an inexcusable delay in the delivery of the tug of 5 months and 20 days, and in the delivery of the barges of 2 months. Exceptions to the rulings and findings of the court in a number of particulars were duly taken by the plaintiffs, and they, by their assignments of error, insist that the damages allowed by the court were entirely inadequate.

With the conclusion reached by the court below that there was an inexcusable delay in the delivery by the defendant of the vessels contracted for by the plaintiffs, we are in entire accord. Therefore the ascertainment of the proper measure of damages applicable to the circumstances found to exist in the present case will dispose of most of the assignments of error, as there were no exceptions by either plaintiffs or defendant below to the action of the court on the prayers submitted. The court below rejected the plaintiffs' claim for damages based upon the fact that the vessels were intended to be used by the plaintiffs in connection with their sugar business in Porto Rico, and that the failure to deliver the vessels within the time stipulated in the contract subjected the plaintiffs to great expense for freight and lighterage, and deprived them of profits that they would otherwise have made; and also rejected the claim for damages alleged to have been caused by the delay in sailing, and the damages, if any, of the hurricane season, charged to have been caused thereby. It will be observed that the contracts required the delivery of the vessels at Sparrow's Point, and not in Porto Rico, and yet much of the evidence offered by the plaintiffs tended to prove the unusual risk and the great cost of taking a tug as small as the one so built and delivered, and barges as shallow as those contracted for, on a voyage of over 1,200 miles from the Chesapeake Bay to Porto Rico. The evidence offered on the subject of rental value had reference to the use of the vessels at Porto Rico, where it was conceded they were intended for use; but their arrival at Porto Rico, and their profitable utilization at that point, were so uncertain, and so entirely conjectural as to necessarily exclude all claims for loss founded upon their use in that country. The contracts made no reference to the arrival of the vessels at Porto Rico, but, on the contrary, distinctly provided for the delivery of the same before any effort was made to remove them to Porto Rico. It does not appear from the evidence that a tug could have been rented in Porto Rican waters during the sugar season of 1900 at any price, and it appears that there were very few barges to be had there under any circumstances, and it is quite evident that such conditions existed as a result of the great cost and the extreme risk attending the efforts to take such vessels from the United States to that section.

In cases of this character, speculative damages are, as a rule, excluded. The indemnity of the vendee is the actual loss sustained by reason of the vendor failing to comply with his contract; and, where there is an absence of fraud, the vendee has never been allowed damages remotely consequential, and resting in mere speculation. In such cases parties should not be held liable for losses which they could not reasonably have anticipated, and which they did not contemplate when the contract was entered into. It is hardly possible that the damages now claimed by the plaintiffs in error could have been in the contemplation of either of the parties to the contracts under which the vessels before mentioned were constructed. Naturally, the vendor in this case presumed that, in the event of a breach on its part, the damages awarded would be proportionate to such recovery

as would be allowed it in case of a breach by the vendee in failing to pay the purchase money when the vessels were delivered at Sparrow's Point, and it is well established that such recovery would be limited to the contract price of the vessels, with legal interest thereon. Damages of the character now insisted upon by the plaintiffs in error are so uncertain, and have reference to so many unforeseen and changing contingencies, that no reasonable basis for properly ascertaining their amount can be established. It would be a mere calculation of chances by juries and by courts, producing results not conducive to the due administration of justice, and deterring prudent men from making contracts like those now under consideration, to the great detriment of business and commercial affairs. It does not appear from the contracts, nor from the correspondence preceding them, nor from the conduct of the parties during the time the vessels were being built, that the defendant below was expected to see to their safe arrival at Porto Rico, or that there would be any special loss to the plaintiffs if delay should occur in the time of delivery. No penalty for delay is found in the contracts, and certainly the plaintiffs did not act as if they regarded time as material, or considered prompt delivery of the completed vessels as essential. On the contrary, they directed various changes to be made in the manner of the construction of the tug,—alterations which they must have realized would cause considerable delay,—and after the completion of the barges they did not take possession of them until six weeks had elapsed. We refer to these facts, fully disclosed by the evidence, for the purpose of showing the absence of such special circumstances as would make other damages than those we have indicated, proper to be assessed because of the breach by the defendant relating to the delay in delivering the vessels. The court below allowed the plaintiffs the sum representing the interest at 6 per cent. per annum, on the payments made by them prior to the delivery of the vessels, for the full time resulting from the delays, and we find no error in that judgment.

The following cases bear upon the questions raised by the assignments of error, and, in our opinion, direct the conclusion we have reached concerning them: *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; *Taylor v. Maguire*, 12 Mo. 313; *Hadley v. Baxendale*, 9 Exch. 341; *Primrose v. Telegraph Co.*, 154 U. S. 1, 29, 14 Sup. Ct. 1098, 38 L. Ed. 883; *The Ceres*, 19 C. C. A. 243, 72 Fed. 936, 943; *Drug Co. v. Byrd*, 34 C. C. A. 351, 92 Fed. 290; *Railroad Co. v. Bucki*, 16 C. C. A. 42, 68 Fed. 864; *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635; *Oil Co. v. Schlens*, 59 Md. 31, 43 Am. Rep. 537; *Blanchard v. Ely*, 21 Wend. 342, 34 Am. Dec. 250; *Trust Co. v. Clark*, 34 C. C. A. 354, 92 Fed. 293.

There is no error in the judgment complained of, and the same is affirmed.

SOUTHERN RY. CO. v. CRAIG.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 404.

1. MASTER AND SERVANT—RAILROAD TRAINS—MODE OF OPERATION—AVOIDING COLLISIONS BETWEEN TRAINS—ORDINARY CARE.

Plaintiff's intestate, a railroad conductor on an extra train, had orders to precede a delayed regular train into defendant's yards. No instructions were given to look out for any other train on entering the yards. Intestate was killed in a collision with a switching engine in the yards. No notice of the approach of the extra train had been given to those on the switch engine. The company's rules, known to intestate, gave the right of way to switch engines in the yards, and required that extra trains must approach and run through yard limits under full control. The evidence as to whether intestate's train was under full control was conflicting. The night of the accident was shown to have been dark and foggy. *Held* that, notwithstanding the rules of the company, it was the duty of the crew of the switching engine to exercise ordinary care in avoiding collisions with incoming trains.

2. SAME—ORDINARY CARE—INSTRUCTIONS.

An instruction that the crew of the switching engine should take proper precautions against collisions with incoming trains, the character of such precautions to be determined by the circumstances of the night, the heavy fog, and the difficulty in hearing and seeing signals, was correct.

3. SAME—OBSERVANCE OF RULES—QUESTION FOR JURY.

The question as to whether intestate observed the rule of having his train under full control on entering the yards was for the jury.

4. SAME—EXCESSIVE DAMAGES—APPEAL.

Where, in an action for the death of plaintiff's intestate, the instructions are proper, and the record shows no attempt to magnify the injury or pain, nor any appeal to the passion, prejudice, or sympathy of the jury, nor indication that the jurors were so influenced, the appellate court will not disturb a verdict on the ground of excessive damages.

In Error to the Circuit Court of the United States for the District of South Carolina, at Columbia.

Thomas P. Cothran, for plaintiff in error.

J. E. McDonald, for defendant in error.

Before GOFF, Circuit Judge, and MORRIS and BOYD, District Judges.

BOYD, District Judge. This action was commenced in the court of common pleas for Fairfax county, in the state of South Carolina, to recover damages for the death of Laurence S. Harrison, the intestate of Craig, the defendant in error, alleged to have been caused by the negligence of the plaintiff in error on the 15th of November, 1899. Upon petition of the plaintiff in error, the Southern Railway Company, the case was removed to the circuit court of the United States for the district of South Carolina for trial. A trial was had before Simonton, circuit judge, and a jury, at Columbia, S. C., on the 13th and 14th days of December, 1900, and a verdict for \$12,500 returned by the jury in favor of the administrator, and judgment was thereupon rendered by the court for said sum as

damages against the plaintiff in error. The case comes here for review upon a writ of error sued out by the railroad company.

Harrison, the intestate of the administrator, Craig, was in the employment of the Southern Railway Company as a conductor, and on 15th of November, 1899, was in charge of a ballast or gravel train on the railroad of the company. Intestate's train was numbered and called "Extra 555," that being the number of the locomotive attached to it and operated by J. W. Fetzer, engineer. During the afternoon of the 15th of November, 1899, Extra No. 555 was engaged in work along the line of the Southern Railway near a place called "Pomaria," about 30 miles from Columbia. At 8:22 p. m. on the said day an order was issued by the railway company's superintendent, and received by intestate and his engineer, directing them to run Extra 555 from Pomaria to Columbia. At Allston, a station on the route from Pomaria to Columbia, an order was received by intestate and his engineer, at 9:02 p. m., to the effect that their train would run ahead of train No. 62, the latter being a regular passenger train, due at Columbia at noon that day, but which was more than 10 hours late. On the way from Allston to Columbia, at Bookman's, at the request of the engineer, who had been recently employed by the railway company, and who was new upon the yard and block system, the intestate left his caboose, and went upon the locomotive to pilot the engine through the yard at Columbia. Extra 555, consisting of 17 cars, loaded with ballast, drawn by the locomotive in charge of Fetzer, reached Columbia at 10:55 p. m. The night was very dark and foggy, and as Extra 555 was moving into Columbia on the main track, and having entered the limits of the yard, the switch engine which was being operated on the yard, whilst running backward, pulling a number of cars from a side track onto the main line, collided with intestate's train, and he was killed in the collision. There was conflict of testimony as to the rate of speed at which the two trains were running when the collision took place. Fetzer, the engineer on Extra 555, testified that his train was running at about 4 miles an hour; that he had it under full control; and that, from the way the engines came together, it was his opinion that the speed of the switch engine at the time was 12 or 15 miles an hour. The fireman on Extra 555 testified that he was on the train, and that it was running 10 miles an hour; and Hart, the flagman on the same train, testified that it was running 15 miles an hour. Foulke, the engineer, and Stevens, the fireman, on the switch engine, both testified that its speed was only 4 or 5 miles an hour. Extra 555, as it approached the place of collision, was coming up a heavy grade, and as it entered the yard at Columbia it made no stop to ascertain if the track was clear, and no torpedoes were set or flagmen stationed to notify the extra not to proceed. As the extra was running on the main line after it entered the yard limits, the engineer, Fetzer, saw the light of the switch engine coming backward, running onto the line, about 50 yards in front, and he then put on the emergency air brakes, blew his whistle, and reversed his engine, but this was too late to prevent the collision. The operator of the switch engine was

not notified by the superintendent that Extra 555 was coming. There was a rule of the company which gave the switch engine the right of way within the yard limits in Columbia over all trains except regular trains, and it was shown upon the trial that intestate had notice of this rule. There was also a rule of the company that extra trains must approach and run through yard limits under full control. Intestate also had notice of this rule.

At the close of the testimony the counsel for plaintiff in error requested the court to instruct the jury as follows:

"Under the rules the switch engine had the right to the use of the main line, protecting itself against only regular trains. The extra was required to proceed through the yard under full control. This requirement applied, not only to the speed of the train, but to such precautions in addition as the dark and foggy night demanded. The switch engine, having the right of way over the extra, it was the duty of the other to be on the lookout for the switch engine, and to take such precautions as the situation demanded to prevent a collision."

The court responded to the said request for instructions as follows:

"Yes, but it did not relieve the switching engine from the exercise of ordinary care in avoiding collisions with trains entering the yard."

To this instruction modifying the defendant's said request the defendant duly excepted before the jury retired. The defendant further requested the court to instruct the jury as follows:

"The rules of the company do not require notice of the movements of extra trains to be given to the crew of a switch engine working within the yard limits, and it is not negligence on the part of the defendant not to have given such notice."

The court charged said request for instructions, but added the following:

"But the crew of the switching engine should take all proper precautions against collisions with trains entering the yard, the character of these precautions to be determined by the circumstances of the night, the heavy fog, and the difficulty in hearing and seeing signals."

To this instruction modifying the defendant's said request the defendant duly excepted before the jury retired.

After the verdict the defendant moved for a new trial upon the following grounds: (1) That the collision was due to the negligence of the engineer of the extra engine, a fellow servant of the intestate; (2) that the court erred in instructing the jury that the switch crew should have taken precautions against the approach of the extra train, owing to the darkness and foggy condition of the weather; (3) that the damages were excessive. The court overruled the motion, saying, as to (1): It was a question of fact about which the court had been unable to form a pronounced opinion, and on that account would not disturb the verdict. (2) Notwithstanding the rule requiring extra to look out for all extra trains, it was the duty of the switch crew, owing to the existing conditions, the foggiess of the night, etc., to observe ordinary care and precautions so as to prevent collisions with incoming trains. This duty was imposed upon them by the law, independent of any rule

of the company. (3) That, but for the decision of the supreme court of the state of South Carolina in case of *Nohrden v. Railroad Co.*, 59 S. C. 87, 37 S. E. 228, holding that damages for wounded feelings could be recovered, he would have reduced the verdict. To which refusals and rulings the defendant duly excepted.

We find no error in the modifications made by the court in giving the instructions requested. After giving the first instruction requested, the court simply said, in substance, that it was the duty of the switching engine to exercise ordinary care in avoiding collisions with trains entering the yard. We cannot conceive of any circumstances under which the operators of a railroad train are relieved from the use of ordinary care to prevent collisions with other trains. This is a duty that devolves upon those running and operating trains at all times. What constitutes ordinary care depends upon the relationship of the parties and the circumstances under which they act, and what would be ordinary care or common prudence under certain conditions would not be under others. It would certainly be incumbent upon the operator of a switching engine moving in a railroad yard, where regular and extra trains are coming and going, to observe a greater degree of caution on a dark, foggy night, when sounds are less distinct, and signals more difficult to be seen, than on a clear night, when such conditions do not prevail; and we therefore think that the second instruction requested, as modified by the court to the jury, was also properly given.

Intestate had orders from the superintendent of the company to proceed with his train to Columbia ahead of No. 62, a regular train, which was belated; and it was the duty of the intestate and his engineer, Fetzer, to obey this order. It was not indicated to them that it would be necessary to look out for any other train or for anything to impede their entrance into Columbia upon the main line, observing the rule, however, that they must approach and run into the yard limits under full control. As to whether intestate observed this rule or not is a question about which there was a conflict of testimony, and which was properly left to the jury to determine.

The only question further for our consideration is that involved in the motion for a new trial on the ground that the damages awarded by the jury are excessive. It is a general principle that an appellate court will be very reluctant to substitute its judgment for that of the jury of the court below, where the judge presiding at the trial has refused to disturb a verdict on account of the amount of the recovery. 8 Am. & Eng. Enc. Law, p. 629. The instructions having been proper, and there having been no attempt, so far as the record shows, at the trial, to magnify the injury or pain, and there having been no appeal to passion, prejudice, or the sympathy of the jury, and nothing at the trial to indicate that the jurors were influenced by any such feelings, the appellate court will not disturb the verdict. Whether the amount of damages allowed in this case is excessive must be determined by the knowledge, judgment, and sound discretion of the presiding judge. Every case must

necessarily depend to a great extent upon its own peculiar facts.
Engler v. Telegraph Co. (C. C.) 69 Fed. 185.

The judgment of the circuit court is affirmed.

THOMASON v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 413.

1. ACTION FOR NEGLIGENCE—DIRECTION OF VERDICT.

Where, in the opinion of the trial court, the evidence is insufficient to sustain a verdict for plaintiff, there is no error in an intimation of an intention to direct a verdict for defendant.

2. NEGLIGENCE—TURNTABLE—PLEADING—BURDEN OF PROOF.

Where a complaint alleged that plaintiff, while attempting to save his younger brother from being crushed by a turntable on which he was playing, was caught between the track of the turntable and the stationary track, and thus crushed and mangled, and there was no allegation of any special negligence of defendant towards plaintiff, the burden of proof was on plaintiff to show that he was injured while rescuing his brother from imminent danger in which he was placed by defendant's negligence, and that he received such injuries while on the turntable for that purpose only.

3. SAME—MAINTENANCE—NEGLIGENCE.

The maintenance of railroad turntables is not per se negligence, though the manner of maintaining them may be negligence.

4. SAME—EVIDENCE—SUFFICIENCY.

In an action for injuries sustained by a boy 12 years old, while trying to save his brother from being crushed by a turntable, the sole testimony was that of one witness, who took plaintiff out of the turntable. The testimony was that plaintiff said "he tried to catch the turntable or tried to hold it off his brother, and got fast in there himself." "He said he caught the turntable, and tried to stop it off his brother." *Held*, that direction of a verdict for defendant was proper.

5. SAME—NONSUIT—JUDGMENT FOR COSTS.

Where plaintiff, in an action for personal injuries, takes a nonsuit, a judgment against him for costs is the only judgment it is proper to enter.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

J. H. Merrimon and Locke Craig (P. J. Sinclair, on the brief), for plaintiff in error.

Charles Price, for defendant in error.

Before SIMONTON, Circuit Judge, and JACKSON and PURNELL, District Judges.

PURNELL, District Judge. Plaintiff in error, a minor 12 years of age, by his next friend, seeks to recover \$30,000 damages for personal injuries received at a turntable maintained by the defendant railway company at Old Fort, N. C., and alleges the injury was caused by the negligence of the defendant. The issues arising on the pleadings were three: First, was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Second, did the plaintiff

contribute to his injury by his negligence? Third, what damages, if any, is the plaintiff entitled to recover?

After both parties announced they had closed, the trial judge reviewed the testimony, and, upon an intimation of an intention to instruct the jury that the plaintiff was not entitled to recover, the plaintiff took a nonsuit and appealed. This is the practice in North Carolina, and no question is raised in regard to such practice.

Plaintiff excepted to an intimation of the court of an intention to sustain the motion of defendant to direct the jury to return a verdict in favor of the defendant on the first issue, and that the evidence introduced by the plaintiff would not sustain an answer in the affirmative to the issue, was the plaintiff injured by the negligence of the defendant company as alleged? Much of the brief and argument on the hearing is directed to an effort to convince this court that there was error in the intimation of the trial judge that a verdict would be directed. Such course on the part of the court is in accord with the established practice in the courts of the United States. Whatever the rule may be elsewhere, in the courts of the United States, as said by the chief justice in delivering the opinion in *C. A. Treat Mfg. Co. v. Standard Steel & Iron Co.*, 157 U. S. 675, 15 Sup. Ct. 718, 39 L. Ed. 854, "when the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover, and a verdict, if rendered for plaintiff, must be set aside, the court may instruct the jury to find for the defendant." To the same effect is the rule laid down in numerous other decisions.

In *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780, quoting *Improvement Co. v. Munson*, 14 Wall. 448, 20 L. Ed. 867, it was held the true principle was: "If the court is satisfied that, conceding all the inferences which the jury can justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury." This rule has been followed in *Montclair Tp. v. Dana*, 107 U. S. 162, 2 Sup. Ct. 403, 27 L. Ed. 436; *Railroad Co. v. Woodson*, 134 U. S. 621, 10 Sup. Ct. 628, 33 L. Ed. 1033; *Peoples' Bank of Greenville v. Aetna Ins. Co.*, 20 C. C. A. 630, 74 Fed. 507; *Sloss Iron & Steel Co. v. South Carolina & G. R. Co.*, 85 Fed. 138, 29 C. C. A. 50; *Patton v. Railroad Co.*, 111 Fed. 712, at last term; *Supreme Lodge v. Beck*, 181 U. S. 52, 21 Sup. Ct. 532, 45 L. Ed. 741, and many decisions.

In the case last above cited, the supreme court, quoting from *Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642, says:

"It is undoubtedly true cases are not to be lightly taken from the jury; at the same time the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunities as jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

If, therefore, in the opinion of the trial judge, the evidence was insufficient to sustain a verdict for the plaintiff, there would have been

no error if he had directed a verdict. He intimated an intention to do so when plaintiff took a nonsuit. Was this error?

The allegations in the complaint are that George, a brother of the plaintiff, five years of age, was playing on the turntable, and had set the same in motion; that said George was about to be crushed by the track of the turntable coming in close proximity to the stationary track; that plaintiff saw the great peril of his brother, and was not near enough to take him off the turntable before he would be crushed or killed; that he attempted to save his brother George, and did save him, by attempting to lessen the motion of the turntable, and in such attempt was caught between the track of the turntable and stationary track, and was thus crushed and mangled and seriously injured. Having made the allegation, the burden was on the plaintiff to furnish proof thereof. Allegation alone will not warrant a verdict. It was incumbent on him to show he was injured by the negligence of the defendant while he was engaged in rescuing his brother from imminent danger, in which he was placed by reason of the negligence of defendant, and he incurred or received such injury while on the dangerous machine for that purpose only.

Plaintiff was over 12 years of age, and, it seems, capable of distinguishing between places of safety and places of danger. The testimony is he was a bright boy, accustomed to being about the trains selling fruit and for other purposes. In North Carolina it seems to have been the rule, recognized by the supreme court, that even infants, capable of so distinguishing between places of danger and those of safety, could not recover damages when they wantonly placed themselves in places of danger, and their acts were the proximate cause of the injury. In *Manly v. Railroad Co.*, 74 N. C. 655, a child 10 years of age fell asleep on a railroad truck, and it was held there could be no recovery; and to the same effect is the decision in the case of *Murray v. Railroad Co.*, 93 N. C. 92, where a boy 8 years of age was injured while riding on the plow of a yard engine. But it is unnecessary to pursue this line of decisions in the case at bar. The rule is conceded to turn on the question of intelligence, and applicable more to the second issue, which is not under consideration.

Having made the allegation, the burden was on the plaintiff. There is no allegation of any special negligence on the part of the defendant towards the plaintiff. Turntables are necessary to the operation of railroads. Their maintenance is not per se negligence, though the manner of maintaining them may be. The plaintiff was not introduced as a witness, and the only witness who testified as to how he was injured or why he was on the turntable was a witness named Stepp, who took him out of the turntable. Stepp's testimony was, "Plaintiff said he tried to catch the turntable or tried to hold it off his little brother, and got fast in there himself." "He said he caught the turntable, and tried to stop it off his little half-brother." This was all the testimony as to how he came there and what he was doing there. There is no evidence to show that when he saw his brother in a dangerous position he was away from danger himself. In short, this is all the testimony. Is this sufficient

evidence to sustain plaintiff's allegations? to justify a verdict in the affirmative on the issue, was plaintiff injured by the negligence of defendant? The trial judge thought not. This court concurs in that opinion. An affirmative answer to the issue could not be justified on this testimony, but would, of necessity, have been based on conjecture.

Many of the decisions cited in the brief and by plaintiff's counsel assert sound propositions of law, but they are not applicable to this case, because of a difference in the facts. Having taken a nonsuit, the judgment rendered against plaintiff for costs is the only judgment it was proper to enter. Hence there is no force in the exception to the judgment. A careful examination of the record does not disclose any error.

There is no error. Affirmed.

GORHAM v. BROAD RIVER TP.

(Circuit Court, D. South Carolina. January 31, 1902.)

WRIT OF ERROR—AMENDING PETITION NUNC PRO TUNC.

Leave to amend a petition for writ of error nunc pro tunc, after the case has been removed by writ of error, though perhaps unnecessary, a formal petition for the writ not being essential, will be granted, there being a clear clerical error in using the word "defendant" for "plaintiff."

At Law.

See 109 Fed. 772.

J. E. Burke, for plaintiff.

Wm. B. McCaw, and D. E. Finley, for defendant.

SIMONTON, Circuit Judge. The present is a motion by the plaintiff's attorney to amend his petition for writ of error granted in this case. The defendant's attorney was duly notified thereof, and was represented at the hearing. The judgment in the case tried before the court without a jury resulted in a verdict for the defendant, Mr. Burke, who in the cause represented the plaintiff, filed a petition for a writ of error, accompanying the petition with assignment of errors, the bond of plaintiff, and citation in the name of plaintiff. By an error he begins the petition for the writ in these words: "The defendant, by counsel, comes and says that in the record and proceedings in this cause there is manifest error in this, to wit: in the particulars appearing in the assignment of errors hereto annexed as part of this petition." Then he goes on: "Wherefore, for these and other errors apparent on the record, the defendant, by counsel, prays writ of error," etc. He signs it counsel for petitioner. The writ of error granted is to the plaintiff by name, the bond is that of plaintiff, the citation is in the name of plaintiff. The assignment of errors charge error in not granting judgment to plaintiff.

The first question is, can this court entertain this motion, the term having elapsed? It being a clerical error clearly, the court has jurisdiction to do this. In re Wight, 134 U. S. 136, 10 Sup. Ct.

487, 33 L. Ed. 865. Can it entertain the motion, the cause having been removed by writ of error to the circuit court of appeals? In *U. S. v. Vigil*, 10 Wall. 423, 19 L. Ed. 954, the supreme court sustained an amendment by the circuit court of a record sent up on appeal, in order that it might appear that the appeal was taken in open court; and this was also recognized as proper practice in *Gonzales v. Cunningham*, 164 U. S. 615, 17 Sup. Ct. 182, 41 L. Ed. 572. If this court can entertain this motion,—and from these cases it would appear that it can,—then should the amendment be granted. A petition for writ of error is not essential if the writ be allowed and citation issued. *Brandies v. Cochrane*, 105 U. S. 262, 26 L. Ed. 989; *Brown v. McConnell*, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495. The last case says that the statute makes no special provision as to the form of an allowance of appeal. The acceptance of security and the signing of citation is, in legal effect, the allowance of an appeal. The circuit court of appeals, Fifth circuit, in *Trust Co. v. Stockton*, 18 C. C. A. 408, 72 Fed. 1, decided that a formal petition for a writ of error is not necessary. Even in the case of an appeal it is not necessary if the judge without it signs a citation and approves the bond. *Brandies v. Cochrane*, *supra*. If it is necessary, an amendment should be allowed. Every step taken after petition filed shows that the plaintiff was the party aggrieved, who sought a correction of the judgment. The defendant cannot suffer by the amendment.

Let the plaintiff have leave to amend his petition *nunc pro tunc* so as to strike out the word "defendant" wherever it occurs, and insert the word "plaintiff."

SOUTHERN RY. CO. v. MAYES.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 421.

1. INSTITUTION OF SUIT AGAINST FOREIGN CORPORATION — ADMISSION OF PRESENCE WITHIN STATE.

The institution of a suit against a foreign corporation in North Carolina is an admission on plaintiff's part that it is doing business and is to be found within that state at the time.

2. SAME—PERSONAL INJURIES—WHAT LAW GOVERNS.

In an action for injuries to the person, brought against a foreign railroad corporation, at plaintiff's election, in North Carolina, where the injury occurred, plaintiff's rights must be determined by the laws of that state.

3. SAME—LIMITATIONS—COMPUTATION OF PERIOD.

Code N. O. § 162, provides that, where a person is out of the state when an action accrues against him, it may be commenced within the time prescribed after his return, and if after such accrual he departs from and resides out of the state, or remains continuously absent therefrom, for one year, the time of his absence shall not be computed. *Held*, that where a foreign railroad corporation was operating its road and doing business in North Carolina at the time of plaintiff's injury, and continued to do so during the entire period limited for commencing suit therefor, an action commenced thereafter was barred; the statute recited not being applicable to such case.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Charlotte.

Charles Price, for plaintiff in error.

Charles W. Tillett (of Jones & Tillett), for defendant in error.

Before SIMONTON, Circuit Judge, and JACKSON and PURNELL, District Judges.

JACKSON, District Judge. This is an action brought by the defendant in error against the plaintiff in error to recover damages growing out of a collision which occurred on the 11th day of April, 1897, between the trains of the defendant company, near Harrisburg, N. C., whereby it is claimed that the plaintiff, who was a passenger on one of the trains, was greatly injured and damaged. It is not denied that the collision took place at the time and place alleged in the plaintiff's complaint, in the state of North Carolina; that the plaintiff in the action was greatly injured thereby; and that by reason of that fact he instituted his suit in the state of North Carolina to recover damages because of the alleged injuries.

The bringing of the suit by the plaintiff in the state of North Carolina is an admission upon the part of the plaintiff that the defendant corporation was doing business in, and was to be found in, that state; otherwise there would be no jurisdiction over the defendant corporation, either in the federal or state courts. In this action it is to be noticed that upon the trial of this case the court below took judicial notice of the fact that the defendant corporation, as such, was a citizen of the state of North Carolina, and was operating within the boundaries of that state about 1,200 miles of railroad.

This action was brought on the 18th day of September, 1900, as appears from the date of the summons, which, by the provisions of section 161 of the Code of North Carolina, is the date when an action is commenced. To this action the defendant railroad company interposed a plea of the statute of limitations, which is the only question presented in the record of this case for the consideration of the court; and the assignment of error is that the court below erred in holding that the cause of action of the defendant in error was not barred by the statute of limitations of the state of North Carolina, to which ruling of the court below the plaintiff in error filed an exception.

The Southern Railway Company, though a foreign corporation, was nevertheless a citizen of the state of North Carolina at the time of the collision,—at least, so far as the rights of any citizen interested in a claim or demand against it. It was a legal entity, and as such represented the rights of the corporators, and had the same legal power as a natural person either to assert or defend its rights. This principle of law is so well established at this date that we deem it unnecessary to cite authorities to support it.

The claim of the plaintiff below is that the defendant corporation was not to be found in the state of North Carolina, so that process could be served upon it, and, under section 162 of the Code of North Carolina, the statute of limitations does not bar a recovery on this action. The facts in this case show that the defendant com-

pany was at the time of the accident doing business in the state of North Carolina, and that it has so continued to do up to the date of the said summons, and in fact ever since, and up to the trial of the case. The plaintiff concedes by his action that the defendant company was at the time of the institution of this suit doing business in the state of North Carolina, otherwise he could not have maintained his action in this form. It clearly appears that the status of the defendant company in the state of North Carolina at the time of the accident was the same as at the commencement of the action. If this is true, then the defendant company, although a foreign corporation, was engaged in running its trains over its railroad, and was to be found within the limits of the state, for more than three years after the collision, and prior to the institution of this action. This is an action for damages to the person of the plaintiff, and it is well settled that an action of this character can be maintained wherever the wrongdoer is found. In this case the wrongdoer, as it is claimed by the plaintiff, is the defendant company, which was operating a railroad in the state of North Carolina; and the accident by which the plaintiff was damaged occurring in that state, and he having elected to bring his action in North Carolina, his rights must be determined by the laws of that state.

It is claimed by the plaintiff that, by section 162 of the Code of North Carolina, the defendant company cannot rely upon the plea of the statute of limitations (which is three years) to defeat the action, for the reason that the limitation had not begun to run before the commencement of the action. Section 162 of the Code of North Carolina provides that:

"If when the cause of action accrue, or judgment be rendered, or docketed against any person, he shall be out of the state, such action may be commenced, or judgment enforced, within the time, herein respectively limited, after the return of such person, into this state, and if, after such cause of action shall have accrued, or judgment rendered or docketed, such person shall depart from, and reside out of the state, or remain continuously absent therefrom, for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action, or the enforcement of such judgment."

It will be observed that the statute relied upon has no application to the facts in this case. In the first place, the defendant below was not at any time within the three years after the accident and before the commencement of this suit out of the state; and, in the second place, it did not depart or reside out of the state, or remain continuously absent, for the space of one year or more. Neither provision of the statute has any application to the facts of this case; for said facts show conclusively that the defendant corporation ever since it commenced doing business in the state of North Carolina has had a local abode and habitation in that state, for more than three years prior to the institution of this action. The defendant company is, within the provisions of the fourteenth amendment of the constitution of the United States, a person, having all the rights that a natural person may have in actions for or against it. Assuming this position to be true, we reach the conclusion that the defendant corporation is entitled to rely upon the

statute as a defense to this action, and that more than three years had elapsed before the suit was commenced.

For the reasons assigned, we are of the opinion that the court below erred in overruling the plea of the statute of limitations, and that the case should be reversed. Reversed.

LYMAN et al. v. WARNER et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 420.

1. LIMITATIONS—PARTIAL PAYMENT—ACKNOWLEDGMENT.

Payment of interest on a note within three years prior to action thereon is an acknowledgment of indebtedness, taking it out of the bar of the statute.

2. CONTINUANCE—DISCRETION—REVIEW.

Refusal to grant continuance cannot be reviewed, in the absence of a showing of abuse of discretion.

3. NOTE—ENFORCEMENT BY PURCHASER.

A purchaser of a note for a valuable consideration may enforce its collection, though there was no indorsement or transfer of it.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

Charles Price (F. A. Sondley, on the brief), for plaintiffs in error.

James H. Merrimon and Walter B. Gwyn (J. Gibbon Merrimon, on the brief), for defendants in error.

Before SIMONTON, Circuit Judge, and JACKSON and PURNELL, District Judges.

JACKSON, District Judge. The defendants in error (the plaintiffs below) instituted their action against the plaintiffs in error (the defendants below), and alleged in their complaint that on the 19th day of October, 1894, A. H. Lyman and C. E. Lyman, defendants below, made and executed their promissory note, in writing, dated the 19th day of October, 1894, payable one year after date; that afterwards Mary E. Blakemore, to whom the note was executed, made and delivered the said note to B. F. Whitman, who likewise indorsed and delivered the same to Cornelia Blakemore Warner, for value, who was the owner and holder of the said note at the commencement of this action, no part of which has been paid to the plaintiffs. The defendants, A. H. Lyman and C. E. Lyman, filed their separate answers, in which they admit the execution of the note, but deny that Cornelia Blakemore Warner was at the time of the institution of this suit the holder and the owner of the note; and they also deny that there is anything due and owing by the defendants to her, and insist that the plaintiffs have no right to maintain this action, for the reason that no legal assignment or transfer of the note was ever made by Mary E. Blakemore to her. The defendants below also suggest, as a matter of defense, that the action is barred, for the reason that the right of action against them

did not accrue within three years before the commencement of this suit. The first answer to this position is that this was a question of fact, which was submitted to a jury, and they found against the defendants. The second answer is that the defendants paid the interest on this note up to April 19, 1898, within three years prior to the institution of this action. This payment of interest was an acknowledgment of the debt, and an implied promise to pay it. 19 Am. & Eng. Enc. Law (2d Ed.) 327, and the cases there cited. In North Carolina, from which state this case comes, it was held in the case of *Hewlett v. Schenck*, 82 N. C. 234, quoted in *Bank v. Harris*, 96 N. C. 118, 1 S. E. 459, that "a partial payment, though the evidence need not be in writing, being an act, and not a mere declaration, revives the liability, because it is deemed a recognition of it, and an assumption anew of the balance." As the plaintiffs in error do not appear to rely upon this defense in their briefs, and have not assigned or complained of it as an error in the proceedings of the court below, we dismiss it without further consideration.

Nine grounds have been assigned by the plaintiffs in error for the consideration of this court:

In the first assignment of errors it is claimed by the appellants that the court below erred in refusing a motion of the defendants to continue the cause, and directing the case to proceed to trial at that time. A motion for the continuance of a cause, addressed to the trial judge, is a matter that always rests in the sound discretion of the court, and is subject to review only for the abuse of his discretion. This was the rule at common law, and, so far as we are aware, the courts of this country have usually followed that rule. The supreme court of the United States, in *Woods v. Young*, 4 Cranch, 237, 2 L. Ed. 607, ruled "that the refusal of the court below to continue the case could not be assigned for error." This court has in all of its subsequent decisions followed that case, and as late as the case of *Means v. Bank*, 146 U. S. 621, 13 Sup. Ct. 186, 36 L. Ed. 1107, held that "the question whether a trial shall be postponed on account of the absence of a witness for the defendant, and the illness of one of his counsel, is a matter of sound discretion, and will not be reviewed where no abuse is shown." See, also, 4 Enc. Pl. & Prac. 901, § 2, and notes 1 and 2. As the record in this case does not disclose that the trial judge abused his discretion in refusing a continuance of this case, we are of the opinion there was no error in overruling the motion.

The eight remaining assignments of error involve substantially the same question, and rest upon the fact, as is claimed by the defendants, that the plaintiffs had no right of action for the recovery of the amount of the note upon which this action was founded. It seems to us that a very brief review and discussion of the evidence in this case must dispose of the last eight assignments of error. The evidence taken in this case was all offered by the plaintiffs below, there being no evidence offered by the defendants. What the evidence of the plaintiffs proves and what it tends to establish must be accepted as the undisputed evidence in this case upon which

the right of action depends. The evidence discloses that the two Lymans, the defendants below, borrowed from Mary E. Blakemore \$3,000, payable one year after date; that when the note matured they did not pay it, but they paid the interest for some years on the note, and they finally ceased to pay the interest when they were called upon to pay the note. Some negotiations were had in reference to it. Miss Blakemore, the holder of the note, seems to have been in bad health. She gave instructions to Whitman to try and secure the payment of the note. In this Whitman failed. After the failure, the plaintiff in the action below, Cornelia Blakemore Warner, discovered that her sister was very much worried in not securing the payment of the interest, took the matter in hand, and went to Mr. Whitman and made arrangements with him to take up the note and pay it off, and held it as her own property. It appears from the evidence that B. F. Whitman, a cashier of a bank in Cleveland, and acting as an intermediary between Mary E. Blakemore, the payee and holder of the note, and the defendants, the two Lymans, made to the defendants, for Miss Blakemore, a loan of \$3,000 for one year, for which they gave their joint note, upon which this action is founded; that when the note fell due it was not paid, nor was it renewed, but remained unsatisfied up to the date of the commencement of this action, though the interest was paid to April 19, 1898. It further appears that Mary E. Blakemore was in bad health, and the neglect of the obligors to pay off and discharge this obligation seemed to prey on her mind,—so much so that her sister, the plaintiff in this action, became so anxious about her sister Mary's condition that she determined to see what could be done to relieve her sister's anxiety. With this in view, she went to Mr. Whitman, the cashier. After some discussion between them, it was decided that he was to procure from Miss Blakemore the note and all the papers relating to the loan. In doing so he informed her that "arrangements had been made for the refunding of the loan." It is true that the loan was not refunded, but it is equally true that Miss Blakemore was desirous of getting the amount due her on the note paid. The note had been in the custody of Mr. Whitman for collection, for it was sent to him at Asheville for that purpose, which he failed to accomplish. When Miss Blakemore sent the note to him, she had, by her own proper indorsement, transferred the note to him, and he became vested with the legal title to it. It is true that after the note was indorsed he returned the note to her; but it is equally true that when she returned the note to him the second time the indorsement remained on the note unaltered, and by her action at that time he became the legal owner of the note, and could have maintained the action in his own name for the recovery of the amount due. After he got possession of the note the second time, he sold it to Mrs. Warner, the plaintiff in this action, for value, realizing the full amount due on the note. Upon this state of facts the defendants claim and insist that Mrs. Warner cannot maintain this action, and that she had no legal title to the note. We do not think that this defense to this action is either good in ethics or sound in law. The note was payable to

the order of the payee, and was therefore negotiable. The payee, by proper indorsement, had assigned and transferred the note to Whitman; and he, having possession of the note, transferred it, by his own proper indorsement without recourse, to the plaintiffs in this action. This case was tried before a jury, and the jury found for the plaintiffs, presumably under the direction of the court, as was decided in *Thompson v. Onley*, 96 N. C. 9, 1 S. E. 620, that, to give title to a note or bond, an indorsement or assignment was not necessary, and the question of the ownership was a matter of fact for the jury to decide.

The answer of A. H. Lyman to the second paragraph of the plaintiffs' complaint affirms that the indorsement on the note in question by Mary E. Blakemore was purely for the purpose of collection. No such condition is attached to the indorsement, and, under the facts proved in this case, it is evident that Mary E. Blakemore intended to give Whitman the full control of the note, in order that he might take such course as, in his judgment, would best subserve her interest and secure the money. No proof is offered by the defendants in support of this allegation in that answer, and for this reason we dismiss the further consideration of that allegation. But suppose, in point of fact, that there was no indorsement or transfer of the note to Whitman or to the plaintiffs; we think that the plaintiffs could maintain this action, even though the note had not been indorsed by the payee. It is a well-settled principle of law that, where the note is payable to bearer or to a designated person, it may be negotiated so as to pass the legal title by simple delivery, without indorsement. In this case the evidence conclusively proves that the payee of this note desired to secure the payment of it. If she received the full amount of the note from Whitman, who was the agent to collect this note, it was a matter of no legal importance, so far as she was concerned, how he secured the money for that note. What she wanted was her money; and her sister, Mrs. Warner, desiring to relieve her of her great anxiety about the payment of this note, went to her authorized agent and purchased the note for a full consideration, and thereby acquired legal ownership of the note. In support of this position we cite 4 Am. & Eng. Enc. Law (2d Ed.) 250, note, giving a long line of authorities. In any view that we can take of this case,—whether this note was transferred by proper indorsement, or whether it was transferred either with or without indorsement, we hold that the plaintiffs in this action, having purchased the note for a valuable consideration, have a right to enforce its collection; and, as we have before said, the defendants have no defense, either in ethics or in law, against the recovery of a judgment in this action.

For the reasons assigned, the judgment of the court below is affirmed.

CAU v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1902.)

No. 1,081.

CARRIERS OF GOODS—LIMITATION OF LIABILITY FOR LOSS BY FIRE—VALIDITY.

A shipper is bound by a provision in a bill of lading exempting the carrier from liability for loss of the goods by fire, where he was chargeable with knowledge that the bill contained such clause, and made no objection thereto, and it is not shown that the loss resulted from the carrier's negligence.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

B. K. Miller, for plaintiff in error.

N. W. Finley, W. W. Howe, W. B. Spencer, and C. P. Cocke, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This was an action by the plaintiff in error to recover the value of certain cotton delivered to the defendant in error to be transported from Texarkana, Tex., to the port of New Orleans, La., at an agreed charge for freight of 60 cents per 100 pounds. The petition alleged that, in evidence of the contract, the company delivered to the plaintiff in error its certain bills of lading; that while the bales of cotton were awaiting further shipment, but after they had been received by the railway company as a common carrier and were in its possession as such, and after it had issued its bills of lading to carry the same, the whole of the cotton was destroyed by fire. The petition alleged, further, that by the third clause of the bills of lading the railway company attempted to limit its liability as a common carrier, declaring that it should not be liable for any damages to, or destruction of, the cotton caused by fire; that this clause is wholly inoperative, null, and void against the petitioner, on the following grounds: (1) That plaintiff did not receive any consideration from the railway company for such limitation of its common-law liability; (2) that the destruction of the cotton by fire was due to, and caused by, the negligence of the company, its agents and servants; (3) that the cotton was received by the railway company prior to the issuance of the bills of lading, and it was without authority, after the receipt of the cotton as a carrier, to limit its liability under the common law. The answer, besides the general issue, set up specially the terms of the third clause of the bills of lading, which, so far as necessary to recite, expressed "that neither the Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damage to, or destruction of, said cotton by fire." The case came on for trial, and, the evidence having been closed, counsel for the defendant moved the court to direct a verdict in favor of the defendant, which motion was granted, and the jury, under the direction of the judge, returned their verdict, "We, the jury, find a verdict in favor of the defendant," upon which judgment was duly entered. In act-

ing on the plaintiff's motion for a new trial, the learned judge of the circuit court said:

"The sole question in this cause is whether the clause in the bill of lading exempting the carrier from liability for loss by fire is binding on the plaintiff. No negligence is charged against the carrier. The shipment was made by the plaintiff's agent, an intelligent and experienced buyer and shipper of cotton. He is presumed to have known the law, and to have been aware that the carrier, if he so desired, was compelled to take the freight under its common-law liability, without the fire clause. Furthermore, it was proven that prior to the shipment plaintiff's agent called for blank bills of lading, took them to his office, and in his own time filled them, and then presented them for signature by the carrier. This fact, together with the general knowledge which the plaintiff's agent must have had from his previous experience in shipping cotton, makes it certain that as matter of fact the plaintiff's agent knew of and assented to the fire clause. Shippers have been held bound by the fire clause in a bill of lading, even when they claimed that they did not know that the clause was in the bill of lading, provided they were afforded a full and fair opportunity to acquaint themselves with the contents of the bill of lading. Failure to read the bill of lading has been held, under such circumstances, not to avail the shipper. But, of course, the present cause is one in which, as matter of fact, the shipper knew, or must be held to have known, that the bill of lading contained the fire clause. I am clear that there is nothing in the evidence which would invalidate the bill of lading for duress, concealment, fraud, or misrepresentation by the carrier."

So far as it affects this case, the statement of the law embraced in the foregoing extract from the trial judge's opinion is fully supported by the leading case of *York Mfg. Co. v. Illinois Cent. R. Co.*, 3 Wall. 107, 18 L. Ed. 170, which has been cited with approval by the supreme court as late as the case of *The Queen of the Pacific*, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419.

We have carefully examined the record submitted to us on this hearing, and concur in the view taken by the trial judge that there is nothing in the evidence which would invalidate the bills of lading for duress, concealment, fraud, or misrepresentation by the carrier.

The judgment of the circuit court is therefore affirmed.

CHARNOCK v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1902.)

No. 1,082.

CARRIERS OF GOODS—LIMITATION OF LIABILITY FOR LOSS BY FIRE—VALIDITY.

A shipper is bound by a provision in a bill of lading exempting the carrier from liability for loss of the goods by fire where he was chargeable with knowledge that the bill contained such clause, and made no objection thereto, and it is not shown that the loss resulted from the carrier's negligence.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

B. K. Miller, for plaintiff in error.

W. W. Howe, W. B. Spencer, and C. P. Cocke, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This was an action very similar to that of *Jovite Cau* against the same defendant (just decided), 113 Fed. 91. It was for the value of cotton delivered to the defendant carrier, which issued to the shipper a bill of lading with the fire exemption clause identical in terms with that given in the *Cau Case*. The cotton was received on a country or plantation switch, which the defendant had put in about the time of the construction of its main line, and which for 10 or 11 years had been used by the planters conveniently adjacent thereto precisely in the manner that this shipment was made. There was a small platform and a small shelter to be used in connection with sending and receiving freight, according to its character and the other conditions at the time of handling, but no agent or employé of the company had ever been put or kept there for the purpose of receiving and guarding freight there received or delivered. The long-established practice was for shippers who had produce to be transported from that point to notify the nearest station agent of the fact, and of the number of cars desired, when the defendant would furnish the cars as requested, and, as soon as they were loaded by the shipper, promptly take them by the first one passing of its local freight trains to the point of destination. There is no evidence that any question or protest was made by this shipper to the contract as limited in the bill of lading. We concur with the trial judge in holding that the evidence does not tend to show negligence on the part of the carrier. There was no dispute as to the goods having been received by the carrier, nor as to the loss falling within the terms of the fire exemption clause. If there was negligence upon the part of the carrier the burden of proving that fact was on the plaintiff, and, as we have said, the proof offered by the plaintiff did not, in our opinion, tend to show such negligence. This case falls clearly within the authority of *Clark v. Barnwell*, 12 How. 272, 13 L. Ed. 985; *Transportation Co. v. Downer*, 11 Wall. 129, 20 L. Ed. 160; *York Mfg. Co. v. Illinois Cent. R. Co.*, 3 Wall. 107, 18 L. Ed. 170.

The judgment of the circuit court is affirmed.

SULLIVAN V. MILLIKEN.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1902.)

No. 1,080.

BROKERS—RIGHT TO COMPENSATION—SUFFICIENCY OF SERVICES.

A declaration set out a writing by which defendant authorized plaintiff to sell for him certain timber lands and other property for a price stated, such authority to continue for 60 days. It alleged that, by defendant's request, plaintiff prepared a written memorandum more specifically describing the property; that plaintiff procured within the 60 days the making of a written contract between defendant and a third person, which was set out, and by which defendant agreed to convey the property on terms therein stated, and the other party agreed to have the same examined within 60 days, and to purchase the same if it should appear from said examination that the statements contained in plaintiff's memorandum were substantially correct; that, by reason of the premises, defendant became indebted to plaintiff for his services in the sum of

\$100,000, for which judgment was prayed. *Held*, that such declaration must be construed as one to recover commissions as a broker, and was demurrable as failing to state a cause of action, because, under the contract pleaded, plaintiff could recover only by proving (1) either that he had made an actual sale of the property, or (2) that within the time limited he had procured a purchaser able and willing to buy it on the terms stated, and that a sale was prevented by some act or default of defendant, neither of which facts was alleged.

McCormick, Circuit Judge, dissenting in part.

In Error to the Circuit Court of the United States for the Northern District of Florida.

This action was brought by William Alfred Milliken, a citizen of New York, against Martin H. Sullivan, a citizen of Florida. The case was first tried on a declaration containing 12 counts, and resulted in a verdict for the defendant, Sullivan. A new trial was granted by the circuit court, and the plaintiff amended his declaration by adding counts numbered 13 and 14. These counts differ but little, and counsel for the plaintiff (the defendant in error here) agrees that count No. 14 may be eliminated. The case was tried and is here considered as based on the thirteenth count, which will be referred to herein as constituting the declaration. It is as follows, including the three exhibits:

"The plaintiff sues the defendant, for that before the institution of this suit, to wit, on and before October 12, 1890, the defendant employed the plaintiff to sell the pine timber lands of the defendant in the state of Alabama, comprising about 250,000 acres, lying in the counties of Escambia, Conecuh, Monroe, and Baldwin, together with the railways and mills situated thereon, for the sum of one million five hundred thousand dollars, and defendant's wharf in the city of Pensacola, Florida, for the sum of one hundred thousand dollars, and, as evidence of the said employment, executed and delivered to the plaintiff on October 12, 1890, a written instrument, a copy of which is hereto attached, marked 'Exhibit A,' and made a part hereof; that, for the purpose of a fuller specification and description of the said property, the plaintiff, at the request of and for the defendant, prepared a written memorandum more fully describing the said property, a copy of which memorandum is hereto attached, marked 'Exhibit B.' That in pursuance of the said employment the plaintiff procured that the defendant and one W. D. Mann should and did on November 16, 1890, enter into a written contract by which the defendant agreed to convey the property mentioned in the written authority and memorandum hereinbefore set forth as Exhibits A and B (which memorandum is the memorandum referred to in the said written contract) to a corporation to be organized by the said Mann as set forth in the said agreement, and the said Mann agreed to cause the said corporation to be organized, and to pay to the defendant for the said property five hundred thousand dollars in cash, one million dollars in the first mortgage bonds, and one hundred thousand dollars in the stock, of the said company, all of which is set forth in the said agreement which is hereby referred to, and, as Exhibit C, hereto attached and made a part hereof for greater particularity and exactness. Plaintiff avers that by reason of the premises he became entitled to demand and receive from the defendant and the defendant became obliged to pay to the plaintiff, for his services aforesaid, a large sum, to wit, the sum of one hundred thousand dollars, which sum, or any part thereof, the defendant has refused to pay to plaintiff, although often requested so to do, to the damage of plaintiff of one hundred thousand dollars, whereupon he sues."

Exhibit A.

"New York, October 12th, 1890.

"W. A. Milliken, Esq., N. Y. City.—Dear Sir: I hereby authorize and empower you to sell my pine timber lands in the state of Alabama, comprising about 250,000 acres, lying in the counties of Escambia, Conecuh, Monroe, and Baldwin, together with the railways and mills situated thereon, for the

sum of \$1,500,000; also my wharf in the city of Pensacola, Fla., for the sum of one hundred thousand dollars (\$100,000). This authority to remain good for sixty days. I will make a deed in fee, with general warranty, to the purchaser.

M. H. Sullivan."

Exhibit B.

"Sullivan Timber Lands.

"Martin H. Sullivan, of Pensacola, Fla., is the owner in fee of two hundred and fifty thousand acres of long leaf yellow pine timber land, in the state of Alabama, situated in the following counties:

County of Escambia.....	156,000 acres
County of Conecuh.....	42,000 acres
County of Monroe.....	40,000 acres
County of Baldwin.....	12,000 acres

Total 250,000 acres

"This land is in one body, beginning on the northern line of the state of Florida, in the county of Escambia, two and a half miles east of Flomaton Junction, on the Louisville & Nashville R. R. It runs north about 25 miles, into the county of Conecuh; thence west some 8 miles, into county of Monroe; thence south 6 miles; thence west 10 miles; thence south with the county line between Escambia and Baldwin to the Florida state line. Within this outline there are several one-quarter ($\frac{1}{4}$) and one-half ($\frac{1}{2}$) sections in the different townships which do not belong to Sullivan. The 12,000 acres in Baldwin county fronts on the Alabama river below old Fort Montgomery, and runs back east to the Escambia county line, connecting with the main body at that point. The great body of this land lies on the head waters of Escambia river, in Escambia county. On the east side the L. & N. R. R. runs through it from Flomaton Junction north to Selma, Alabama. On the south the L. & N. R. R. runs through it from Montgomery, Ala., to Mobile. It is about 50 miles by rail from Sullivan Mill, on this land, to Mobile, and about 45 miles from Flomaton by rail to Pensacola, Fla. The map accompanying this statement shows the position of these lands as marked thereon. The lands are all above overflow, and the timber on every acre is perfectly accessible. The timber on the land is what is known as the 'Long Leaf Yellow Pine'; the trees growing from 70 to 80 feet to the first limb, perfectly straight. The largest will square 12 inches, 70 to 80 feet from the butt. About 200,000 acres of this timber is practically virgin forest. The remaining 50,000 acres has been partially cut prior to 1892. Only the largest trees were cut then, leaving all under fifteen inches in diameter. These lands were carefully selected by Mr. Sullivan, who is a timber expert, having been engaged in the timber business about 40 years. His estimate is that the poorest lands will cut five thousand (5,000) feet, and the entire tract can safely be estimated at seven thousand (7,000) feet per acre; and Sullivan is not a man who will make an overestimate in this matter. On this land Mr. Sullivan has built three railroads of standard gauge, as follows: One road running from Sullivan station, on the L. & N. R. R., out eleven (11) miles through the forest to a former mill site; one from Wallace station, on the L. & N. R. R., some ten (10) miles out into the forest; and another branch from this line, six (6) miles. These lines were laid with 30-lb. rails, and were built to haul logs from the forest to the mills, and the timber from mills to L. & N. R. R., and thence to Mobile and to Pensacola. They were built in 1890 and 1891, and used during that time, but have not been in use since. The rails are in good condition, but the road is not. There are two mills and one mill site on these lands, as follows: One known as 'Wallace Mill,' situated on the L. & N. R. R., near Wallace station in Escambia county. This is a fine steam mill, built in 1891, and with all modern improvements, and cost \$125,000. It was run less than 1 year, and is in perfect order, and, with the purchase of a new band, could be put to work at once. It has a capacity of 100,000 feet of timber per diem. It has every facility for handling logs and timber, and the output of this mill can be delivered by rail 55 miles to Pensacola, Fla. Another, known as the 'Pine Log Mill,' is situated in Baldwin county, near the

Alabama river. This is a water mill of about 35 to 40 thousand feet capacity per diem. It is in moderately good condition. Its output can be shipped down the Alabama river to Mobile, about 75 miles. A mill site known as 'Sullivan Mill' is situated in Escambia county, on the 11-mile branch road running from Sullivan station on the L. & N. R. R. Here is a magnificent boom, and every facility for handling logs and timber. There was a water mill here in 1891-2. The output from a new mill built at this point could be sent by rail to Mobile or to Pensacola. These improvements were put on this land by Mr. Sullivan in 1890-1, when he organized the Sullivan Timber Co., and with a view of carrying on the timber business on an extensive scale. The price of timber declined in '92 to such a point (being about \$7.50 per thousand at Pensacola and Mobile) that he preferred to close up the business rather than cut his trees and sell timber at such rates. Since then the trees have been carefully preserved, and to-day the forest is intact. These lands were all high and dry, slightly undulating, good soil, and, where cultivated, produce excellent corn and cotton, and all the fruits of that climate, of fine quality. Lands in these counties, when cleared of timber, sell readily at from \$4.00 to \$6.00 per acre for agricultural purposes. The climate of this section is delightful, being, of course, mild in winter; and the summer heat is tempered by the ocean winds from the south. The health of these counties is unusually good.

"I consider the following figures as a safe, low estimate of the value of the timber on this land, and the value of the lands after the timber is cut:

The poorest, 50,000 acres, at 5,000 ft.....	250,000,000 ft.
The other, 200,000 acres, at 7,000 ft.....	1,400,000,000 ft.

Making the total timber..... 1,650,000,000 ft.

"There are excellent locations on these lands, where four (4) new steam mills can be erected, on these railroads, of a capacity of 100,000 feet to each per day. These four, together with the two now on hand (changing the water mill into a steam mill), would put out 600,000 feet per day, or 15,600,000 feet per month of 26 working days, or 187,000,000 feet per annum. The present price of timber at Pensacola, Fla., and Mobile, Ala., is \$16.50 per thousand. To cut these trees, haul them to the mills, saw into timber, load on cars, and deliver on wharf at Pensacola or Mobile, is less than \$5.00 per thousand. These six mills can cut the entire timber from these lands in less than nine (9) years. But it cannot be expected that timber will remain at the present high figures more than a year or two. One can safely, however, count on timber continuing for many years at very remunerative figures. But for the next two years, by putting the 4 new mills in operation, the six mills can put out 187,000,000 feet per annum. This, delivered at Pensacola, will net certainly \$10.00 per thousand, or \$1,870,000 per annum. This shows the possibilities for the next two years at the present unusually high price for timber. It is proper to state here that the demand for timber at Pensacola and Mobile for foreign shipment is far beyond the output. Contracts can be made there with thoroughly reliable houses for timber for 6 to 8 months' delivery at present rates. These four new mills, of the capacity required, can be built to-day for \$50,000 each. It is not necessary to erect so expensive a mill as the one now at Wallace.

"Turpentine. Another source of revenue from this timber, and one not to be overlooked, is turpentine. Contracts can be made with reliable parties to allow them to box these trees ahead of the cutters, so as not to injure them for timber, and from this source from \$2.50 to \$3.00 per acre can be obtained. None of this timber has ever been boxed. It is in the 'forest primeval.'

"Resale. If the purchaser of this land should desire to do so, this land can be sold off to great advantage in lots from 10,000 to 30,000 acres. Mr. Sullivan will not break his block up, but prefers to sell it as a whole or not at all.

"Stumpage. In this section of Alabama and Florida, stumpage is \$2.00 per thousand. A purchaser of this land can sell as much stumpage as he cares

to at \$2.00. Mr. Sullivan considers it a waste to sell it at such figures, and will not do so.

"These are the principal facts in connection with these lands.

"The price of the lands, with everything on them,—mills, mill booms, and railroads, is \$1,500,000. Of this \$500,000 in cash, and \$1,000,000 will be carried on bond and mortgage at four per cent., with a proper sinking fund to retire the bonds when due, running, say, ten years. This land is free from all incumbrances, and a deed in fee, with general warranty, will be given the purchaser by Mr. Sullivan.

"Wharf at Pensacola, Fla.

"In addition to this land, Mr. Sullivan owns a wharf at Pensacola, Fla., which is the principal wharf in the city. It comprises some seven acres, and is filled in with stone, and from eight to ten ocean-going vessels can load from the dock at one time. A double-track railroad belonging to Mr. Sullivan runs on this wharf, connecting with the L. & N. R. R., so that cars from the L. & N. can run on the wharf to a ship's side, and be unloaded from the car into the ship. There is also a large boom in connection with this wharf, into which timber can be unloaded to await arrival of vessels, and from there loaded into the ships. The price of this wharf is \$100,000. It can be purchased in connection with the lands, or not, as the purchaser may desire. But together, these lands and wharf, with the mills in operation, make the most valuable property of this character in the Southern states. Sullivan's timber lands are well known in the South by all timber merchants, and are regarded as the pick of that section."

Exhibit C.

"New York, Nov. 16th, 1890.

"Memorandum of agreement this day entered into by and between Martin H. Sullivan, of Pensacola, Fla., and W. D. Mann, of New York City, witnesseth: Martin H. Sullivan agrees to sell and convey by general warranty deed in fee, as hereinafter provided, his timber lands situated in the state of Alabama, in the counties of Escambia, Conecuh, Monroe, and Baldwin, comprising about two hundred and fifty thousand (250,000) acres, together with all mills, booms, and other fixtures now thereon; also railroads situated now on said lands in the county of Escambia; also the wharf property in the city of Pensacola, Fla., now known as 'Sullivan's Wharf.'—for the sum of one million six hundred thousand dollars (\$1,600,000), upon the following terms and conditions, to wit: The said W. D. Mann is forthwith to select some one or more persons to go upon said lands and wharf and examine same, and make a report as to the amount of timber per acre on said lands, and value thereof; as to the number of mills and booms on same, condition and value; as to the railroads on same, condition and value; and as to the wharf property in Pensacola, Fla., its condition and value; also as to any and all matters upon which the said Mann may desire information in regard to said property. Said examination and report is to be made within sixty (60) days from this date. Upon the examination of said report, if it shall appear that the statements set forth in the written memorandum given to the said Mann as to said property are substantially correct, then the said W. D. Mann undertakes and agrees to cause to be organized, under the laws of the state of ———, a corporation, to be known as the ——— Company, with an authorized capital stock of \$——— (to be fully underwritten at par by bona fide solvent underwriters), and with power to issue bonds for one million dollars (\$1,000,000), with interest at four per cent. (4%) per annum, payable semiannually, and due and payable ten (10) years after date, with a sinking fund of ten per cent. (10%) per annum, to be paid in redemption of said bonds, and to cause said company, when organized, to purchase from Martin H. Sullivan said lands, mills, booms, railroads, and wharf property for the sum of one million six hundred thousand dollars (\$1,600,000), to be paid as follows: Five hundred thousand dollars (\$500,000) to be paid in cash, and one million dollars (\$1,000,000) to be paid in the authorized bonds of said company, due and payable as above set forth, and fully secured by a first mortgage on all the lands, mills, railroads, wharfs,

and other property of said company, and one hundred thousand dollars (\$100,000) to be paid in the shares of the capital stock of said company at par. The said Martin H. Sullivan agrees and contracts to convey by deed in fee, with general warranty, the said two hundred and fifty thousand (250,000) acres, more or less, of timber lands, together with the mills, booms, railroads, and all other fixtures now thereon, and the wharf in Pensacola, Florida, to the said company, and receive payment for same as above set forth. This agreement is to be fully executed within ninety (90) days from this date. Witness our hands and seals in this sixteenth day of November, 1899.

M. H. Sullivan.
"W. D. Mann.

"Witness in presence of:

"W. A. Milliken.

"F. W. Weeks."

The defendant, Sullivan, demurred to the declaration, and as grounds of demurrer assigned the following: "(1) It is alleged in said count that the plaintiff was employed to sell the property of defendant, and it is not alleged that any sale was ever made. (2) It is alleged in said count that the plaintiff was employed to sell the property of defendant, and it is not alleged that any sale was ever consummated, or that it failed of consummation by the fault of the defendant. (3) It is alleged in said count that the plaintiff was employed to sell the property of defendant, and it is not alleged that any sale was ever made, but only that a contract was made for a sale; and it is not alleged that any sale resulted from said contract, or that the parties contracting to buy were able to do so, or that the sale failed of consummation by reason of any fault of defendant. (4) It is alleged that the plaintiff was employed to make a sale, and it is only alleged that a contract of sale was made; but it is not alleged that any sale was made, or that it failed to be made on account of any fault of defendant. (5) It is not alleged that any sale was made within sixty days from October 12, 1899." The circuit court overruled the demurrer. The case went to trial on pleas that were filed, and resulted in a verdict and judgment for the plaintiff, Milliken, for \$77,890.70. The defendant, Sullivan, brings the case to this court on writ of error, and assigns that the circuit court erred in overruling the demurrer to the declaration. The view we take of the case makes it unnecessary to state and decide the many other exceptions and assignments of error contained in the record.

Thomas H. Watts, H. Bisbee (John B. Jones, F. G. Caffey, and Alexander Troy, on the brief), for plaintiff in error.

W. A. Blount, W. W. Howe (A. C. Blount, Jr., on the brief), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Did the circuit court err in overruling the demurrer to the declaration? This is an action by a broker against his principal for commissions for selling real estate. The declaration should contain a statement of facts which entitles the plaintiff to recover. No fact material to recovery should be left to inference. By considering what it is necessary for the plaintiff to prove in such case, we ascertain what must be alleged in the declaration. The issues to be tried involve the questions: (1) What did the broker undertake to do? (2) Has he completed the undertaking within the time and upon the terms stipulated? (3) If not, is his failure attributable to the fault or interference of the principal? If on investigation it be determined that the broker has performed his contract within the

time and upon the terms agreed on, he is entitled to his commissions. If he has not, he has earned no commissions, unless performance by the agent was prevented by the fault or wrong of the principal. To entitle him to recover, he must prove, and therefore he must allege, (1) that he was employed as an agent or broker to sell the property; (2) that he sold it at the price and on the terms fixed by his principal, or on other terms agreed to by him, or that he found a purchaser ready, willing, and able to buy the property at the price and on the terms fixed or agreed to by the principal; and, if the sale was not made, that the failure to conclude the same was caused by some fault of the principal. The undertaking of the plaintiff was to sell the property. This is specifically averred, and the written authority to sell is made Exhibit A to the declaration. Addressing the plaintiff, the defendant wrote:

"I hereby authorize and empower you to sell my pine timber lands." etc. (Briefly describing the property and stating the price). "This authority to remain good for sixty days. I will make a deed, with general warranty, to the purchaser."

The plaintiff acted under this authority. His undertaking, therefore, was, clearly, to sell. The plaintiff, having been employed to sell the property, prepared, at the request of the defendant, an elaborate description of it. In this prospectus he estimates the number of acres; describes the booms, sawmills, and railways; states the value of the timber on the land, the amount of lumber that could be put on the market from the lands, and states the several sources of revenue from the lands. This estimate and description is made a part of the declaration, as Exhibit B. It tends to show the property to be worth much more than the price asked for it. It is not alleged that the defendant was in any way responsible for its contents. He did not sign it. He did not sign any agreement alleging that the statements of this memorandum are true. It is only referred to in the contract between the defendant and Mann as "a written memorandum given to the said Mann." There is no averment that Sullivan gave Mann the memorandum, or that Sullivan knew of its contents. This memorandum was made by the plaintiff, and no fact is alleged that would make the defendant responsible to the plaintiff for the truth of its statements. If the declaration can be construed to make Sullivan responsible to Mann for the truth of the prospectus, it certainly cannot be held, on its averments, that he ever represented to Milliken that the prospectus was true. Milliken, it is averred, and not Sullivan, is its author. It is the plaintiff's handiwork. There is no claim asserted in the declaration that a sale was prevented by the wrong or interference of the defendant. The case, therefore, depends on the allegation as to performance on the part of the broker. It is not alleged that the plaintiff sold the property. It is not alleged that he found a purchaser ready, willing, and able to buy the property. As a substitute for these averments, usual in suits by brokers to recover commissions, the plaintiff alleges that:

"In pursuance of the said employment the plaintiff procured that the defendant and one W. D. Mann should and did on November 16, 1890, enter

into a written contract by which the defendant agreed to convey the property mentioned in the written authority and memorandum hereinbefore set forth as Exhibits A and B [which memorandum is the memorandum referred to in the said written contract] to a corporation to be organized by the said Mann as set forth in the said agreement, and the said Mann agreed to cause the said corporation to be organized, and to pay to the defendant for the said property five hundred thousand dollars in cash, one million dollars in the first mortgage bonds, and one hundred thousand dollars in the stock, of the said company, all of which is set forth in the said agreement, which is hereby referred to, and, as Exhibit C, hereto attached and made a part hereof for greater particularity and exactness."

The plaintiff, therefore, bases his right to recover on the fact that he procured Mann to make a contract with the defendant on November 16, 1899. The claim is that the plaintiff is entitled to the commissions sued for, because he procured Mann to make this contract. If his contention is well founded, his right to the commissions accrued as soon as the contract was made. There is no averment as to what followed the making of the contract. The case made by the declaration ends with the signing of the contract. It is not alleged otherwise that Mann became the purchaser of the property. The agreement is made a part of the declaration. Reading it, we find that it is clearly binding on Sullivan to sell if Mann finally agrees to buy. But it clearly does not bind Mann unconditionally to purchase. Mann agrees "forthwith to select some one or more persons to go upon said lands and wharf and examine the same, and to make a report as to the amount of timber upon said lands, and the value thereof. * * * Upon examination of said report, if it shall appear that the statements set forth in a written memorandum given to the said Mann as to said property are substantially correct," then, and in that event only, Mann agrees to organize a corporation to buy the property on terms stated in the contract. The contract as to Mann is tentative, his acceptance being dependent on the result of an investigation to be made in 60 days. Can it be true that, as soon as this contract was signed, the plaintiff, who was employed to sell the property, was entitled to commissions, whatever the person or persons selected to examine the property might report? If the prospectus was untrue, was he entitled to commissions? Has he earned the commissions, under an employment to sell, by preparing a prospectus showing the great value of the property, and finding a customer who agrees to take the property if the description and estimated values are substantially correct? Did Sullivan, when he signed the contract with Mann,—a contract not binding on Mann unless Mann's investigations confirmed Milliken's prospectus,—become indebted to Milliken for commissions on the agreed price? Consider the question in this way: The authority which Sullivan gave Milliken to sell the property, of course, authorized him, as Sullivan's agent, to make a written offer to sell it. Except for the changes as to the terms of sale, he might well have signed as agent for Sullivan the contract with Mann. Now, if he had signed an agreement binding his principal to convey the land to Mann on the terms and at the price named in his authority, and Mann had agreed to buy the land, if, on the report of experts to be appointed to examine it, it was found

that the prospectus prepared by Milliken was substantially correct, would Milliken be entitled to commissions, as on a sale, whether Mann completed the purchase or not? Whether the land was examined by the experts or not? Whether the descriptions and estimates prepared by Milliken were true or not? We cannot think he would have earned his commissions by making such contract. To so hold would give the agent great advantage of his principal, and would encourage him to exaggerate the value of the property in his dealings with customers. If he was reckless in his descriptions and extravagant in his valuations, he might easily find a customer to contract to buy the property if it was found to be as valuable as the agent said it was. Such performance, surely, would not entitle him to commissions.

To show that the contract is binding on Mann, it is said that Sullivan could recover damages for the failure by Mann to complete the purchase. This proposition need not be examined further than to say it is clear that such damages could not be recovered without alleging and proving that the prospectus prepared by Milliken was substantially correct, or at least that the persons appointed to examine the property reported it so. An action for damages might lie on the averment that it was Mann's duty to appoint persons to examine the property, and that he failed to do so, and that the prospectus was substantially correct. But the declaration in question contains no averment of fact which shows that a recovery could be had in damages by Sullivan in a suit against Mann for a breach of the contract.

It is also said that the contract in this case was one of sale, because it could be specifically enforced. The question on this suggestion here is, could it be specifically enforced against Mann, admitting the averments of the declaration to be true? That it is a contract to sell that could be enforced by Mann against Sullivan, if Mann performed his part of the contract, may be admitted. Sullivan bound himself to convey. But Mann has not bound himself unconditionally to purchase. He stipulates for time to have the property examined, and agrees to purchase only in the event that it is found to conform to the prospectus. When it appears by the contract, in its express terms, that it was intended to be binding upon one of the parties alone, it may be specifically enforced against that party, although the remedy cannot be granted to him against the other party. *Pom. Cont.* § 169. The declaration in this case does not describe a contract for which Sullivan would have a remedy in equity for specific performance. Mann agreed to buy on condition that the prospectus was shown to be substantially correct, and there is no averment that it is correct. Unless the property met this requirement, there was no "true contract" of sale. *Id.* § 334. The prospectus not being substantially correct, the contract would not bind Mann, or at least he could revoke it. A court of equity will not enforce specific performance against a party who has the power of revocation. *Southern Exp. Co. v. Western North Carolina R. Co.*, 99 U. S. 191-200, 25 L. Ed. 319. The contract pleaded is not a completed sale, and, on the facts averred in the declaration, it is

not a contract that Sullivan could specifically enforce against Mann. *Mayer v. McCreery*, 119 N. Y. 434, 23 N. E. 1045. The declaration shows nothing done by Milliken to earn a commission, except to procure the making of the contract with Mann. To show a legal claim to commissions, it must allege a completed sale, or an enforceable agreement for sale. *Hammond v. Crawford*, 14 C. C. A. 109, 66 Fed. 425; *Jacobs v. Shenon*, 2 Idaho, 1002, 29 Pac. 44. Securing a preliminary or tentative agreement not shown to have resulted in a complete sale, and not binding on the proposed purchaser, is not sufficient. *Hale v. Kumler*, 29 C. C. A. 67, 85 Fed. 161. In such cases nothing should be left to conjecture or speculation. "There should have been as much certainty on the one side of the contract as upon the other. * * * The broker must complete the sale (that is, he must find a purchaser in a situation, and ready and willing, to complete the purchase on the terms agreed on) before he is entitled to his commissions." *McGavock v. Woodlief*, 20 How. 221, 227, 15 L. Ed. 884. The declaration states that the plaintiff, at the request of the defendant, "prepared a written memorandum describing the property." The action, however, is not for such service. The declaration, we think, is properly construed in that respect by the learned attorneys for the defendant in error, in their printed argument, when they say this is an action "to recover \$100,000 commissions alleged to have been earned by Milliken by selling," etc. We have so considered it. The services were performed under a special employment to sell, and no right to recover on the quantum meruit is asserted.

Tested by these principles and authorities, the declaration does not show a right of action against the plaintiff in error, and the demurrer to it should have been sustained.

The judgment of the circuit court is reversed, and the cause remanded, with instructions to set aside the verdict of the jury, sustain the demurrer to the declaration, and to grant a new trial, proceeding according to law and the views herein expressed. Reversed.

McCORMICK, Circuit Judge. I agree with my Brethren that the judgment of the circuit court in this case should be reversed, and the cause remanded to that court, with direction to award the defendant a new trial; but I am unable to agree with them in the ground on which they base the decision of the court. I do not construe the thirteenth count in the declaration as an action to recover compensation stipulated for in a written contract. Exhibit A, attached to that count, makes no mention of compensation. It simply authorizes and empowers the plaintiff to sell certain property of the defendant at a price named. Exhibit B shows only some of the services rendered by the plaintiff to the defendant; and Exhibit C helps to show further the services rendered by the plaintiff, and accepted and acted on to the extent therein shown by the defendant. And the count claims that, in pursuance of his employment, the plaintiff procured that the defendant and one W. D. Mann should and did on November 16, 1899, enter into a written contract by which the defendant agreed to convey the property mentioned in the writ-

ten authority and memorandum set forth as Exhibits A and B, which contract of November 16, 1899, is the Exhibit C attached to the count; and the plaintiff avers that by reason of the premises he became entitled to demand and receive from the defendant, and the defendant became obliged to pay to the plaintiff, for his services aforesaid, a large sum of money, to wit, the sum of \$100,000. How this can be construed as other than demanding the reasonable compensation for the services shown to have been rendered, I confess my inability to understand.

The twenty-fourth error assigned is, in my judgment, well taken. It is thus stated in the record:

"Twenty-Fourth Assignment of Error. After the jury had rendered their verdict, to wit, 'We, the jury, find for the plaintiff in the sum of thirty-one thousand nine hundred and fifty dollars, less six thousand nine hundred and fifty credit, with New York interest,' and after the jury had been polled, and each had said that it was his verdict, and after the said verdict had been read and ordered to be received, and after the other proceedings shown in the bill of exceptions, the court said to the jury: 'Gentlemen of the Jury: In this case you have found for the plaintiff, and you have found against the pleas of the defendant. You have found that the plaintiff has a right to recover. The court charged you that the only testimony,—charged you heretofore, and now I repeat, that the only testimony before you bearing, as I recollect it, upon the question of amount, was the testimony of Mr. Milliken, to the effect that in New York City, where the transaction took place, the customary and usual percentage was from five to ten per cent. on the full face value of the one million six hundred thousand dollars, and that he had agreed to take that amount as his compensation,—the amount of five per cent. You will take the case, gentlemen.' The defendant then and there, before the jury retired, excepted to the said action of the court. This assignment is on the ground that after the jury had rendered their verdict, and said verdict had been received by the court and ordered recorded, the court had no authority to again submit the matter to the said jury, or to charge them concerning their verdict."

And on this ground I concur in the judgment of reversal. Taken in connection with the other proceedings shown by the bill of exceptions to have been had at the time, the instruction was equivalent to the general charge to find for the plaintiff on the merits, and to render their verdict for 5 per cent. commissions on \$1,600,000, viz., for \$80,000, less the admitted credit. The jury so understood it, and returned their verdict accordingly:

"We, the jury, find for the plaintiff in the sum of \$80,000, with interest from the commencement of this suit, less the sum of \$6,950, with interest from January 8, 1900."

This shows clearly the taking of the case entirely from the jury, and substituting for their verdict the finding of the court.

DE LANCEY v. WELLBROCK et al.

(Circuit Court, S. D. New York. January 9, 1902.)

1. BOUNDARY—LAND BELOW HIGH-WATER MARK.

The inshore boundary of a grant of a strip of land below high-water mark, 400 feet wide, changes with the high-water mark, the shifting of the shore being from natural causes.

2. GRANT OF LAND BELOW HIGH-WATER MARK.

The state, having granted in fee a strip of land under water, extending out 400 feet from high-water mark, cannot thereafter give another the right to erect a public dock thereon.

At Law.

An action for ejectment to recover the possession of a strip of land under water in front of uplands of the defendants Wellbrock at City Island, in the city of New York, and extending out about 400 feet from high-water mark. The premises are situated under the waters of Long Island Sound, adjacent to Minneford's, now called City, Island, and are part of a large tract which extends 400 feet from high-water mark outward and under the waters of the sound on the east, west, and south sides of the island. This tract of land under water was granted by the English crown to Benjamin Palmer, his heirs and assigns, by royal patent dated May 27, 1763, upon the tenure of free and common socage and upon the express condition that he pay to the said crown or its successors yearly, forever, a certain rent. At the time of this grant Benjamin Palmer was the owner of the entire upland of the island. The colonial assembly, and afterwards the legislature of the state of New York, the people having succeeded to the rights of the crown, passed a number of acts directing the grantees of lands chargeable with perpetual rents to redeem from their defaults, and, in case of their failure to do so, declaring that such lands should be sold by reason of such nonpayment. By chapter 222 of the Laws of 1819 the lands so forfeited were directed to be sold by the comptroller of the state of New York. Under this act the lands were sold on March 26, 1826, but the deed was not delivered until April 5, 1836, when the comptroller duly transferred by patent the said premises about City Island to Elias D. Hunter, who was plaintiff's ancestor and devisor. See *De Lancey v. Piegras*, 138 N. Y. 26, 33 N. E. 822, and *Same v. Hawkins*, 23 App. Div. 8, 49 N. Y. Supp. 469. In 1884 the defendants Wellbrock procured a grant from the state for the premises under water opposite uplands owned by them upon which they erected a public dock or wharf extending about 350 feet into the waters of Long Island Sound. These premises, the subject of this action, are a part of the strip of land under water contained in the Palmer patent, and the dock or wharf so erected upon the premises by the defendants Wellbrock was open to the public upon payment of the usual rates for wharfage.

Walter D. Edmonds, for plaintiff.

George F. Martens and Gratz Nathan, for defendants Wellbrock.

John Hunter, Jr., for defendants Hunter.

LACOMBE, Circuit Judge (after stating the facts as above). I have taken into consideration the various authorities which have been cited,—the earlier cases concerning this City Island property,—and reached a conclusion as to the disposition to be made of the case. Really, there is no question for the jury here. There is no disputed issue of fact. There might be some dispute as to what the facts implied or what legal conclusion the facts called for, but what the facts are is not really in dispute here.

The first question that comes up is as to the extent of the grant originally to Palmer, and subsequently, by sale of the comptroller, passing to the predecessors of the plaintiff. Of course, it is a well-known principle that where courses and distances are given in general terms, with quantities and so on, and the deed is accompanied by a map with metes and bounds laid out, and the map is referred to and made practically a part of the deed itself, the map will sometimes control; but the principle, for all that, is simply the ordinary

principle of the interpretation of all written documents, that the whole must be taken into consideration; and taking the entire document in, and working it over, it is interpreted according to what the plain intent of it is found to be from an examination of all its parts. Here, despite the circumstance that the map that is recited, and is referred to again in the deed itself in the conveying clause, has distances which are varying, the entire body of the deed—the deed and map together—leaves in my mind no doubt at all as to the plain meaning of what the crown at that time undertook to convey. It is all controlled by the express and specific statements as to width included in it. No matter what may be said, therefore, in the deed or in the accompanying map, as to metes and bounds, or anything else, it was intended to convey a strip 400 feet in width in every part, stretching out from the common high-water mark around the island, except in the places where there was no grant at all.

With that construction, the next question is the location of that tract upon the soil. The inshore boundary is the common high-water mark. There is no indication of any cataclysm that has taken place, making an extraordinary change there. Whatever shifting there has been in or out of the shore line has been only gradual and normal in its character. The evidence points that way. Under those circumstances, it seems to me the rule laid down in *Scrutton v. Brown*, 4 Barn. & C. 485, and which is approved in *Trustees v. Kirk*, 84 N. Y. 215, 38 Am. Rep. 505, is the rule to be applied that, where the crown grants a subject the soil between high and low water mark, that boundary shifts to such an extent as that the shore itself may shift by entirely natural causes, without any earthquake or anything extraordinary, by the operation of accretion and erosion. Thus, under the circumstances, at one time the grantee of a strip like this might gain land towards the shore, but he would not gain on the whole, because the more he gained inshore by the shifting boundary the more he would lose by his outer boundary, and he would not get any more than 400 feet. And, per contra, he might lose from the land inside, and as long as his 400-foot line did not take him beyond the ownership of the soil of the state he would not lose on the whole, because it would shift his outer line out, though he might lose even then, because there might be no place for his outer line to go. I am of the opinion, therefore, that the common high-water mark, as it stood at the time of the commencement of this suit, or thereabouts, is to be taken as the inshore boundary, from which the 400 feet are to be measured off; and, that being so, clearly the premises which are described in the complaint are within the boundary of this particular grant. That being so, the next question that arises is, what is the effect of the subsequent deed of the commissioner of the land office to Wellbrock? I have gone over these cases (*De Lancey v. Piepgras*, 138 N. Y. 26, 33 N. E. 822, and *Same v. Hawkins*, 23 App. Div. 8, 49 N. Y. Supp. 469), and it seems to me that the controlling point of view is just this: The state granted a fee. That has been held by the court of appeals. It granted a title in fee to

the land under water—that 400-foot strip—to Palmer, and again, through the comptroller's deed, to Hunter. There was an easement reserved in it,—an easement that the people possessed of navigating over it and anchoring and fishing; an easement that the state possessed over land covered with water, where the soil belonged to a private owner and the water was navigable. That also remained as an easement upon the land. It is not necessary for us to discuss here what the state might or might not have done, or might or might not have permitted to be done, in the way of exercising easement itself or authorizing anybody else. What the state undertook to do was to give, again, the fee to another person. That it could not do, in my opinion. I am referred to cases holding that a grant cannot be held void in a collateral action. But it is not necessary to declare it void. It is sufficient to declare that this deed here introduced in evidence does not convey to Mr. Wellbrock the right to maintain upon the land, the fee of which has already been granted to somebody else, the particular structure which he put up. These conclusions lead to the direction of a verdict in favor of the plaintiff.

Another point raised in the case is as to the effect upon the defendants Hunter of deed when they are out of possession of part of the property. As to that, I shall direct affirmative relief in favor of the defendants Hunter, the same as I do in favor of the plaintiff. Of course, all this is with the same proviso that was indicated in the Piepgras Case as proper to be inserted in the judgment. I will therefore deny the motion of the defendant to direct a verdict, with a separate exception on the separate grounds. I deny the motion of the defendant to exclude the defendants Hunter from any affirmative relief, with an exception to such disposition.

A verdict is directed in favor of the plaintiff and of the defendants Hunter, stating their respective titles and rights in the premises, in the ordinary form of a verdict in ejectment, for the premises described, excluding the strip which the testimony of the plaintiff shows to be without the bounds as now plotted, and inserting in the verdict the proviso and reservation contained in the patent to Palmer.

McLEAN v. MAYO.

(District Court, E. D. North Carolina. December 21, 1901.)

INJUNCTION—RESTRAINING PROSECUTION OF SUIT—DISSOLUTION.

In a suit by a trustee in bankruptcy to restrain the prosecution of an action by a third person against a United States marshal for trespass in seizing the stock of goods under a warrant of the bankruptcy court, on the ground that it prevented a settlement of the estate, where defendant's verified answer disclaims any interest in the goods in the trustee's hands, and surrenders all claim thereto, and alleges defendant's election to rely on his remedy in the state court against the marshal individually, and not as an official, the temporary restraining order will be dissolved.

F. H. Burton and B. F. McLean, for plaintiff.

Chas. F. Warren, R. H. Battle, and W. B. Rodinson, for defendant.

PURNELL, District Judge. A. D. McLean, trustee of Hoyt & Mitchell, bankrupts, asked for an injunction to restrain the prosecution of a suit by Mayo against Dockery for trespass in seizing the stock of goods under a warrant of the bankruptcy court, alleging that it obstructs and prevents a settlement of the bankrupt estate. Mayo files a duly-verified answer to the rule to show cause, disclaiming any interest in the goods in the hands of the trustee, and surrendering any claim therein he may have, and alleging his election to rely on his remedy in the state court against Dockery individually, and not as United States marshal, and raises the question of jurisdiction of the district court to enjoin the prosecution of that suit. See *Bryan v. Bernheimer*, 21 Sup. Ct. 559, 560, 45 L. Ed. 814, 5 Am. Bankr. R. 629-631. The case here seems to be controlled by the decision of the United States supreme court in *Lerough v. Hudson*, 109 U. S. 468, 3 Sup. Ct. 309, 27 L. Ed. 1000. That case, it is true, was in the circuit court, while this is in a court of bankruptcy, which may, under certain circumstances, do what the circuit court cannot,—restrain a state court. Considering the case above cited in connection with the recent decisions of the supreme court in *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, 4 Am. Bankr. R. 163, and *Wall v. Cox*, 181 U. S. 244, 21 Sup. Ct. 642, 45 L. Ed. 845, 5 Am. Bankr. R. 727, I am of the opinion that the allegation in the petition that the suit of Mayo against Dockery, who, it appears, is fully indemnified, interferes with the process of the bankruptcy court, is too remote to justify this court in exercising the extraordinary power of continuing the injunction forbidding the parties to proceed, or the state court from exercising jurisdiction of the suit of Mayo against Dockery. While the bankruptcy act creates the office of trustee in bankruptcy, such trustee is a quasi officer of the court in a qualified sense. He is in reality elected by and represents the creditors of the bankrupt, under the provisions of the bankruptcy act. The bankruptcy court will protect the trustee in the discharge of his quasi official duties, but, as the representative of the creditors, his duties as such representative must be discharged, not as an officer of the court, strictly speaking, but as provided in the bankrupt act.

It is therefore considered, ordered, and adjudged that the answer of the respondent herein is sufficient, and this court has no jurisdiction in this matter; that the rule be discharged, and the restraining order dissolved.

In re KLEINHANS et al.

(District Court, W. D. New York. January 9, 1902.)

No. 818.

1. BANKRUPTCY—RECEIVERS—SUMMARY PROCEEDINGS—JURISDICTION.

Bankr. Act, § 2, subd. 3, gives the court in which bankruptcy proceedings are pending power to appoint marshals or receivers to take charge of the property of the bankrupt, and section 70 provides that a trustee of a bankrupt's estate is vested with the title of the bankrupt at the date of the adjudication. *Held*, that where a receiver was appointed to take charge

of the goods of the bankrupt, and prior to his qualification lessors of the bankrupt instituted summary proceedings in the state court to recover the leased premises containing the goods of the bankrupt, but no possession was obtained prior to the qualification of the receiver, he was entitled to an injunction restraining the summary proceedings.

2. SAME—REMOVAL OF ASSETS.

The lessors may petition the court to have the goods of the bankrupt removed and the premises vacated by the receiver.

In Bankruptcy. In the matter of a petition that Horace Kleinhans and Edward L. Kleinhans be adjudged bankrupts. Motion by Seaver & Jenkins and others to vacate an injunction against summary proceedings instituted by them to obtain possession of the premises leased to the bankrupts. Motion denied.

Seaver & Jenkins, for landlords James Mooney and others.

Baker, Schwartz & Dake, for receiver Gabriel Elias.

Shire & Jellinek, for receiver Moses Kochenthal.

HAZEL, District Judge. This is a motion to vacate an injunction against summary proceedings instituted by the landlords of the alleged bankrupts in the municipal court of Buffalo. It appears from the papers read on the motion that on the day of filing the creditors' petition, returnable January 8, 1902, that Horace and Edward L. Kleinhans be adjudged bankrupt, an order to show cause why a receiver should not be appointed was granted. Counsel for petitioning creditors and counsel for the alleged bankrupts appeared in court on the afternoon of the same day that the order was granted, and consented to the appointment of Gabriel Elias as receiver. Mr. Elias was appointed receiver, and duly qualified on December 27, 1901, the following day, and on the same day took into his custody the property of the bankrupts, consisting of men's furnishing goods, contained in store leased by the alleged bankrupts from James Mooney and others. The business was by order of the court continued by the receiver. At this time H. Kleinhans & Co., the alleged bankrupts, were indebted to the lessors of the store in the sum of \$3,125.00, the rent for the month of December, payable December 1st in advance. On the same day that the receiver was appointed summary proceedings were commenced in the state court to remove the alleged bankrupts from their store for nonpayment of rent. The removal proceeding was enjoined by this court on the application of the receiver pending a motion to continue the stay until the adjudication. Counsel for landlords lay stress upon the contention that the jurisdiction of this court did not attach before that of the municipal court, and that the receiver did not obtain title to the property prior to the institution of the proceedings in the municipal court.

The question presented here is not whether the receiver obtained title to the property of the alleged bankrupts by virtue of his appointment, but rather whether the bankruptcy court obtained such jurisdiction over the res at the time of filing the involuntary petition to have H. Kleinhans & Co. adjudged bankrupts as to justify this court's intervention in an attempt on the part of the lessors to oust the receivers and officers of this court, to the detriment of the bank-

rupt estate, from the possession of the leased premises. Counsel for lessors contend that by section 70 of the bankrupt act a trustee of a bankrupt's estate is vested by operation of law with the title of the bankrupt as of the date of the adjudication, and that in the absence of an express provision of the bankrupt act vesting title in the receiver as of the date when a petition is filed it must be held that the title continues in the alleged bankrupts until a trustee is appointed, and therefore the process of the state court to remove for nonpayment of rent ought not to have been enjoined. This contention is unsound. Coincident with the filing of a petition in bankruptcy, either voluntary or involuntary, a court of bankruptcy acquires control over the estate of a bankrupt or person charged with acts of bankruptcy. It may immediately seize and lay claim to all property either in the actual possession of the bankrupt or such as may be reduced to possession. Power is conferred on the court to appoint marshals or receivers to take charge of the property of bankrupts. Section 2, subd. 3, Bankr. Act. It is the immediate duty of the receiver of the property to preserve the estate intact, and to conserve the assets and estate of the bankrupt, pursuing that course pointed out by the act which will best promote and further the interests of the creditors. True, the receiver here is not vested with a title to the property of which he becomes custodian, nor does any provision of the bankrupt act vest him with powers similar to that of a trustee appointed by the creditors. The property, however, corporeal and incorporeal, either comes into his possession as an officer of the court, or such right to possession is obtained as will tend to retain intact the actual and visible assets of the bankrupt, to the end that, when an adjudication is made, the trustee may be vested not merely with the bankrupt's title to the property, but that he may have and receive the actual possession of all assets in the control of the bankrupt at the instant that the protection of the court was invoked. It is insisted on behalf of the lessors that, inasmuch as the receiver did not qualify before the summary process to remove the tenants was issued by the state court, he acquired no such right of possession as to deprive the state court of its jurisdiction. The receiver, however, had qualified, and this court was in possession, through its receiver, before the lessors had obtained possession or the right of possession through their summary proceeding, and before the application for an injunction was made. Manifestly, the jurisdiction of the court having attached before that of any other court, the receiver, in the exercise of his duty, properly invoked the court's jurisdiction to have the proceedings instituted in the state court enjoined. In *re Chambers, Calder & Co.* (D. C.) 98 Fed. 867. In *re Metz*, Fed. Cas. No. 9,509, was a case very similar to this. In that case an injunction was granted restraining interference with the property of the bankrupt before adjudication in an involuntary proceeding and restraining the landlord from dispossessing them. The injunction order was made after the proceedings to dispossess the debtors were instituted. Judge Blatchford said:

"The occupation of the premises by the marshal was the occupation of them by the court. * * * A landlord who lets premises to a tenant to

be occupied for the purposes of trade must be held to do so with the full understanding that the tenant may be proceeded against in bankruptcy, and that the bankrupt court may be called upon to take possession of the goods of the tenant on the premises. In many cases it would be impossible to remove the goods, before a sale of them, without great loss and injury."

The injunction is continued until after an adjudication or the dismissal of the petition. If H. Kleinhans & Co. are adjudicated bankrupts, a further stay may be granted. The question of allowance for rent during the time of occupancy by the receiver is not before me. In view of the fact, however, that quite serious damages may result to the lessors by reason of the receiver's occupancy of the store in question, and that they may be deprived of an advantageous lease for a period of years either at the same or greater rental, it appears to me to be proper to suggest that under such circumstances the lessors may petition the court to have the goods of the alleged bankrupts removed and the premises vacated by the receivers.

In re HENRY C. KING CO.

(District Court, D. Massachusetts. January 22, 1902.)

No. 3,916.

1. BANKRUPTCY—PROOF OF CLAIMS—SURRENDERING PREFERENCES.

If a given payment received by a creditor without knowledge of insolvency need not be surrendered before proof, not being a preference within the bankruptcy act because the result of the whole transaction is to increase the net indebtedness to the creditor, the same payment received with knowledge of insolvency is not a preference, and need not be surrendered.

2. SAME—DECREASE OF NET INDEBTEDNESS.

A bankrupt's clerk, four months before the date of the bankruptcy, had a priority claim against him for wages for \$300 and a common claim for \$33. During the four months he earned \$415, and at the date of bankruptcy, if no payments had been made reducing the same, would have had a priority claim for \$300 and a common claim for \$478. During the four months he received \$404 in goods and money. He applied \$333 in settlement of the wages due four months before bankruptcy, and \$70 on wages earned within that period, but which had then lost their priority, so that his common claim was reduced to \$74. *Held* that, his common claim having been reduced within the four-months period, the clerk had received a preference, and, it not being surrendered, could not prove the balance of his claim, unless willing to do so as a creditor not entitled to priority, in which event his claim would have increased within the four months, and there would have been no preference.

In Bankruptcy.

Wilbur E. Rowell, for creditor proving claim.
Jeremiah J. Mahoney, for objecting creditors.

LOWELL, District Judge. In this case the creditor, a clerk of the bankrupt, had, four months before the date of the bankruptcy, a claim against the bankrupt for wages amounting to \$333.19. During four months immediately preceding bankruptcy he earned \$445, and within three months preceding bankruptcy earned more than \$300. During the four months, however, and with knowledge of the

bankrupt's insolvency during that time, he received in goods and money \$403.77, having an open running account with the bankrupt; on the one side for wages due, and on the other side for groceries, wood, coal, and money received from the bankrupt at irregular intervals. \$333.19 was credited in settlement of the wages due four months before bankruptcy. The balance received—\$70.58—was credited upon the wages earned within four months of bankruptcy. The creditor now seeks to prove for \$300 as a preferred creditor, under the decision of the circuit court of appeals in *Dickson v. Wyman*, 111 Fed. 726. But that decision is carefully limited to a transaction "without any intention to acquire any unjust preference," "without reasonable cause on [the creditor's] part to believe him insolvent." In the case at bar the creditor knew the bankrupt's insolvency. In spite of the language in *Dickson v. Wyman*, it would seem that knowledge of insolvency cannot affect the question of preference or no preference. A preference is defined in Bankr. Act, § 60a, without reference to knowledge of insolvency. *Pirie v. Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. That case held that the transaction was none the less a preference because the element of knowledge was wanting, and, if this be so, a transaction can hardly be any more a preference because knowledge of insolvency is present; in other words, knowledge of insolvency converts an innocent preference which may be retained if the creditor will forego proof, into a guilty preference which may be recovered back by the trustee. But, since the element of knowledge is excluded from the definition of preference, it follows that even an innocent preference—one received without knowledge of insolvency—is still a preference, and must be surrendered before proof. It follows also that knowledge of insolvency cannot transform into a preference an act which otherwise is no preference. If a given payment, received without knowledge of insolvency, need not be surrendered before proof, because it is no preference, the same payment received with knowledge of insolvency is not a preference. If a payment by the bankrupt which would otherwise be a preference is yet not a preference because the result of the whole transaction is an increase of the net indebtedness to the creditor, this must be equally true whether knowledge of insolvency exists or not. The bankrupt act does not provide that any payment received by the creditor from the bankrupt within four months is a preference, but only when the effect of this payment "will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." If this is not the effect of the payment, there is no preference, and if, within four months, the net indebtedness is increased, the court of appeals has held in *Dickson v. Wyman* that the creditor does not obtain a greater percentage of his debt. If, by reason of increase of net indebtedness, a certain payment does not constitute a preference, then a creditor who, with knowledge of insolvency, receives such a payment, receives no preference, and so, in spite of his knowledge of insolvency, may retain the payment against the trustee, and need not surrender it before proving the rest of his claim. Bankr. Act, § 60b, does not

provide that the trustee may recover all payments received with knowledge of insolvency, but only preferences so received. This seems to be the inevitable result of *Dickson v. Wyman*, combined with *Pirie v. Trust Co.* I must hold, therefore, that knowledge of insolvency did not make a preference of acts which otherwise did not amount to a preference.

But the claim cannot be allowed priority. Four months before bankruptcy the creditor had a claim of \$333.19. Though this claim then had priority, it is now without priority. A further claim of \$445 accrued within the four-months period. If no payment had been made on either claim, the creditor would now have a priority claim of \$300, and a common claim for \$478, but the priority claim at the time of bankruptcy would not be that part of the claim which had priority four months earlier. The priority of the earlier claim would have disappeared, and for the purposes of this discussion that claim must be treated as a common claim, because, in these proceedings, it must be proved as such. The creditor seeks to apply the payment which he has received wholly to the common claim. The result of this application will be to leave him a common claim of \$74, due at the date of bankruptcy, a sum smaller than the claim which was due four months earlier. If he be now allowed to prove a priority claim for \$300 without surrendering the payments he has received, his common claim will have been diminished within the four-months period, and so, under the decision of *Dickson v. Wyman*, he has received a preference. If any preference has been received, it is undoubtedly a guilty one, and can be recovered back by the trustee under section 60b, Bankr. Act, and this without any set-off as provided in section 60c. That the creditor should be allowed to prove any claim against the estate, whether having priority or not, when the trustee has a claim against him for a guilty preference, is not to be permitted. It was argued that at the beginning of the four-months period the creditor had a claim for \$300 having priority, and a common claim for \$33, and that at the time of the bankruptcy he had a priority claim for \$300 and a common claim for \$74, and that, therefore, his common indebtedness had increased within the four months, rather than decreased; but, as has been said, the indebtedness which had priority at the beginning of the four months must, for the purposes of this case, be treated as having lost it, and therefore the common indebtedness must be deemed to have diminished. If the creditor is willing to prove as a creditor not having priority, inasmuch as his claim will then have increased within four months prior to bankruptcy, he may prove without surrendering the payments made to him, but his claim of priority must be disallowed. Unless the creditor desires to withdraw it, his proof of claim will be allowed without priority.

McNAIR et al. v. McINTYRE et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 417.

1. **BANKRUPTCY—PARTNERSHIP—LIENS.**

Validity of mortgage given by partnership is not affected by bankruptcy proceedings within four months thereafter against one of the partners alone.

2. **SAME—COSTS OF SALE.**

The proceeds of property of a bankrupt subject to liens should first be charged with the costs of sale, and the liens be then paid out of the remainder, according to their priority.

3. **SAME—PREFERENCE.**

A creditor given a mortgage for past indebtedness within four months of bankruptcy proceedings against the debtor may retain the preference, though brought into the proceedings in invitum; no claim being made against the general estate, and the mortgage being executed with no intent to give a preference and no knowledge of the insolvency.

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of North Carolina, at Wilmington, in Bankruptcy.

E. K. Bryan, for petitioners.

Iredell Meares, for respondents.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

SIMONTON, Circuit Judge. This case comes up upon a petition to superintend and revise in matter of law proceedings in the district court of the United States for the Eastern district of North Carolina, sitting in bankruptcy. 109 Fed. 857. The facts of the case are these: The firm of McNair & Pearsall were creditors of the firm of Sanderlin & McMillan. On 13th of September, 1900, Sanderlin & McMillan executed to McNair & Pearsall a chattel mortgage to secure a sum of \$1,500, of which \$1,282.10 was cash then lent, and the remainder an amount then due by Sanderlin & McMillan to the mortgagees on open account. The personalty mortgage was a sawmill plant at McKee's Cut, on the Carolina Central Railroad, in North Carolina. The mortgage was duly recorded. On the same 13th September, 1900, J. B. Sanderlin, one of the firm of Sanderlin & McMillan, executed a chattel mortgage to McNair & Pearsall, securing the sum of \$2,500, of which sum \$805.52 was cash then advanced to him, and the remainder was the amount of an open account at that date due by Sanderlin to the mortgagees. This also was duly recorded. The firm of Sanderlin & McMillan was dissolved in October, 1900. In January, 1901, within four months of the execution of these mortgages, Sanderlin was adjudged a bankrupt. Stephen McIntyre was made trustee of the estate. The trustee took possession of all the property in which Sanderlin had an interest, including the property covered by these two mortgages, and under proceedings instituted by him in the bankrupt court, to which he made McNair & Pearsall parties, sold the mortgaged property free of all liens. Up

to the date of these proceedings McNair & Pearsall had not appeared in the bankruptcy court, and had not made any proof of claim.

The question made is as to the disposition of the proceeds of the sales of the mortgaged property. The property mortgaged by the firm of Sanderlin & McMillan brought \$2,308.50. That mortgaged by Sanderlin alone brought \$2,605.50. The referee proposed to pay out of the proceeds of the first-named mortgage two small liens in existence at its date held by other parties, and then to apply the remainder to the payment of the chattel mortgage given by Sanderlin & McMillan, which firm has not been adjudicated bankrupt. He also proposes to charge against each lien so paid the proportionate part of the expenses of sale as its amount bears to the total proceeds.

The referee finds, and it is not disputed, that the Sanderlin mortgage was executed in good faith by him, not intended as a preference, and without knowledge on his part or on that of the mortgagees that he was insolvent. He recommends that so much of the mortgage debt as secures the \$805.59 advanced in cash be paid, with its interest, out of the proceeds of sale; that the remainder of the proceeds go into the general estate, and that McNair & Pearsall prove the remainder of their claim against the bankrupt estate as general creditors. He makes the same suggestion with respect to the proportionate amount of costs as he made as to the proceeds of the first-named mortgage. Upon review of his report by the district court, the action of the referee in recognizing the validity of the mortgage of Sanderlin & McMillan was affirmed. In this we concur with the court below.

The ruling of the referee with regard to the proportionate division of the costs was reversed, the court ordering that the entire costs be first paid out of the fund, and that the liens be paid out of the remainder, according to their priority. This is the most simple way of settling the costs, and the ruling on this of the court is affirmed.

The district court sustained the referee in his ruling that only \$805.59 be paid to McNair & Pearsall out of the proceeds of the Sanderlin mortgage, and that for the remainder of their claim they come in only as general creditors. The surplus proceeds of sale are placed by him in the general fund. It having been found without question that neither the mortgagor nor the mortgagees were aware of the insolvency of Sanderlin, and that the mortgage was executed in good faith, with no intent to give a preference, we are of the opinion that the referee and the court erred in this conclusion. The law upon this subject is declared in *Pirie v. Trust Co.*, 182 U. S. 446, 21 Sup. Ct. 906, 45 L. Ed. 1171. That case decides that, although a creditor may have received a preference within four months of the adjudication of bankruptcy, he may retain it if he did not have cause to believe that it was intended as a preference or with knowledge of the insolvency. If he retain it, however, he loses all claim against the estate of the bankrupt.

It would seem to be a corollary from this case that, if he insists upon his claim against the general estate, he will be held to have waived his lien. In the case at bar, McNair & Pearsall made no such claim. On the contrary, they disclaim all intention so to do.

They clearly are entitled to hold their lien. It is true that they have come into this case. But this was only in obedience to the order of the court making them parties by proceedings in invitum. These proceedings were instituted for the express purpose of selling the mortgaged property free of lien, and, of course, of transferring the lien to the proceeds. McNair & Pearsall came in for this purpose, insisting on their lien. In this respect the ruling of the district court is reversed.

The case is remanded to that court, with instructions to carry out the points settled by this judgment.

McGAHAN et al. v. ANDERSON et al.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1902.)

No. 409.

1. APPEAL—BANKRUPTCY—QUESTIONS CONSIDERED.

The motion of a bankrupt to dismiss an appeal from a judgment allowing certain exemptions, for want of jurisdiction, may be denied without consideration on the merits, when the bankrupt fails to take a cross appeal.¹

2. BANKRUPTCY COURTS—JURISDICTION—EXEMPTIONS.

The bankruptcy court given jurisdiction by Bankr. Act 1898, § 2, subd. 11, to determine all claims of bankrupts to their exemption, has exclusive jurisdiction to determine such claims, as any other rule might create a conflict of jurisdiction, and deprive the bankruptcy court of its right to determine all questions arising under the act.

3. SAME—PLEADINGS—ISSUES.

Where a bankrupt files a schedule claiming his homestead and personal property exemptions as authorized by Bankr. Act 1898, § 7, subd. 8, and the assignee, in filing his account with the court, as required by section 47, gives the estimated value of each article, as required by general order No. 17 (18 Sup. Ct. vl.), which also authorizes exceptions therefrom to be taken within 20 days, and a creditor files exceptions, and the referee certifies the question of exemptions to the court, such question may be considered without being specially pleaded.

4. SAME—EXEMPTIONS—EVIDENCE—SUFFICIENCY.

A bankrupt admitted that he began the erection of a house claimed as a homestead after July 1st, but did not make a candid disclosure as to where he received the money for its construction. He admitted that a portion thereof came from the sale of goods which were not paid for. The house was built on a lot owned by his wife, which was conveyed to him so that he could claim a homestead. An involuntary petition in bankruptcy was filed against him on October 25th, and he was declared a bankrupt within a month thereafter. *Held* not sufficient to show that the bankrupt was solvent, and able to pay his creditors, at the time of the construction of the house, so as to enable him to acquire it as a homestead with money taken from his business.

5. SAME—EVIDENCE—BURDEN OF PROOF.

A bankrupt claiming a homestead exemption has the burden of showing by clear and conclusive proof that he was solvent, and able to pay all claims against him, when he acquired the homestead.

6. SAME—PERSONAL PROPERTY EXEMPTION—UNPAID MERCHANDISE.

Under Const. S. O., which allows a debtor to hold personal property exempt from attachment to the amount of \$500, but provides that no

¹Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 O. C. A. 9.

property shall be exempt from payment of obligations contracted for the purchase of such property, a bankrupt is not entitled to such exemption out of the proceeds of a sale by the trustee in bankruptcy of merchandise which has not been paid for.

Appeal from the District Court of the United States for the District of South Carolina, Sitting in Bankruptcy, at Charleston.

For former opinion, see 103 Fed. 854.

P. A. Willcox (Claudian B. Northrop, on the brief), for appellants.
W. F. Clayton, for appellees.

Before SIMONTON, Circuit Judge, and JACKSON and PURNELL, District Judges.

JACKSON, District Judge. It appears from the transcript of the record in this case that the bankrupt filed his petition on the 5th day of October, 1899, praying that he be adjudged a bankrupt, and that on the 18th day of November, 1899, he was adjudged a bankrupt, and at the time of his adjudication he filed a schedule of his property that he claimed as exempt under the constitution and the laws of the state of South Carolina. On the 4th day of January, 1900, the trustee set apart, as being exempted under the laws, personal property to the amount of \$500 and realty to the amount of \$1,000, making a total of \$1,500. On January 9, 1900, exceptions were filed by creditors of the bankrupt to the report of the trustee. On January 11, 1900, the bankrupt filed a notice requiring the creditor T. R. McGahan to make exceptions more definite, and on January 15, 1900, an amendment to the exceptions was filed. On February 28, 1900, the referee made his report on the nature and character of the indebtedness of the bankrupt, under the order of the court before entered, which required him to take such further proceedings as were required by the act. On the 3d day of April, 1900, the referee filed his report upon the exceptions to the exemptions, and reported that the bankrupt was entitled to an exemption of \$425 in cash, and \$50 for wearing apparel, and \$25 for a bicycle, making in all \$500; and further reported that he was entitled to his homestead, a house and lot, valued at \$1,000. Exceptions were taken to this report of the referee, and heard by the court. The court, in its first opinion, after due consideration, reached the conclusion that the bankrupt was not entitled to an exemption of \$425 set apart by the referee, but was entitled to the allowance of articles of personal property of the value of \$75, and to the homestead exemption of the value of \$1,000. This is briefly the history of the case up to the time of the appeal, which was taken to the ruling of the court upon the questions of the two exemptions.

The first question that we shall consider is the one raised by the appellees upon their motion to dismiss this proceeding for the reason that this court is without jurisdiction. We might very well dispose of this question by stating that there is no cross appeal upon the part of the appellees to raise any such question. The only appeal from the rulings of the court disclosed by the record is that of the appellants, which we will now consider. The learned judge

well remarked that "by section 2, subd. 11, of the bankrupt act, this court has jurisdiction to determine all claims of the bankrupt to exemptions." In the nature of things, this must be so. The bankrupt court, as a necessity, must alone deal with the exemptions of the bankrupt. If any other tribunal was to intervene to determine this question, it would be the exercise of a jurisdiction, which might result in a conflict of authority, and deprive the bankrupt court of its rightful power to speedily determine all questions of law and right arising under the bankrupt act, which was clearly the intention of congress when it enacted the law. The supreme court, which was designated by the bankrupt act to promulgate certain general orders in bankruptcy, expressly prescribed in general order 17 (18 Sup. Ct. vi.) the duties of the trustee after receiving the notice of his appointment, one of which was to make a report to the bankrupt court within 20 days after receiving said notice of the articles set aside by him. We think that we may fairly infer that the supreme court would not have adopted general order 17 (18 Sup. Ct. vi.) if it had any doubt about its power and authority to do so; certainly it cannot be contended that congress, in the passage of a general bankrupt act, has not the right to determine the terms and conditions upon which a bankrupt may secure the benefit of the act. This principle has been recognized in every bankrupt act which has been passed by congress since the creation of our government. The express provision in this act which we have now under consideration makes it the duty of the trustee to set apart such property to the bankrupt as provided for under the laws of the state in which he lives as being exempt from seizure under any legal process whatever. This appears to have been done by the trustee as required by the act. It does not appear to us that it is necessary to cite any authorities to support this position, but, if any were needed, it would be found, after an examination of the case of *In re Mayer*, 47 C. C. A. 512, 108 Fed. 602, that it fully sustains this position, the court holding that by section 2 of the bankrupt act the courts of bankruptcy are given jurisdiction to determine all the claims of the bankrupt to their exemptions. The supreme court, in the case of *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, we think, fully sustains this position.

The first error assigned by the appellants is to the ruling of the court below in reference to the homestead exemption in the real estate. The learned judge below, who heard this case upon a rehearing of this question, held, in his second opinion, that the case was "not before him in such a shape that would enable him to decide it." It is to be observed that by section 7, subd. 8, of the bankrupt act, the bankrupt is required to file his claim for such exemptions as he may be entitled to. Evidently the purpose of congress in the enactment of this statute was to protect an insolvent debtor at least to the same extent that he was protected by the laws of his state, provided that the exemption claim did not exceed the amount allowed under the laws of the state in which the bankrupt lives. When the bankrupt had exercised this right under the act of congress by filing his schedule as prescribed by the act, then it

became the duty of the trustee to set aside the property specified in the exemption for the benefit of the bankrupt and his family, if any he had. As soon as the property was set apart under the claim of the bankrupt, he became invested with the title thereto free from all existing debts; but such title or claim to such exemption might be challenged, which challenge must be heard by the bankrupt court, as it alone could determine the right to the property between the bankrupt and the trustee, who alone represents the rights of the creditors in the matter. It might be otherwise if it were a contest between the bankrupt and a third party, who claimed any portion of the property set aside under the exemption, or, in fact, any other property of the bankrupt that the trustee might seek to recover from a third party. We concur with Judge Jenkins in his able opinion in the case of *In re Mayer*, supra, when he says undoubtedly the bankrupt court is given jurisdiction, which before the act was lodged in all the courts of general jurisdiction, to determine, if there be any dispute, as to the rights of the bankrupt under his claim of exemption. So far as this question is raised by the appellants in this case, we hold that the bankrupt court under the act possesses full and plenary power to dispose of these questions. The learned judge below in his first opinion allowed the homestead exemption, but in his subsequent opinion he held that the question of the homestead exemption was not properly before him, and could not be determined upon the exceptions to the allowance of the homestead. In this conclusion we must differ with the court below. Certainly this question has been raised by the bankrupt filing his claim and schedule of exempted property, and the action of the trustee setting aside the property claimed as exempt, and the exceptions to the action of the trustee taken by the creditors before the referee in bankruptcy, and the action of the referee and his report upon the exemptions, in which he disposes of the question certifying the whole matter to the judge of the court for his opinion. This is in strict compliance with general order 17, which requires the trustee to make his report to the court under the provisions of section 47 of the act, giving the estimated value of each article, to which report any creditor may file exceptions within 20 days after the filing of the report. This general order directs that the exceptions be argued before the referee, and at the request of either party his action shall be certified to the court for final determination. This course was pursued in this case. Not only was the question relating to the personal property, but the exemption relating to the homestead was certified to the judge of the court for his action. This certificate makes a well-defined issue founded upon the pleadings and evidence in the case, which invokes the judgment of the court. In the view that we take of this case, no necessity exists for any special pleading. The only question for the court to consider is whether or not this bankrupt is entitled to the homestead exemption that he claims. The history of how and when he acquired this property that he claims to be set apart as a homestead is fully disclosed by the evidence. In his schedule he claims the property. The trustee set it apart and assigned it

to him. Exceptions were taken to this assignment by the creditors, and the matter referred to the referee in bankruptcy, who, in an elaborate opinion, overruled all the exceptions, and approved the report of the trustee, and the referee certified his conclusions to the court for its action. We cannot agree with the conclusions of the referee in regard to either exemption. As to the homestead exemption, the evidence of the bankrupt is by no means satisfactory. He admits that he began the erection of the "house in July or August, 1899,—after July 1st." He does not make a candid disclosure as to where the money came from to build this house, but, when pressed, admitted that a part of it "came from the sale of goods which he had not paid for." He fails to disclose how much money came from the goods which he had purchased and never paid for. He alone was possessed of the information upon the subject. It was his duty, in setting up a claim to a homestead, to show by clear and conclusive proof that at the time he built the house upon the property he was in a solvent condition, and able to satisfy all the claims against him, before he could take money from his business for the purpose of securing a homestead. The fair deduction from all the evidence in this case tends clearly to prove that at the time he commenced the erection of this house he was in a failing condition, if not insolvent. He built this house upon a lot owned by his wife, and afterwards had it conveyed to himself in order that he might have it set apart as a homestead. This is a most potential fact to show that he was shaping his course to protect himself as far as possible from the consequence of bankruptcy, which the evidence tends to show was imminent at that time, for on the 25th day of October following a petition of involuntary bankruptcy was filed against him, and in less than a month he was adjudicated a bankrupt. We deem it unnecessary to discuss the evidence in detail filed in this case, but content ourselves with the conclusions that we have reached based upon all the evidence, more particularly on the evidence of the bankrupt himself.

In the view that we take of this case, we reach the conclusion that the bankrupt court has the power to dispose of this question upon the issue raised by the pleadings and the evidence as they exist in this record, and that upon the evidence and pleadings the bankrupt has no right to have the property that he claims as a homestead set aside, for the reason that we are of the opinion that he had no money that he could justly call his own at the time when he commenced to erect the building upon the lot of his wife, which was subsequently conveyed to him, as we think, for the purpose of claiming it as a homestead. Exceptions were also taken to the action of the trustee in setting apart \$500 as personal property, for the reason that \$425 was money which was set apart as exempted property under the law. It is true that the trustee did not set apart specific articles of property as exempt, but it appears that there was an understanding between the trustee and the bankrupt that the entire stock of goods should be sold, and that the bankrupt should receive his exemption of personal property in cash. The trustee deemed it to be for the best interest of all the creditors to do so.

and the referee approved the action of the trustee in this respect, and directed that the entire stock of goods should be sold. To this action of the referee there was an exception taken, which exception raised an issue as to the right of the trustee to sell the entire stock of goods, and to give the bankrupt \$500 in cash, the amount of his exemption in personal property. This action of the referee was not approved by the court, the court holding that only the \$75, of the \$500, could be set aside, and overruled the action of the referee in setting aside the \$425 in cash as a personal exemption. In this conclusion of the court below we concur, for the reason that under the provisions of the constitution of the state of South Carolina money derived from the sale of merchandise on which purchase money is still due cannot be set aside as an exemption, and it would be unjust to the creditors to do so.

In the view that we take of this case it is unnecessary to pass upon the other exceptions, as the ones we have passed upon necessarily dispose of the two exemptions claimed by the bankrupt. For the reasons assigned, we are of the opinion that so much of the judgment of the court below as holds that the bankrupt court has not the power to dispose of the question of the homestead exemption be reversed. This court holds that it has such power, but is of the opinion that the bankrupt is not entitled, under the pleadings and evidence in this case, to the homestead exemption of the house and lot claimed by the bankrupt in Schedule B. The court is further of the opinion that the exception to the judgment of the court below as to the personal exemption of \$500 should be overruled, this court holding that the allowance of \$75 as a personal exemption, and the disallowance of \$425, is correct.

For the reasons assigned, we are of the opinion that the judgment of the court below be reversed, and this cause remanded to that court, with direction to conform its action to the judgment of this court. Reversed.

In re KELLOGG.

(District Court, W. D. New York. January 27, 1902.)

No. 448.

1. BANKRUPTCY—PROPERTY VESTING IN TRUSTEE—MORTGAGED REALTY.

Wherever a bankrupt holds the legal title to mortgaged property when the adjudication is made, it will pass into the custody of the bankruptcy court, and, by operation of law, the title of the bankrupt will vest in the trustee as of the date of such adjudication.

2. SAME—ESTATE OF MORTGAGOR—WHAT LAW GOVERNS.

The estate of a mortgagor in mortgaged premises situated in New York must follow the rules laid down by the state tribunal.

3. SAME—NATURE OF MORTGAGE—ESTATE CREATED.

A mortgage on real estate in New York has none of the characteristics of a conveyance, but is merely a chose in action, giving the mortgagee no legal estate in the land, but merely a lien on the property.

4. SAME—JURISDICTION OF BANKRUPTCY COURTS.

The jurisdiction conferred on bankruptcy courts by Bankr. Act, § 2, subd. 7, giving them jurisdiction to cause the estate of bankrupts to

be collected and distributed, and to "determine all controversies in relation thereto, except as herein otherwise provided," depends—First, on whether the controversy has reference to property actually in the possession of the bankruptcy court or belonging to the bankrupt estate; second, whether it arises in the bankruptcy proceedings, and the property becomes, therefore, subject to distribution to creditors; or, third, whether, by the nature of the controversy, power is conferred on the court to determine conflicting liens and apportion assets.

6. SAME—DETERMINING VALIDITY OF MORTGAGE.

Where mortgaged property owned by a bankrupt is in the custody of the bankruptcy court, and the legal title thereto is lawfully held by the trustee in bankruptcy as a part of the bankrupt's estate, the federal district court has jurisdiction to hear and determine a question as to the validity and amount of the mortgage lien.

6. SAME—RIGHT OF TRUSTEE TO PLEAD USURY.

Where a trustee in bankruptcy sues to set aside a fraudulent conveyance by the bankrupt, and the fraudulent grantee thereupon conveys the property involved to the trustee, the latter stands in the same relation to a mortgage thereon executed by the bankrupt as the bankrupt himself, and, therefore, though the defense of usury is personal to a borrower, may attack it as invalid on that ground.

7. SAME—KNOWLEDGE OF USURY.

A mortgage which expressly provides for the payment of lawful interest will not be invalid for usury unless exacted with the knowledge of the lender as a condition of the loan.

8. SAME.

Where a loan is negotiated by an agent of the lender, it must be established by proof that the lender knew, or must be presumed to have known, that usury was exacted.

9. SAME—DEVICE TO COVER USURY.

The inhibition of the statute against usury follows the making of a contract with a third person, where it appears to have been a mere device to cover the unlawful undertaking, and that such scheme was in contemplation of the parties.

10. SAME—RIGHTS OF BONA FIDE HOLDER.

Under the laws of New York, a mortgage void for usury in its inception is not valid in the hands of a bona fide holder.

11. SAME—MORTGAGE ADJUDGED USURIOUS.

A bankrupt who had received but \$15,000 on a \$25,000 mortgage thereafter agreed in writing to pay the mortgagee's agent, who negotiated the loan, and who was the brother of the mortgagee's husband, 5 per cent. on the gross sales of her business, on the agent's assurance that otherwise no more money would be forthcoming. A new mortgage was then executed for the same amount as the first, and the remaining \$10,000 paid. Afterwards the mortgage was assigned to the mortgagee's mother-in-law. The evidence showed a community of interest. Held sufficient to show an intent to exact usurious interest on the part of the mortgagee, and that a finding that the mortgage was void in its inception was therefore supported.

12. FAILURE TO PRODUCE WITNESSES—EFFECT.

Where a party has it in his power to produce a material witness, and fails to do so, a presumption arises that the testimony would be unfavorable to him.

In Bankruptcy.

See 112 Fed. 52.

Frank H. Robinson, for trustee and creditors.

Pierre M. Brown, for mortgage creditor.

HAZEL, District Judge. On March 1, 1901, Clara E. Kellogg was adjudged a bankrupt on her voluntary petition. A temporary

receiver of her property was appointed by this court on the same day. Thereafter, at a meeting of creditors, the receiver was appointed trustee. Immediately after his qualification, the trustee commenced an action against the C. E. Kellogg Company, a Delaware corporation, to set aside, as a fraud on creditors, a transfer of property made to that company by the bankrupt January 29, 1901. On the same day that the case was commenced, the Kellogg Company, by its board of directors, rescinded its transfer, and reconveyed the property to the trustee. On June 6, 1900, the bankrupt executed and delivered to Una R. Goslin a mortgage upon this same property, consisting of real estate, which included an extensive planing mill plant. The amount secured by the mortgage was \$25,000. The transfer to the Kellogg corporation was made subject thereto. Subsequently, on March 20, 1901, Sophie M. La Grave, of Paris, France, to whom Mrs. Goslin assigned the mortgage, instituted a suit in the supreme court of the state of New York to foreclose it. The trustee thereupon filed in this court a petition praying for an order directing that the assets in his actual possession, including the property mortgaged as hereinbefore stated, be sold free from all incumbrances, and that all liens should be transferred to the proceeds of the sale, their validity and amount to be determined by the bankruptcy court. Notice of this application was given to all creditors, and on the return day proof was made by the mortgagee, Mrs. La Grave, as to the consideration of the mortgage and her status as a lienor. She objected to the jurisdiction of the court, on the ground that the referee had no power to determine in a summary proceeding the question of the validity of the mortgage, and maintained that the validity of the lien could only be determined by plenary suit commenced by the trustee in the proper state tribunal against the holder of the mortgage. The objection was not sustained by the referee. Proofs were then taken, both parties being heard, tending to show that the mortgage lien was usurious in its inception. The referee found that the bankruptcy court had acquired complete jurisdiction over the res; that the lien was asserted to property, title of which was vested in this court, and in the actual possession of the trustee; the transfer to the Kellogg corporation was in fraud of creditors, and therefore the trustee, on reconveyance of the property to him, stood in the same relation to the mortgage as the bankrupt. The referee also found, from all the evidence in the case, that the circumstances conclusively justified an inference that the mortgage executed by the bankrupt to Mrs. Una R. Goslin was invalid for usury. The comprehensive opinion of the referee is found in 6 Am. Bankr. R. 389.

The questions for review are as follows: (1) Is the defense of usury available to a trustee in bankruptcy as against an obligation of the bankrupt? (2) Can the question of validity and amount of a mortgage lien upon property in the bankrupt estate be determined in a summary proceeding before a referee? (3) Did the supreme court of the state of New York acquire jurisdiction of the property, to the exclusion of the United States district court, by

the filing of the summons, complaint, and notice of pendency of action in foreclosure before the trustee was appointed, the bankruptcy court having previously acquired jurisdiction by the filing of the petition in bankruptcy and the appointment of a receiver, who had qualified and taken possession of the property prior to the commencement of said action of foreclosure? (4) Where the mortgagor, with intent to hinder and delay her creditors, conveys the mortgaged property to a corporation participating in such intent, and the trustee repudiates such transfer on account of such fraud, and takes possession of the property, and by mutual consent the fraudulent grantee and the trustee rescind such conveyance, does the fact that the property upon which the mortgage was an apparent lien was transferred by the mortgagor to the said corporation, after the recording of the mortgage and subject to the lien thereof, before the beginning of the bankruptcy proceedings, preclude the trustee from pleading usury? (5) Was the mortgage void for usury as a matter of fact?

The second and third questions may be considered together. At the outset, therefore, it is important to inquire of what did the estate of the bankrupt consist at the time of the adjudication. Assuming that the bankrupt, Mrs. Kellogg, held the legal title to the mortgaged property in question when adjudication was made, it passed into the custody of this court, and therefore, by operation of law, the title of the bankrupt vested in the trustee as of the date of such adjudication. The estate of the mortgagor or mortgagee in mortgaged premises within the state of New York must, of course, follow the rules laid down by the state tribunal. In *re Novak*, 7 Am. Bankr. R. 27, 111 Fed. 161. A mortgage on real estate in the state of New York has none of the characteristics of the conveyance, but is merely a chose in action, giving no legal estate in the land, but entitling the owner of the mortgage to a lien thereon, as security for the debt thereby secured. *Trimm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623. The property was therefore protected from any action which might have been taken other than in a suit instituted to foreclose or establish a lien of the mortgage. The entire property, subject to whatever lien Mrs. La Grave possessed, came within the control of the court of bankruptcy. This court had undoubted authority, after an adjudication in bankruptcy, to stay the foreclosure suit commenced by Mrs. La Grave. No less had it authority to direct a sale by the trustee in bankruptcy free and clear of all liens and incumbrances, and transfer a lien to the proceeds. In *re Worland*, 1 Am. Bankr. R. 450, 92 Fed. 893; In *re Pittelkow* (D. C.) 92 Fed. 903. The purpose and object of the bankrupt act is to vest such power and authority in the courts of bankruptcy, at law and in equity, as will give jurisdiction to carry out and enforce the provisions of the act. By subdivision 7 of section 2, jurisdiction is conferred to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." The claim, therefore, that this court has jurisdiction must be based upon the authority conferred on it by clause 7 of section 2. The

supreme court said in *Bardes v. Bank*, 178 U. S. 535, 20 Sup. Ct. 1005, 44 L. Ed. 1175:

"The chief reliance of the appellant is upon clause 7, § 2. But this clause, in so far as it speaks of the collection, conversion into money, and distribution of the bankrupt's estate, is no broader than the provisions of section 1 of the act of 1867, and in that respect, as well as in respect to the further provision authorizing the court of bankruptcy to 'determine controversies in relation thereto,' it is controlled and limited by the concluding words of the clause, 'except as herein otherwise provided.'"

The court then said the clause providing that United States circuit courts shall have jurisdiction of all controversies at law and in equity, etc., "indicated the intention of congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy."

In *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, the supreme court said, quoting section 2, subd. 7, and the words, "except as herein otherwise provided":

"The exception refers to the provisions of section 23, by virtue of which, as adjudged at the last term of this court, the district court can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy against third persons to recover property fraudulently conveyed by the bankrupt to them before the institution of proceedings in bankruptcy. *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175."

This last sentence from the *Bernheimer* Case, particularly in view of the fact that elsewhere in the opinion the court limits the application of the *Bardes* Case, would seem to clearly indicate the scope of the *Bardes* Case upon the point at issue. It is clear that the decision of the supreme court is that controversies not strictly or properly part of proceedings in bankruptcy should not come within the jurisdiction of the district courts of the United States without the consent of the proposed defendant. Now, what are controversies of that nature? The court removes all doubt by declaring, in unmistakable language, that such controversies have reference to independent suits brought by the trustee in bankruptcy to assert title to money or property as assets of the bankrupt against adverse claimants. Such suits obviously are actions brought to set aside fraudulent transfers, and to recover property of the bankrupt wrongfully withheld by a third person. But, where the property is in the actual possession of the court, the right to decide conflicting claims is paramount, if not inherent, in the court first acquiring possession. Counsel for the mortgagee contends that this is a controversy between the bankrupt and an adverse claimant, and that a summary proceeding, in which a trustee assails the title to property held by him, or the validity of a lien against it, is just as much a controversy between the trustee and an adverse claimant as an action brought against a third party holding the property adversely, and therefore is not cognizable by the

bankruptcy court in any form of action or proceeding. But the case at bar is clearly distinguishable from the cases cited by counsel. The proceeds of the sale of the mortgaged property, indeed the property itself before the sale was directed by the bankruptcy court,—the mortgaged property,—was in the custody of that court. It was part of the res over which this forum gained control by virtue of the adjudication in bankruptcy. It was held by the trustee as part of the bankrupt's estate, and the district court, therefore, had jurisdiction to hear and determine the issues presented in the nature of a claim to, or lien upon, the assets of the bankrupt estate. *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; *In re Whitener*, 44 C. C. A. 434, 105 Fed. 180; *In re Matthews* (D. C.) 109 Fed. 603. It may be quite true that the trustee, in the exercise of discretion, had a right to institute an action in the proper tribunal to annul the mortgage on account of its invalidity due to its usurious origin. But, manifestly, where two remedies are open to a trustee, one affording relief in the forum creating his trust, and pointing out a very simple and less expensive method of attaining his end than is attainable by the other, then the trustee's duty is to pursue that remedy according to the nature of the controversy, where congress intended such remedy or procedure should be instituted. *In re Baudouine*, 3 Am. Bankr. R. 651, 101 Fed. 574, cited by counsel for mortgagee, is clearly distinguishable from the case at bar. There a trustee in bankruptcy claimed that the income to which the bankrupt was entitled as a beneficiary of a trust created by will was applicable to the payment of the bankrupt's creditors, and therefore instituted proceedings against the bankrupt and testamentary trustee in the bankruptcy court to compel the payment to him of such funds. The bankrupt's interest in the estate was merely in the nature of a chose in action against the testamentary trustee who held funds under and by virtue of his trust. These trust funds never came into the possession of the bankruptcy court. Judge Wallace, speaking for the circuit court of appeals, in that case said:

"The language of clause 7 would seem to be sufficiently comprehensive to authorize the determination by courts of bankruptcy of every controversy relating to the estates of bankrupts. * * * Nevertheless, it is capable of a narrower construction, and can be read as extending only to controversies about property which actually belongs to the bankrupt's estate, or which arise strictly in the bankruptcy proceeding, such as those in reference to the marshalling of assets, or the extent and priority of conflicting liens."

In the light of this decision, considering the scope of section 2, subds. 6, 7, of the bankrupt act, the jurisdiction here depends upon (1) whether the controversy is one having reference to property actually in the possession of the bankruptcy court or belonging to the bankrupt's estate; or (2) whether it arises in the bankruptcy proceeding, and the property in question, therefore, becomes subject to distribution to creditors; or (3) whether by the nature of the controversy power is conferred on the court to determine as to conflicting liens and apportion assets. No application was made to the court to restrain the sale of the property by the trustee, nor to require him, in the interest of the mortgagee, to interpose a possible

defense in the foreclosure suit instituted in the state court. Had such an application been made, it may well be that the court, in the exercise of its discretion, because of the character of the defense and the existing conditions, would have directed the trustee to interpose any defense to the validity of the mortgage in the state court where the suit had been commenced. This course not having been adopted, and the mortgaged property or its proceeds being in the actual custody of the trustee, all persons interested in the res, including lienors and mortgagees, became parties to the bankruptcy proceeding. *Carter v. Hobbs*, 1 Am. Bankr. R. 215, 92 Fed. 594. The property or interest in property claimed under such circumstances, although adverse to the bankrupt or in hostility to the trustee and general creditors, must be adjudicated by the district courts in the manner pointed out by subdivisions 6 and 7 of section 2 of the bankrupt act. In *re Pittelkow*, *supra*, and cases cited; In *re Whitener*, *supra*; In *re Russell*, 41 C. C. A. 323, 101 Fed. 248. The circuit court of appeals for this circuit, in *Re New York Economical Printing Co.* (C. C. A.) 110 Fed. 514, had before it a case where a chattel mortgagee of the bankrupt laid claim to the funds in the bankruptcy court realized from a sale of the mortgaged property pursuant to an order of the bankruptcy court. There the bankruptcy court had, as in the case at bar, directed the mortgaged property in its custody to be sold, and provided that all liens upon the property should attach to the proceeds. The circuit court of appeals then disposed of the validity of the chattel mortgage as against the proceeds. Manifestly, this principle applicable to the proceeds realized on sale of personal property upon which there was a chattel mortgage certainly applies in a case where real estate was sold free of incumbrances by order of the bankruptcy courts, and the order provides that all liens on the property should attach to the proceeds. The question of the validity of the mortgage in question here was not determined upon a mere motion or affidavits. A full hearing was had before the referee, and the mortgagee had abundant opportunity to present all possible evidence in support of the validity of her lien.

Since writing the foregoing, the court's attention is called to memorandum of opinion by the circuit court of appeals for the Ninth circuit, in *Re San Gabriel Sanatorium Co.* (C. C. A.) 111 Fed. 892 (Jan. 7, 1902), where it is held that the district court was right in granting leave to the mortgagee to make the trustee in bankruptcy a party defendant to the foreclosure suit commenced in the state court, and in denying trustee's application to restrain the foreclosure suit. The syllabus states that "the bankruptcy act does not confer upon a district court of the United States as a court of bankruptcy jurisdiction of a controversy between a trustee and a mortgagee of the bankrupt to determine the validity of the mortgage unless with the consent of such mortgagee." An examination of the facts of this case, which appear where it is previously reported in 42 C. C. A. 369, 102 Fed. 310, discloses that the title to the property in question was not in the trustee at the time this question was before the court for determination. Therefore the jurisdiction was clearly lacking, under the doctrine of the *Bardes Case*, *supra*. The court is therefore of

the opinion that, inasmuch as the property was in the lawful possession of the trustee in bankruptcy and of the bankruptcy court, the district court is vested with jurisdiction to determine the question of validity and amount of a mortgage lien upon property in the bankrupt's estate, such as exists in the case at bar, and that the supreme court of the state of New York did not acquire jurisdiction of the property to the exclusion of the United States district court.

The question of usury must now be determined. It is quite true that usury is a personal defense to the borrower, and that grantees taking property subject to an existing mortgage cannot be heard to plead the invalidity of that mortgage because of its usurious origin. *Merchants' Exch. Nat. Bank of City of New York v. Commercial Warehouse Co. of New York*, 49 N. Y. 635; *Bullard v. Raynor*, 30 N. Y. 206; *Insurance Co. v. Nelson*, 78 N. Y. 150; *Ord. Us. § 131*; 27 *Am. & Eng. Enc. Law* (1st Ed.) 954; *Hartley v. Harrison*, 24 N. Y. 172.

In the case at bar the trustee stands in the place of the mortgagor, and, by express provision of the bankruptcy act, he is vested, immediately upon his appointment and qualification, with the title of the bankrupt to the mortgaged premises. He is empowered and it is his duty to have set aside transfers and incumbrances made in fraud of creditors. Section 67 of the bankrupt act provides that property conveyed by the bankrupt in fraud of creditors becomes, by virtue of the adjudication, a part of the assets of the estate. Conveyances made with intent to defraud creditors are declared to be null and void. The conveyance to the trustee by the Kellogg Company, a fraudulent grantee, therefore, places the trustee in the position of the original grantor and mortgagor, and the right to interpose a plea of usury is preserved. The agreement to pay usurious interest is not apparent from the mortgage in controversy, or from the contract whereby a commission of 5 per cent. is agreed to be paid from the gross earnings of the business carried on by the bankrupt. The mortgage expressly provides for the payment of lawful interest. It is essential, therefore, that it be proved either by direct proof or evidence circumstantial in its nature, leading to a conclusion beyond reasonable doubt that the intendment of the contract was to demand and receive a usurious exaction. It must be exacted with the knowledge of the lender as a condition of the loan. When a loan is negotiated by an agent of the lender, it must be established by proof that the lender knew or is presumed to have known that a greater sum was to have been paid for the loan or forbearance than is permitted by statute. The inhibition of the statute follows the making of a contract with a third party when it appears to have been a device and scheme to cover the unlawful undertaking, and that such scheme was in contemplation of the parties. *Clarke v. Sheehan*, 47 N. Y. 198; *U. S. v. Waggener*, 9 Pet. 378, 9 L. Ed. 163; *Call v. Palmer*, 116 U. S. 98, 6 Sup. Ct. 301, 29 L. Ed. 559. The proofs show that \$15,000 only was advanced on the execution and delivery of the first mortgage, dated in April, 1900. The remaining sum of \$10,000 was withheld. A demand was made upon Miss Kellogg, the mortgagor, that she execute a contract of assignment of a one-third interest in

the business conducted by her at Canisteo, N. Y., to E. F. Goslin, who aided in negotiating the loan. Mr. Goslin is the brother-in-law of the original mortgagee, and son of the present holder of the mortgage. It was also demanded of Miss Kellogg that she pay to E. F. Goslin 5 per cent. of the gross sales of the business as a condition of the payment of the balance unpaid on the mortgage of April, 1900. Neither of these conditions was assented to at the time, but Miss Kellogg subsequently executed an agreement in writing embodying the latter arrangement. A new mortgage for \$25,000 was made in place of the one already mentioned, and then the balance of \$10,000 was paid at different times. Miss Kellogg testified that E. F. Goslin, who negotiated or aided in negotiating the loan, said "there would be no more money forthcoming"; that "they never loaned any money at 6 per cent., and never would"; and she needed the money, and, in order to obtain it, assented to the contract. This was not a new contract with a third party. The same persons who negotiated the original mortgage were instrumental in withholding the payment of the mortgage for which the mortgage stood security. It is clear that both transactions, the one relating to the first mortgage and the other to the mortgage now in controversy, as well as the intervening negotiations, are intimately connected; each of them is a part of the other. The conflict of evidence relating thereto has been resolved by the referee in favor of the trustee. He found that the circumstances of the transaction, as shown by the evidence presented, constitute the offense of usury. The evidence, and his conclusions thereon, are presented by him in an able opinion, with much fullness and painstaking. The court is of opinion that the effect of the entire transaction and of the circumstances surrounding it was to secure to the mortgagee, or the person who actually made the loan it represents, a greater rate of interest than 6 per cent. per annum. In *Fiedler v. Darrin*, 50 N. Y. 443, it is held that the intent is essential to constitute the offense of usury, and the court says:

"The intent must be deduced from, and determined by, the acts. The intent which enters into and is essential to constitute usury is simply the intent to take or reserve more than seven per cent. per annum for the loan or forbearance of money. There are cases in which an act is lawful or unlawful, depending upon the particular intent of the actor."

The 5 per cent. contract above described was evidently intended to cover the usurious act, and the condition incorporated therein, that E. F. Goslin was to act as the New York agent for the sale of lumber of Miss Kellogg, was a pretext and a cover to avoid the consequences of the unlawful exaction. The all-important questions in the case are whether the mortgagee had such knowledge of the acts of her representatives as to render her chargeable with them, or were the acts of the representatives and lender so interwoven as to justify a presumption of knowledge and participation on the part of the mortgagee? The mortgage and contract, the basis of this contention, must be governed by the laws of the state of New York. By the statutes of that state, it is declared that all securities whatsoever, whereupon or whereby there shall be reserved or taken a greater sum or value for a loan or forbearance of any money than

the rate of \$6 upon \$100 for one year, shall be void. Rev. St. N. Y. (9th Ed.) p. 1855. This statute has many times been construed by the highest court of the state. It is held that, where a usurious instrument is considered void in its inception, it will remain void in the hands of a bona fide holder. *Webb, Us.*, § 183; *Miller v. Zeimer*, 111 N. Y. 441, 18 N. E. 716; *Morgan v. Tipton*, Fed. Cas. No. 9,809. It follows, therefore, that, if the mortgage was void for usury because of knowledge or participation in a usurious agreement on the part of Una R. Goslin, her assignment of the mortgage to an innocent holder for value will not remove the taint. The authorities also uniformly hold that a lender cannot be charged with taking unlawful interest when the transaction was completed by an agent, where the agent, for his own benefit, exacted more than the lawful rate, unless the lender had knowledge of the usurious acts of the agent. *Call v. Palmer*, *supra*; *Barrietto v. Snowden*, 5 Wend. 181; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Bell v. Day*, 32 N. Y. 165; *Stillman v. Northrup*, 109 N. Y. 473, 17 N. E. 379. In the case last cited, Judge Earl, speaking for the court of appeals, said:

"The defense of usury, involving crime and forfeiture, cannot be established by mere surmise and conjecture, or by inferences entirely uncertain. If, upon the whole case, the evidence is just as consistent with the absence as with the presence of usury, then the party alleging the usury has failed."

These authorities, however, have no application here, other than to show the liability of the lender for the acts of the agent making a bargain prohibited by the statute because of usury, and to amplify the well-settled rule that the proofs to sustain a corrupt and usurious agreement shall be clear, convincing, and consistent with the presence of usury. The court has carefully weighed the circumstances of this case adduced by the evidence, and is reluctant to hold that the mortgage is invalid for usury, inasmuch as no usurious sum was paid, and because the bankrupt obtained and used in her business the sum borrowed, and the bankrupt estate has the benefit of the loan thereof. The evidence of the unlawful bargain, and the evident purpose and intent to evade the statute, is so clearly to be inferred that the court is constrained to concur with the referee on his finding that the mortgage was void and usurious at its inception. This finding rests upon substantial grounds. The wisdom of the usury statute is not to be questioned by a judicial tribunal. It is the duty of this court to enforce the law, and not to legislate. Where the proofs are clear and satisfactory, the court is bound to apply the remedy, without giving consideration to the drastic and penal features of the statute applicable to the facts under consideration. The proofs show with sufficient clearness that although the mortgage was executed in favor of Una R. Goslin, wife of A. R. Goslin, and subsequently assigned by her to Mrs. La Grave, her mother-in-law, that the loan was in fact made and controlled by her husband. He seems not to have been prominent in the negotiations for the loan and the execution of the usurious contract. That was left to the brother. He was, however, so connected with it as to preclude an innocent intent. It does not clearly appear whose money it was. The finding of the referee is that a

community of interest existed between the lender and those who negotiated the loan. The testimony offered by the mortgagee, that the contract was in consideration of E. F. Goslin acting as agent for Miss Kellogg, and that pursuant to the contract he transacted business as such agent, is not convincing, in the view that the court has taken that the entire transaction was a corrupt and unlawful scheme to evade the provisions of the usury statutes. The mortgagee had it in her power to produce witnesses by whose testimony any doubt with reference to the scope of the authority by which those who acted or presumed to act for her would have been removed. This she failed to do. No denial of complicity or community of interest is made. Neither Una R. Goslin, the original holder of the mortgage, nor E. F. Goslin, who aided in negotiating the loan, and for whose apparent benefit the usurious contract was made, has appeared to affirm the righteousness of the transaction and to remove the taint attached thereto. The fact that they possessed knowledge enabling them to clarify the transaction, and withheld it, must be considered against the holder of the mortgage. The rule is that, under such circumstances, a presumption is created that the testimony would be unfavorable. *Graves v. U. S.*, 150 U. S. 118, 14 Sup. Ct. 40, 37 L. Ed. 1021; *Runkle v. Burnham*, 153 U. S. 217, 14 Sup. Ct. 837, 38 L. Ed. 694; *American Bell Tel. Co. v. National Tel. Mfg. Co. (C. C.)* 109 Fed. 1018. Miss Kellogg testified that she never asked E. F. Goslin or A. J. De Kantstein to represent her, and that she never received any orders from them, and that, prior to her assenting to the contract to pay 5 per cent. commission, E. F. Goslin said that no more money would be forthcoming, and that they never loaned any money at 6 per cent., and never would. This evidence believed by the referee to be reliable and credible stood uncontradicted. Considerable evidence is also introduced in the case by the trustee to show the connection existing between the parties and the existence of the unlawful agreement. The silence of E. F. Goslin and Una R. Goslin, the mortgagee, must be considered against them upon the question of the alleged usurious contract. The inference which necessarily followed from the entire evidence with reference to Mrs. Goslin's knowledge of or acquiescence in the transaction must be construed against her. If she had no knowledge of the transaction, if what was done was without her acquiescence, it was her duty to herself to testify concerning thereof, if the truth was otherwise than as found by the referee. Her failure to testify deprived the trustee of an opportunity to show more clearly on her cross-examination that she had knowledge of her agent's acts. Obviously, her testimony might have dispelled all doubt with reference to her knowledge of the unlawful acts.

From the foregoing, it follows that the first, second, fourth, and fifth questions submitted for review are answered in the affirmative, and the third in the negative. The report of the referee is affirmed.

In re GAYLORD et al.

(District Court, E. D. Missouri, E. D. February 3, 1902.)

BANKRUPTCY — STOCKBROKER AND CUSTOMER — NATURE OF RELATION—SURRENDERING PREFERENCES.

The relation existing between stockbrokers and customers maintaining running accounts with them and buying stock on a margin is not fiduciary in its character, but is that of debtor and creditor, and a customer of a bankrupt broker, who has received a preference, is therefore within Bankr. Act, § 57g, which declares that the claims of creditors who have received preferences shall not be allowed unless the preference is surrendered.

In Bankruptcy.

See 111 Fed. 717.

George D. Reynolds, for trustee.

Isaac H. Orr, for claimant.

ADAMS, District Judge. The bankrupts, under the firm name of Gaylord, Blessing & Co., were brokers engaged in the business of buying and selling stocks, bonds, cotton, grain, and provisions for their customers. D. M. Gilbert was one of their customers. As the result of prior dealings with the bankrupts, he had to his credit on their books on October 31, 1900, the sum of \$1,419.82. On November 3, 1900, he deposited with them the further sum of \$250, which went to his general credit in an account kept with him by the bankrupts. The bankrupts had before then purchased for him 250 shares of the common stock of the St. Louis Transit Company, the purchase price for which, with commissions, etc., amounting to \$5,400, stood on their books as a debit charge against Gilbert. On different dates between December 3, 1900, and March 4, 1901, the last-mentioned shares of stock, by Gilbert's direction, were sold for him by the bankrupts, resulting in a net profit of \$424.50. This went to his credit in the general account. That account, on March 4, 1901, showed a balance due Gilbert of \$2,094.32 as a net result of all the debit and credit entries. On the following day—March 5, 1901—the bankrupts, being then insolvent, and having been so insolvent for nine months theretofore, paid to Gilbert \$1,200 on account, and charged the same to him in his account. This left a balance then due Gilbert of \$894.32. On March 11, 1901, the bankrupts made a voluntary assignment under the laws of the state of Missouri, and on March 20, 1901, proceedings were instituted by their creditors to secure an adjudication of bankruptcy against them. An adjudication followed in due course. The main question submitted by the certificate of the referee is whether Gilbert can prove his demand for the sum of \$894.32 without first surrendering the \$1,200 so received by him on March 5th, within 15 days of the institution of the proceedings in bankruptcy. The payment of the \$1,200 to Gilbert at the time and in the manner hereinbefore stated constituted a transfer of property by the bankrupts, so as to be an unlawful preference within the meaning of section 60 of the bankruptcy act. By the provisions of section 57g, the

receipt of such a preferential payment precludes proof of any claim for the balance due the preferred creditor, unless he shall first surrender the amount of the preferential payment. This is conceded to be the law, and it is also conceded that, if the relation existing between the bankrupts and Gilbert was that of debtor and creditor, the general rule is applicable to this case, requiring the surrender of the payment of \$1,200 as a condition to the allowance of the demand presented. It is contended by the claimant that the bankrupts' relation to him was that of bailee or agent, acting in a fiduciary capacity, and that the legal consequence of that relationship is that the agent is pro hac vice the principal, and therefore that what he holds as such agent is held and owned by the principal. This theory really is that the fund in the hands of the bankrupts is a trust fund belonging to the beneficiary absolutely, but the claimant does not seem to carry his theory to its legitimate result. If he did, he would be here tracing a trust fund, and asserting exclusive right and title to the same as against all other creditors of the bankrupts. Instead of so doing, he presents a claim for the allowance of a general demand upon which he will ultimately receive only his pro rata share of all distributable assets. It is represented to the court that this case is one of many, and that its decision will govern others of like character now pending before the referee. Accordingly, careful consideration has been given to the merits of the matter.

Section 63 of the bankruptcy act provides: "Debts of the bankrupt may be proved and allowed against his estate, which are * * * (4) founded upon an open account or upon a contract express or implied." The facts found by the referee show that for some time before bankruptcy proceedings were instituted the bankrupts had an open running account on their books with the claimant. It does not appear that the claimant had ever actually purchased any stocks through the agency of the bankrupts, so as to finally receive any certificate upon full payment therefor. He had, on the other hand, been putting up "margins" as and when required to secure the bankrupts against fluctuations in market prices, ordering the purchase of one stock or another at a given price, and ordering the same sold when, in his judgment, he had made profit enough to satisfy his requirements, or sustained the limit of loss to which he was willing to submit. So far as he was concerned, his transactions seem to have amounted to a wager on the market price from day to day or week to week, and, so far as the bankrupts were concerned, the transactions, while doubtless in some instances of the character which might have bound the claimant to a legal liability to take and pay for the stock actually ordered purchased and actually purchased for his account, were in fact not intended for such purpose, but rather as bookkeeping transactions, intended by them as well as by the claimant to be closed out for a profit when possible, and at a loss when necessary. The account kept in the books was a running account, showing on one side credits to the claimant for all moneys put up as margins, and also for any and all profits when such were realized on sales, and on

the other side debits for commissions, interest on money employed, and losses sustained. The bankrupts intermingled claimant's money with their own and that of other customers. The parties treated each other as debtor and creditor. The books showed that relation, and the account presented for allowance in this case emphasized that fact. The certificate of the referee shows that it was admitted as a fact by the claimant "that the effect of the payment of \$1,200 made to him by bankrupts on March 5, 1901, was and will be to enable claimant, as a creditor of bankrupts, to obtain a greater percentage of his debt than any other creditors of bankrupts of the same class." This admission, though adding nothing to the legal import of the facts themselves, strikingly shows that the claimant's pretensions are violative of the fundamental principle of equality, which underlies the bankruptcy act. Merchants who keep a debit and credit account with their customers in the usual way do not, in my opinion, occupy any substantially different relation to their customers than do these bankrupts to such a customer as Gilbert; yet merchants are required to surrender any and all preferential payments before being allowed to make proof of any balance shown to be due from the bankrupts. The immunity claimed for customers of brokers, resulting in the substantial defeat of the main purpose of the bankruptcy act, and also invidious distinctions between them and customers of merchants, should not be allowed, unless the dealings between them and their customers clearly disclose a fiduciary or trust relation with respect to the particular money or property in controversy; indeed, such a relation as vests title to the same in the customer so completely that he might successfully maintain an action at law or in equity for the recovery of the same in specie. If such be the situation, then the customer may not merely prove his claim for any such money or property, and share in the assets pro rata with other creditors, but he may successfully assert claim to the same to the exclusion of all others: and this on the distinct theory that such money or other property forms no part of the bankrupts' assets, but is the money or property of the customer himself, and that the customer may, if he is able to do so, trace the trust fund or property, and reclaim the same for his own use or benefit. Unless the situation is of the kind just mentioned, the customer's rights are simply those of a general creditor. In my opinion, the relation shown to exist between the bankrupts and Gilbert in this case was not of a fiduciary character. It was purely that of debtor and creditor.

Counsel were unable at the argument to call my attention to any authorities arising under the bankruptcy act of 1898 relating to the subject now before the court, and I have been unable to find any such authorities. But fortunately the bankruptcy acts of 1841 and 1867 gave occasion for consideration by the supreme court of the United States of questions kindred to those involved in the present inquiry. By the provisions of the bankruptcy act of 1841 (5 Stat. 441, § 1) the benefits of the acts were withheld from persons owing debts "created in consequence of a defalcation as a public officer or as executor, administrator, guardian or trustee or while acting in any

other fiduciary capacity"; and by the provisions of the same act (section 4) no person was entitled to a discharge who had applied trust funds to his own use. By the provisions of the bankruptcy act of 1867 "no debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer or while acting in any fiduciary character shall be discharged by proceedings in bankruptcy, but the debt may be proved and the dividend thereon shall be a payment on account of such debt." Rev. St. 1878, § 5117.

In the very early case of *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236, a case arose involving the interpretation of the foregoing provision of the act of 1841. The important question for determination was whether a commission merchant or factor who sells for others was indebted in a fiduciary capacity, within the meaning of the act of 1841, if he withheld the money received from property sold by him for his principal. The supreme court, speaking by Mr. Justice McLean, said, on this subject:

"If the act embraces such a debt, it will be difficult to limit its application. It must include all debts arising from agencies, and, indeed, all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act."

The court finally concludes that a factor occupies no such fiduciary relation to his principal as to create a trust as distinguished from a debt, within the meaning of the bankruptcy act.

In the case of *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565, the supreme court, speaking by Mr. Justice Bradley on the subject of what is a fiduciary debt within the purview of the act of 1867, states the question before the court as follows:

"We have to decide the question whether a discharge in bankruptcy under the act of 1867 operates to discharge the bankrupt from a debt or obligation which arises from his appropriating to his own use collateral securities deposited with him as security for the payment of money or the performance of a duty, and his failure or refusal to return the same after the money has been paid or the duty performed; or whether a debt or obligation thus incurred is within the meaning of the thirty-third section of said act (section 5117, Rev. St.), which declares that 'no debt created by the bankrupt * * * while acting in any fiduciary character shall be discharged under this act.'"

It seems to me that this question presents a case fully covering the contention now before this court. If the appropriation of collaterals given to secure advances does not create a debt of a fiduciary character, certainly the balance found in the running account, resulting from mutual dealings between a broker and his principal, such as is disclosed in this case, does not constitute a trust fund in favor of the principal.

After so stating the question before the court, Mr. Justice Bradley first takes up the opinion in *Chapman v. Forsyth*, supra, and approves the same. He afterwards reviews many other cases, federal, state, and English, and concludes thus:

"The creditor who holds collateral holds it for his benefit under contract. He is in no sense trustee. His contract binds him to return it if its purpose as security is fulfilled; but, if he fails to do so, it is only a breach of contract, and not a breach of trust."

He also remarks as follows:

"It is no doubt true, as said in *Chapman v. Forsyth*, that a construction of the excepting clauses which would make them include debts arising from agencies would leave but few debts upon which the law could operate."

The following cases also afford ample authority for holding that the relation between the bankrupts and Gilbert was not fiduciary in its character within the meaning of the bankruptcy act, but was only that of debtor and creditor: *Upshur v. Briscoe*, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931; *Fleitas v. Richardson*, 147 U. S. 538, 13 Sup. Ct. 429, 37 L. Ed. 272; *Cronan v. Cotting*, 104 Mass. 245, 6 Am. Rep. 232.

Collier, in the third edition of his work on Bankruptcy (page 206), says as follows:

"If factors are not fiduciary debtors, agents clothed with similar powers cannot be regarded as fiduciary debtors. Thus agents authorized by agreement to make sales, and to collect moneys and carry them into account, and pay over monthly or at other regular intervals, are to be treated as debtors, and not as trustees. They do not occupy a fiduciary capacity."

He cites in support of the text the following cases: *Grover v. Clinton*, Fed. Cas. No. 5,845; *Kaufman v. Alexander*, 53 Tex. 562; *Guilfoyle v. Anderson*, 9 Daly, 64; *Cronan v. Cotting*, supra. These cases have been examined, and, in my opinion, fully sustain the text.

The definition of a provable debt (section 63 of the act of 1898, supra) seems also to satisfactorily determine that the obligation of the bankrupts to Gilbert is a debt within the meaning of the act. It is undoubtedly founded upon an open account, and likewise creates an implied promise or contract on the part of the bankrupts to pay any balance appearing thereby to be due to Gilbert. According to the definition aforesaid, an obligation "founded upon an open account, or upon a contract, express or implied," is a provable debt under the bankruptcy act. There is no showing that the bankrupts kept Gilbert's money by itself. On the contrary, it sufficiently appears that the same was intermingled with that of other customers as well as that of the bankrupts themselves. The parties permitted the account to run for months in such a way as to clearly indicate their purpose to establish the relation of debtor and creditor between themselves. The obligation to pay was not only implied, but Gilbert, by presenting a claim for a debt instead of a claim for a trust fund belonging to him exclusively, affirmed the reasonable legal import of the relation between himself and the bankrupts to be that of debtor and creditor. On reason as well as authority I have reached the conclusion that Gilbert cannot be allowed to occupy any other position, and cannot make proof of any balance due him from the bankrupts, without first conforming to the provisions of section 57g, and surrendering the preferential payment received by him on account only a few days before bankruptcy proceedings were instituted.

No occasion is found to pass upon the other proposition submitted by the referee as to whether the fictitious purchase and sale of certain shares of Southern Railroad Company's stock created any obligation on the part of Gilbert to account for the fictitious loss sustained thereby. If Gilbert surrenders his preference, and proves up his claim, some such question may arise, and it will then require adjudication. Likewise the discrepancy between the amount of \$850 actually claimed by Gilbert and the \$894.32 which he might have claimed requires no present consideration.

The vital question in controversy has been determined. The result is that the action of the referee in allowing the claim of Gilbert without a previous surrender of the preferential payment received by him was error, and the same is disapproved. An order will now be made vacating the allowance as made, leaving Gilbert to take such action in the future as seems advisable to him.

In re HOOVER.

(District Court, W. D. Pennsylvania. January 21, 1902.)

No. 1,620.

1. BANKRUPTCY—LIEN FOR RENT—EQUITABLE EXECUTION.

Where a court of bankruptcy takes possession of goods liable for rent, under Purd. Dig. p. 842, pl. 70, which provides that goods, etc., demised for years or otherwise, taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for rent due at the time of taking such goods in execution, not exceeding one year's rent, its process whereby the same is sold will, for the purposes of such statute, be regarded as an equitable execution.

2. SAME—PRIORITY—PROPERTY IN HANDS OF TRUSTEE.

Purd. Dig. p. 842, pl. 70 (Laws Pa. 1835-36, p. 777) provides that goods, etc., demised for years or otherwise, taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for rent due at the time of taking such goods in execution, not exceeding one year's rent. Bankr. Act, § 64, cl. 5, gives priority to debts owing to any person who by the laws of the state or the United States is entitled to priority. *Held*, that property of a bankrupt subject to a landlord's rent lien, as against which the bankrupt had waived the benefit of the state exemption law, remains subject to such lien when the trustee in bankruptcy takes possession thereof.

3. SAME.

Where a landlord, prior to his tenant's bankruptcy, has distrained for rent overdue on a lease, waiving the benefit of the exemption laws of the state, the bankrupt is not entitled, as against the landlord, to claim exemption of articles distrained; the rest of the distrained articles being insufficient in value to pay the rent.

In Bankruptcy.

Way, Walker & Morris, for trustee.

J. McF. Carpenter, for landlord.

W. C. Stillwagon, for bankrupt.

BUFFINGTON, District Judge. In this case \$85, the rent of Hoover, the tenant, was in arrear, and his landlord lawfully distrained for that sum. Under the statutes and decisions of Pennsylvania he

thereby acquired a lien to that amount upon all the personal property on the premises, for by lease the tenant had lawfully waived the benefit of the exemption law of the state. Pending a sale of the distrained goods, Hoover filed a petition in bankruptcy, and therein claimed as his statutory exemption an automobile then held by the bailiff under the distress warrant. Thereafter the goods were taken from the bailiff's possession by the trustee, who awarded the automobile to the bankrupt as exempt, and sold the balance of the property. The amount realized therefrom was not sufficient to pay the rent. The landlord filed objections to the allowance of the bankrupt's exemption, which objections the referee dismissed, and certified the question "whether, under the first exception filed to the trustee's report of exempted property, and the facts shown in the testimony taken under said exception, the bankrupt is entitled to be allowed the exemption set apart to him in said report." After due consideration, this question is answered in the negative. The Pennsylvania statute (see Act June 16, 1836; Laws 1835-36, p. 777; *Purd. Dig.* p. 842, pl. 70) provides:

"The goods and chattels being in or upon any messuage, lands or tenements, which are or shall be demised for life or years, or otherwise taken by virtue of an execution, and liable to the distress of the landlord, shall be liable for the payment of any sums of money due for rent at the time of taking such goods in execution: provided, that such rent shall not exceed one year's rent."

The bankrupt court having taken possession of this property, thus liable for the rent, its process whereby the same was sold must, for the purposes of this statute, be regarded as an equitable execution. The case is within the equity of the statute. *Longstreth v. Pennock*, 87 U. S. 575, 22 L. Ed. 451. The property sold was, when received by the bankrupt court, subject to a lawful lien by reason of the distress, and by the act quoted was made liable for the rent due. Such lien and priority, by virtue of the Pennsylvania statute, was one recognized and enforced by section 64, cl. 5, of the bankrupt act. The claim, then, being one whose validity and priority were recognized both by state and bankrupt law, and the property coming to the bankrupt court for administration subject to a lien as against which the owner had waived the benefit of the exemption law, it is clear the bankrupt cannot, by claiming the benefit of such waived statute, annul or lessen the grasp of such existing lien. The case of *In re Bolinger*, 6 Am. Bankr. R. 171, 108 Fed. 374, decided by this court, does not rule the present one. Its facts were different. It was there said:

"The preference created by the execution being illegal, the incident of such execution preference, to wit, the waiver of the exemption as against the enforcement of the debt on valid lawful process, must be deemed to have fallen with the expired unlawful preference."

The present case turns on its own facts, and what is now decided is that where a landlord, prior to his tenant's bankruptcy, has distrained for rent overdue on a lease waiving the benefit of the exemption law of Pennsylvania, the bankrupt is not entitled, as against the landlord, to claim an exemption of articles distrained, where the rest of the distrained articles are not sufficient in value to pay the rent.

In re CARVER et al

(District Court, E. D. North Carolina. February 7, 1902.)

1. BANKRUPTCY—REPORT OF REFEREE—EXCEPTIONS.

Where no exceptions to the report of a referee in bankruptcy are filed, as provided by equity rule 83, requiring the errors to be specifically pointed out, the findings of facts are conclusive.

2. SAME—ASSIGNMENTS UNDER STATE LAW—WHEN REVIEWABLE.

The accounts of an assignee in an assignment for the benefit of creditors under the insolvency act of North Carolina (Acts 1893, c. 453), made more than four months before the adjudication of the debtor as a bankrupt, will not be reviewed in the bankruptcy proceedings, the assignment being valid until the suspension of the state law by the operation of Bankr. Act 1898, which, by section 3, limits the time within which the making of a general assignment constitutes an act of bankruptcy to four months; and hence the assignee can only be required to account for the property of the bankrupt in his hands at the commencement of the bankruptcy proceedings.

In Bankruptcy.

Jno. H. Cook, assignee, in pro. per.

B. F. McLean and Patterson & McCormick, for trustee.

PURNELL, District Judge. The following are certified as the findings of fact by the referee:

"That on the 27th day of February, 1901, the bankrupts executed a deed of assignment for the benefit of creditors. That the assignee, John H. Cook, disbursed the funds which came into his hands as set out in the statement attached, more than four months prior to the institution of the bankruptcy proceedings. That, at the time of the assignment to him by bankrupts, and at the time of the disbursements, John H. Cook, assignee, was a member of the firm of Cook & Morrison. That since the institution of these bankruptcy proceedings, to wit, last November, 1901, the said firm has been dissolved. At request of attorneys for creditors, I find, as a fact, that the check for \$62.48, given by John H. Cook to B. F. McLean, trustee, was drawn by the said Cook upon his personal account in the Bank of Laurinburg. That John H. Cook stated in open court that the answer of bankrupts set forth the facts relied upon as the defense by him in the present status of the case."

No exceptions being filed, the findings of fact are conclusive. Equity rule 83; Railroad Co. v. Gordon, 151 U. S. 285, 14 Sup. Ct. 343, 38 L. Ed. 164; In re Covington (D. C.) 110 Fed. 143. The court will not look through a voluminous record to find other facts. On the hearing, out of an abundance of caution, this part of the record was read over to counsel, and, there being no omission suggested, it must be conceded these are all the facts.

Then in the report is added:

"As conclusions of law the referee holds: That the assignee for the benefit of creditors is not an adverse claimant as to the trustee in bankruptcy, so far as property in his hands, or which has been improperly paid out by him, is concerned, and that the four months' time limit has no application to the question presented. In the opinion of the referee the cost of administering this estate by J. H. Cook, assignee, is excessive, and with a proper administration the assignee would still have funds on hand. That the trustee should proceed in the proper tribunal to call the assignee to account. The referee is of the opinion that the trustee should proceed by a petition in bankruptcy court, and that John H. Cook, assignee, should be

required to appear at a time fixed by the court to show cause why the amounts paid as attorney's fees, the amounts retained as commissions, and the amounts charged as expenses should not be reduced."

To the above conclusions of law, John H. Cook objects, excepts, and appeals to the judge.

Act Cong. 1898 (Bankrupt Law), is the exercise of a general grant of power, but the exercise of this power does not per se abrogate state insolvent laws. When the act of congress is invoked, or its provisions put in operation, state insolvent or assignment laws are suspended as to the res affected thereby. This must be properly done in apt time. The act of congress limits, not because of any special reason therefor, but arbitrarily, the time within which certain acts are acts of bankruptcy. General assignments, as in the case at bar, are so limited. Section 3. After the four months have expired creditors cannot take advantage of such acts in an involuntary proceeding, as this is, of a general assignment, but the creditors are presumed to have assented to or condoned the act, and the bankrupt law affords them no relief on this account. It is in the nature of an estoppel in pais. To avail themselves of the rights and remedies provided for in the act of congress the act must be invoked within the time prescribed. The state law (Acts 1893, c. 453) contemplates and provides for general assignments for the benefit of creditors, and how settlements shall be made. This state law is not abrogated by the bankrupt law, but when proceedings in bankruptcy are instituted, and an adjudication made, the state assignment law is suspended, and the bankrupt estate administered in the court of bankruptcy. The assignment made by Carver & Co. was in accordance with, and valid under, the provisions of the state law. The act of congress was not invoked by the filing of a petition in bankruptcy until more than four months after such assignment was made, and the estate partly distributed in pursuance thereof. The assignment thus becomes valid, and whatever was done under its provisions is also valid. Creditors who have slept on their rights cannot complain. It appears not only the assignment was made more than four months before the proceedings in bankruptcy were instituted, but the payments were made. The creditors seem to have been taking chances. They delayed too long. They are entitled to only what was found in the hands of the assignee belonging to the unadministered trust. The court of bankruptcy cannot take retroactive cognizance of trusts beyond four months. To do so would be to upset business settlements, which was never contemplated. The provisions of the act as to involuntary proceedings were suspended, to take effect four months later than the provisions as to voluntary proceedings, showing conclusively this was the legislative intent. Hence the court of bankruptcy has no authority to inquire into or review settlements made over four months prior to the adjudication, but will administer the estate as it exists at the time of the adjudication. The assignee is not an adverse claimant; he is the agent of the bankrupt, but what he has done as such agent under the assignment cannot be inquired into after the lapse of time. The law favors vigilance. It does not protect those

who do not protect themselves, or neglect to claim its protection in apt time.

The decision of the referee is modified accordingly, the case remanded to be proceeded with, and the assignee to be required to account for such funds or property of the bankrupts as remained in his hands at the time this proceeding was instituted.

In re ROYAL.

(District Court, E. D. North Carolina. January 27, 1902.)

1. BANKRUPTS—DISCHARGE—SUCCESSIVE APPLICATIONS.

A bankrupt is not entitled to file a second petition for a discharge when his first petition is denied after investigation on the merits.

2. SAME—RIGHT TO DISCHARGE—PRESUMPTIONS.

The court will not seek for grounds to refuse the discharge of a bankrupt, unless properly presented by the parties, but, if no objection is made, will presume that it should be granted.

3. SAME—REHEARING—REFEREE'S FINDINGS—CONCLUSIVENESS.

Where objections are interposed to the discharge of a bankrupt, and the case is heard, and the discharge refused on facts found by a referee, to whose findings no objections have been filed, the findings are conclusive, and the cause will not be reheard on allegations that they may be disproved if the cause is reopened and another reference made.

In Bankruptcy.

W. R. Allen, for petitioner.

PURNELL, District Judge. This case was heard at Wilmington in October, 1901, on what was then certified by the referee as the facts in the premises. Counsel were understood to concede the facts as then stated to be true, and later the question of the right of petitioner to a discharge was maturely considered and duly decided. A discharge was refused. A petition is now filed asking for a rehearing, alleging that petitioner did not have the amount of money (\$109.38), or any other amount, to his credit in bank which was omitted from his schedules. No newly-discovered testimony is set out. It is simply alleged that what heretofore appeared were to all intents and purposes conceded to be the facts are not facts, but may be disproved if the cause is reopened and referred to the referee to take further testimony. Since the former decision of this cause ([D. C.] 112 Fed. 135) the matter has been before a grand jury on a bill of indictment drawn by the United States attorney, and that body ignored the bill,—indorsed it, "Not a true bill." This only proves that body did not have sufficient testimony before it to make out a prima facie case. It is as important in bankruptcy proceedings as in any other that parties should deal fairly with the court, and there should be an end of litigation. Petitioner was fully heard before the referee, to whose findings of fact he filed no exception, as required by the rules of practice, and before the judge of the district, represented on both occasions by able counsel. Having filed no exceptions, he risked his case on a finding of facts which he and his counsel thought en-

titled him to a discharge from all his debts. The matter was fully argued, and after mature consideration the court was constrained to decide against him,—refuse a discharge. This should end the matter. A bankrupt is not entitled to file a second petition for discharge when his first petition is denied after investigation of its merits. In *re Brockway* (C. C.) 23 Fed. 583. The petition is, in effect, a second application or petition for a discharge. Petitioner has had his day in court. When not otherwise provided in the act the equity rules govern. Exceptions to findings of fact by a referee who is a special master, under district rules in proceedings for a discharge, must be filed in accordance with equity rule 83, as construed by the supreme court. Upon newly-discovered testimony, excusable neglect or oversight, the court might grant a rehearing. It is discretionary, even if the court is justified in exercising such discretion, of which no opinion is now expressed. In the case at bar there is nothing which would justify the exercise of such discretion. Proceedings in bankruptcy must be orderly, and according to the rules of court. The court will not seek for grounds to refuse a discharge unless they are properly presented by the parties. In *re Schuyler*, Fed. Cas. No. 12,494; In *re Rosenfeld*, Fed. Cas. No. 12,057; In *re Frey* (D. C.) 9 Fed. 376. If the parties do not object, the court will presume they consent, or that no reason exists for not granting a discharge. But when objections are interposed, the case heard on facts found by a referee, to whose findings of fact there is no objection filed, the finding of fact is conclusive (equity rule 83); and, when the cause is decided on such facts, then it is a final disposition of the cause.

Petition dismissed. Rehearing refused.

In re HOLDEN et al.

(Circuit Court of Appeals, Ninth Circuit. January 16, 1902.)

BANKRUPTCY—LIFE INSURANCE—EXEMPTION.

A husband and his wife were each adjudged bankrupt, and the same trustee appointed for both. His life was insured, the policies payable to her, but provided that, if she should not survive him, payment should be made to his executors, administrators, and assigns. They claimed the policies as exempt under Laws Wash. 1896, p. 336, providing that the proceeds or values of all life insurance shall be exempt from all liability for any debt, and Bankr. Act, § 6, providing that the act shall not affect the allowance to bankrupts of the exemptions prescribed by the state laws. *Held*, that such section 6 does not control the provisions of section 70a, that when the bankrupt has an insurance policy which has a cash surrender value, payable to himself, his estate, or personal representatives, the policy shall pass to the trustee as assets, unless the bankrupt pays such value to the trustee; and, as the wife could not hold the policies payable to her, nor the husband hold them when payable to his personal representatives in the event of her prior death, the policies passed to the trustee.

Petition for Revision of Proceedings of the District Court of the United States for the Northern Division of the District of Washington.

P. P. Carroll and John E. Carroll, for bankrupts.
Bausman & Kelleher, for petitioner.

Before McKENNA, Circuit Justice, and GILBERT and ROSS,
Circuit Judges.

McKENNA, Circuit Justice. This is a petition filed under section 24b of the bankruptcy law of 1898 to review an order of the district court for the district of Washington, Northern division, made and entered in the above-entitled cause. The said D. N. Holden and Lizzie Holden were separately proceeded against in bankruptcy by their creditors. The causes were consolidated by consent, and "one and the same answer" filed to the petitions. Subsequently it was adjudged that the "respondents and each of them are bankrupts within the true intent and meaning of the acts of congress relating to bankruptcy." The respondents then prayed exemption from the claims of creditors of two life insurance policies. The claim was disallowed by the referee, who made due report of his action to the court. The respondents filed exceptions to the report, and, after hearing, the court, by an order duly entered on the 16th of July, 1901, vacated the report, and adjudged the policies to be exempt. To review this order of the district court the present petition was filed by J. A. Stratton, the duly-appointed trustee of the estates of said bankrupts. No answer has been filed to the petition, and the question is whether, upon the facts stated, the order of the district court should be revised.

The policies in question were issued on the 15th of June, 1894, by the Northwestern Life Insurance Company of Milwaukee, Wis., and were respectively numbered 206,383 and 303,921, and were respectively for the amounts of \$5,000 and \$2,000. Daniel L. Holden was the insured in both, and Lizzie Holden was the beneficiary in both, with the provision, however, that, if she should not survive him, payment should be made to his executors, administrators, and assigns. It is provided in policy No. 206,383 that it is "issued on the semitontine plan, and its tontine dividend period is twenty years," and the following is indorsed on the policy:

"Upon surrender by the insured and beneficiary of a policy for \$10,000 of like number and kind dated May 2nd, 1890, this policy for \$5,000 is issued at their request in lieu of one-half of the former policy; in all other respects this policy is made and accepted pursuant and subject to the application upon which the original policy was issued. A full-paid life nonparticipating policy, number 303,931, for \$2,000, is issued in consideration of the surrender of one-half of the original policy."

It is alleged in the petition that the policies have a present cash surrender value, combined, of about \$2,200; and it was stated on the argument that the creditors of each of the bankrupts are the same. It is provided by the laws of the state of Washington "that the proceeds or values of all life insurance shall be exempt from all liability for any debt." Laws 1895, p. 336. By section 70a of the bankrupt law of 1898 it is provided that:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more. upon

his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Section 6 of the bankrupt law is as follows:

"Exemptions of Bankrupts. (a) This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

The effect and extent of section 6 was considered by this court in *Re Scheld*, 44 C. C. A. 233, 104 Fed. 870, 52 L. R. A. 188, and it was said that the purpose of the section did not pervade the whole act, but was controlled by section 70a, and that under the latter section policies of insurance payable to the bankrupt himself, his estate, or personal representatives, passed to the trustee of the estate. But we also said:

"It will be seen that the clause of section 70 above quoted does not include policies of insurance payable to the wife, children, or other kin of the bankrupt, but is limited to policies the proceeds of which are payable to the bankrupt himself, his estate, or personal representatives. The enactment does not deprive the family of a debtor of the protection which he may have secured to them in taking out policies for their benefit payable at his death, but it does prevent debtors from availing themselves of the opportunity of making investments for their own benefit in the form of endowment policies, or policies payable to themselves, and holding the same, while seeking a discharge from their debts through the bankruptcy act."

What is the character of the policies in the case at bar? Are they covered by the proviso of section 70? It will be observed that the policies were not payable to either Holden or his wife absolutely, but to her only if she survived him, and to his personal representatives if he survived her. Subject to such contingent interest in him, the policies and the money to become due under them belong to her, and it is beyond his power to transfer them to any other person, or to surrender them. In *re Heilbron's Estate*, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602, citing *Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370, and other cases. Under the laws of Washington her interest in the policies became her separate property, and was assignable by her. 2 May, Ins. 399q, and cases cited. Each, therefore, has an interest in the policies, and each

must be held to have an insurance policy which has a cash surrender value payable to him or her, or to his or her estate, or personal estate or personal representatives, and subject, therefore, to the provisions of section 70; in other words, passed to their respective trustees as assets of their respective estates. It may be that neither could surrender the policies without the consent of the other, but such right of surrender passed with the policies to their respective trustees. In *Steele v. Buel*, 44 C. C. A. 287, 104 Fed. 968, the circuit court of appeals of the Eighth circuit has decided that the rule of exemption of section 6 pervades the whole act, and is to be read into every other section and provision of the act. The difference of opinion between that learned court and this court demonstrates the ambiguity of the bankrupt act, and, while not insensible to the necessity of harmony in the decisions of the courts of appeal, we are not disposed to depart from the ruling in *Re Scheld*. There is a way open to respondents for a further review of the questions involved.

It follows that the order of the district court should be revised in accordance with this opinion, and it is so ordered.

DOWNES v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 430.

1. CUSTOMS DUTIES — COUNTERVAILING DUTY — BOUNTY OR GRANT ON EXPORTATION.

Section 5 of the tariff act of 1897, which provides that whenever any country "shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country" which is dutiable under the act, an additional duty equal to such bounty or grant shall be collected thereon upon its importation into the United States, is a protective measure, and is intended to cover every case where by the laws of a foreign country the exporter is given, either directly or indirectly, a pecuniary benefit from the exportation, whether by way of a direct bounty paid from the public treasury, by the remission of taxes, or by exemption from taxes which would otherwise be imposed on the article.

2. SAME—LAWS OF RUSSIA—REMISSION OF TAXES ON EXPORTED SUGAR

The laws of Russia bestow a bounty or grant upon the exportation of so-called "free sugar," so as to work a benefit or advantage to the exporter in two ways: (1) By remitting the excise tax due upon the sugar exported, and (2) by the issuance by the government to the exporter of a certificate of exportation, which authorizes the sale in the domestic market of an equal quantity of "free reserve or free surplus" sugar without the payment of the additional tax otherwise required to be paid thereon, and which certificate is transferable and has a substantial market value; and such sugar, when imported into the United States, is subject to the additional or countervailing duty imposed by section 5 of the tariff act of 1897.

3. SAME—AUTHORITY OF SECRETARY OF TREASURY—CONCLUSIVENESS OF DECISION.

Under the provision of section 5 of the tariff act of 1897, that the net amount of any bounty or grant paid or bestowed by a foreign country on the exportation of an article or merchandise "shall be from time to

time ascertained, determined, and declared by the secretary of the treasury," the decision of the secretary as to such amount is conclusive, and cannot be reviewed by the courts; but the question whether a country pays or bestows such bounty or grant, where it depends upon the construction of the laws of such country, is a judicial one, and, while it is to be decided primarily by the secretary, his decision thereon is reviewable.

Appeal from the Circuit Court of the United States for the District of Maryland.

Ernest A. Bigelow, for appellant.

John C. Rose, U. S. Atty.

Before GOFF and SIMONTON, Circuit Judges, and PURNELL, District Judge.

GOFF, Circuit Judge. This is an appeal from a decree of the circuit court of the United States for the district of Maryland, entered in the matter of the petition of Robert E. Downs concerning the decision of the board of the United States general appraisers, rendered April 19, 1901, as to the construction of the law and the facts respecting the classification of, and rate of duty imposed on, certain Russian sugar, imported by said Downs at the port of Baltimore, Md. The collector of that port, acting under the provisions of section 5 of the tariff act of July 24, 1897, assessed and levied an additional or countervailing duty on said sugar, which was paid under protest by the importer, who, under the fourteenth section of the act of congress of June 10, 1890, had the action of the collector in so assessing such duty reviewed by the board of United States general appraisers. That board, after the questions involved had been carefully examined, affirmed the decision of the collector, and thereupon the importer, as he was authorized by law to do, asked the court below to review the matters of law and fact involved in said affirmance, which that court in due time did, and passed the decree affirming the decision of the board of general appraisers, now complained of.

We reach the conclusion that the collector of the port of Baltimore, under the provisions of the fifth section of the tariff act of July 25, 1897, properly imposed the duty now complained of by the appellant. We find that the Russian exporter of sugar obtains from his government a certificate, solely because of such exportation, which is worth in the open markets of that country from 1 ruble and 25 kopecks to 1 ruble and 64 kopecks per pood, or from 1.8 to 2.35 cents per pound. Therefore we hold that the government of Russia does secure to the exporter of that country, as the inevitable result of its action, a money reward or gratuity whenever he exports sugar from Russia, and we think it was from such indirect grants as this that the congress of the United States intended to protect the manufacturers of this country, by authorizing the secretary of the treasury to make all proper regulations for the assessment and collection of such additional duties as were imposed by the collector on the sugars imported by the appellant. The act of which said fifth section is a part was not only intended

to aid in the collection of revenue, but also to encourage the industries of the United States, as is clearly stated in its title. One method of protection the congress had in mind was the imposition of an additional duty on all articles of merchandise imported into the United States from any country which had paid or bestowed, directly or indirectly, any bounty or grant upon the exportation of such merchandise, the same being dutiable under that act; such additional duty to be simply the net amount of the bounty or grant which had been allowed for the purpose of facilitating the exportation.

In affirming the decree of the court below, we also affirm the judgment rendered by the board of general appraisers, whose opinion so fully expresses our views, and so ably presents the facts involved herein and the law applicable thereto, that we deem it entirely appropriate to adopt the same as part of the opinion of this court. It is as follows:

"The importation in this case consists of refined sugar, which was exported from Russia, and arrived at the port of Baltimore as shown above. No controversy arises as to the proper classification of the sugar as made by the collector; his action in this particular not being challenged. The only question for decision relates to the imposition of a so-called countervailing duty, levied under the provisions of section 5 of the tariff act of July 24, 1897, which reads as follows:

"Sec. 5. That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the secretary of the treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties."

"Under the authority conferred by this law, the secretary of the treasury has duly 'ascertained, determined, and declared' the net amount of the bounty or grant which, in his judgment, was bestowed by the laws of the Russian government upon the exportation of this sugar. T. D. 20,407, dated December 12, 1898; T. D. 22,814, dated February 14, 1901. It is not denied by either party to this suit that, if in fact any bounty or grant was bestowed, the secretary's finding as to its amount was correct. Moreover, it would seem that the decision of that officer as to this particular fact, being made in pursuance of a special statutory authority, would be quite as conclusive on this board and the courts as the finding of the value of foreign coin by the director of the mint, under the provisions of section 25 of the tariff act of 1894, a statute strictly analogous, which finding has been held to be conclusive, and not reviewable by this board or the courts. U. S. v. Klittingenberg, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. Ed. 647; Wood v. U. S., 72 Fed. 254, 18 C. C. A. 553, explaining Klittingenberg's Case; Hadden v. Merritt, 115 U. S. 25, 5 Sup. Ct. 1169, 29 L. Ed. 333. It is conceded, however, that the decision of the secretary as to whether the laws of Russia do in fact bestow such a bounty or grant is reviewable by this board, as it involves the construction of the laws of Russia relating to the precise subject-

matter covered by said section 5, above cited. The jurisdiction of the board in this particular has been sustained by the United States circuit court of appeals for the second circuit in the recent case of *U. S. v. Hills Bros. Co.*, 46 C. C. A. 167, 107 Fed. 107. Alluding to this phase of the subject, Hon. Lyman J. Gage, secretary of the treasury, has made the following observation: 'Do the Russian government regulations have such a bearing upon the facts of the case as to bring Russian sugar within the intent of said law as disclosed by its terms? While the question in its initiative lies with the administration of the treasury department, the question is of a judicial, rather than of an administrative, character, and its importance demands determination by a judicial tribunal. The board of general appraisers constitutes such a tribunal, and from its decisions appeal may be taken to the United States courts.' Cong. Record, 50th Cong., 2d Sess., p. 3335 (speech of Hon. J. R. Mann, of Illinois).

"The word 'bounty,' in its ordinary signification, may be defined to be 'an additional benefit conferred upon, or a compensation paid to, a class of persons.' 1 Bouv. Law Dict. (Ed. 1897) p. 290. The subject of sugar bounties has been a matter of consideration for the past 30 years or more, and has been discussed by various international conferences of the European powers, specially convened for the purpose of considering some suitable method for their suppression or modification, so far as relates to the continent of Europe and Great Britain and her colonies. A conference of this character was held at Brussels in June, 1898, the proceedings of which, under the denomination of 'Sugar Bounties,' have been published by authority of congress as senate document No. 171, fifty-sixth congress, second session, under the direction of the senate committee on finance. After an elaborate discussion and exchange of views between the delegates to this conference, the consensus of opinion among them seemed to be (page 61) that 'bounties whose abolition is desirable are understood to be all the advantages conceded to manufacturers and refiners by the fiscal legislation of the states that, directly or indirectly, are borne by the public treasury.' It was furthermore stated that 'there should be classified as such, notably: (a) The direct advantages granted in case of exportation; (b) the direct advantage granted to production; (c) the total or partial exemptions from taxation granted to a portion of the manufactured products; (d) the indirect advantages growing out of surplus or allowance in manufacturing effected beyond the legal estimates; (e) the profit that may be derived from excessive drawback.'

"It is important to observe, in the consideration of this subject, that section 5 of the tariff act of 1897, under which this case arises, does not use the word 'bounty' in any narrow or technical meaning. It embraces 'any bounty or grant' bestowed or conferred by the government, whether directly or indirectly. The word 'grant' is more comprehensive in meaning than the term 'bounty.' It implies the conferring by the sovereign power of some valuable privilege, franchise, or other right of like character, upon a corporation, person, or class of persons. Under the ancient laws of England this was deemed in many cases to be the prerogative of the king, who possessed large powers for the regulation of trade and commerce. It is stated, for example, by Macaulay, as follows: 'In addition to his [King James I.'s] undoubted right to grant special commercial privileges to particular places, he long claimed a right to grant special commercial privileges to particular societies and to particular individuals.' And again: 'He readily granted oppressive patents of monopoly.' 4 Macaulay, History of England, pp. 222, 223. A well-known instance of a similar grant was in the great 'Case of Monopolies' (Coke's Reports, pt. 11, p. 86), where a patent had been granted to the plaintiff, giving him the sole right to import playing cards and the entire traffic in them, and the sole right to make such cards within the realm. The court held that the grant to have the sole benefit of making them was 'against the common law and the benefit and liberty of the subject.' See comment on this case in *Slaughter-House Cases*, 16 Wall. 36, 103, 21 L. Ed. 894. In more modern times, the grant of special privileges by the Louisiana legislature to a particular class of persons, giving them a monopoly of establishing slaughter houses in the city of New Orleans, is another illustration. The supreme court, per Miller, J., speaking of the act of the legislature,

remarked: 'It is true that it grants, for a period of 25 years, exclusive privileges.' And again: 'We think it may be safely affirmed that the parliament of Great Britain * * * continued to grant to persons and corporations exclusive privileges,—privileges denied to other citizens,' etc. See, also, 15 Am. & Eng. Enc. Law, p. 711, 'Monopoly.'

'These cases are cited for the purpose of illustrating the broad and comprehensive meaning of 'grant,' which differs in many respects from 'bounty.' While it involves the idea of a favor or benefit conferred by the government, sometimes of an exclusive character, it does not necessarily embrace the act of appropriating or paying money out of the public treasury. Indeed, the word 'grant,' in its broad signification, may well include the remission of a tax already levied and assessed by the authority of government. It has been held that, in the absence of special statutory remedies, and sometimes in addition to such remedies, actions of debt may be maintained for the collection of taxes. *Dollar Sav. Bank v. U. S.*, 19 Wall. 227, 240, 22 L. Ed. 80, 82, citing numerous English cases; also *U. S. v. Lyman*, 1 Mason, 482, 26 Fed. Cas. 1024 (No. 15,618), in which the question is exhaustively treated by Judge Story. There would seem to be no difference between the remission of a tax, and the resulting cancellation of the debt due the government, and a case where the tax may have been actually collected and paid into the treasury and then refunded and repaid by authority of law. A law enacted by the sovereign power, remitting the taxes due by a citizen for a single year or a specified number of years, in consideration of his rendering a service or engaging in an enterprise deemed of advantage to the public, would unquestionably be construed to be a 'bounty or grant' as fully as if the like amount of money had been actually collected and refunded under the technical name of a bounty. It has long been the practice in many of the American states for the legislature to confer charters on banks, railroads, and especially on manufacturing corporations, containing a special grant of exemption from taxation under the general laws of the state. *Railroad v. Guffey*, 120 U. S. 569, 7 Sup. Ct. 693, 30 L. Ed. 732; *Given v. Wright*, 117 U. S. 656, 6 Sup. Ct. 907, 29 L. Ed. 1021. In this connection, the remarks of Chief Justice Fuller in *U. S. v. Passavant*, 169 U. S. 16, 23, 18 Sup. Ct. 219, 222, 42 L. Ed. 644, 646, are of importance: 'Doubtless, to encourage exportation and the introduction of German goods into other markets, the German government could remit or refund the tax, pay a bonus, or allow a drawback. And it is found that, in respect of these goods, when "purchased in bond, or consigned while in bond, for exportation to a foreign country, this duty is remitted by the German government, and is called "bonification of tax," as distinguished from being refunded as a rebate.' The use of the word "bonification" does not change the character of this remission. It is a special advantage, extended by government in aid of manufacturers and trades, having the same effect as a bonus or drawback. To use one of the definitions of drawback, it is "a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all.'" And again: 'Exoneration from its payment (i. e., payment of the tax) was a mere special advantage extended by the German government, as we have said, in promotion of manufactures and commerce.'

"The question, then, which is before us for consideration, is reduced to this: Did the laws of Russia and the regulations made by the minister of finance for the purpose of carrying such laws into execution operate to confer a 'bounty or grant,' directly or indirectly, upon the exportation of this sugar from the Russian dominions? And in making this inquiry it is immaterial in what manner the 'bounty or grant' was paid or bestowed. The law regards substances, not shadows; things, not names. The Russian law covering the production and exportation of sugar is an exceedingly complex scheme, both as it stands upon the statute book and as it is administered in actual practice. The system was pronounced by one of the delegates to the Brussels conference to be 'an extremely ingenious device,' and it was further said that 'the Russian empire is indebted to it for the notable increase in the output of sugar which has taken place since it came into operation,—all this with the appearance that no premium, in the narrow mean-

ing of the word, has been applied.' The leading features of the Russian law and regulations, as set forth in the stipulated agreement of facts and shown by the record, may be summarized as follows:

"Under the Russian law of November 20, 1895, sugar is divided into the three following classes (page 2 of stipulation, section IV.): (a) "Free sugar," which consists of a certain quantity of sugar, which the Russian government permits a factory or refinery to sell for home consumption under an excise tax of 1.75 rubles per pood. (b) "An obligatory or indivertible reserve" of sugar, which consists of a certain quantity kept at each factory or refinery by order of the government, and which may not be sold or removed without the special permission of the government. (c) "Free reserve or free surplus," which consists of such sugar as is manufactured over and above the quantity of "free sugar" and "obligatory or indivertible reserve." This sugar may not be sold for home consumption, except upon payment of the regular tax of 1.75 rubles and an additional tax of 1.75 rubles, or 3.50 rubles in all.' And the Russian government fixes and determines the following conditions: (a) The total quantity of sugar required for home consumption. (b) The quantity of "free sugar" allowed to each factory and the "obligatory reserve" which each factory or refinery shall keep on hand. (c) The maximum price at which sugar may be sold for domestic consumption.'

"It is admitted that the sugar imported in this case consists of 'free sugar,' as above defined, and would have been subject to a tax of 1.75 rubles per pood, if sold in Russia (about 2½ cents per pound, allowing 36 pounds to the pood). With the view of protecting home producers of sugar against foreign competition, the Russian government imposes an import duty on sugar of 3 rubles per pood, which is equivalent to about 4.28 cents per pound. Other important provisions of the Russian law are as follows:

"(10) The delivery of sugar from factories and beet sugar refineries is allowed only upon permits of the excise supervisor, who certifies by his signature upon the transit document to the regularity of the delivery.'

"(5) Sugar in excess of the normal production cannot be put on the home market otherwise than upon payment of an additional tax; the normal tax being payable according to the general regulation. However, it is allowed to the manufacturers to keep this excess of sugar as free reserve, and in such case, so long as the sugar does not leave the factory, they are not required to pay either the additional or the regular excise.'

"An important provision enabling the Russian government to control prices is found in section 7 of the law, which reads as follows:

"(7) In cases where the prices in the home market exceed the normal prices fixed, the minister of finance authorizes the issuance of sugar from the obligatory reserve and from the free reserve (if necessary) in sufficient quantities to cause a decrease of prices without payment of the additional tax, but with payment of the normal excise.'

"Section 9 runs as follows:

"(9) Upon the exportation from factories of the excess of sugar, the same is exempted from excise and additional tax in full measure.'

"The minister of finance, acting in conjunction with a committee of ministers, is authorized either to reduce or to suspend totally for a given period of time the provision of the Russian law which exempts exported sugar from not only the normal tax, but also the additional tax as well. Such action would operate to subject imported sugar to the full tax of 3.50 rubles per pood (equal to about 5 cents per pound). The particular bounty or grant which seems to be conferred by the Russian law upon the exportation of sugar accrues under section 39 of said law, providing that 'a manufacturer may cede to another manufacturer his right to place on the home market free—i. e., without the payment of an additional tax—his allotted quota of sugar.' This cession can be made only in accordance with certain rules prescribed in section 40 of said law, by which notice of such transfer is required to be given to the local excise board, authorizing the reduction of the quantity of free sugar in one mill and the increase thereof by assignment at another mill. This cession or transfer is accomplished by means of gov-

ernment certificates or vouchers, which operate as follows: Refiner A. is authorized to get the benefit of the failure of refiner B. to supply the home market with his full quota of free sugar. Home refiner A. becomes willing to pay refiner B. a certain required sum if he will export a portion of his allotted quota of sugar, and he accordingly gives A. the official evidence of such exportation in the form of a voucher or certificate, as above described; and this, under the operation of the Russian law and regulations, authorizes A. to sell in the home market, at a tax of 1.75 rubles per pood, an equivalent portion of the sugar produced by him (A.) in excess of his quota. One of the purposes of these transfers is expressly stated to be "in order to facilitate the exportation of the surplus to foreign countries." Sections 39, 40.

"The character and value of these certificates are further explained in the following extracts from the stipulated agreement of facts in this case:

"(VI.) That, upon the exportation of said sugar from Russia, the Russian government, under its laws and regulations, released said sugar from said tax of 1.75 rubles, either by a refund of the tax, or a cancellation of indebtedness, or otherwise.

"(VII.) That, in addition to remitting said excise tax, the government issued to the exporter a certificate certifying that he had exported such a quantity of so-called free sugar. The said certificate and such certificates for free sugar have a substantial market value, and are transferable, and the price thereof is usually determined by the difference existing at the time between the price obtainable for the sugar on the home market and the price obtainable abroad.

"(VIII.) That said certificates are sold to and used by sugar manufacturers or refiners, who are thereby enabled to transfer from their "free reserve or free surplus" to their "free sugar" an amount of sugar equal to the amount shown by said certificates to have been exported, which amount may then be sold for domestic consumption on paying the ordinary tax of 1.75 rubles per pood (to which free sugar is regularly subject)."

"The following statement on this subject is made in the report of the American consul to the treasury department, and which was admitted in evidence at the hearing:

"On shipment abroad of sugar which cannot be placed on the home market without the payment of additional excise, the latter—i. e., the excise—is guaranteed by approved securities, and for this sugar a certificate is given to the effect that the same has been manufactured at such a factory in such a year and figures in the category of "free reserve," and is being sent abroad through such custom house. When thereafter this sugar arrives at the custom house and has been shipped abroad, the customs authorities make an indorsement on the certificate and also issue to the shipper quittances, which are accepted in lieu of payment of the excise computed as being due on that sugar. The manufacturer presents this certificate to the local excise administration, which sets the securities free which were deposited when the sugar was being removed from the factory. To avoid the necessity of giving securities as guaranty for additional excise, and, in general, for the greater freedom in business transactions, the manufacturer is granted the right to export abroad "free sugar,"—i. e., that on which no additional excise is payable. For such sugar, on its being taken from the factory, a certificate is given, on which is written "Free Sugar." When thereafter the sugar is exported abroad, and an indorsement is made on the customs certificate, then, on presentation of this certificate to the local excise inspection, the latter transfers to the "free sugar" an equal quantity from the "free reserve." It is, of course, understood that on the exportation abroad of free sugar the customs authorities also issue quittances, which are valid in lieu of payment of excise on sugar. It is permitted to export free sugar abroad, not only for the purpose of liberating for admission to the home market the "free reserve" of any one factory, but also of any other factory. For this purpose the owners of the factories who enter among themselves into such an agreement must notify their local excise officials, and these in turn must notify each other. That factory which desires to export abroad its free sugar, say 5,000 poods, for the account of

another factory indicated by it, asks for the transfer in its factory and excise books of 5,000 poods from the category of "free sugar" to the category of "free reserve" in order that from the category of the "free reserve" of the other manufacturer 5,000 poods may also be transferred to the category of "free sugar." The other manufacturer hands in a notice for the liberation of 5,000 poods of the free reserve from the additional excise and its transfer to the category of free sugar, in view of the fact that in its place 5,000 poods of the free sugar have been transferred to the free reserve of the first manufacturer. Consequently the first manufacturer ceded to the second his right of placing on the home market 5,000 poods, which he can now only sell abroad or pass out into the home market after payment over and above the excise of the additional excise of 1.75 rubles per pood. As the first and second methods of disposing of this sugar are less advantageous than placing the article on the home market as free sugar, the manufacturer who ceded his right receives from the manufacturer who acquired the right the price per pood agreed upon between them, which is usually determined by the difference existing at the moment between the price obtainable for the sugar and on the home market and the price obtainable by sale abroad. This is what is termed a "transfer." Dependent upon the fluctuations in price of sand sugar in Russia and abroad, the price of these transfers also varies. Therefore, the person who sells the transfer (the right of issue into the home market) charges several kopecks more than the difference mentioned above. This is done on account of the risk that is taken that sugar prices abroad may fall, and also for the trouble involved in exporting, etc. Example: Price of sand sugar at a station in the southwestern region: (a) For the home market, Rs. 4.25 per pood, or, without excise, Rs. 2.50; (b) for abroad, Rs. 1.25. Consequently the difference or value of transfer is Rs. 1.25; but in that case, for the reasons given, Rs. 1.28 to Rs. 1.30 is paid for the transfer. * * * For example, four sugar factories far away from the shipping port have to export 50,000 poods each, or in all 200,000 poods. Another factory situated near a shipping port, to which the freight is cheaper, and with the demand for sugar not great, finds it more profitable to export its entire output (250,000 poods), and receives export certificates for this quantity. These certificates are given to the owners of the four factories mentioned, and these in turn deliver 200,000 poods of sugar, which can be sold on the home market whenever the owner pleases. It should have been stated that certificates to the extent of 200,000 poods are exchanged for the same quantity of sugar, and not 250,000 poods. These certificates can be sold to a bank, or to a speculator who has engaged to deliver sugar at the port abroad to which the sugar was shipped. The government also takes these certificates in payment of excise at par; i. e., 1 ruble 75 kopecks a pood.

"The natural result of the Russian laws governing the sugar industry is the accumulation of a large surplus of sugar, and the disposal of such surplus has proved a problem of no small difficulty. Much of it has necessarily gone abroad for export, even at a loss to the manufacturers. It is manifest from the foregoing considerations that the exporter of sugar from the Russian empire, under the provisions of the Russian laws already mentioned, as enforced by the regulations of the minister of finance, receives a valuable bonus through the operation of such laws and regulations, and that this bonus accrues to him upon the exportation of his sugar. The export certificates or vouchers, to which we have referred, are only the legal evidence of this valuable privilege or grant conferred by the government, without whose authority such transfers of sugar would be valueless and of no effect. Our conclusion, therefore, is that a bounty or grant, within the meaning of section 5 of our tariff act, has been paid or bestowed by the Russian government upon the exportation of this sugar, so as to work a benefit or advantage to the Russian sugar exporter, as follows: First. Upon the exportation of the sugar, the government remitted or refunded the excise tax due thereon, or otherwise canceled the indebtedness of the sugar manufacturer, so that he was enabled to place his product upon the market free from the burden of either the regular or additional excise tax. Second. The certificate which the government issued to him upon the exportation

of his sugar had a substantial market value, and was transferable, and operated as a premium, grant, bonus, or reward. Looked at from the Russian standpoint, these advantages might, perhaps, be described as a bounty on production; but (in the language of the circuit court of appeals in the Hills Bros. Co. Case, supra), 'from the standpoint of other countries,' they become a bounty or grant on exportation. It will be observed, too, that in the Hills Bros. Co. Case it was the fact alone of the remission of the excise tax by the Dutch government which brought into operation the bounty received by the sugar makers. In other words, it created it; for without such remission there would have been no bounty. It is immaterial, we may add, whether the price obtained for the exported sugar reaped a profit or inflicted a loss upon the manufacturer or producer. The simple inquiry is whether, at whatever price he may have sold it, he received a bounty or grant of pecuniary value, upon its exportation by reason of and through the operation of the system of laws of the Russian empire designed for the regulation of the sugar industry, both for home consumption and exportation.

"There is nothing in the decision of the circuit court of appeals in the case of U. S. v. Hills Bros. Co., supra, which, in our judgment, conflicts in any manner with the conclusions we have reached in this case. On the contrary, the reasoning of the court is strongly confirmatory of the views we have expressed. That decision, it may be noted, reversed the decision of the circuit court holding that the bounty paid by Holland was a bounty on production (99 Fed. 425), and affirmed the decision of this board, which held it to be a bounty on exportation. In re Hills Bros. Co., G. A., 4261. In examining the mass of evidence introduced in this case, and in construing the Russian laws and regulations, we have borne carefully in mind the principle laid down by Mr. Justice Miller in *Henderson v. Mayor*, 92 U. S. 259, 268, 23 L. Ed. 543, 547, that 'in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.'

"Testing the Russian sugar laws by this standard, and giving to the importer the benefit of every reasonable doubt as to the construction of the law, we are impelled to the conclusion that the Russian sugar statutes and regulations operate to pay or bestow a bounty or grant, directly or indirectly, upon the exportation of sugar. The protest is overruled, and the decision of the collector is affirmed."

The decree appealed from is affirmed.

FIDELITY TRUST CO. v. McCLAIN.

(Circuit Court, E. D. Pennsylvania. February 1, 1902.)

No. 7.

1. INTERNAL REVENUE—PASSAGE OF LEGACIES—INTERVENING ESTATES.

Prior to the passage of the revenue act of 1898, providing for a tax on legacies or distributive shares arising from personal property passing, after the passage of the act, from any person possessed of such property, by will or otherwise, a testator died leaving a will giving real and personal property to his wife for her life, with remainder to his children named in the will, with a power to the wife to direct by her will the respective shares to be received by such children. Testator's wife died after the passage of the revenue act, leaving a will in which, pursuant to the power given by her husband's will, she made division of the estate among his children. *Held* that, notwithstanding the wife's intervening estate, the legacies passed to the children by virtue of the will of their father, who was the person possessed, within the meaning of the statute, and hence such legacies were not subject to the tax thereby imposed.

2. SAME—PERSON HOLDING INTERVENING ESTATE—POWER TO APPORTION.

The wife's power to direct the respective shares to be received by the children did not prevent the legacies from passing to them by their

father's will, since the legacies as created and fixed by the will of the father could not be changed by that of the wife, but merely ascertained or apportioned.

At Law. Action to recover United States internal revenue taxes alleged to have been unlawfully assessed by the defendant as collector. The defendant demurred to the plaintiff's statement.

John Marshall Gest, for plaintiff.

J. Whitaker Thompson, Asst. U. S. Atty., and Jas. B. Holland, for defendant.

ARCHBALD, District Judge.¹ The plaintiff declares for internal revenue taxes assessed by the defendant on certain legacies, and paid by it under protest. The facts set out in the declaration, to which the defendant has demurred, are about as follows: George H. Crosman died May 28, 1882, leaving a widow and four children, and the issue of two others, who were dead. By his will, which was probated June 6th following, after one or two specific bequests, he gave to his wife, Hannah B. Crosman, the rents, issues, and profits on all the residue of his estate, real and personal, for life, and upon her death he provided that:

"After the termination of the entire life interest hereinbefore given to my wife, I do give, devise, and bequeath to my six children, or their issue, as the case may be, in regard to any who may be deceased at the time of the death of my wife, namely, George, Heron, and Mary Crosman, and Margaret Phillips, and the issue of my deceased sons, Frederick and Alexander Crosman, all the rest, residue, and remainder of my whole estate, real and personal, in such manner, shares, and proportion, however, as she, my said wife, Hannah B. Crosman, by her last will and testament, shall order, direct, limit, and appoint. And in case she, my said wife, should not, by any such will and testament, order, direct, limit, and appoint the respective shares and proportions of my said children or their issue, or the manner in which they shall be held, then the said rest, residue, and remainder of my estate, after the death of my said wife, shall be equally divided, share and share alike, among my children, their heirs and representatives; the issue of my deceased child or children taking, however, and only receiving, such part or shares thereof as his, her, or their deceased parent would have had and taken if living."

He also appointed his wife executrix. Mrs. Crosman lived until December 28, 1898, and then died, leaving a will, in which, in execution of the power of appointment given her by her husband, she directed that to the actual amount of his estate should be added the advancements made by him to his children in his lifetime, the whole to be then divided into six equal shares, each share being charged with the advancements made to the child to whom it was to go, one such share being given to each of the four children, George H. Crosman, J. Heron Crosman, Margaret C. Phillips, and Mary C. Thornton, and one share to her executors in trust for the children of Alexander F. Crosman, deceased, and another in trust for her granddaughter Frederika J. Crosman, daughter of Frederick E. Crosman, deceased.

After the death of Mrs. Crosman, the Fidelity Trust Company, as her executor, filed an account for her as executrix of her husband,

¹ Specially assigned.

upon which the orphans' court of Philadelphia made distribution in accordance with the directions given by her will, and upon the legacies so ascertained the collector levied the tax claimed. The question is whether they were subject to it, and this depends on when the legacies passed,—if by the will of the father, then, as that long antedated the passage of the revenue act of 1898, they were not so taxable; but if by the will of the mother, in December, 1898, then they were.

That it is the passage of the legacy, and not the time of its vesting, which determines whether it is subject to a tax, is clearly pointed out in *McClain v. Pennsylvania Co.*, 47 C. C. A. 529, 108 Fed. 618; and the same case decides that "the person possessed," within the meaning of the statute, is the decedent from whose estate the legacy really comes, and not the one to whom it may have been given by him intermediately in charge or trust for such beneficiary. This case, in effect, disposes of the question now in controversy. The present legatees take from their father, and by virtue of his will, notwithstanding that the mother was given the power to determine the amount to which they should be relatively entitled. It is their father's estate that is distributed to them, and not their mother's. Neither can she be regarded as the person possessed because she had a precedent life interest, and theirs is an interest in remainder after her. The relative rights of their mother and themselves were fixed by the will of the father, and both passed from him to them thereby. They took nothing from their mother; they simply took after her. The corpus of the estate was indeed passed on to them from her after she was through with it, but it was passed simply in continuation of its original passage from their father, who was clearly the person possessed, within the meaning of the act. In no sense are they the legatees of their mother, while they are the direct legatees and beneficiaries of their father, having been actually named by him in his will.

It adds nothing to the argument in favor of the tax that the extent of the children's interest was left to be determined by Mrs. Crosman if she so desired. The exercise of this power did not extend to the naming of the persons who were to take. They were fixed by the will of the father, and could not be changed. *Wickersham v. Savage*, 58 Pa. 365. She simply had authority to decide what should be the share of each. The legatees were not created by her will; they are merely ascertained by it.

In *Com. v. Duffield*, 12 Pa. 277, the testator, a resident of Maryland, left a fund to his executors in trust, to pay the income to his sister for life, and empowered her to dispose of one-half of the principal at her death. She executed the power by a bequest to her niece, and the question came up, on the probate of her will in Pennsylvania, whether a collateral inheritance tax was due on the fund so passing, and it was held that it was not. "An appointee," says Gibson, C. J., "derives title immediately from the donor of the power, by the instrument in which it was created, and consequently not under, but paramount to, the appointor by whom it was executed." The case of *Com. v. Williams' Ex'rs*, 13 Pa. 29, is quite

similar. A testator devised real and personal estate in trust for his daughter for life, and after her death for the use of such persons as she by will should appoint, and it was held that the estate passed to her appointees, not by virtue of her will, but by that of her father, she having a mere power to designate. This was a tax case also, and the question when the estate passed was directly in issue; for, if it went by the will of the daughter, as the beneficiaries were collateral it was subject to a collateral inheritance tax, while if they took from the original testator they were lineal descendants, and it was not. Both these cases go further than is necessary to meet the one in hand, for here we have the parties who are to take, directly established by the original will, and only the extent of their taking to be determined by the donor of the power, while in each of those cited the fixing of the beneficiaries was also left open, and yet the estate was held to pass at the death of the first testator.

The English cases on the subject are instructive. By the rule which there prevails, as a general power of appointment enables the donor of the power to dispose of the property in his own favor it is regarded as in effect a part of his estate, and it might therefore be supposed that an interest which is created by the exercise of such a power would be held to have been derived from it. But such is not the case. In *Braybrooke v. Attorney General*, 9 H. L. Cas. 182, it was decided that the interest was derived, not from the person exercising the power, but from the one who created it. This was followed in *Re Barker*, 7 Hurl. & N. 109, where the facts were as follows: A testator died in 1850, devising his estate to his wife for life, and after her death on such further trusts as she by will might appoint. The wife died in 1859, devising the estate to the testator's niece. In the meantime the act of 16 & 17 Vict. c. 51, had been passed, imposing a succession tax on "every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof, upon the death of any person dying after the time appointed for the commencement of the act," but varying it according to relationship, and the question came up as to the rate to be paid. If the estate which the niece took was to be regarded as derived from the appointment of the wife, they being strangers in blood, the duty would be 10 per cent., but if from the husband, who created the power, it was but 3 per cent., and it was held taxable only at the latter rate. *Attorney General v. Pickard*, 3 Mees. & W. 552, is to the same effect, Lord Abinger declaring that "nothing can be better settled than the general rule that interests created by the execution of a power take effect precisely in the same manner as if created by the instrument which gives the power"; and this being made the basis of determining the succession tax there decided to be due. In *re Lovelace's Settlement*, 4 De Gex & J. 340, is the same way, and, after a review of all the cases, the doctrine was again asserted in *Attorney General v. Mitchell*, 6 Q. B. Div. 548. So, in *Emmons v. Shaw*, 171 Mass. 410, 50 N. E. 1033, it was held that the donor of a power, rather than the donee, must be regarded as the decedent whose estate is liable to taxation under the act im-

posing a tax upon legacies and successions, and this was followed in *Balch v. Shaw*, 174 Mass. 144, 54 N. E. 490. A similar ruling is also to be found in *Re Stuart*, 131 N. Y. 274, 30 N. E. 184, 14 L. R. A. 836.

Not only on principle, therefore, but by authority, there seems no escape from the conclusion that the legacies in the present instance passed by virtue of the will of George Crossman, the original testator, in 1882, and not by that of his wife, Hannah, and that they were not, therefore, liable to the tax which the plaintiff, as executor, has been compelled to pay. There are no facts in dispute, the point of law involved being the only matter in controversy, and, this being found against the defendant, the case is in shape for final disposition, the right of the plaintiff to recover being sustained.

Let judgment be entered on the demurrer in favor of the plaintiff for the taxes declared upon, with interest and costs.

FOOT v. BUCHANAN, United States Marshal.

(Circuit Court, N. D. Mississippi, W. D. January 14, 1902.)

1. WITNESSES—EVIDENCE—INCRIMINATING—PROTECTION—CONSTITUTION—STATE.

Under the fifth amendment of the constitution of the United States, providing that no person shall be compelled in any criminal case to be a witness against himself, a witness before the grand jury cannot be required to answer as to his participation in, and knowledge of, a combination to regulate and control the price of cotton seed and the product and price of oil throughout certain states, in violation of the act to protect trade and commerce against unlawful restraints and monopolies (26 Stat. 209), notwithstanding Rev. St. § 860, providing that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence or in any manner used against him in any court in any criminal proceeding, since such section does not exempt the witness from prosecution for the offense which may be disclosed by his testimony.

2. SAME—INTERSTATE COMMERCE ACT—VIOLATION—WITNESS—EXEMPTION FROM PROSECUTION—UNLAWFUL MONOPOLIES—PROHIBITION—APPLICABILITY OF EXEMPTION.

Act Cong. Feb. 11, 1893 (27 Stat. 443), providing that no person shall be excused from testifying in a proceeding growing out of an alleged violation of an act to regulate interstate commerce, approved February 4, 1887, on the ground that his testimony will tend to incriminate him, and that no person shall be prosecuted, etc., on account of anything concerning which he may testify in such proceeding, applies only to proceedings connected with the act of February 4, 1887, and does not apply to a prosecution for violation of the act to protect trade and commerce against unlawful restraints and monopolies (26 Stat. 209), so as to abrogate in relation thereto Const. U. S. Amend. 5, providing that no person shall be compelled in a criminal case to be a witness against himself.

3. SAME—QUESTION FOR JUDGE.

Where a witness claims that the answer to a question will tend to incriminate him, it is not for the witness, but for the judge, to decide whether, under all the circumstances, such might be the effect, and the witness entitled to the privilege of silence.

4. SAME—NATURE OF TESTIMONY.

Where a person has already been indicted for an offense about which he is to be examined as a witness, and the questions asked him tend

to connect him with such offense, the testimony sought is within the inhibition of Const. U. S. Amend. 5, providing that no person shall be compelled in any criminal case to be a witness against himself.

5. SAME—ASSURANCE OF SAFETY—RELINQUISHMENT OF PRIVILEGE.

Where a witness before a grand jury declines to answer certain questions, and is taken before the judge, who assures him that he can safely answer, as his testimony cannot be used against him, he is not compelled by such assurance to relinquish his constitutional privilege, where the answer may tend to criminate him.

6. SAME—CONTEMPT—COMMITMENT—HABEAS CORPUS—RELIEF.

Where a witness is committed for contempt in refusing to answer all of a series of questions, for the reason that the answers would tend to criminate him, and some of the answers would have that tendency, he should not be denied relief on habeas corpus because some of the questions might be safely answered.

Habeas Corpus.

Lawrence Foot was subpoenaed as a witness before the grand jury for the district court of the United States for the Western division of the Northern district of Mississippi. He was sworn and examined in relation to violations of an act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209). This act is intended to suppress conspiracies or trusts in restraint of trade, and it provides that every person who shall violate its provisions shall, on conviction, be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or both, in the discretion of the court. The assistant United States attorney propounded to the witness a number of questions, among which were the following:

"State whether or not you attended any meeting, called either at Memphis or New Orleans or Meridian or elsewhere, in the early part of this fall, or at any time within the past eighteen months, to discuss fixing a price upon cotton seed, or the products of cotton seed?"

"Has your mill, or any other, to your knowledge, contributed anything to the selection of a committee whose duty it is to see that the various mills in the states of Mississippi, Louisiana, and Tennessee keep up a uniform rate on cotton seed and its products?"

"If your mill should immediately advance the price of cotton seed, or lower the price of products, would you be subject to any sort of forfeiture, censure, or supervision from any source whatever?"

"Is there any sort of understanding existing between the mills in Mississippi, Tennessee, or Louisiana, either written or verbal, by which the various mills are to be allowed to press a certain amount of seed; and, in the event any greater amount is pressed by any mill, is there any obligation on the part of such mill to account for the same to any committee whose duty it is to look after such matters?"

"Is it not a fact that within the past six months one oil mill will not invade what is known as the 'territory' of another oil mill to purchase seed; and is it not a fact that all the mills in a certain territory have an agreement whereby each day, or every few days, they communicate with each other over the telephone, by letter, or otherwise, and inform each other what they are paying for seed, or what they intend to pay next day or next week, and by virtue of such communications or agreements do not all the mills pay the same price for seed and sell all products within such territory at the same price, and has this not been the practice this fall?"

"During the past six months has there existed an agreement between the oil mills of Memphis, or those of Mississippi, Tennessee, and Louisiana, that you will all be governed, in purchasing cotton seed and selling the products thereof, by the Memphis or New Orleans market, and do you strictly adhere to said agreement?"

The witness refused to answer these questions, and gave as the reason for his refusal that "in answering the questions he would criminate himself, and put the government in possession of information as to the details of

said alleged combine and agreement, and the names of parties and witnesses, which might supply the means of convicting him of the same offense." For this refusal to answer, on report of the grand jury, the witness was carried before the district court, where he repeated his reasons for declining to answer. The court required the witness to return to the grand jury and answer the questions, and, on his refusal to obey the order of the court and answer the questions, he was committed to jail, "there to remain from day to day and term to term of this court until he shall answer said interrogatories, or be otherwise discharged by due course of law." Being in the custody of the United States marshal for the Northern district of Mississippi under this order of the court, he filed a petition for the writ of habeas corpus. The petition alleges the facts which have been stated, and also, on information and belief, that the petitioner "at the time of his refusal to answer the questions propounded to him by the grand jury aforesaid, and at the present time, stands indicted in the district court of the United States at Jackson, Mississippi, for the same identical offense which the grand jury was seeking to investigate in propounding the questions aforesaid to your relator." The writ was issued, and the return of the marshal shows that the petitioner was held under the said order of the court. The United States attorney, who, by order of the judge granting the writ, was notified of the proceedings, filed the following addition to the marshal's return: "We admit that the questions in the petition were asked, but deny that the defendant is entitled to the relief sought, and state the facts to be that the defendant was assured by the court that no information given by him in answer to the questions would or could be used against him in any prosecution in any United States court in this state. And we deny that the defendant knew of any indictment against him at the time the questions were asked, etc., but admit that he was under indictment."

A. K. Foot and James Stone (J. C. Wilson, on the brief), for petitioner.

M. A. Montgomery, U. S. Atty., for respondent.

SHELBY, Circuit Judge (after stating the case as above). 1. It is a rule of the common law that a witness will not be compelled to answer any question, the reply to which would supply evidence by which he could be convicted of a criminal offense. This doctrine was firmly implanted in the common law of Great Britain and of the colonies long before the adoption of the constitution of the United States. The principle is held so sacred in this country that it is embodied in the respective constitutions of all the states, as well as in the federal constitution. The principle, as applied to this case, is found in the fifth amendment to the constitution: "No person shall be compelled in any criminal case to be a witness against himself." The question here is, does this provision protect the petitioner in declining to answer the questions propounded to him? The general power of the court to punish a witness for contempt who refuses to answer is unquestioned. But that power is limited by the language quoted from the constitution. Any exercise of jurisdiction or power violative of this provision is void, and the witness imprisoned by an order made in excess of the court's authority is entitled to be discharged on the writ of habeas corpus. *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; *Rev. St. § 752*. Was the order of the district court requiring the petitioner to answer these questions, and committing him for his refusal to answer, in excess of the court's authority?

In 1890 Charles Counselman was subpoenaed before the United

States grand jury for the Northern district of Illinois which was engaged in investigating alleged violations of an act to regulate commerce, approved February 4, 1887 (24 Stat. 379). Questions were propounded to him, the answers to which would tend to criminate him. He declined to answer, and was carried before the court. The court held (Judge Gresham presiding) that section 860 of the Revised Statutes of the United States provided that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him, in any court of the United States, in any criminal proceeding, and that he was fully protected by this statute; that therefore he should be required to answer. It was held, in view of this statute (Rev St. § 860), that the witness could not claim the privilege of silence under the fifth amendment of the constitution. Counselman's petition seeking to be discharged on habeas corpus was dismissed, and he was remanded to the custody of the marshal. *In re Counselman* (C. C.) 44 Fed. 268. Counselman took an appeal to the supreme court. The decision of the lower court was reversed. The supreme court held that the witness could not be required to answer. Referring to section 860, the supreme court said:

"It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which would be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted." And again: "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecutions for the offense to which the question relates." The court concluded: "From a consideration of the language of the constitutional provision, and of all the authorities referred to, we are clearly of opinion that the appellant was entitled to refuse, as he did, to answer." *Counselman v. Hitchcock*, 142 U. S. 547, 564-585, 12 Sup. Ct. 195, 198-207, 35 L. Ed. 1110, 1114-1122.

By the unanimous judgment of the supreme court the appellant, Counselman, was discharged from custody.

That case seems conclusive of the case at bar. But the learned district attorney contends that "the case of *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, is virtually a repeal of the case of *Counselman v. Hitchcock*." Is that contention true? After the opinion in *Counselman v. Hitchcock* was rendered, the congress passed an act, approved February 11, 1893, to give immunity to witnesses in certain cases. It provides, in brief, that no person shall be excused from testifying in interstate commerce actions, or from producing books, papers, contracts, etc., before the interstate commerce commission, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of congress entitled "An act to regulate commerce," ap-

proved February 4, 1887, on the ground or for the reason that the testimony or evidence required of him would tend to criminate him or subject him to a penalty or forfeiture, and that no person shall be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he may testify or produce evidence before said commission, or in obedience to its subpoena, or in any such case or proceeding. 27 Stat. 443. The supreme court having decided that section 860 of the Revised Statutes did not confer complete indemnity on witnesses, this act was evidently passed to confer such indemnity in the cases to which it refers. The act has no application to the case at bar. It is confined by its terms to proceedings connected with "An act to regulate commerce," approved February 4, 1887, and amendments thereto. The petitioner in the case at bar was examined before the grand jury in reference to offenses under "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (26 Stat. 209; 1 Supp. Rev. St. p. 762). In the case of *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, cited by the district attorney, the court construed the act of February 11, 1893 (27 Stat. 443). The court held (four of the justices dissenting) that the act affords absolute immunity to the witness in the cases to which the act relates against prosecution, state or federal, for the offense about which the witness is examined, and deprives the witness of his constitutional right to refuse to answer. This act, as we have said, by its terms is confined to a certain class of cases, and has no application to the case at bar. There is no statute applicable to the case at bar which tends to protect the witness, except section 860 of the Revised Statutes, and that has been held by the supreme court not to afford the protection furnished by the constitution. The principle established by the decision in *Counselman v. Hitchcock*, so far as it is applicable to the case at bar, is unaffected by the opinion of the court in *Brown v. Walker*. The result of the two cases is (1) that since the statute of February 11, 1893 (27 Stat. 443), parties or witnesses in cases or proceedings under the act of February 4, 1887 (24 Stat. 379), to regulate commerce, and amendments thereto, may be required to answer questions that tend to criminate the witness or party; but (2) witnesses or parties in other cases may not be required to answer criminalizing questions, because section 860 of the Revised Statutes does not afford complete indemnity to the witness or party. The first result is established by a bare majority in *Brown v. Walker*. The second proposition is established without dissent in *Counselman v. Hitchcock*.

2. It is true that the witness cannot avoid answering questions upon his mere statement that his answers to them will tend to criminate him. It is for the judge to decide whether his answer will reasonably have such tendency, or whether it will furnish an element or link in the chain of evidence necessary to convict him. In determining whether or not the witness is entitled to the privilege of silence, the court may look at all of the circumstances of the case, and determine whether or not there is reasonable ground to appre-

hend danger to the witness from his being compelled to testify. If the fact that the witness is in danger appears, great latitude should then be allowed to him in judging for himself of the effect of any particular question. A question which might appear at first a very slight and innocent one might, by establishing a link in a chain of evidence, become the means of convicting the witness. *Ex parte Irvine* (C. C.) 74 Fed. 954. In the case at bar it appears that the defendant was already indicted for the offense about which he was examined, and the questions tended to connect him with the offense for which he is indicted. There can be no doubt that under such circumstances, when the questions are such as seek to connect him with the crime under investigation, the court will not require him to answer them.

3. It is set up in the answer filed by the district attorney that the petitioner, when carried before the court upon his failure to answer questions before the grand jury, was assured by the court that no information given by him in his answers to the questions would or could be used against him in any prosecution in any court of the United States. The petitioner could not be required to waive his constitutional privilege upon such an assurance by the court. He has a right to stand upon his constitutional privilege, notwithstanding such assurance, and to remain silent whenever any question is asked, the answer to which may tend to criminate him. *Temple v. Com.*, 75 Va. 892.

4. It is argued by the district attorney that some of the questions asked (we have not stated them all) could have been answered without endangering petitioner, and that, if any one of them did not call for a criminating answer, he is not entitled to relief. We cannot accept that view. He was carried before the court, and the court required him to answer all of the questions. He is under commitment for refusal to answer all. It was one examination, relating to one subject, and the questions culminated in an effort to show the witness' connection with the misdemeanor charged. Where there is a series of questions, the examiner cannot "pick out one, and say, if that be put, the answer will not criminate him." If it is one step having a tendency to criminate him, he is not compelled to answer. *People v. Mather*, 4 Wend. 230, 254; *Paxton v. Douglas*, 16 Ves. 240, 243.

The act to protect trade and commerce against unlawful restraints and monopolies is the law of the land, and should be enforced. We would make no order that would tend to obstruct its proper enforcement. It confers jurisdiction on the United States courts, and provides a remedy in a civil action "by way of petition setting forth the case, and praying that such violation shall be enjoined or otherwise prohibited." 26 Stat. 209, § 4. This provision does not prevent the criminal prosecution of those guilty of its violation. But the procedure against violators of the act must conform to law. The penalties of fine and imprisonment provided by the act may be imposed by the same procedure sustained by the same kind of evidence, either direct or circumstantial, that is admissible in prosecutions for other misdemeanors, and it ought not to be necessary, and certainly is

not permissible, to resort to methods in conflict with the constitutional rights of the citizen.

It is ordered that the petitioner, Lawrence Foot, be discharged from custody. Petitioner discharged.

PARDEE and McCORMICK, Circuit Judges, who were present at the hearing of this case, concur in this opinion.

STANDARD CASTER & WHEEL CO. v. CASTER SOCKET CO., Limited.

(Circuit Court of Appeals, Sixth Circuit. December 17, 1901.)

No. 1,016.

1. PATENTS—INVENTION—ADAPTING DEVICE TO NEW USE.

The transfer of a device from one art to another does not amount to invention where it performs the same function in both without any change of form to adapt it to the new use.

2. SAME—MAKING SEPARATE PARTS IN SINGLE PIECE.

The mere making in one piece of a device formerly made in two parts mechanically attached is not invention, and the exception to the general rule must depend upon special facts indicating the presence of the inventive faculty in a degree greater than the mere mechanical knowledge required by so simple an improvement.

3. SAME—FURNITURE CASTERS.

The Berkey patent, No. 318,533, for a caster socket provided with an interior spring made integral with one side of the socket and from the same material, the purpose of which is to press against the bulbous head of the caster shank, and prevent it from dropping out when the furniture is raised from the floor, was anticipated by the Kane & Brown patent of 1866, which showed the same spring, except that it was made of a separate piece of metal, and mechanically attached to the socket.

4. SAME—EVIDENCE OF INVENTION—EXTENSIVE USE.

It is only when the patentability of a device is doubtful that its general use may turn the scale.

5. SAME—INFRINGEMENT.

Infringement cannot ordinarily be escaped by merely cutting in two a device made in one piece, or by making integral an article formerly made in two; but to render such change a defense to the charge of infringement special facts must appear to show that it is not merely colorable.

6. SAME—FURNITURE CASTERS.

The Berkey & Fox patent, No. 345,613, as to claims 3, 4, 5, and 6, covering a track plate for furniture casters, though narrow, was not anticipated, shows invention, and is valid. Also *held* infringed.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

Willard Parker Butler, for appellant.

Arthur Denison, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge. This is an appeal from a decree sustaining two patents as valid and finding infringement. Both patents belong to the appellee, the Caster Socket Company, and both relate to improvements in furniture casters. The first patent involved was issued May 6, 1885, to Julius Berkey, and is numbered 318,533; the

second is dated July 13, 1886, is numbered 345,613, and was issued to Julius Berkey and Wm. R. Fox.

1. The Berkey patent is for an improved socket for receiving the shank of a furniture caster, said socket being provided with a spring made integral with one side of the socket, and from same material. The object of this integral tongue or spring is to hold the caster in place so that it will not drop out when the furniture is lifted from the floor, but not so firmly but that it is readily removed and inserted. The socket is described as made in two parts, which when in use are put together, thus forming a socket, which may be driven into the opening provided for it. To better understand the device, we insert below certain drawings from the specifications:

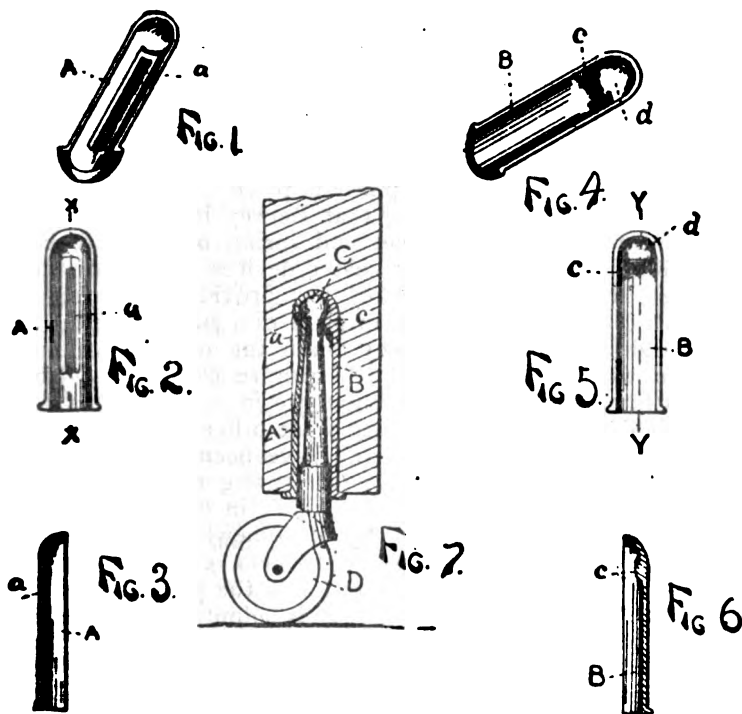


Fig. 2 of the drawing is a plan view of the half socket, "A," and Fig. 3 is a sectional view of the same on the line X—X of Fig. 2. Fig. 5 is a plan view of the half of the socket without the spring tongue, provided with a ridge for holding the ball of the caster shank. Fig. 6 is a sectional view of the same half socket on line Y—Y of Fig. 5. Fig. 7 is a sectional view of the entire socket in position in the furniture with caster in place. The only claim of the patent is in these words:

"In a caster socket, the half socket, A, provided with a tongue, a, integral with and formed of a part of the half socket, A, substantially as and for the purposes described."

The prior art shows many forms of what are known as "hold-up casters." The patent to Kane & Brown of February 6, 1866, is beyond all question an anticipation, unless the fact that Berkey's spring is made integral with one-half of his socket constitutes a patentable improvement. The Kane & Brown patent was for a socket made in two parts, each half containing a curved, flat spring "riveted in the inside," as described in the specifications. This spring performed the same function as the integral spring of the Berkey patent, and, to quote from the opinion of the court below, "only differs in that the tongue is mechanically attached, while the tongue in the Berkey device is formed out of one side of the socket." But is the mere making in one piece a structure which had theretofore been made of two or more pieces mechanically attached invention? Or, to put it in another form, is it a patentable invention to substitute for a riveted spring in a caster socket a spring made integral with the socket? A spring, either made integral with the supporting member or mechanically attached, for holding a pintle in place, was not new, and this the patentee concedes on the face of his specifications when he says, "I am aware that a spring is not broadly new for holding a pintle in place." The only ground, then, upon which it can be urged that Berkey has made a patentable improvement over the socket and spring of Kane & Brown, to say nothing of a long line of caster devices not so clearly approximating Berkey, is that Berkey has provided a spring made integral with one-half of a socket, in place of a spring riveted to the socket. In doing this he has not taken the idea of an integral spring from what counsel call the "furniture caster art," but has found such integral spring in common use in other arts as a well-known method of seizing and holding some other part of a structure in place. A large number of patents have been filed by appellant for devices in which a spring tongue or spring finger is shown attached integrally to the supporting member in distinction to being riveted thereto. Some of these are in somewhat analogous arts, as in watch sockets, pen and pencil sockets, candle sockets, etc. We need not specially consider these, for in the printed brief of the very frank counsel for the appellee it is admitted "that a spring tongue or a spring finger formed of the same piece of metal as the body of the article, and adapted to seize and hold some other article placed in contact therewith, was a common thing in sheet metal structure." But it is said that in the "furniture caster art" such a spring made integral with the caster socket is not shown, and that it may be invention to transfer a device from one art to another. For this, *C. & A. Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275, is cited. But the transfer has plainly been made from arts where the spring was integral with a socket, and where its purpose and function was precisely that to which it is applied in Berkey's device. No change in form has been made to adopt the device to a new application. No difficulties of adaptation have had to be cleared away. Such a change from even a non-analogous art cannot be regarded as involving invention. The case in this aspect is governed by *Stearns & Co. v. Russell*, 29 C. C. A.

121, 85 Fed. 218, where Judge Taft, for this court, gave thorough consideration to the limits of the doctrine of *C. & A. Potts & Co. v. Creager*. There a device taken from button-making and printing-press machinery, for lifting and holding small articles by exhausting the air in hollow points, and applied in the pill-making art to hold pills while dipping them in a bath for the purpose of coating them in gelatine, was held not to involve invention. Said the court, in that case:

"Here the old use was lifting and holding paper and small articles, and the new was lifting and holding pills. We are of opinion that, notwithstanding the utility and success of the new application of the device to pill-dipping, the circumstances that no change or form was necessary to the new application, and that the functions or purposes new and old were not wholly different and distinct, but were substantially the same, make this a different case from *Potts v. Creager* and lead to a different result."

To the same effect is the decision of this court in *L. Schreiber & Sons Co. v. Grimm*, 19 C. C. A. 67, 70, 72 Fed. 671, 674, where a ball and socket joint was applied in a device for furnishing an adjustable seat for caster support. It was urged to be invention to carry the device from other arts to one in which it had not been used. Speaking for the court, Judge Séverens said:

"The ball and socket joint was a common construction, and was in universal use in mechanics wherever the requirements indicated its utility. In this instance the requirement was for a joint between the saddle and its seat, which would permit the saddle to rock laterally and longitudinally so as to permit the surface of the saddle to adjust itself to the surface of the casks. The ordinary hinge susceptible of only one of these movements would not answer the purpose. It would seem that it would be obvious to a mechanic fairly skilled in his business to meet the requirement by interposing the ball and socket device. Again, no new appliances are here provided which affect the operation of the joint. That is perfect for all the functions that are required of it, and there is no new result substantially distinct in its nature. It is simply the case of an employment for a new use, and nothing more, and falls within the general doctrine of those cases in which it has been so many times held that the mere extension of a well-known device into another field of usefulness, where the transfer does not involve the faculty of inventive genius, will not support a patent. *Tucker v. Spalding*, 13 Wall. 453, 20 L. Ed. 515; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Ansonia Brass & Copper Co. v. Electric Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 327; *Manufacturing Co. v. Cary*, 147 U. S. 323, 18 Sup. Ct. 472, 37 L. Ed. 307,—where many of the previous cases are collected."

But it is said that the mere making in one piece a device theretofore made in two or more, which were soldered or otherwise mechanically attached, may involve invention. There are cases in which, under very special circumstances, such an improvement may show patentable invention. The case of *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558, is relied upon as giving countenance to this claim. The device involved there was a collar button made out of one piece of sheet metal. Such buttons had been theretofore made out of two or more pieces soldered together. The improvements involved an improvement in form, strength, and lightness, and, being generally made of gold, an important cheapening in the cost. The case was a very close one, and finally turned upon its universal adoption. The case of *How-*

ard v. Stove Works, 150 U. S. 164, 14 Sup. Ct. 68, 37 L. Ed. 1039, involved a patent upon a stove grate, where the alleged invention consisted in casting in one piece an article which had formerly been cast in two pieces and put together by nuts and bolts. This was held not to involve invention. In *Manufacturing Co. v. Holtzer*, 15 C. C. A. 63, 67 Fed. 907, the circuit court of appeals for the First circuit held that the right to improve on prior devices by making solid castings in lieu of attached parts is so common and universal in the arts as to cast a heavy burden upon any one claiming patentability for such an improvement to show special reasons in support of his claim. The mere fact that an article made in one piece instead of in two mechanically attached is more durable, and the cost of construction cheapened, is not in itself enough to constitute invention. That result the court in the last case cited said was "the ordinary consequence of dispensing with joints by casting solid, well known in all the arts."

The conclusion from all the cases must be that the mere making in one piece of a device formerly made in two parts mechanically attached is not invention. The exception to the general rule must depend upon special facts indicating the presence of the inventive faculty in a degree greater than the mere mechanical knowledge exhibited by so simple an improvement. Much stress has been laid upon the alleged large use and sale of this improved socket. The evidence upon this point is not very forceful in respect to this particular invention. The sales were chiefly of a structure which included track plate and socket, or these in combination with a caster, the track plate and caster being the subject of other patents; and it is not made plain that any more of the alleged success of the sale of the track plate socket was due to the socket than to the track plate. However this may be, we do not think the question of patentability doubtful, and it is only when the patentability of a device is doubtful that the general use of the patented article may turn the scale. *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; *Duer v. Lock Co.*, 149 U. S. 216, 13 Sup. Ct. 850, 37 L. Ed. 707.

We find it unnecessary to consider the limitations upon this patent or the question of infringement. We are satisfied that the patent, for the reasons stated, is invalid, and the decree upholding it must be reversed.

2. The Berkey & Fox patent also relates to furniture casters. The inventor had several objects in view, but, so far as material to this suit, the object was "to provide an improved track plate for the anti-friction wheels, which plate serves also as a furniture protector," and "to secure the track plate to the furniture without the use of screws or nails." The only question here involved relates to the alleged infringement of this "track plate" of the patent. This track plate and its uses are thus described by the inventor as follows:

"The track plate, T, may be cast in the form shown or cut from sheet metal and then formed up. In the latter case it would not have the shoulder shown at n in the Fig. 1. The teeth on the outer and upper edge attach the plate to the wood, prevent the latter from splitting, and also insist in holding the plate and socket together in position on the furniture. The socket,

c, c', has a flange, F, on its lower end, which, when the socket is driven into position, combines with the teeth to hold the track plate firmly against the wood. This track plate is especially valuable when used on furniture requiring a caster block, as a portion of the teeth engage the frame of the furniture and the remainder engage the block, holding it securely in place. When used with the common caster, without the anti-friction wheels, the track plate is still of service in assisting to hold the socket more firmly in the wood, and in preventing the latter from splitting. On account of the peculiarly curved form of the track plate, as shown, it serves as a shoe, permitting the easy sliding of the furniture when the caster is temporarily removed, preventing the flange, F, from catching on the floor, and avoiding the necessity of chamfering the edges of the bottom of the leg."

We insert, for the better understanding, Figs. 1, 2, and 4 from the drawing:

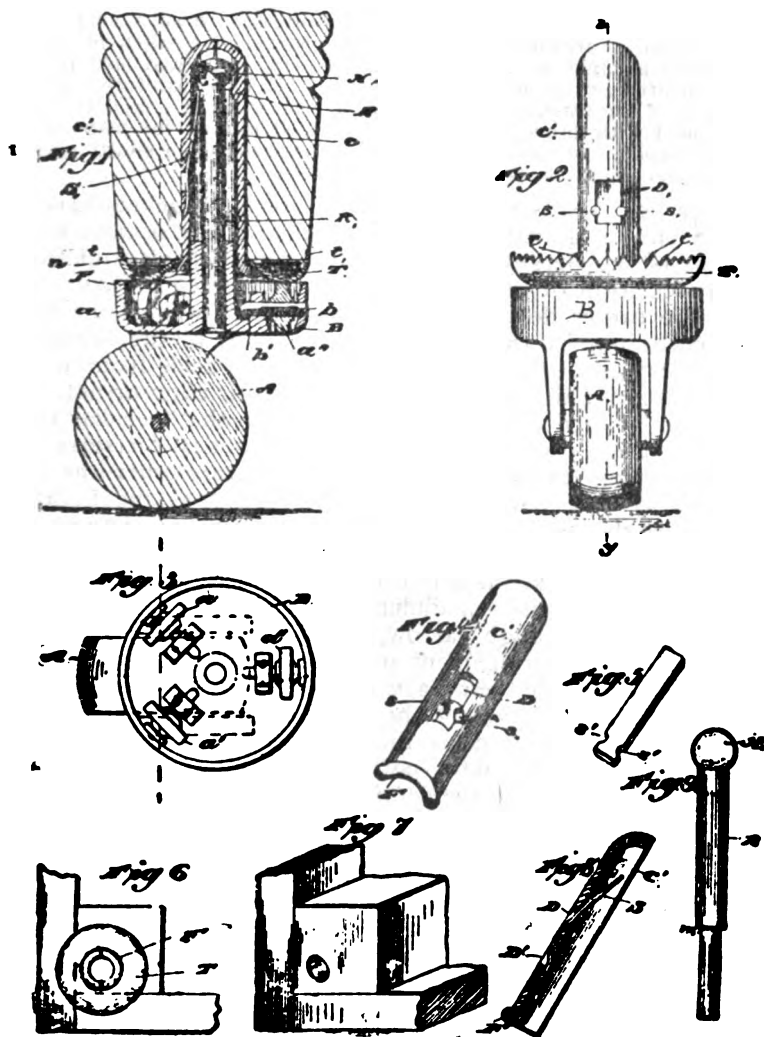


Fig. 1 is a vertical sectional view of the caster when inserted, taken on the line X—Y of Fig. 2. Fig. 2 is a front view of the caster, track plate, and socket attached together and removed from the furniture. The track plate in question is shown at T in both figures, and no point in either figure is here involved which is shown below T. Fig. 4 is a perspective view of one part of the socket showing the flange, F, referred to in the claims involved here. There are six claims in the patent. Those here involved are 3, 4, 5, and 6, which are as follows:

"(3) In a furniture caster, the combination of a socket having a flange and a track plate with its central portion sufficiently depressed to receive the entire flange above the lowest surface of the plate when in position, substantially as and for the purpose described. (4) In a furniture caster, a track plate having the outer portion of its lower surface of the annular convex form, and the central portion of the depressed form, shown and described. (5) In a furniture caster, the combination of a track plate and a socket having a flange adapted to engage the said plate and hold the same onto the furniture, substantially as described. (6) In a furniture caster, the combination of the track plate, T, provided with teeth, t, t, and the socket, c, c', provided with flange, F, the flange adapted to hold the plate securely against the wood, and the teeth to prevent the wood from splitting, and to hold both more firmly, substantially as described."

Many earlier patents for caster track plates and sockets have been put in evidence as anticipations. They undoubtedly operate to limit the claims of the Berkey & Fox device to a track plate of the peculiar curved form of the one described and shown. Thus limited, none of the earlier devices present either that form or the advantages pointed out by the patentees as a result of the form. The principle function of the track plate in question aside from its function as a track for the wheels of a caster, anti-friction or not, which the inventor pointed out and claims as due to the "peculiar curved form of the track plate, as shown," is the fact that "it serves as a shoe," permitting the easy sliding of the furniture when the caster is temporarily removed, thus preventing injury to the floor, and also avoiding the necessity for chamfering the edges of the bottom of the leg. Another advantage claimed is that it is valuable when used on a caster block, "as a portion of the teeth engage the frame of the furniture and the remainder engage the block, holding it securely in place." Though narrow, we think the patent sustainable.

The question of infringement presents peculiar difficulties. The defendants below made their track plate in two parts instead of one; in other words, they have cut the track plate of the patent in two equal halves. But when in use the two constitute the track plate of the patent "having the outer portion of its lower surface of the annular convex form, and the central portion of the depressed form shown and described" in the drawings and specifications of the patent. If these halves were intended to perform separately some new function, or, when united, were adapted to some useful purpose not attainable by the track plate when made integral, the change might avoid infringement. But this is not the case. Again, the track plate and socket of the infringing device, instead of being separate structures, are made in one piece, and the dividing line between what would otherwise be the flange of the socket must be arbitrarily located. By thus uniting the track plate and the socket

it is claimed that infringement is avoided, inasmuch as the infringing device omits the flange, F, of the patent. By thus making in one piece the two parts of the patented device, no material change in form or function has been produced. The track plate itself constitutes a flange for the socket, so far as it was the function of the track plate to prevent the socket from being driven too far into the receptacle prepared for it in the leg of the furniture. By making the socket and track plate integral, the latter is held in attachment to the socket, an attachment maintained in the device of the patent by means of the flange of the socket. Neither the division of the track plate nor the uniting of the socket and track plate into one piece operate, when in use, to vary the "peculiar curved form" of the track plate of the patent, and the functions dependent on this form are precisely the shoe functions of the infringing device when the caster is removed. We are impressed with the belief that this division of one part and uniting of two others has been done solely for the purpose of escaping infringement. Narrow as the Berkey and Fox patent is, we cannot ignore the fact that, if such merely colorable modifications are to be sanctioned, the very essence of the patented device will have been appropriated. It is not broadly patentable to make in one part, without change of function, an article originally made in two or more mechanically attached. The converse of this is equally true. Infringement cannot ordinarily be escaped by merely cutting in two a device made in one piece, or by making integral an article formerly made in two. *Bundy Mfg. Co. v. Detroit Time-Register Co.*, 36 C. C. A. 375, 94 Fed. 524. To escape infringement some special facts must appear to show that the change is not merely colorable.

The decree sustaining the validity of claims 3, 4, 5, and 6 of the Berkey & Fox patent, and finding that they have been infringed, is affirmed. The costs of this appeal and of the court below, so far as they have accrued, will be divided. The cause will be remanded for further proceedings in accord with opinion.

WEST INDIA & P. S. S. CO., Limited, v. WEIBEL.
(Circuit Court of Appeals, Fifth Circuit. January 7, 1902.)
No. 1,070.

SHIPPING—INJURY OF WORKMAN—LIABILITY OF SHIP.

The owners of a ship are liable for an injury to a carpenter, employed by a firm which had been hired to make repairs or changes in the interior of the ship to fit it for cargo, and who was sent on board to work during the night, and fell through a hatchway in a dark and unusual place, which had been negligently left open, without notification or warning to those who were doing the work.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This case was commenced in the circuit court on a petition, among other things, showing as follows: "Petitioner shows that he is a carpenter by trade, and was, at the date first mentioned below, employed as such by the firm of William J. Hannon & Co., a commercial firm doing business in the city of New Orleans, to do certain work on the steamship *Nicaraguan*, be-

longing to the West India & Pacific Steamship Company, Limited, a corporation organized under the laws of a foreign country, and having its domicile and residence in said foreign country (which said country your petitioner is informed, and so believes and charges, is the kingdom of Great Britain). Petitioner further shows that on or about the 1st day of May, 1900, between the hours of 12 o'clock midnight and 4 o'clock a. m., he was directed by the said William J. Hannon & Co., by their employes and foreman, under whose orders your petitioner was working, to go aboard said steamship, and, with others employed with him, to do certain carpenter work in the interior of said ship, which work was the work your petitioner was employed to do. Petitioner further shows that while he was at work in the interior of said ship it was the duty of said West India & Pacific Steamship Company, Limited, to provide sufficient light to enable him to do said work, and to have the hatches of said ship in that part where he was at work securely closed. Petitioner shows that said West India & Pacific Steamship Company, Limited, failed and neglected to do either of said things; that although there was a good electric plant aboard said ship, and that same had been running in the early part of the night, that same was shut down (although same was in good working order) before he was sent aboard said ship and put to work therein, and that the only light furnished him in the dark interior of said ship was a tallow candle. Petitioner further shows that the hatches on said ship were not closed, but were left open and uncovered, although same were not in use, especially what are known as the 'bread hatches,' which are situated in the side of the decks of the steamship Nicaraguan, which is a most unusual place for a hatch to be situated; all of which open hatches and absence of light your petitioner shows was due to the fault, laches, and negligence of the said West India & Pacific Steamship Company, Limited, its servants, officers, employes, and agents, whose duty it was to provide a safe place in which your petitioner could work, and sufficient light to enable him to move about in the interior of said ship, as his said work might require. But your petitioner shows that the said West India & Pacific Steamship Company, Limited, its officers, servants, agents, and employes, required and compelled your petitioner to work in the interior of said ship without taking reasonable and necessary precautions for his safety by closing said hatches, and providing proper and sufficient lights, as it was their duty to do, although said steamship company, its officers, agents, employes, and servants, knew that your petitioner was working in said ship. Petitioner further shows that at the said time he was a minor, under the age of twenty-one years, and that he has only lately attained his majority. Petitioner further shows that about the hour of four o'clock a. m., while working in the interior of said ship, and in the absence of proper and sufficient light, your petitioner, without fault or negligence on his part, fell through one of said open 'bread hatches' in the side of the deck of said ship, into the hold of said ship, a distance of about twenty-two feet, falling upon the iron bottom and sides of said ship. Petitioner shows that by said fall he was greatly injured, bruised, and damaged, his collar bone was broken, his right arm was broken, his person badly bruised, injured, and broken in sundry places, and he suffered concussion of the brain."

The answer of defendant shows, among other things, as follows: "That it denies all and singular the allegations therein contained, except such as may be hereinafter specially admitted. Further answering, this respondent admits that its steamship Nicaraguan was in the port of New Orleans on the 30th day of April, 1900; that this respondent had a contract with W. J. Hannon & Co. to fit said steamship Nicaraguan for grain; that under and by virtue of said contract said W. J. Hannon & Co. performed certain work in the hold of said steamship Nicaraguan; that the plaintiff herein was one of the employes of said W. J. Hannon & Co., and that he received certain injuries, of the extent of which respondent has no knowledge, while in the employ of W. J. Hannon & Co.; but this respondent avers that it is in no way or manner or in any amount liable to the plaintiff herein by reason thereof, there being no privity of contract existing between this respondent and plaintiff, and there being no obligation arising ex delicto or by reason of any act or negligence on its part in favor of plaintiff. Further answering,

this respondent avers that if plaintiff was injured, as alleged in his petition, it was due to no fault or negligence on its part, and, if due to the fault or negligence of any one other than the plaintiff himself, it was due to the fault and negligence of W. J. Hannon & Co., his employers, with whose conduct of the work of fitting said steamship Nicaraguan for grain this respondent in no wise controlled or interfered, and at whose disposal were all the necessary and proper facilities for lighting the said ship, and otherwise protecting all persons employed or coming on board from injury and damage; said steamship Nicaraguan being, at the date of said accident, fitted with a complete electric lighting plant, together with all usual and necessary appurtenances for fully protecting all persons employed or coming on board said steamship, and said steamship actually burning at the time of said accident all lights usual and necessary for lighting said steamship."

By a bill of exceptions it appears that: "A jury having been impaneled, and the pleadings having been read to the jury, Mr. Gilmore, on behalf of the defendant, objected to all testimony or evidence on behalf of the plaintiff in this case, on the ground that the only cause of action that the plaintiff has is against Wm. J. Hannon & Co., there being no privity of contract between the plaintiff and the defendant, and there being no obligation arising from the defendant to the plaintiff *ex delicto*. This objection being overruled, counsel for the defendant then and there duly excepted, and hereby tender this, their bill of exceptions, to the court to sign and seal, and the court does hereby sign and seal the same."

J. P. Baldwin, for plaintiff in error.

John C. Wickliffe, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The only error insisted upon in this court is in admitting evidence over objections in support of the facts alleged in the petition. The question, as presented, is the same as if, in the court below, the defendant had filed an exception of no cause of action. The petition shows that, having business aboard the defendant steamship, the petitioner was there injured by falling through a hatch, in a dark place, which hatch the owners had negligently left open, without giving sufficient notice thereof, and charges that the owners had neglected their duty to provide a safe place for petitioner to work in said ship, and had not taken reasonable and necessary precautions for safety. It is well settled that the owners of a ship are liable for injuries to persons not notified nor warned, and who are lawfully aboard the ship, when such injuries are caused by, or directly result through, negligence in the construction of the ship, the lack of safe appliances, or from the failure to take reasonable precautions for the safety of such persons, and we are clear that the petition in this case avers facts which show *prima facie* that the defendant was liable for the injuries suffered by the petitioner. The case is argued as though the petition showed the case of a ship fully turned over to a contracting stevedore for the purpose of loading or preparing, with notice of defects in dangerous places, in which case it has been held that the owners are not liable to the employes of the contractor for damages arising from the open condition of hatches or other defects. For the declaration of the rule, see *The Auchenarden* (D. C.) 100 Fed. 895. That, however, is not the case here, but rather such a case as this court found in *Burrell v. Fleming* (decided at the last term) 47 C. C. A. 598, 109 Fed. 489, where the owners were held liable for injuries to a stevedore's em-

ployé falling through an uncovered hatch, because sufficient notice of the ship's condition was not given. The ruling complained of was correct. The record shows a case in which interest should be allowed from the date of the verdict.

The judgment of the circuit court is amended so as to allow legal interest from rendition of the verdict, and as so amended is affirmed. All costs to be paid by the plaintiff in error.

UNITED STATES v. MORAN et al.

(Circuit Court, S. D. New York. December 28, 1901.)

NAVIGABLE WATERS—DUMPING OF REFUSE MATTER—INDICTMENT—SUFFICIENCY.

An indictment based on Act June 29, 1888 (25 Stat. 209), as amended by Act Aug. 17, 1894 (28 Stat. 360), charged that M., being the owner, and R., being the master, of a steamer, "did unlawfully dump," and "aid and abet in the dumping" of, refuse matter "into the tidal waters of the harbor of New York, and the waters adjacent thereto"; the place being "at the Southern district of New York, within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court." Act March 3, 1899, prohibited the discharge of refuse into any navigable waters of the United States, etc. Section 16 declared that any master, pilot, or engineer, etc., who should knowingly engage in towing any vessel loaded with refuse matter to any point of deposit in any harbor or navigable water elsewhere than in certain prescribed limits, should be guilty of a violation of the act. *Held*, that the indictment charged an offense within the act of 1899, as well as within the act on which it was based, and therefore that the court would not consider whether the earlier acts were repealed by the act of 1899.

In Admiralty.

Henry L. Burnett, U. S. Atty., and William S. Ball, Asst. U. S. Atty.

Kellogg & Rose (Abram J. Rose, of counsel), for defendants.

THOMAS, District Judge. Moran, the owner, and Riley, the master, of a steam tug, are indicted for dumping a scow containing mud at a prohibited place, hereafter mentioned, in violation of a permit issued by the supervisor of the harbor of New York to the steam tug, on the application of Riley, in the name and by the authority of Moran. The indictment is based on the act of congress of June 29, 1888 (25 Stat. 209), as amended by the act of August 17, 1894 (28 Stat. 360). Upon demurrer to the indictment, it is urged, *inter alia*, that said act was repealed by the act of congress of March 3, 1899 (30 Stat. 1121), in which case Moran, owner, at least, would not be indictable under any facts stated in the indictment. The indictment, after charging the relation of Moran and Riley severally toward the tug as owner and master, the obtaining of the permit from the war department, and that the steamer and scow "were then and there subject to the terms, conditions, and requirements of the said permit and its indorsements," all of which are set out as appearing in and on the permit, further charges that:

"On the said 10th day of May in the year of our Lord 1901, at the Southern district of New York, within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court, the said

Michael Moran, being then and there the owner of the said steamer, M. Moran, and the said Frank S. Riley being then and there the master of the same, the said steamer being engaged in towing the said scow or dumper number 15X, as aforesaid, did unlawfully dump, discharge, and deposit, and aid and abet in the dumping, discharging, and depositing, into the tidal waters of the harbor of New York, and the waters adjacent thereto, from and out of said scow or dumper, of which the said Michael Scotto was then and there the master and in charge as aforesaid, the said mud; and the place where the said mud was so dumped, discharged, and deposited as aforesaid was at a place prohibited by lawful authority, and was not at the dumping, discharging, and depositing place named and specified in the said permit and the indorsements thereon, but deviated therefrom."

It will be observed that the indictment alleges that Moran and Riley "did unlawfully dump, discharge, and deposit, and aid and abet in the dumping," and that the place of such wrongful act was "at the Southern district of New York, within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of this court," and that the discharge was "into the tidal waters of the harbor of New York, and the waters adjacent thereto." This charge would fall within the earlier act, and would also fall within the act of 1899, prohibiting such discharge "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water." Section 16 of the act of 1899 also provides:

"And any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel, who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section 13 of this act to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the secretary of war, * * * shall be deemed guilty of a violation of this act, and shall upon conviction be punished as hereinbefore provided in this section."

Therefore, whatever act governs, the allegations of the indictment are sufficient, as regards the question of jurisdiction. The court is unwilling to pass upon facts not before it. The indictment is sufficiently specific, and the demurrer should be overruled, with leave to plead over.

MERRITT & CHAPMAN DERRICK & WRECKING CO. v. CHUBB et al.¹
(Circuit Court of Appeals Second Circuit. November 22, 1901.)

No. 80.

1. ADMIRALTY—PLEADING—WAIVER OF MISJOINDER.

Where no exceptions are taken to a libel in which separate claims for salvage and towage services against different defendants are joined, objection to the misjoinder is waived.

2. SALVAGE—SUIT FOR COMPENSATION—DECREE AS BETWEEN DEFENDANTS.

The pleadings and proofs in an action to recover for salvage services, in which judgment was rendered against an insurer which had contracted for the services, held not to authorize the court to decree the payment of such judgment by the company which owned the salvaged vessel, also a party defendant, on the ground that in another proceeding by it for limitation of liability it had been permitted to retain a sum deducted from the appraised value of the vessel to pay the claim of the salvors.

¹ Republished from 111 Fed. 1008.

8. ADMIRALTY—SALVAGE AWARD—INTEREST.

Where a libellant made greatly exaggerated and unwarranted claims for salvage services and towage, he will not be allowed interest on the amount awarded.²

Appeal from the District Court of the United States for the Southern District of New York.

This is a libel for salvage services in raising the passenger steamboat Catskill, which had been sunk in collision in the North river, and for towing her ashore.

The following opinions were delivered in the court below by BROWN, District Judge:

In the decision previously announced I held that Chubb & Son were not bound to pay for raising and towing the Catskill at ordinary contract rates per day's work, but only in proportion to the value of the results of the salvage operations; and in this view I apportioned the amount to be paid by the Catskill Company at \$200, and by Chubb & Son, insurers, at \$500, making \$700 for the whole salvage service.

The salvage service was, however, a lien upon the vessel or her proceeds. The vessel was sold under a subsequent libel in New Jersey, and bought in by a third person, in reality, as it appears from the statements of counsel, for the benefit of the Catskill Company. The Catskill Company received the proceeds, which after deducting for the repairs upon the vessel prior to the sale, netted about \$734, which the Catskill Company still holds. That company, moreover, in limited liability proceedings begun in this court and still pending, procured an appraisal of the vessel, and gave testimony by its president before the commissioner on appraisal, showing that the fair value of the salvage service, which would be a lien upon the vessel or its proceeds, would exceed the entire proceeds derived from the sale of the vessel in New Jersey; and upon this testimony the report of the commissioner was made allowing this salvage service as a deduction from the value of the wreck, which was therefore considered as nothing, and he reported 85 cents as the only proceeds, which represented so much unpaid "freight pending."

Chubb & Son upon the payment of the sum of \$500, under the decree in this cause for salvage services, would by subrogation have a right to be indemnified to that amount out of the proceeds of the vessel in the hands of the Catskill Company for which allowance was made as a deduction in its favor in the limited liability proceeding. As all parties are before the court in both proceedings, and both are pending, the proper disposition of the whole matter would be, in recognition of this whole relation, as in the case of *The Eleanora*, 17 Blatchf. 104, 105, Fed. Cas. No. 4,335, to direct that both the sums of \$500 and \$200 be paid by the Catskill Company as a charge against the net proceeds in their hands, received from the sale of the Catskill and referred to in the limited liability proceedings. The small sum remaining would probably not more than pay the costs due the Catskill in the limited liability proceedings, and no further accounting for those proceeds would, therefore, be necessary in that proceeding; it being conceded in the brief for the petitioners therein, upon the report of the commissioner on appraisal, that unless the proceeds of the sale of the vessel were thus applied, they must be brought into court by further order.

A decree may be settled on notice in accordance herewith.

Settlement of the Decree.

(November 29, 1899.)

The decree previously directed is for the best interest of every party concerned, and one competent for the court to make. The technical objections raised seem to me mistaken.

1. The libel was filed to recover compensation for services of a salvage

² Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

character, and for nothing else. The claim being based upon an alleged contract, founded on the defendants' request, and the suit being in personam, it was proper to state the case in the introduction to the libel as either a "cause of salvage," or as a "cause of contract." Neither form is necessarily exclusive of the other, or very material.

2. After the exceptions to the original libel, the statement of separate claims against the different defendants in the amended libel, was of course technically objectionable; but no exception was taken to the amended libel and objection to it was waived, and for the convenience of all, the trial proceeded upon the amended libel by consent.

3. The objection that the facts stated in the last opinion were not before the court, is a mistake. All the matters there referred to were either proved, or had been repeatedly stated by counsel in the three or four preceding hearings of the case, as facts in the cause, commented on and submitted to the court as admitted facts. The record in the limited liability proceedings of the Catskill, had been three times presented for the inspection of the court, upon as many different arguments, and was minutely examined. The sale under the New Jersey libel, appears from the evidence in the stenographer's notes; and the sum of about \$734 was stated and acquiesced in without contradiction, as the net result. All the facts presented and submitted to the court as a part of the case, belong to the "record" when made up. That these matters do not all appear in the stenographer's notes is of no importance. A case may be, and occasionally is, dismissed upon the opening of counsel alone, when there is no other record of the hearing than the statements of counsel.

4. The record in the limited liability proceedings of the Catskill Company, showed that the company in the appraisalment of the vessel retained moneys on account of the very services for which the libelants seek a recovery in this suit. Had not that company been allowed to retain those moneys in order to meet this claim, it must have been paid into court. The Catskill Company having thus procured an allowance to them of the \$734 as a deduction from the amount to be paid into court on the appraisalment of the vessel on account of this very claim, is estopped from asserting that they hold these moneys on any other account, except such allowance by way of costs as might be awarded to the company out of it. The residue of those moneys thus became in fact the primary fund for the payment of the claim in suit. The simplest equity, therefore, requires that the Catskill Company, a codefendant holding the fund primarily applicable to pay this claim, should be decreed to apply it thereto, before Chubb & Son are personally called on to pay it, though the latter remain liable for it if not collected from the Catskill Company. "All the processes and modes, both of practice and decision," in the admiralty courts, says Lowell, J., "are equitable." *Richmond v. Copper Co.*, 2 Low. 315, 316. Fed. Cas. No. 11,800. Such a decision is in strictest accord with the ordinary practice in admiralty to recognize the equitable rights of codefendants. It is the same in principle as the usual form of decree in collision causes, where the damages are divided between two codefendants. In such cases each is individually liable for the whole amount. Yet the right of each defendant to have the other primarily charged with the payment of one-half of the damages for the protection of the former, if collectible, is an absolute right; and a decree that does not recognize and protect that right, is erroneous. *The Alabama and The Gamecock*, 92 U. S. 695, 23 L. Ed. 763. See *The Sailor Prince*, 1 Ben. 461, Fed. Cas. No. 12,219. And as the Catskill Company defendant holds the money reserved on account of this claim, which it is estopped to deny, the defendant must be primarily charged with payment.

Besides this evident equity, other circumstances require that the court should make this decree; namely, that if not made, the net proceeds remaining in the hands of the Catskill Company would immediately become a source of three independent claims, viz.: (1) The claim of Chubb & Son by subrogation for their payment on this decree; (2) the claim of the Sea Insurance Company by reason of its payment in full of a valued policy on the Catskill; and (3) the St. Johns' claimants for one-half the amount paid by the St. Johns on Miller's claim against the two vessels. Each of these claims would involve no small amount of litigation, trouble and expense.

This should be avoided by the application of those moneys where they belong, and in payment of the salvage services; and this disposition seems to me to be in the manifest interest of all the parties alike.

5. The objection that the decree gives the whole value of the wreck as compensation for those services, is only apparent and not real. The question of the precise value of the wreck did not arise. There is no doubt from the circumstances proved and admitted, that the value of the wreck was much greater than the net proceeds. I excluded evidence on this point, however, as unnecessary and likely to involve a protracted examination with no useful result, inasmuch as the libelant, as a constructive party, was bound by the result of the sale in admiralty (evidently procured by the Catskill Company for its own benefit) as much as if the sale had been upon the libelant's own demand. Thus the libelant, not being entitled, as I found, to compensation on a quantum meruit, or pay by day's work, was estopped from claiming more than the net proceeds of the sale; while the Catskill Company by its proceedings on the appraisement in limited liability, in which its president had testified that the salvage services were worth from \$2,000 to \$3,000, and having been allowed to retain all the net proceeds on account of those services, was equally estopped from claiming those services to be less. Further proof on values was, therefore, unnecessary.

6. No error or mistake as to the facts being suggested, the decree should be as formerly indicated.

James E. Carpenter, for appellant Merritt & Chapman Derrick & Wrecking Co.

Robt. D. Benedict, for appellant Catskill & N. Y. Steamboat Co.

Joseph Larocque, Jr., for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. From the testimony in the case we are satisfied that the services of the libelant in and about the raising of the wreck of the Catskill were rendered upon an agreement with Chubb & Son that they should be compensated for as salvage services only in proportion to value of remnants salvaged. We see no reason, upon the testimony, to question the propriety of the amount found by the court (\$500). Under the pleadings, and upon the proofs, we think the district court erred in decreeing for this sum against the steamboat company. The decree should have been against Chubb & Son. If they are entitled to recover over against the company by reason of its improperly retaining proceeds of sale, they may do so by proper proceedings. We find upon the evidence in the record that the only services rendered by the libelants for the Catskill & New York Steamboat Company or for its benefit were the towage services rendered at its request after the vessel had been raised. We find no competent evidence in the record as to the value of these services, aside from the admission in the answer of the company that they were worth \$100. Although separate controversies against different parties were joined in the same libel, there was no objection, and the cause was tried as though the joinder were proper. The only decree authorized by the evidence was a decree against Chubb & Son for \$500, and against the steamboat company for \$100. In view of the exaggerated claims made by the libelant, no interest should be allowed as against either respondent.

Decree is reversed and cause remanded, with instructions to decree in conformity with this opinion.

CITY TRUST, SAFE DEPOSIT & SURETY CO. v. GLENCOVE GRANITE CO.

(Circuit Court of Appeals, Third Circuit. January 24, 1902.)

No. 15.

AFFIDAVIT OF DEFENSE—SUFFICIENCY—FORMER JUDGMENT.

Affidavit of defense, in action against T., as surety of C., on a bond conditioned to pay any judgment that plaintiff might recover against C. on a lien claim, is sufficient to present a prima facie defense, and prevent a summary judgment, where it alleges that plaintiff sued T. and C. in a New York court to recover such sum as might be determined to be due plaintiff from them under the bond; that said action was proceeded with fully and on its merits, and that it was there adjudicated that plaintiff could recover nothing against T.; and a judgment of the New York court is set out, finding for plaintiff against C., but finding that plaintiff was a foreign corporation, and had failed to prove that it had procured the certificate required to entitle it to do business in and sue in the state, and, as against T., dismissing the complaint.

Dallas, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Lincoln L. Eyre, for plaintiff in error.

Horace L. Cheyney and Laroy S. Gove, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This writ of error is brought for the reversal of a judgment entered against the defendant below (the plaintiff in error) for want of a sufficient affidavit of defense. The Glencove Granite Company, a corporation of the state of Maine, on February 25, 1901, brought an action in the court below against the City Trust, Safe Deposit & Surety Company, a corporation of the state of Pennsylvania, upon a bond given to the plaintiff by Patrick Costello, as principal, and the defendant company, as surety, whereby the obligors jointly and severally undertook to pay to the Glencove Granite Company the amount of any judgment, not exceeding \$8,279, which might be recovered in an action upon the claim or demand specified in a certain notice of lien filed by the plaintiff against moneys due Costello from the city of New York under a specified street-paving contract; and the plaintiff's statement of claim in this suit averred that the plaintiff brought an action in the supreme court of the state of New York, in the county of New York, to foreclose said lien, against said Patrick Costello, and that therein a judgment or decree was entered in favor of the plaintiff against Costello in the sum of \$5,860.31, together with the sum of \$402.22 costs,—in all, the sum of \$6,266.53. The defendant company filed an affidavit of defense, which averred that on or about May 5, 1899, the plaintiff, the Glencove Granite Company, brought suit against Patrick Costello and the City Trust, Safe Deposit & Surety Company in the supreme court of the county of New York, in the state of New York, to recover such moneys as might be in said suit determined to be due said Glencove Granite Company by

said Patrick Costello and said the City Trust, Safe Deposit & Surety Company by virtue of the terms and provisions of their bond sued upon in the present action; that the defendant company was served with process in said former suit, and entered an appearance in that action, and that the same "was duly proceeded with, fully and upon the merits thereof, for the same cause of action as now here and again sued upon, and between the same parties, with the addition of said Patrick Costello and the city of New York"; that after issue joined, in accordance with the practice and law of the state of New York, and by consent of all the parties, the case was tried upon all questions of fact and law before one of the justices of said supreme court without a jury; and that, in pursuance of the decision rendered in that proceeding, "a judgment was rendered by said court, and duly filed, in favor of the said the City Trust, Safe Deposit & Surety Company, and against the Glencove Granite Company, whereby it was adjudicated that the said Glencove Granite Company could not recover anything whatsoever against the City Trust, Safe Deposit & Surety Company, with a further order or judgment against said plaintiff for the payment of costs." And the affidavit of defense averred that said judgment "now stands unappealed from and unreversed, and as a final judgment in said cause." A rule for judgment for want of a sufficient affidavit of defense having been taken, the defendant company, "with leave of, and in pursuance of, the order of the court," filed a supplemental affidavit of defense, and, as part thereof, attached thereto a full and true copy of the judgment entered by the supreme court of the state of New York, referred to in the original affidavit of defense. Referring to this copy, we find that the judgment recites that the "issues in this action to foreclose a municipal lien against the defendant Patrick Costello, as contractor, and the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, as surety therefor," came on for trial before the Honorable Charles H. Truax, one of the justices of the court, who made and filed his decision, "wherein and whereby he found and decided that the plaintiff was, and still is, a foreign corporation organized under the laws of the state of Maine, and that the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia was, and still is, a foreign corporation organized under the laws of the state of Pennsylvania, and lawfully transacting business in the state of New York; that, as against the defendant the said City Trust, Safe Deposit & Surety Company of Philadelphia, the plaintiff, the Glencove Granite Company, had failed to prove that it had procured from the secretary of state the certificate required by section 15 of the general corporation law, for the purpose of authorizing the said plaintiff to do business in, and sue in the courts of, the state of New York, as a foreign corporation; that the plaintiff cannot recover in this action against the bond of the said defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, given to discharge the plaintiff's lien herein, and that the complaint of said plaintiff, as against said defendant, be dismissed, with costs to said defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, against said plaintiff"; and then, after further recitals of findings by

said justice as to the paving contract between Patrick Costello and the city of New York, the work done, and amount due thereunder, the furnishing of materials for the work to Costello by the plaintiff, the filing of the plaintiff's notice of lien, and the giving by Costello, as principal, and the City Trust, Safe Deposit & Surety Company, as surety, of the bond aforesaid, whereby the plaintiff's lien was discharged, the judgment proceeds thus:

"Now, on reading and filing the summons, complaint, answers of the defendants, Patrick Costello and the City Trust, Safe Deposit & Surety Company of Philadelphia, the decision of Mr. Justice Truax, and on motion of Frederick J. Swift, Esq., attorney for the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, it is ordered and adjudged that the complaint of the plaintiff herein, the Glencove Granite Company, as against the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, be dismissed, and that the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia recover of, and have judgment against, the plaintiff, the Glencove Granite Company, for its costs, amounting to the sum of \$89.10. And it is further ordered, adjudged, and decreed that the plaintiff, the Glencove Granite Company, recover of, and have judgment against, the defendant Patrick Costello for the sum of \$5,860.31, together with the sum of \$406.22, costs adjusted as aforesaid, amounting in all to the sum of \$6,266.53."

Evidently this judgment against Costello is the same judgment briefly recited in the plaintiff's statement of claim, and which recital is an essential part of the statement. It thus appears that in the same action in which the plaintiff company recovered its judgment against Costello, upon which it relies to make out its case here, the plaintiff proceeded against the present defendant company to charge it upon the bond here sued on, and it was there decided that the plaintiff could not recover thereon, and judgment was rendered dismissing the plaintiff's complaint as against this defendant. We do not have before us the whole record in the former action, but the original affidavit of defense here averred that that action "was duly proceeded with, fully and upon the merits thereof, for the same cause of action as now here and again sued on," and that it was there "adjudicated that the Glencove Granite Company could not recover anything whatsoever against the said the City Trust, Safe Deposit & Surety Company"; and those averments, we think, are consistent with the terms of the judgment brought upon this record by the supplemental affidavit of defense. The controlling question, then, is whether the original and supplemental affidavits of defense were sufficient to prevent a summary judgment against the defendant company, which deprived it of the opportunity of proving the facts alleged. Upon this question our opinion is with the plaintiff in error. We think that the averments of the defendant's affidavits, taken in connection with the New York judgment itself, presented a good *prima facie* defense to the plaintiff's statement of claim. Extrinsic evidence, not inconsistent with the record, nor impugning its verity, is admissible to show what matters were involved in a former action, and to apply the judgment and give effect to the adjudication actually made. *Miles v. Caldwell*, 2 Wall. 35, 17 L. Ed. 755; *Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204; *Wilson's Ex'r v. Deen*, 121 U. S. 525, 7 Sup. Ct. 1004, 30 L. Ed. 980. But, independently of the averments

of the affidavits of defense, the judgment in the former action, upon its face, discloses enough to prevent a summary judgment, without trial, against the defendant in the present suit. The finding that the plaintiff, a foreign corporation, had failed to show that it had procured the certificate required by law to authorize it to do business in the state of New York, undoubtedly was a finding responsive to an issue tendered by the pleadings, as between the Glencove Granite Company and the City Trust, Safe Deposit & Surety Company. *W. P. Fuller & Co. v. Schrenk*, 58 App. Div. 222, 225, 68 N. Y. Supp. 781. Moreover, that finding went to the merits of the case. It related to a substantial matter. It sustained a defense which involved the rights of the parties. It went to the plaintiff's right of action. *McCanna & Frazer Co. v. Citizens' Trust & Surety Co.*, 24 C. C. A. 11, 76 Fed. 420, 39 U. S. App. (third circuit) 332; *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759. Now, the situation is this: The judgment against Costello is an essential part of the plaintiff's case against the surety in the bond in suit. Yet the record showing that judgment also shows a judgment in favor of the surety, and a finding and decision adverse to the plaintiff's right of action. We think, therefore, that, as the case now stands, there appears at least a *prima facie* defense. The apparent obstacle to a recovery may be open to explanation, and thus put out of the way. Again, if the statutory inhibition against doing business operates only on the remedy, and may be lifted if the delinquent corporation is able to procure out of time the issuance by the secretary of state of the required certificate (*Neuchatel Asphalte Co. v. City of New York*, 155 N. Y. 373; 377, 49 N. E. 1043), it may be competent for the plaintiff to show here that it obtained such a certificate since the former trial, or even before. Upon these questions we intimate no opinion. We hold simply that the affidavits of defense sufficiently met the plaintiff's statement of claim, and that the same should have gone to trial.

The judgment for want of a sufficient affidavit of defense is reversed, and the cause is remanded to the circuit court for further proceedings.

DALLAS, Circuit Judge (dissenting). Affidavits of defense are exacted for the purpose of avoiding the expense, vexation, and delay of trial in any case in which the defendant cannot, upon oath or affirmation, deny some material allegation of the plaintiff, or himself allege any fact or state of facts which, if established to the satisfaction of a jury, would, as matter of law, support a verdict in his favor. If none be filed during the lawfully prescribed period, the plaintiff becomes entitled to a judgment as of course, but, if an affidavit be interposed which he avers to be insufficient to preclude an immediate adjudication in his favor, an issue resembling that which arises upon a demurrer to a plea is presented, and that issue is for decision upon the facts alleged, and upon them only. But an affidavit of defense differs materially from a plea. In a plea all things may be pleaded according to the pleader's conception of their legal effect, subject to the consequence that a mistake in stating their legal effect,

if apparent upon the face of the pleading, is fatal on demurrer, and, if not apparent, is fatal in evidence (Gould, Pl. c. 3, §§ 174, 176); whereas in an affidavit of defense the facts themselves must be presented, in order that the court may determine whether, if found by a jury, their legal effect would or would not be to establish a valid defense. Where the Pennsylvania system of practice is not pursued, a plea may, by bare averment, however baseless, coerce a formal trial; but where, as in this jurisdiction, that practice is followed, an affidavit that merely avers a defense, without disclosing the fundamental facts which constitute it, will not, in any case, suffice to postpone a final decision. This distinction has, I think, been generally recognized, and upon its observance, as I believe, is dependent the attainment of the object which the provision for affidavits of defense was intended to accomplish. Therefore affidavits of this sort should state facts, not conclusions; and these, though they need not be set forth with technical exactness, should be made to appear with at least reasonable clearness and certainty. Equivocal statements will not be beneficially interpreted, nor any avoidable ambiguity be aided by intentment. *McBrier v. Marshall*, 126 Pa. 396, 17 Atl. 647; *Erie City v. Brady*, 127 Pa. 175, 17 Atl. 885; *Bank v. Stadelman*, 153 Pa. 637, 26 Atl. 201; *Comly v. Bryan*, 5 Whart. 265; *Bardsley v. Delp*, 88 Pa. 420; *Pack v. Jones*, 70 Pa. 84; *Consumers' Gas Co. v. American Electric Const. Co.*, 1 C. C. A. 663, 50 Fed. 778; *Reed v. Raymond* (C. C.) 37 Fed. 186.

The affidavit which was first filed in the present case did not meet these authoritatively established requirements. It did not state that the New York judgment was rendered upon the merits, but only that "said action * * * was duly proceeded with, fully and upon the merits"; and though it did state that, by consent, the case was tried before one of the justices upon all questions of fact, as well as of law, without a jury, this, I think, must be understood as meaning nothing more than that the parties agreed to waive a jury. It cannot be taken to mean that it was stipulated that the justice should decide the case upon its merits, and not otherwise; and that he actually did so decide it is nowhere suggested, unless by very dubious inference, although nothing could have been easier than to have distinctly and directly averred that he did, and to have annexed a copy of the record, so that the court might determine whether or not that averment could be verified. *Consumers' Gas Co. v. American Electric Const. Co.*, 1 C. C. A. 664, 50 Fed. 778. But instead of adopting this ingenuous, and therefore proper, mode of stating this defense, resort was had to the "uncandid and evasive" presentment of what are really "conclusions of law, carefully stated so as to appear to be facts." *Erie City v. Brady*, supra. The court below, however, did not at once enter judgment, but ordered the filing of a supplemental affidavit of defense; and the defendant availed itself of the privilege thus accorded, by filing, "with the leave of, and in pursuance of the order of, the court," an additional affidavit, which, though called "supplemental," was substantially and in effect a substituted one. This second affidavit reasserts the entry of a judgment in the proceeding to which reference had been made in the first one, but it

further declares, with respect to that judgment, "that a full, true, and correct copy is hereto attached, and to be taken as a part of this supplemental affidavit of defense." To what, then, was the court to look for enlightenment in endeavoring to determine what the supreme court of New York had actually adjudicated? Surely, as it seems to me, to this full, true, and correct copy, and to it exclusively; for, apart from it, there was nothing before the court but the simulated and unavailing averment that the action had been proceeded with upon the merits. Now, what does the copy which the defendant relied on disclose? It recites that testimony had been presented by the plaintiff, the Glencove Granite Company; that the defendants, Patrick Costello and the City Trust, Safe Deposit & Surety Company of Philadelphia, had separately moved for a dismissal of said complaint as against each of the defendants; that said testimony and the arguments on said motions to dismiss had been heard and considered by the justice, and that he had found and decided that the plaintiff, the Glencove Granite Company, was a foreign corporation, and that it had failed to prove, as against the City Trust, Safe Deposit & Surety Company of Philadelphia, that it (the Glencove Company) had procured the certificate required by the law of New York for the purpose of authorizing it to do business in, and to sue in the courts of, that state, and "that the plaintiff cannot recover in this action against the bond of the said defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, given to discharge the plaintiff's lien herein, and that the complaint of said plaintiff as against said defendant be dismissed, with costs to said defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, against said plaintiff." Not until after the disposition then about to be made of the case as against the defendant last named had been thus indicated were the intrinsic grounds of action at all adverted to, but immediately thereafter they were recited as prefatory to the conclusion "that the plaintiff was entitled to judgment against the defendant Patrick Costello." Then followed the judgment, in these words:

"Now, on reading and filing the summons, complaint, answers of the defendants, Patrick Costello and the City Trust, Safe Deposit & Surety Company of Philadelphia, the decision of Mr. Justice Truax, and on motion of Frederick J. Swift, Esq., attorney for the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, it is ordered and adjudged that the complaint of the plaintiff herein, the Glencove Granite Company, as against the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia, be dismissed, and that the defendant the City Trust, Safe Deposit & Surety Company of Philadelphia recover of, and have judgment against, the plaintiff, the Glencove Granite Company, for its costs, amounting to the sum of \$89.10. And it is further ordered, adjudged, and decreed that the plaintiff, the Glencove Granite Company, recover of, and have judgment against, the defendant Patrick Costello for the sum of \$5.860.31, together with the sum of \$406.22, costs adjusted as aforesaid, amounting in all to the sum of \$6,268.53."

Nothing, as I view it, could be clearer than the showing of this record. Each of the defendants had separately moved to dismiss. As to one of them—the City Trust, Safe Deposit & Surety Company—that motion was allowed, upon the ground that, as to it, the plaintiff had failed to prove that it was authorized to sue in a court

of New York; and upon that ground solely, for the purpose of the enactment under which the decision was made "was not to avoid contracts," and, notwithstanding the terms of the first clause of the section in question, its only effect, as a whole, is to prohibit a corporation from maintaining an action in that state until it shall have procured the prescribed certificate. *Neuchatel Asphalte Co. v. City of New York*, 155 N. Y. 373, 49 N. E. 1043; *W. P. Fuller & Co. v. Schrenk*, 58 App. Div. 225, 68 N. Y. Supp. 781. But as to the other of the defendants, Patrick Costello, the motion to dismiss (for some reason which does not appear, and which is not material) was manifestly disallowed; for, as against him, a judgment for the sum demanded was awarded. As to him, therefore, there certainly was an adjudication upon the merits; but it is, I think, equally apparent that as to his co-defendant they were not decided at all, and, a fortiori, not in a different and seemingly inconsistent way. I conclude that the case was fully determined against Costello, but that, as to the trust company, the court, in pursuance of the incapacitating statute to which it referred, simply declined to take cognizance of it. Its order was not decisive of the issue, but was made, as appears to be the practice (*W. P. Fuller & Co. v. Schrenk*, supra), in response to an interlocutory motion. If the circuit court had not before it the whole record in the former case, it is because the defendant saw fit to produce but a part of it; and, as I have already said, I cannot agree that that part exhibited a judgment upon the merits, or that the facts requisite to support a plea of *res judicata* were in any manner made to appear. I do not doubt that either by the entire record, or by evidence dehors the record, but consistent with it, it may be shown what matters were actually adjudicated in a former action; but in these affidavits we have no statement of, nor proposal to prove in either way, any fact whatever concerning the nature or scope of the judgment to which they relate, but merely the gratuitous assertion that in character and amplitude it is something quite different from what on its face it purports to be. For averments such as this I can find no legal justification nor shadow of excuse. Their toleration is not essential to the conservation of any genuine right, and its tendency, I fear, will be to impair the long-established usefulness of the affidavit of defense law in promoting the speedy and economical administration of justice.

I am of opinion that the judgment of the circuit court should be affirmed.

SUTHERLAND-INNES CO., Limited, v. AMERICAN WIRED HOOP CO.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1901.)

No. 1,574.

ACTIONS—SUBSTITUTED SERVICE OF SUMMONS—PERSONAL JUDGMENT.

A Wisconsin corporation recovered a money judgment in the circuit court of the United States, in Minnesota, against a Canadian corporation. About the same time the latter company obtained a money judgment against the former in a state court in Wisconsin, which it sought to set off by petition in federal court. The Wisconsin corporation had

no office or officer in that state, and service of the summons in the action against it was made on its president, at his home in Minnesota. It did not appear in the action, and judgment by default was entered. An order authorizing such service of the summons was issued on an affidavit alleging that a suit by attachment had been brought, and lands of the Wisconsin company attached in that state, and that its officers were nonresidents of that state. Rev. St. Wis. 1898, § 2637, provides that actions against corporations shall be commenced in the same manner as personal actions against natural persons, and that the summons against a domestic private corporation shall be served by delivering a copy to the president or certain other officer or managing agent, or as provided in section 1775b, which provides that within 10 days after each election of officers a domestic private corporation shall file with the register of deeds of the county in which its articles of incorporation are recorded a list of its officers on whom service may be made, and, if it fails to do so, service on it may be made by delivering copy of process to such register, and that such service shall have the same effect as personal service. Section 2639 provides that service on persons in certain specified cases may be made without the state or by publication, and may be so made on a corporation when the proper officers on whom to make service do not exist or cannot be found. Section 2731 authorizes attachment when all proper officers of such a corporation on whom to serve the summons are nonresidents of the state. *Held*, that the substituted service, provided by section 2639, did not authorize the rendition of a personal judgment against the Wisconsin corporation, but only a judgment good against the property attached in that action; hence the petition to set off was properly denied.¹

In Error to the Circuit Court of the United States for the District of Minnesota.

This case arises on the following facts: The American Wired Hoop Company, a corporation of Wisconsin, the defendant in error, on February 1, 1900, recovered a judgment against the Sutherland-Innes Company, Limited, a Canadian corporation, the plaintiff in error, for the sum of \$1,122, in the circuit court of the United States for the district of Minnesota. On January 5, 1900, the Canadian corporation last named recovered a judgment against the Wisconsin corporation above named in the circuit court of Douglas county, state of Wisconsin, for the sum of \$2,438.60. At the time the action was instituted in which the last-mentioned judgment was recovered the Wisconsin corporation against which it was rendered, although a domestic corporation, had no officers or agents residing in Wisconsin, where the action was brought. Service was accordingly obtained by delivering to the president of the Wisconsin corporation at his home in St. Paul, in the state of Minnesota, a copy of the summons and complaint. No answer was filed or appearance entered, but at the return term the Wisconsin court rendered a judgment by default for the sum heretofore stated against the Wisconsin corporation. Thereupon the Canadian corporation filed a motion in the circuit court of the United States for the district of Minnesota to obtain an order that the one judgment be set off against the other so as to cancel the judgment against it and to discharge the judgment against the Wisconsin corporation pro tanto. Such order was denied by the circuit court on February 27, 1901, on the sole ground that the Wisconsin court did not, by virtue of the service aforesaid, acquire jurisdiction to render a personal or general judgment against the Wisconsin corporation, and that as a general judgment it was a nullity. To reverse this decision the Canadian company sued out the present writ of error.

Alfred H. Bright, for plaintiff in error.

Morris P. Brewer, for defendant in error.

¹ Service of process on foreign corporations, see note to *Eldred v. Palace-Car Co.*, 45 C. C. A. 3.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Both of the parties litigant, by their counsel, agree apparently that it was unnecessary for the Sutherland-Innes Company, the plaintiff below, to have filed an original bill to enforce the right of set-off which it asserted, and that the right in question, if it exists, can be enforced in the manner attempted; that is to say, by a motion or petition filed in the lower court in the case wherein one of the judgments involved was recovered. Accepting that as a sound view concerning the question of practice, we proceed to inquire whether the judgment which was rendered by the circuit court of Douglas county, Wis., hereafter referred to as the Wisconsin court, was obtained on such service of process as would support a personal or general judgment against the American Wired Hoop Company, since it is further conceded that unless it was a valid general judgment no right of set-off exists.

The service on which the judgment of the Wisconsin court was founded was, as above stated, made in the state of Minnesota by the delivery of a copy of the summons and complaint to the president of the Wisconsin corporation. The order authorizing such a service was obtained on an affidavit which alleged, in substance, that a suit by attachment had been brought against the Wisconsin company by the Canadian company; that lands belonging to the former company, located in Douglas county, Wis., had been attached; and that the proper officers of the attached corporation, on whom service of legal process might be made, were nonresidents of the state of Wisconsin, and could not be found therein. There can be no doubt, therefore, and no controversy arises on that point, that the service was sufficient to enable the Wisconsin court to render a special judgment subjecting the lands that were within its jurisdiction, and had been attached, to the payment of the plaintiff's demand after it had been established. It is a very different question, however, whether the judgment that was rendered on this service was valid and binding as a general judgment in personam against the Wisconsin company. The plaintiff in error maintains the affirmative of this issue, while the defendant in error supports the negative.

Chapter 120 of the Revised Statutes of Wisconsin for the year 1898 (Sanborn and Berryman's Annotations) deals with the subject of commencing civil actions and the mode of serving civil process. Beginning with section 2629, it first provides how natural persons may be served, and then provides, by section 2637 of the same chapter, for service upon corporations of various kinds. That section declares that:

"Actions against corporations shall be commenced in the same manner as personal actions against natural persons. The summons and the accompanying complaint or notice aforesaid shall be served and such service held of the same effect as personal service on a natural person by delivering a

copy thereof as follows: (1) If the action be against a county, to the county clerk. (2) If against a town, to the chairman of the town or the town clerk. * * * (10) If against any other corporation organized under the laws of this state, to the president or other such chief officer, vice-president, secretary, cashier, treasurer, director or managing agent thereof, or in the manner provided in section 1775b in the cases therein provided for."

The American Wired Hoop Company was a corporation of the class referred to in the tenth subdivision, last quoted, of section 2637. Section 2639 of the same chapter (that is to say, chapter 120) is entitled "Service by Publication, Etc.," and is as follows:

"Sec. 2639. Service of the summons may be made without the state or by publication upon a defendant against whom a cause of action appears to exist, or who appears to be a necessary or proper party to an action relating to real estate, on obtaining an order therefor as provided in the next following section, in either of the following cases: (1) When such defendant is a non-resident of this state or his residence is unknown, or is a foreign corporation, and the defendant has property within the state, or the cause of action arose therein, and the court has jurisdiction of the subject of the action, whether the action be founded on contract or tort. (2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors or avoid the service of a summons, or keeps himself concealed therein with the like intent. (3) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. (4) When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real estate, and the defendant is a proper party thereto. (5) When the action is for a divorce. (6) When the action is against any private corporation organized under the laws of the state and the proper officers on whom to make service do not exist or cannot be found. (7) When the subject of the action is real or personal property in this state and one or more of the defendants are unknown and have or claim a lien or interest, actual or contingent, therein, and the relief demanded consists wholly or partially in excluding such defendant or defendants from any lien or interest therein."

Chapter 124, Rev. St. Wis. 1898, deals with the subject of actions by attachment. Section 2731 of the latter chapter provides in what cases writs of attachment may be issued. It will suffice to say of this section that it permits the issuance of a writ of attachment when the plaintiff files an affidavit to the effect—First, "that the defendant has absconded or is about to abscond from this state, or is concealed therein, to the injury of his creditors, or keeps himself concealed therein with intent to avoid the service of a summons"; second, "that the defendant has assigned, conveyed, disposed of or concealed, or is about to assign, convey, dispose of or conceal his property or any part thereof, with intent to defraud his creditors"; third, "that the defendant has removed or is about to remove any of his property out of this state with intent to defraud his creditors"; fourth, "that the defendant fraudulently contracted the debt or incurred the obligations respecting which the action is brought"; fifth, "that the defendant is not a resident of this state"; and, sixth, "that the defendant is a foreign corporation; or if created under the laws of this state that all proper officers thereof on whom to serve the summons do not exist, are non-residents of the state or cannot be found."

Section 1775b of the Wisconsin Revised Statutes, to which refer-

ence is made in subdivision 10 of section 2637 provides in substance, that every private corporation organized under the laws of Wisconsin shall, on or prior to October 1, 1898, and thereafter, within 10 days after each election of officers, file with the register of deeds of the county where its articles of incorporation were recorded a list of its officers on whom service may be made, as provided in subdivision 10 of section 2637, and that in all cases when a corporation fails to file such a list service may be had upon it by delivering to such register of deeds true copies of such legal process as one desires to serve. The section also declares that such service shall have the same effect as if it had been served personally upon any one of the officers designated in subdivision 10 of section 2637. Laws Wis. 1899, c. 46, pp. 61, 62.

The question arising on the foregoing statutes is, in the first instance, one of legislative intent, the question being: Did the law-maker, by subdivision 6, § 2639, Rev. St. 1898, intend to authorize the rendition of a general judgment against a domestic corporation on service had by publication or outside the state, or merely to empower the courts of the state to enforce any right, claim, or demand which might be preferred against property located within the state in which a domestic corporation was interested whose officers could not be found within the state? Although the question is not wholly free from doubt, we incline to the latter view, and so decide.

Since the decision in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, it has not been the habit of the legislatures of the various states to authorize the rendition of general judgments against natural or artificial persons, on substituted service, such as service by publication or service made outside of the state; while it has been a common practice on the part of such bodies to make provision by substituted service for the due enforcement of attachment liens and all other rights and claims against property located within the state, when there are persons or corporations having, or appearing to have, an interest in the property who cannot be personally served. When resort is had to substituted service, there is always more or less danger that a judgment may be rendered without actual notice to the defendant, and, in the absence of a clear manifestation of a contrary purpose, we think it always ought to be presumed, when a judgment on substituted service is authorized, that it was the intent of the lawmaker that such a judgment should bind the absent defendant to such extent only as might be necessary to enable the courts of the state to effectually enforce rights, liens, or claims which might at any time be asserted against property within their jurisdiction.

The Wisconsin statute makes no distinction at first between natural persons and artificial persons as respects the method of service. The service upon each is required to be personal by the delivery of a copy of the summons and complaint to the defendant, such delivery, in the case of an ordinary private corporation, to be made to the president or other chief officer. Section 2637, subd. 10. That provision of the statute on which the plaintiff in error

relies as justifying a different mode of service for the purpose of obtaining a general judgment is found in the section concerning service by publication or substituted service, and a glance at the various subdivisions of that section shows that in every instance where substituted service is permitted, except in subdivision 6, it is allowed for the express purpose of enabling a plaintiff to enforce some right against property, either because it has been attached or is cumbered with a lien, or because the title is clouded with some adverse claim which the plaintiff desires to have removed. The provision allowing service by publication in cases of divorce belongs to the same category, such actions being in the nature of proceedings in rem to dissolve the marital relation and determine the status of the parties. In framing section 2639, it is manifest, therefore, that the legislature had in mind a class of proceedings that are quasi in rem,—the very class of actions in which it is usual to make provision for bringing in persons by constructive service who are beyond the jurisdiction of the court, merely for the purpose of binding their interest as respects the res.

Furthermore, it will be observed that there is almost an exact correspondence between the various subdivisions of section 2639 and the subdivisions of section 2731 relative to attachments. The cases wherein substituted service is allowed are such cases as were liable to arise under the attachment statute. It is made one of the grounds of attachment (vide section 2731, subdiv. 6) that the defendant is a corporation created under the laws of the state, and “that all proper officers thereof on whom to serve summons do not exist, are non-residents of the state or cannot be found”; from which a very strong inference arises that when, by subdivision 6 of section 2639, the legislature authorized a corporation to be brought in by publication if “the proper officers on whom to make service do not exist or cannot be found,” it intended to provide a method of service where a writ of attachment was sued out under subdivision 6 of section 2731 against the property of a corporation.

It is further noticeable that section 1775b, which provides a species of constructive service under certain conditions therein mentioned, expressly declares that such service, when resorted to, shall be as effectual as personal service upon one of the officers specified in subdivision 10 of section 2637, whereas subdivision 6 of section 2639 contains no equivalent declaration as to the effect of the service. In view of this circumstance, it may be fairly inferred that the latter species of constructive service was intended to have no greater force or effect than the service provided for in the other subdivisions of section 2639; and, as respects service had under the other subdivisions of that section, it is plain, we think, that such service was only intended to lay the foundation for a special judgment, binding the absent defendant, not generally, but only as respects property within the state that had been attached, or as respects which some other relief was sought by the plaintiff. Being of the opinion, therefore, that subdivision 6 of section 2639 was not intended to authorize the rendition of a general judgment against a corporation whose officers could not be found within the state, it

becomes unnecessary to determine the further question, which has been argued at length, whether, if such was the legislative purpose, the act would be valid. The legislature, in our judgment, did not intend to authorize the rendition of a general judgment against a defendant corporation unless it appeared and submitted itself to the jurisdiction of the court. As the Wisconsin corporation in the present instance did not thus appear, but suffered a default, the judgment rendered against it was only effective to bind the attached property, and is not good as a general judgment. This, as we understand, was the view entertained by the trial court, and, being of the same opinion, the judgment below is accordingly affirmed.

In re WELLING.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1902.)

No. 809.

1. **BANKRUPTCY—ASSETS—SEMITONTINE POLICY.**

Bankrupt Act, § 70a (30 Stat. c. 541), provides that a trustee in bankruptcy shall be vested with the title of the bankrupt to (subdivision 5) property which he could by any means have transferred, or which could have been sold under process against him, provided that where any bankrupt has any insurance policy which has a "cash surrender value," payable to himself, he may pay such surrender value to the trustee, and retain the policy free from creditors. A semi-tontine policy on a bankrupt's life contracted to pay insured's wife \$10,000 on his death, and, further, that if three annual premiums had been paid, and default was afterwards made, a proportionate paid-up policy should be issued in favor of the wife. The provisions indorsed on the policy, and made a part thereof, recited that at the end of the tontine period insured should have certain options, one of which was to receive in cash the policy's accumulated reserve, and also the surplus apportioned to it. *Held*, that though the policy had no "cash surrender value," within the meaning of the proviso, it had an actual value, which constituted a right of property in the bankrupt, and which could have been transferred by him, and therefore passed to the trustee.

2. **SAME—DISPOSITION OF POLICY BY TRUSTEE.**

As the trustee takes the policy subject to the duty of continuing it in force by the payment of premiums until the completion of the tontine period, and subject to the contingency of the bankrupt's death before that time, in which event he would fail to realize anything,—the policy being payable to the bankrupt's wife,—either the actual value of the policy at the adjudication in bankruptcy should be determined, and the bankrupt permitted to pay to the trustee the proportion coming to him at the time stated, and to receive a conveyance from the trustee of all claims thereto, or the trustee should be directed to sell the bankrupt's interest in the policy at the date of the adjudication in bankruptcy for the benefit of his creditors.

Grosscup, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the Northern District of Illinois.

On the 13th day of April, 1900, David Welling, a citizen and resident of the state of Illinois, was by the court below adjudged a bankrupt, and on the 20th of that month filed schedules of his property. On May 11th the Chicago Title & Trust Company was appointed trustee of the bankrupt. In the schedule of assets the bankrupt did not include a certain policy of life

insurance, dated March 16, 1892, issued by the Equitable Assurance Society of the United States (being numbered 336,460), for the sum of \$10,000, upon the life of the bankrupt. On the 22d of October the trustee filed its petition setting forth the facts above stated, and praying that the bankrupt be required to appear and be examined concerning the policy, and to show cause why he should not surrender the policy to the trustee according to the bankrupt act, that the surrender value thereof may become an asset for distribution to his creditors, and that Welling may not be discharged of his debts under his petition to that end theretofore filed, until such examination be had. The answer of the bankrupt denied that the policy in question was an asset of his estate; admitted that it had a cash surrender value, but that such cash surrender value is the property of Anna B. Welling, his wife; denied the right of the trustee to the possession of the policy, or to obtain its surrender value; and alleged that the assurance company was under no legal right and was not legally bound to pay to the bankrupt any sum of money as a cash surrender value of the policy, that the amount offered by the company as hereinafter stated was offered only in a spirit of accommodation, and that the company would not under any circumstances pay the surrender value without the concurrence of his wife. The matter was referred to a referee, and there was produced before him a communication from the actuary of the company under date of July 21, 1900, offering, upon return with proper release of the policy on November 27, 1900, or within six months thereafter (if premiums be paid to that date, and the premium due on that date be not paid), to pay in cash \$2,926, or a paid-up policy for \$7,000; the offer not to be binding after the expiration of the six months named. The offer also required the release to be signed by Mrs. Welling. By the contract of insurance in question the assurance society, in consideration of the payment of \$250 semiannually on May 27th and November 27th of each year for 20 years, promises to pay to Anna B. Welling, the wife of the bankrupt, for her sole use if living, and if not living to the surviving children of David Welling, or their guardian for their use, or, if there be no such children surviving, then to the executors, administrators, or assigns of the bankrupt, the sum of \$10,000 within 60 days after satisfactory proofs of the death of the bankrupt. The policy contains a further provision that if premiums upon the policy for not less than three complete years of assurance shall have been duly received by the society, and the policy should thereafter become void in consequence of default in the payment of a subsequent premium, the society will issue in lieu of such policy a new paid up policy, without participation in profits, in favor of Anna B. Welling, if living, and, if not living, to the surviving children of David Welling, or their guardian for their use, or, if there be no such children surviving, then to the executors, administrators, or assigns of David Welling, for as many twentieth parts of the original amount assured as there shall have been complete annual payments received in cash by the society at the date when default shall first be made, provided that the policy shall be surrendered, duly receipted, within six months of the date of default in payment of premiums as mentioned. The provisions indorsed upon the policy are made part thereof as fully as if they were recited at length therein. There is indorsed upon the policy the following: "(1) That the policy is issued under the semitontine plan, the particulars of which are as follows: (2) That the tontine dividend period for this policy shall be completed on the twenty-seventh day of November in the year nineteen hundred and six. (3) That no dividend shall be allowed or paid upon this policy unless the person whose life is hereby assured shall survive the completion of its tontine dividend period as aforesaid, and unless this policy shall be then in force. (4) That all surplus or profits derived from such policies on the semitontine plan as shall not be in force at the date of the completion of their respective tontine dividend periods shall be apportioned among such policies as shall complete their tontine dividend periods. (5) That upon the completion of the tontine dividend period on Nov. 27th, 1906, provided this policy shall not have been terminated previously by lapse or death, the said David Welling shall have the option either—First, to withdraw in cash this policy's entire share of the assets (i. e., the accumulated reserve, which shall be six thousand eight

hundred and fourteen $\frac{80}{100}$ dollars), and in addition thereto the surplus apportioned by this society to this policy; secondly, to convert the same into a paid-up policy for an equivalent amount, provided, always, that, if the amount of said paid-up policy shall exceed the original amount of the assurance, a satisfactory certificate of good health from one of the society's medical examiners shall be required; thirdly, to withdraw in cash the share of the accumulated surplus apportioned by said society to this policy, and continue the policy in force on the ordinary plan; or, fourthly, to continue the assurance for the original amount, and apply the entire tontine dividend to the purchase of an annuity; the amount derived from such annuity, together with annual dividend on this policy, shall be paid in cash to said David Welling or assigns." The policy does not provide for its surrender by the assured, or for payment of its surrender value. The referee reported that the policy had no cash surrender value payable to the bankrupt under its terms, did not belong to the class of policies referred to in section 70 of the bankruptcy act, and the petition of the trustee should be dismissed. The court on June 4, 1901, overruled the exceptions to the report, and decreed that the report stand approved, from which decree this appeal is taken.

George Sawin, for appellant.

Philip S. Brown, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

In the case with which we have to deal, the law of the state of the domicile of the bankrupt does not exempt policies of insurance from judicial pursuit by creditors. The questions, therefore, are sharply presented, whether the insurance in question is property which, under the bankruptcy act, passes to the trustee, and whether the case comes within the proviso of section 70a of the act (30 Stat. c. 541). The solution of these questions requires us to ascertain the real nature of this contract. The policy is a semitontine policy; upon its face, an ordinary life policy, the premiums payable in 20 years, and the amount stated to be paid upon the death of the bankrupt to his wife, Anna B. Welling, if she be living; otherwise to his surviving children, if any; otherwise to his legal representatives or assigns. It also provides for the right after payment of premiums for three years, and upon default thereafter in the payment of a subsequent premium, to a paid-up policy, without participation in profits, in favor of the wife, if living; if not living, to the surviving children; and, if none such, to the personal representatives or assigns of David Welling,—for as many twentieth parts of the original amount assured as there have been complete annual premiums received. If these provisions constituted in full the contract, we could not doubt that the bankrupt has no pecuniary interest in the policy which would pass to his trustee, because in no case would there be payable to him in his lifetime any sum of money whatever upon the contract. There are, however, superimposed upon this contract certain conditions which qualify its effect and restrict the rights of the wife. These conditions declare that upon the completion of the tontine dividend period, November 27, 1906, the policy not having then been terminated by lapse or death, the bankrupt, not his wife, should have one of the four specified options, one of which is to receive in cash the

policy's accumulated reserve, stated to be \$6,814.50, and also the surplus apportioned by the society to the policy. It is clear that the entire interest of the wife in this policy, and her right to receive any sum of money thereon, is contingent upon the death of her husband before the completion of the tontine period, subject, perhaps, to her right before that time to receive in lieu of the policy a paid-up policy upon her husband's life, payable to herself, for as many twentieth parts of the sum assured as there have been annual dividends paid. It is likewise clear that this is also a contract between the assurance society and the bankrupt that on the 27th day of November, 1906, if he then survive, the society will pay him, if he so elect, a certain sum of money, or, should he so elect, will issue certain insurance to him, as stated in the condition. We cannot doubt that the bankrupt, from the moment the policy was issued, had a pecuniary interest in it, and a right to receive money upon it at the stated time, contingent only upon his surviving the tontine period; that the wife's interest is contingent upon her husband's death within the tontine period; and that her interest lapses at the completion of the tontine period, unless there had been substituted for the policy a new paid-up policy in the event and upon the terms stated. The proviso of section 70a declares that:

"When any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated and continue to hold, own, and carry such policy, free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

We are of opinion (and therein we concur with the court below and with the referee) that this policy does not fall within the proviso. The term "cash surrender value," therein employed, has a defined and legal meaning, namely, the cash value—ascertainable by known rules—of a contract of insurance abandoned and given up for cancellation to the insurer by the owner, having contract right to do so. The "surrender" of the proviso is not the subject of negotiation or agreement, but of right. The proviso does not include those policies where the right to surrender is not given by the contract. In the present case, failing provision in the policy to that end, surrender could only be legally accomplished through agreement with the company by the joint action of Welling and his wife. There exists no right in the wife or in the bankrupt, or in both jointly, to surrender. It could only be done by the joint action of the two by agreement with the assurance society. If provision for surrender were incorporated in the contract, it would not be within the power of the bankrupt to surrender the policy, and thereby cut off the interest of his wife therein. *Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370. She has a distinct interest in the policy, which does not pass to the trustee in bankruptcy. *Atkins v. Society*, 132 Mass. 395, 402. We cannot concur in the suggestion to the contrary in *Re Steele* (D. C.) 98 Fed. 78, 80. Nor could the bankruptcy court rightfully compel such surrender and cancellation of the pol-

icy by the bankrupt, he agreeing thereto in concurrence with the company; for that might be to deprive the wife of her interest. And likewise it would not be within the power of the wife to surrender the policy, and thereby deprive the husband of his right at the end of the tontine period to receive the stipulated amount. Surrender can only be accomplished through agreement with the company by the joint action of husband and wife. Besides, if we concede that this policy has a "cash surrender value," within the meaning of the proviso, that value was not "payable to himself," for both the bankrupt and his wife had an interest therein. We are not advised by the record, nor are we otherwise informed, that there is any known rule by which surrender value—assuming such to exist—could be equitably apportioned between the bankrupt and his wife, or by which it could be ascertained what proportion thereof was "payable to himself," within the meaning of the proviso. From the report in *Re Diack* (D. C.) 100 Fed. 770, the referee would seem to have reached an apportionment in such case, but the basis of his calculation is not apparent. We are therefore clearly of opinion that the policy in question does not fall within the provisions of the proviso.

But it does not follow, as was assumed by the court below and by the referee, that, because the policy does not fall within the terms of the proviso, the bankrupt has not property therein which passes to his trustee. By the terms of the policy he was entitled to receive at the end of the tontine period the cash payment stipulated in the contract. That is a vested contract right, contingent only upon his surviving the tontine period. The right is valuable, increasing in value with each successive payment of premium. The policy, technically, had not a "surrender value," within the meaning of the proviso; but it had an actual value, and that valuable right was right of property existing in the bankrupt. It is the plain provision of the bankruptcy law that all the estate of the bankrupt shall, by operation of law, be vested in the trustee, save such as is specifically excepted by the provisions of the bankruptcy law, or by the law of the domicile of the bankrupt. The language of the provision is comprehensive. Subdivision 5 of section 70a declares that there shall be thus vested in the trustee "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." Then follows the proviso which we have considered. It is clear that this proviso merely defines a certain class of insurance which may be excepted and exempted, by the action of the bankrupt and upon the conditions stated, from the general property which by the law is vested in the trustee. In other words, the proviso is in the nature of a privilege to the debtor to retain such specified insurance upon yielding to the trustee the cash surrender value of the policy at the time of adjudication. All other property of the bankrupt, including all insurance owned by him, which does not fall within the provisions of the proviso, passes to the trustee. The statute cannot legitimately be construed to mean that a policy does not vest in the trustee except it have a cash surrender value, and that such may be rescued by the bankrupt upon

the terms stated. The meaning of the provision is clear,—that all the property of the bankrupt except that specified in the proviso, shall be vested in the trustee, and that also shall pass unless the bankrupt avail himself of the privilege granted him by the law. The contract in question gives to the bankrupt the right to receive at a certain date a specified sum of money, contingent upon his surviving to that date. This is a vested right of property existing in the bankrupt, which passes to the trustee. It is a property right which he could have transferred, and it falls within the comprehensive language of the section which vests title in the trustee. 2 May, Ins. § 459d; *Porter v. Porter*, 2 Willson, Civ. Cas. Ct. App. § 434; *Cameron v. Fay*, 55 Tex. 58; *Levy v. Van Hagen*, 69 Ala. 17; *Tompkins v. Levy*, 87 Ala. 263, 6 South. 346, 13 Am. St. Rep. 31; *Boyden v. Insurance Co.*, 153 Mass. 544, 27 N. E. 669; *Tennes v. Insurance Co.*, 26 Minn. 271, 3 N. W. 346; *Talcott v. Field*, 34 Neb. 611, 52 N. W. 400, 33 Am. St. Rep. 662; *Evers v. Association*, 59 Mo. 429. In the last case it was ruled that there was no joint interest in the policy during the continuance of the life of the insured; that while he lived he had the sole and absolute interest, with a bare contingency resulting to the other party, that, "had he survived to the designated time when the payment of the policies was to inure to him personally, he, and he alone, would have reaped their fruits, and no other one was jointly interested with him"; and that the interest of the beneficiary did not take effect until the insured's interest ceased by death. It does not appear that the policy in that case contained a provision like the one here, providing for a paid-up policy to the beneficiary named in case of default in the payment of premium after three annual premiums had been paid. This provision, even if the doctrine of the Missouri case can be upheld to its full extent, would, as we think, give to the wife a present right and interest in the policy, to receive upon the conditions stated a paid-up policy upon the life of her husband,—a right however, which she could not exercise without his consent, since that would be to deprive him of his right to receive the amount specified at the conclusion of the tontine period.

The case of *Ex parte Dever*, 18 Q. B. Div. 660, is not in conflict with our conclusion. The policy there was like the one here, except that the right of option at the conclusion of the tontine period was vested in the wife, and not the husband. The right of the husband to receive anything under that policy rested in the possibility of the wife, at the end of the tontine period, exercising her option to receive a specified sum of money, which, it was argued, under the marital laws of England, would pass to the husband. Whether it would so pass was not determined; but the court ruled that the husband had no property right in the policy which passed to the trustee, because it was something that could only accrue in the exercise of the wife's option on the double contingency which had not happened at the time he obtained his discharge. The court said:

"It was the mere hope of a hope that something might come to him by reason of his surviving the ten years, and of his wife's exercising her option in that particular manner, and it was a mere spes, and there was nothing which could vest in the trustee in bankruptcy."

In *re Slingluff* (D. C.) 106 Fed. 154, 3 Nat. Bankr. News, 254, 5 Am. Bankr. R. 76, was a case upon an endowment policy, where the specified amount was payable to the bankrupt at the date stated, if he survived, and, if he should die within the period, then to the wife or her legal representatives. Judge Morris in that case delivered an able and exhaustive opinion, covering the whole ground here considered, and reaching the conclusion to which we are compelled.

It remains to consider how this matter should be dealt with by the court below. The trustee takes the policy as of the date of the adjudication in bankruptcy, and subject to all its burdens. He takes it subject to the duty of continuing it in force by the payment of semiannual premiums until the completion of the tontine period. That will involve a large outlay of money, which may prove burdensome to the estate. He also takes the policy subject to the contingency of the death of the bankrupt before the completion of the tontine period, and, if that contingency should happen, he will fail to realize anything, and possibly the bankrupt's estate might lose the amount disbursed in payment of premiums. There would seem to be two modes of practically and equitably solving the problem. One is to ascertain, if it be possible, the actual value of the policy at the date of the adjudication in bankruptcy, and the equitable apportionment of that value among the respective interests in the policy, and then, in analogy to the declared policy of the law as stated in the proviso, to permit the bankrupt, if he so desire, to pay to the trustee that proportion of the actual value which would be coming to him at the time stated and upon the plan suggested, and that the trustee thereupon convey all claim to the policy to the bankrupt. The other plan is to direct a sale by the trustee of the interest of the bankrupt in the policy at the date of the adjudication in bankruptcy. These views are suggested to the court below for its consideration in the equitable disposition of the matter under the rules which we have declared, and because the record furnishes no data from which specific directions may be given.

GROSSCUP, Circuit Judge (dissenting). I concur in the opinion that the policy does not fall within the provisions of section 70a relating to a cash surrender value; but am forced to dissent from that portion of the opinion which holds that in virtue of the condition of the policy relating to David Welling's right of election upon the completion of the tontine dividend period, November 27, 1906, Mrs. Welling's vested interest will cease, and Welling's right become a property which could have been transferred April 13, 1901, the date of adjudication, or which might have been levied upon and sold under judicial process against him.

The policy, on its face, contracts to pay Anna B. Welling, if living, or, if not living, the surviving children, the sum of ten thousand dollars within sixty days after satisfactory proofs of death of David Welling, subject, however, to the condition, among others, that upon the completion of the tontine period, November 27, 1906, (the policy not having been terminated previously by lapse or death) David

Welling should have the option: (a) to withdraw in cash the policy's entire share of the assets; (b) to convert such share into a paid-up policy for an equivalent amount; (c) to continue the policy in force on the ordinary plan, withdrawing the accumulated surplus in cash, or, (d) to continue the policy for the original amount, applying the tontine dividend to the purchase of an annuity for the benefit of David Welling.

Now, the law holds, that in a policy of insurance taken out by a husband on his life, making a reasonable provision for the family after his death, without intent to hinder, delay or defraud creditors, the interest of the wife vests from the moment the policy is issued, and remains vested until the policy matures, unless there is a clear provision to the contrary. The policy under consideration contains no clear contrary provision. The right of Welling to take out, at a given period, the value of the policy in cash, connected as it is with the other alternative, that the policy may continue in force on the ordinary plan, is not in itself a divestment of Anna B. Welling's interest. The alternative—the continuance of the policy in force on the ordinary plan—is a continuance of her vested interest as it was previously. The effect of the contract, taken as a whole, is that the insurance company promises to pay Anna B. Welling, or the surviving children, upon the death of David Welling, the sum of ten thousand dollars, unless on November 27, 1906, David Welling shall have elected to withdraw in cash the policy's entire share of the assets. In such a contract, the interest of Anna B. Welling, though subject at the option of David B. Welling (to be exercised November 27, 1906) to termination, is not, in fact, terminated or divested until the option has been exercised.

Assuming then, that Anna B. Welling has a vested interest in the policy, not terminable November 27, 1906, unless David B. Welling elects to take out in cash the policy's share of the assets, it is clear to me that such right of election is one not transferable, or subject to levy upon judicial process. If the subject matter of the option were a mere future interest or expectancy, disconnected from obligations to, or with the interests of, another, there might be little doubt of its assignability. But that is not its nature or substance. The subject matter of the option is a policy of life insurance—the provision a husband makes for his wife and family in the event of his death. Presumably, the wife has contributed her share toward obtaining the premiums that have enabled the husband to carry along the policy; presumably, too, any other provision for her or the family has been affected by the fact that a life insurance provision is in existence. If disposed of, such a policy, unlike other property, brings no equivalent—once let go it can in many cases never be replaced. An option so intimately interwoven with the wife's interest, and with the obligations due to her from her husband, cannot be exercised against her interests, except in exact accordance with the substantial terms in which the option is formulated and put in force.

One of those terms is that it shall be exercised November 27, 1906. Time, here, so far as Mrs. Welling is concerned, is of the

essence of the option. The interest of the wife, and the sense of obligation of the husband, may be different on that day from that of any day preceding or following. It is, in my judgment, the wife's right that the election—affecting as it does her vital interests—shall be exercised only in view of the considerations that may influence the husband at that time; neither those before nor those after.

Another term of the option is that the election shall be by the husband himself. No one else can stand in his place, or exercise the option under the circumstances and sense of obligation that will influence him. It is the wife's right to have the husband's judgment, not that of a stranger—the judgment of the man who presumably has an interest in her future, not that of a man whose interest in this respect is in conflict with hers. I am of the opinion that a fair interpretation of the spirit of the policy would disallow the exercise of the option of Welling until the day for its exercise had arrived, and would then disallow its exercise, unless it be by the judgment of Welling himself. Such an interpretation, of course, forbids the view that the option is transferable in advance—in this case six years in advance—or was subject to levy by creditors.

The decree is reversed and the cause remanded to the court below with direction to proceed therein in accordance with the views expressed in this opinion.

DE GIGNAC et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1902.)

No. 801.

1. POST OFFICE—MAILING PROHIBITED MATTER—SUFFICIENCY OF INDICTMENT.

An indictment under Rev. St. § 3893, as amended by 1 Supp. Rev. St. 621, charging the defendant with having deposited in a post office for mailing a letter or circular giving information where and of whom might be obtained obscene, lewd, and lascivious pictures, is sufficient if it specifies the place where and of whom the letter or circular gave information, and alleges the character of the information, leaving further disclosures to the evidence. It is not necessary to aver ownership or possession of the objectionable matter, nor that the information was given to one who inquired for or desired it, nor to describe the pictures about which information was given, further than to state their character.

2. SAME—ELEMENTS OF OFFENSE.

It is not necessary, to constitute the offense of mailing a letter or circular giving information where obscene, lewd, and lascivious pictures or publications may be obtained, under Rev. St. § 3893, as amended by 1 Supp. Rev. St. 621, that the writing mailed should describe the objectionable matter or state its character. It is sufficient if the writing, although unobjectionable on its face, in fact gives information where matter of the character specified in the statute can be obtained, and the indictment need not plead all the words constituting the information with the particularity required in cases of libel or forgery.

3. SAME—INDICTMENT CONSIDERED.

An indictment under Rev. St. § 3893, as amended by 1 Supp. Rev. St. 621, charged the defendants with having deposited for mailing a cir-

cular, and, after setting out the circular in hæc verba, averred: "Which said circular then and there was a circular which gave information, as they, the said * * *, then and there well knew, where and of whom might be obtained certain obscene, lewd, and lascivious photographic pictures, in the said circular called 'views'; that is to say, information that the said pictures might be obtained of * * * at * * *." *Held*, that such indictment was sufficient, although the circular set out was merely an advertisement of a machine for exhibiting "views," and of different sets of views for exhibition therein; the character of the pictures not being described.

In Error to the District Court of the United States for the Northern District of Illinois.

The indictment in this case is based upon section 3893 of the Revised Statutes of the United States, as amended by the act of September 26, 1888 (1 Supp. Rev. St. 621), and embraces two counts. A demurrer to the indictment having been overruled, the defendants entered their pleas of guilty to both counts. A motion in arrest of judgment was overruled, and exception duly taken. The defendants were thereupon sentenced each to pay a fine of \$1,000, and to be imprisoned in the Illinois State Penitentiary at Joliet at hard labor for three years; the said sentence of imprisonment to be satisfied by each serving one year in the county jail of Cook county. Motion to vacate and set aside judgment was then made and overruled. The ruling of the court in passing sentence, in denying the motion in arrest of judgment, and in denying the motion to vacate judgment is assigned for error, and the sufficiency of the indictment is the sole question presented here for consideration.

Section 3893 of the Revised Statutes, as amended, reads as follows:

"Sec. 3893. Every obscene, lewd or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means any of the hereinbefore mentioned matters, articles or things may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing of or of aiding in the circulation or disposition of the same, shall, for each and every offense be fined upon conviction thereof not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court."

The indictment is as follows:

"The grand jurors for the United States of America, inquiring for the Northern division of the Northern district of Illinois, upon their oaths present that Anthony L. De Gignac and Herbert S. Mills, late of the city of Chicago, in the said division and district, on the thirteenth day of December, in the year of our Lord nineteen hundred, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post office of the said United States there, for mailing and delivery, a certain envelope, to wit, an envelope which then and there bore two uncanceled, United States two-cent postage stamps and the following return card direction and address; that is to say: 'Return in 5 days to Mills Novelty Co., Chicago, U. S. A. Peter Lemington, Esq., 2261 Arapahoe, Room 12, Denver, Colo.'—and contained a certain printed circular, to wit, a printed circular of the tenor which here follows; that is to say:

The Quartoscope

\$50.00

Our New Picture Machine

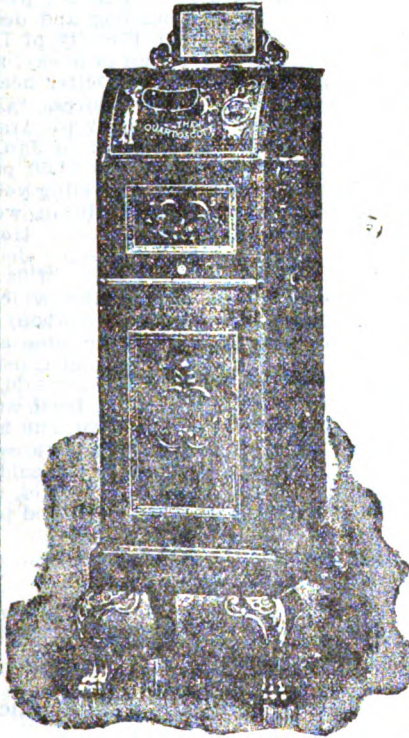
\$50.00

The Views

are arranged in sets of twelve stereoscopic views, with four sets to each machine. One set of twelve pictures can be seen for a nickel : : :

Other Sets.

supplied on appli-
cation at lowest
prices : : : : :



Over
50,000

subjects to select
from : : : : : o

We Quote

the machine ready
for operation which
includes batteries,
electric lamps and
four sets or 48
pictures: c c c c c

MANUFACTURED AND FOR SALE ONLY BY THE

Mills Novelty Co.

11 to 23 So. Jefferson Street CHICAGO, ILL

—Which said circular then and there was a circular which gave information, as they, the said Anthony L. De Gignac and Herbert S. Mills, then and there well knew, where and of whom might be obtained certain obscene, lewd, and lascivious photographic pictures, in the said circular called 'Views'; that is to say, information that the said pictures might be obtained of the Mills Novelty Co., at Nos. 11 to 23 South Jefferson street, in the said city of Chicago,—against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

"(2) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said Anthony L. De Gignac and Herbert S. Mills, on the tenth day of January, in the year of our Lord nineteen hundred and one, at Chicago aforesaid, in the division and district aforesaid, unlawfully did knowingly deposit and cause to be deposited in the post office of the said United States at Chicago aforesaid, for mailing and delivery to one Peter Simington, at No. 2261 Arapahoe street, in the city of Denver, in the state of Colorado, a certain typewritten letter; that is to say, a letter of the tenor following, beginning next below the engraved letter head thereof, which it is impossible to here produce, to wit: 'Cable Address, "Coin." 'Phone, Monroe, 47. Jan. 10, 1901. Mr. Peter Simington, 2261 Arapahoe St., Denver, Colo.—Dear Sir: Replying to your valued favor of Jan. 4th, will say that the price of our views such as you desire are \$1.50 per dozen. We also allow you to exchange the same for others, providing you have not retained them over thirty days, and they are in good condition, we allowing you two-thirds of their original value in exchange for new. Hoping to be favored with your valued order, assuring you that the same shall have our prompt and careful attention, we remain, yours very truly, Mills Novelty Co. A. H. C.,'—which said letter then and there was a letter which gave information to the said Peter Simington, as they, the said Anthony L. De Gignac and Herbert S. Mills, then and there, to wit, at the time and place of so depositing the said letter in the said post office, and causing the same to be deposited therein, for mailing and delivery as aforesaid, well knew, where and of whom might be obtained certain obscene, lewd, and lascivious photographic pictures of nude women, too obscene, lewd, and lascivious to be here described; that is to say, information that such pictures might be obtained of the Mills Novelty Co., then doing business in the said city of Chicago,—against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided."

Wm. S. Forrest, for plaintiff in error.

S. H. Bethea, for the United States.

Before JENKINS and GROSSCUP, Circuit Judges, and HUMPHREY, District Judge.

HUMPHREY, District Judge, after making the foregoing statement, delivered the opinion of the court.

The contention on behalf of plaintiffs in error is that the indictment does not aver that the writing therein set forth gave the prohibited information directly or indirectly; that it contains no averment that obscene, lewd, and lascivious photographic pictures or views were in fact at Nos. 11 to 23 Jefferson street, in the city of Chicago, or were in the possession or under the control of the Mills Novelty Company. Counsel contend that an indictment drawn under this section for mailing prohibited matter, or for mailing a writing giving information where such matter may be obtained, is subject to the rule of pleading applicable to indictments for slander, libel, forgery, etc.; that the case at bar is strictly analogous to an indictment for criminal libel; that therefore, in order to make

a good indictment, the writing itself must upon its face purport to be what is prohibited, or, failing in that, the indictment must contain explanatory allegations, averments, or writings showing that the writing itself, interpreted by such explanations, does not contain what is prohibited.

This contention cannot be sustained. The primary object of this federal enactment (section 3893, Rev. St. U. S.) is to protect the mails from corrupt communications. The incidental purpose of the law is to protect the public morals. The law has been construed by the supreme court. It is not necessary, in an indictment under this section, that all the words constituting the information should be pleaded with the particularity used in cases for libel and forgery. It is sufficient that the character of the information be described, leaving further disclosures to the introduction of evidence. The offense here denounced is the giving of information by mail where obscene matter may be obtained. Any communication by mail which does this is actionable. The gist of the offense is the giving of the information by mail. It is not necessary to aver ownership or possession of the obscene matter. Neither is it necessary to aver that the information was given to one who inquired for or desired the same. One very common purpose of those who violate this statute is the corruption of the young and the innocent. It is not necessary that the writing complained of should in terms describe obscene matter. The writing may be innocent and harmless on its face. Yet if it in fact give information where obscene matter may be obtained, and the explanatory averment so states, it cannot save the plaintiffs in error harmless because the obscene matter in question is described by the indefinite term of "views."

On the exact question arising here the cases of *U. S. v. Grimm* (C. C.) 45 Fed. 558, *Id.* (D. C.) 50 Fed. 528, and *Grimm v. U. S.*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550, are in point. These cases have been much relied upon by counsel on both sides. The indictment here is sufficient under the authority of either of the *Grimm* Cases. In the first *Grimm* Case, the main objection to the indictment, and the one on which it was held insufficient for uncertainty, was that it did not contain any averment, either in the writing itself or by way of explanation, as to the place where the objectionable matter could be obtained. The indictment failed to aver that the writing complained of conveyed the information denounced by the statute. The indictment here is specific on this point. It avers that the writing complained of did contain information where such denounced photographs could be obtained, viz.: "Information that the said pictures might be obtained at Nos. 11 to 23 South Jefferson street, in said city of Chicago." In the second *Grimm* Case, opinion by Mr. Justice Brewer, it is said at page 608, 156 U. S., page 471, 15 Sup. Ct., and page 551, 39 L. Ed.:

"It is insisted that the possession of obscene, lewd, or lascivious pictures constitutes no offense under the statute. That is undoubtedly true, and no conviction was sought for the mere possession of such pictures. The gravamen of the complaint is that the defendant wrongfully used the mails for transmitting information to others of the place where such pictures could be obtained, and the allegation of possession is merely the statement of a

fact tending to interpret the letter which he wrote and placed in the post office. It is said that the letter is not in itself obscene, lewd, or lascivious. This also may be conceded. But, however innocent on its face it may appear, if it conveyed, and was intended to convey, information in respect to the place or person where, or of whom, such objectionable matters could be obtained, it is within the statute. * * * On the contrary, it is sufficient to allege its character and leave further disclosures to the introduction of evidence. It may well be that the sender of such a letter has no single picture or other obscene publication or print in his mind, but, simply knowing where matter of an obscene character can be obtained, uses the mails to give information to others. It is unnecessary that unlawful intent as to any particular picture be charged or proved. It is enough that in a certain place there could be obtained pictures of that character, either already made and for sale or distribution, or from some one willing to make them, and that the defendant, aware of this, used the mails to convey to others the like knowledge."

Measured by this standard the indictment is sufficient. It avers, after setting out the circular in hæc verba:

"Which said circular then and there was a circular which gave information, as they, the said Anthony L. De Gignac and Herbert S. Mills, then and there well knew, where and of whom might be obtained certain obscene, lewd, and lascivious photographic pictures, in the said circular called 'Views'; that is to say, information that the said pictures might be obtained of the Mills Novelty Company, at Nos. 11 to 23 South Jefferson street, in the said city of Chicago,—against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided."

It very properly left further disclosures to the introduction of evidence.

The judgment of the district court is affirmed.

HUTCHINSON v. LE ROY.

In re HUTCHINSON, Petitioner.

(Circuit Court of Appeals, First Circuit, January 8, 1902.)

Nos. 388, 390.

1. BANKRUPTCY—PROCEDURE ON REVIEW.

The decision of a court of bankruptcy on a petition claiming ownership of funds in the hands of a bankrupt's trustee, where the facts are undisputed, may be reviewed by a petition for revision, under Bankr. Act 1898, § 24b, and not by appeal under that act.¹

2. SAME—PROCEEDS OF PLEDGE—RECOVERY FROM TRUSTEE OF PLEDGE.

A pledgee of a certificate of stock repledged it to a bank, without the knowledge of his pledgor, to secure a debt of his own. He afterwards made a general assignment, and still later was adjudged a bankrupt. The bank sold the securities, and, after its claim was paid, had a sum remaining exceeding the proceeds of such certificate, which it paid over to the assignee, who had been previously notified by the original pledgor of his right to the certificate, subject to payment of his own debt, which he had duly tendered. The assignee had funds in his hands exceeding the proceeds of such certificate at all times until he turned the same over to the trustee in bankruptcy, who thereafter

¹Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

also had at all times funds in excess of such amount. *Held*, that the original pledgor had the equitable right to follow the fund received by the bank in excess of its debt through the hands of the assignee and into those of the trustee, and to recover from the latter the proceeds of his stock, less the amount of his indebtedness to the bankrupt.

2. SAME—LACHES.

The original pledgor, having no knowledge that his stock had been repledged by the bankrupt until after he had filed his claim as a preferred creditor of the bankrupt estate, cannot be said to have waived any rights, or to have been guilty of laches which would preclude him from thereafter asserting the same against the fund in the hands of the trustee.

4. SAME—Costs.

In re Dickson (C. C. A.) 111 Fed. 726, affirmed as to costs.

Appeal from, and Petition for Revision of Proceedings in, the District Court for the District of Massachusetts.

For opinion below, see 108 Fed. 212.

Addison C. Burnham and Albert S. Hutchinson (Freedom Hutchinson, on the brief), for appellant.

Roland Gray (Ropes, Gray & Gorham, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. These two proceedings were brought to revise the decree of the district court for the district of Massachusetts, sitting in bankruptcy, directing a payment to Le Roy by the trustee in bankruptcy of \$6,490.29. As occurred in *Re County of Worcester*, 42 C. C. A. 637, 102 Fed. 808, and in *Re Fisher*, 43 C. C. A. 381, 103 Fed. 860, 51 L. R. A. 292, and in *Re Dickson* (C. C. A.) 111 Fed. 726, the moving party in this court, who is the trustee in bankruptcy, being uncertain as to the nature of his remedy, both appealed, which constitutes the case of *Hutchinson v. Le Roy*, and filed a revisory petition, which constitutes that of *Hutchinson*, petitioner. There can be no doubt that the latter proceeding is the correct one, and the appeal must be dismissed for want of jurisdiction.

The proceeding commenced by Le Roy filing a proof of debt, claiming this \$6,490.29, but closing the proof with the following, "Deponent claims to be entitled as a preferred creditor." What Le Roy thus sought to accomplish could not be accomplished in that form, as the claim which he intended to maintain was not a preferred debt, under the bankruptcy act of 1898. Subsequently Le Roy obtained leave to amend as follows:

"And now comes the claimant, Stuyvesant Le Roy, and moves to amend his proof of claim heretofore filed by substituting therefor the following:

"The trustee appointed in the above-entitled bankruptcy proceeding received \$6,490.29, belonging to this claimant, and forming no part of the estate of the bankrupts. Wherefore this claimant prays that the trustee may be ordered to pay to him said sum, less the amount of the dividend which has already been paid to him.

"This application is made without prejudice to the claimant's right to share as a general creditor for said amount of \$6,490.29, in the event of the denial of this prayer for full payment."

The amendment having been allowed, what was originally intended as a proof of a preferred claim was converted into a summary petition for the payment to Le Roy of a specific amount from the funds in the possession of the trustee. The district court clearly had jurisdiction over this petition, and granted it. Le Roy claimed the proceeds of 65 shares of American Sugar Refining Company stock, sold as hereinafter stated; the amount realized on the sale being \$8,320. According to well-established rules, a court winding up insolvent estates must take cognizance of all equitable set-offs, no matter how they may arise. Bankr. Act 1898, § 68; Carr v. Hamilton, 129 U. S. 252, 256, 9 Sup. Ct. 295, 32 L. Ed. 669; Scott v. Armstrong, 146 U. S. 499, 507, 13 Sup. Ct. 148, 36 L. Ed. 1059; Auten v. Bank, 174 U. S. 125, 148, 19 Sup. Ct. 638, 43 L. Ed. 920. It is sufficient that on the adjustment of all accounts between Le Roy and the bankrupts, including the matter of the 65 shares of American Sugar Refining Company stock, there was a balance due the former of \$6,490.29.

Le Roy had pledged to the bankrupts before their failure the 65 shares of American Sugar Refining Company stock. Afterwards, at a date not given, the bankrupts borrowed of the Beacon Trust Company \$100,000, pledging it a long list of securities, including with the rest the American Sugar Refining Company stock, and a small amount of other stocks belonging to other persons, without their consent, and without the consent or knowledge of Le Roy. Next, on December 27, 1899, the bankrupts made an assignment for the benefit of their creditors to one George C. Dickson. On the next day, or the day after, Le Roy called at the office of the bankrupts, and offered to pay the balance due from him on the delivery to him of the American Sugar Refining Company stock; but he was advised that nothing could be done, because the assets of the concern had been transferred to Mr. Dickson. Not knowing that his stock had been pledged to the Beacon Trust Company, Le Roy, forthwith after his interview with the bankrupts, informed Mr. Dickson that it belonged to him, and that it and its proceeds should be kept separate from the general assets of the insolvents. Between December 28, 1899, and January 2, 1900,—the details of the dates not being given, nor important,—the Beacon Trust Company sold all the securities pledged to it, with some exceptions not necessary to consider, but including Le Roy's, realizing on the sale \$111,340.75. The dates show that, both at the time of the assignment and of the claim made by Le Roy on Dickson, his stock was still intact in its hands. The trust company paid from the proceeds of the sale the amount of its loan, and delivered to Mr. Dickson a cash surplus of \$11,340.75 and the unsold securities. The stock belonging to Le Roy was, as already said, sold for \$8,320, and the other stocks belonging to other persons were sold for \$3,200. As the net amount of Le Roy's claim is the sum already named, \$6,490.29, all the reclamations which could be made by all the owners of all the stocks so pledged were less than the amount thus turned over.

The petition on which the adjudication of bankruptcy was made was subsequently filed, at a date not given in the record, and Hutchinson was duly appointed trustee. Meanwhile Mr. Dickson made some disbursements and realized some other funds, but at all times he had in his hands as assignee at least \$11,340.75 in cash, and he turned over to the trustee \$30,783.62. The trustee always has had, as trustee, cash in excess of \$11,340.75, not required for any special purpose connected with the estate of the bankrupts, or with the proceedings in reference to the bankruptcy. From the time Mr. Dickson received the money from the Beacon Trust Company until the amendment was made which converted Le Roy's proof into a summary petition, there always was in the hands of Mr. Dickson and the trustee a sum which could have been applied to satisfying Le Roy's claim, without affecting any interests, except the amount of dividends to be paid the general creditors, who could prove their claims either under the assignment or in bankruptcy.

The record not showing that Le Roy knew what disposition had been made by the bankrupts of his American Sugar Refining Company stock, or, indeed, that he knew that they had made any disposition of it, we are not to hold that it was in his power to take any further action to protect his rights. Therefore we are to hold that he has not been guilty of any laches which could prejudice him. We might hold that the claim which Le Roy made on Dickson placed sufficiently on Dickson the duty of ascertaining whether any of the stock in the hands of the Beacon Trust Company belonged to Le Roy. But Dickson, as assignee of the insolvents, was not a purchaser for value, and therefore it is of no consequence whether he was advised of this fact. It is also well settled that the trustee, as well as the assignee, took only the equities of the bankrupt. *Stewart v. Platt*, 101 U. S. 731, 738, 25 L. Ed. 816; *Bank v. Yardley*, 165 U. S. 634, 653, 17 Sup. Ct. 439, 41 L. Ed. 855. Therefore it follows that the trustee can set up no right against Le Roy which Dickson, as assignee, could not have done.

For the purpose of determining Le Roy's equities, it is not necessary to go back of the condition of things when the securities came into the hands of the Beacon Trust Company. Of course, the circumstantial facts concerning every transaction of this nature differ from those of every other, and it is not always for the trustee in bankruptcy to determine for himself whether such differences involve anything of substance. Nevertheless an examination of the record impresses us that this case must be determined in favor of Le Roy, on simple rules, and on recognized and well-established equitable principles.

There can be no doubt that, before the securities were sold by the Beacon Trust Company, Le Roy had a legal right to pay to it its loan, and take up all of them, for the purpose of protecting his interest in his own stock. It is said, however, that, in case the Beacon Trust Company had refused to accept payment or to surrender the stock, his only remedy would have been by an action at common law. Although this proposition, if sustained, could not affect the equities of this case, nevertheless it is not correct. If the

Beacon Trust Company had refused to surrender, Le Roy, being a stranger to the transaction between it and the bankrupts, could have maintained a bill of redemption. Story, Eq. Jur. (13th Ed.) § 1032. However, Le Roy had other equities, in all respects the same as those of a surety, including the rights of marshaling and subrogation, and also the right to avail himself of the law of application of payments in such manner as would be most to his advantage. These principles are so thoroughly settled that no citation of authorities is necessary in reference to them; but the two rights first named are well explained by Lord Hatherley in *Ex parte Alston*, 4 Ch. App. 168, and by Lord Justice Cotton in *Ex parte Salting*, 25 Ch. Div. 148, 152.

It is quite probable, also, that on a showing that the Beacon Trust Company could have repaid itself, certainly and immediately, on a sale of the securities belonging to the bankrupts, Le Roy could, on its refusal to sell, have brought a bill, in the nature of a bill for marshaling the assets, requiring it to sell them, and thus relieve his own stock. It is not necessary, however, to determine this, because he was clearly entitled to the specific equities which we have pointed out, and which are uniformly recognized and protected by the chancery courts. These equities adhered, of course, to the surplus, equally whether the sale was made by the Beacon Trust Company, or its loan was paid by Le Roy, or a sale was effected by a chancery court on a bill for that purpose.

As, according to equitable principles, these equities attached to the fund, it followed it, of course, wherever it could be found, until it should reach the hands of an innocent purchaser for value. The proposition of the trustee in bankruptcy that it cannot be determined out of what portion of the proceeds the loan of the Beacon Trust Company was paid, and that therefore it cannot be said that Le Roy had any lien on the specific surplus remaining after payment of the loan, is one nowhere recognized. It is also met by the well-known rule of appropriation of payments, to the effect that, where the parties themselves have made no specific direction, the law appropriates in such way as to protect the just rights of all. Moreover, the proposition is strictly met by *Ex parte Alston*, *ubi supra*, where it appears that the pledgees, situated like the Beacon Trust Company, applied to the payment of their debt the specific proceeds of property pledged without authority, as was Le Roy's stock in the case at bar; yet the court gave the owner of what was thus improperly pledged a lien on the remaining securities in the hands of the pledgees for the value of his property. An examination of the English cases doubted and overruled will show that *Ex parte Alston* has never been questioned. It was expressly recognized as authority by the court of appeal in *Ex parte Salting*, *ubi supra*.

Story, Eq. Jur. (13th Ed.) §§ 1255-1258, reaches, in these respects, every case where property has been wrongfully misapplied, without any limitation as to the relations between the owner and the person who misapplied it. In section 1258 it is said:

"Wherever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property,

if its identity can be traced, it will be held in its new form liable to the rights of the original owner or cestui que trust."

In a note to this section it is said that this rule applies a fortiori if the property has been rightfully sold by an agent or trustee; but the text is stated so broadly that it reaches proceeds wrongfully misapplied, no matter by whom, and without regard to whether or not the misapplication is by a person standing in a confidential relation. The same rule is thus stated, in a summary form, in *May v. Le Claire*, 11 Wall. 217, 235, 20 L. Ed. 50, 54:

"At law in many cases if property be tortiously taken or converted, the tortfeasor may be used in trespass or trover, or the injured party may waive the tort and sue in assumpsit. In the latter case the same results follow as if there had been an implied contract." "In the same class of cases, where the converted property has assumed altered forms by successive investments, the owner may follow it as far as he can trace it, and sue at law for the substituted property, or he may hold the wrongdoer liable for appropriate damages." "There are kindred principles in equity jurisprudence, whence, indeed, these rules of the common law seem to have been derived."

The efficiency of the rules of the chancery courts, by virtue of which Le Roy seeks to impress the surplus in the hands of the Beacon Trust Company with equities in his behalf, is peculiarly illustrated by an extensive class of authorities, of which the opinion of Mr. Chief Justice Gray in *Bank v. Barry*, 125 Mass. 20, is a noteworthy one. There the money in question was taken by a clerk of the bank, yet not in his capacity as clerk. It was stolen. A part of it was delivered by him to one Barry, who was a stranger to the bank, and who with it purchased land, taking the title in the name of his mother; and Mr. Chief Justice Gray, delivering the opinion in behalf of the court, said that equity would charge the land with a trust in favor of the bank for the money received by Barry, it appearing that he knew that it was stolen. Thus, although the money was stolen in the form of currency or coin, and although it had gone through two hands, equity so earmarked it as to follow it into the real estate in question.

Notwithstanding the proposition of the trustee that, if Le Roy had undertaken to proceed against the Beacon Trust Company on a supposed refusal by it to recognize his rights, his remedy would have been only at law, yet, clearly, he would have had one in equity. This follows not only from the special rule we first stated, but also from the fact that his rights are equitable, as we have already shown, and are based on the principle stated in what we have quoted from *May v. Le Claire*, 11 Wall. 217, 235, 20 L. Ed. 50, 54. It has often occurred, in the history of the law, that a right is first recognized in equity, and a remedy therefor first given by the chancery courts, and that afterwards the common law recognizes the right, and gives a remedy according to its own rules. This, however, does not ordinarily oust the original equitable jurisdiction in chancery with reference thereto, especially where, as in the class of cases to which the topic we are discussing relates, the equitable principles are of a somewhat complicated nature, and not fully enforceable by the common law. Therefore, while quite likely, under the modern

rules of the common-law courts, *Le Roy*, in case of the refusal of the Beacon Trust Company to recognize his rights, might have brought an action for money had and received against the corporation, yet his relief in equity was not barred.

Neither is there involved here any of the questions raised in *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565. The statement there made that a creditor who holds collateral is in no sense a trustee went beyond the case. *Hennequin v. Clews* related merely to the construction of certain provisions of the bankruptcy act then under consideration, with reference to what classes of debts were not covered by a discharge; and the decision, together with others of the supreme court in the same line, strictly limited those provisions to debts created by actual fraud, as distinguished from constructive fraud, and to those contracted in a fiduciary character, in a technical sense. They expressly held that commission merchants and factors failing to account for the proceeds of property committed to them for sale were relieved by the discharge, although it cannot be questioned that such merchants and factors occupy, in one sense, a fiduciary relation. Indeed, it was so expressly stated in *Bank v. Gillespie*, 137 U. S. 411, 419, 11 Sup. Ct. 118, 34 L. Ed. 724, where it was also held that *Hennequin v. Clews* and other decisions of that class are not in point on the question involved at bar. *Bank v. Gillespie* related to certain funds deposited with the bank by a factor under such circumstances that the bank must have known that they were the proceeds of the property of the factor's principal. The proceeding was in equity, in behalf of the principal, and the court granted him relief, and put the case, at pages 419 and 420, 137 U. S., pages 121, 122, 11 Sup. Ct., and pages 727, 728, 34 L. Ed., on the simple propositions that the bank, when it received the funds, knew that they belonged equitably to him, and that justice forbade its applying the moneys in payment of a debt due from the factor to itself, and demanded that the bank should account for the sums so received and appropriated. Indeed, excepting the fact that the funds had not gone beyond the hands of their first recipient, *Bank v. Gillespie* covers every substantial proposition involved in this appeal. That exception is met by what we have already cited from *May v. Le Claire*, *ubi supra*, and by the approval by the supreme court of a decision cited in *Central Nat. Bank of Baltimore v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 69, 26 L. Ed. 693, each to the effect that equity will follow the fund through any number of transactions, and preserve it for the owner, so long as it can be identified. It is true that in the case last named the particular sum in question arose out of a fiduciary relation; but the rule as declared, whether by the supreme court, especially in *May v. Le Claire*, or by the great multitude of authorities which have had occasion to deal with it, is without any reference to any such limitation.

The trustee on this appeal undertakes to define the conditions on which he claims that the *Le Roy* petition must be allowed, if at all, and gives him but three opportunities: First, on the theory that he is a preferred creditor; second, the theory of a trust, and the following of trust property; and, third, the theory of marshaling.

So far as the first and third are concerned, we have said all that need be said.

The protection of trusts and the following of trust properties have given rise to a class of cases in which the rules which govern this appeal have been pushed farther than we have any occasion to push them here. The leading authority in this direction is *In re Hallett's Estate*, 13 Ch. Div. 696, which relates to the misapplication of funds which were strictly trust assets. The result of this line of cases is, perhaps, well stated by a citation by the supreme court in *Central Nat. Bank of Baltimore v. Connecticut Mut. Life Ins. Co.* (already referred to), at page 67, 104 U. S., page 699, 26 L. Ed., to the effect that, if a man mixes a trust fund with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his own. This reverses the rule of presumption which we have applied in the present case, where Le Roy has taken the burden, and has shown specifically that there was in the hands of the Beacon Trust Company, to which his equitable lien applied, a fund not needed to discharge its debt, and which, on the equitable rules of marshaling, and the common-law rules as to the application of payments, remained his specific assets. It is true that this summary statement cited by the supreme court was not intended by it, nor is it represented by us, as covering the entire range and effect of *In re Hallett's Estate*; but it is nevertheless true that, as the development of that decision, the chancery courts may have afforded more ample protection to funds strictly trust assets than is involved in the principles which solve the case at bar.

There is another class of cases, where an implied fraud is involved, which is equally as far-reaching, though in another direction, as *In re Hallett's Estate*. We refer to those of the class of *Railway Co. v. Johnston*, 133 U. S. 566, 576, 10 Sup. Ct. 390, 33 L. Ed. 683, where it is held that funds which had been received on deposit by a bank which had become hopelessly insolvent, so known to its officers, may be followed in equity.

The case at bar, however, is solved by the simple rule that where the property of any person has been, without his consent, and sometimes even with his consent, converted into money, the money may be followed in equity so far as it is possible to earmark it, provided the rights of innocent strangers who have given value are not prejudiced. This rule is so strongly fortified by the plainest principles of equity jurisprudence, and has been so constantly and uniformly applied for so many years, that the difficulty in drawing out the views herein stated comes less from the apprehension of it, and the certainty that it applies to the case at bar, than from the force and earnestness with which the various distinctions sought to be made by the trustee, and the line of reasoning by which he attempts to make them practically available, has been urged upon us.

No formal motion has been made to dismiss the appeal for lack of jurisdiction, and therefore no costs should be allowed thereon. *In re Dickson* (C. C. A.) 111 Fed. 726.

In No. 386, *Hutchinson v. Le Roy*, the appeal is dismissed, without costs to either party.

In No. 390, Hutchinson, Trustee, Petitioner, the decree of the district court is affirmed, with interest; the costs on the petition are awarded to the respondent, Le Roy; and the district court is directed to give effect to this decree, both as to debt and costs.

In re NEELY.

(Circuit Court of Appeals, Second Circuit. January 7, 1902.)

No. 46.

1. BANKRUPTCY—REPLEVIN—JUDGMENT AGAINST TRUSTEE — DAMAGES FOR DETENTION—PRORATING—ACT OF BANKRUPT.

Plaintiff sold books to N., and on October 17, 1899, brought replevin in a state court to recover possession for false representations as to solvency. Part of the books were in storage, and under the state statute possession could not be given plaintiff except by consent or order of court after proof of title. Four days later, N. was adjudged bankrupt, and the suit restrained by the federal court. His trustees qualified November 15th, but took no steps to defend until the court, on plaintiff's petition, in March, 1900, authorized them to do so, and vacated the restraining order. It being apparent that the cause could not be reached for trial until autumn, plaintiff offered to refer the cause, or to sell the books for the benefit of the action, if the trustees would permit their removal; but both offers were declined. The case came on for trial February 11, 1901, and plaintiff recovered judgment for possession, with \$1,080 damages for detention, and \$647 costs. *Held* error for the federal court to enjoin the judgment and direct the damages to be treated as a claim against the bankrupt and prorated with other claims, while permitting the costs to be paid in full, the detention not being the bankrupt's act except for four days, but the act of his trustees, and plaintiff being, therefore, entitled to payment in full.

2. SAME—WANT OF ACTUAL POSSESSION—EFFECT.

The fact that the trustees never had actual possession of the books was not ground for prorating the damages, it being their action and that of the federal court which prevented plaintiff from getting possession.

3. SAME—REFUSAL BY PLAINTIFF TO TRY TITLE BEFORE REFEREE IN BANKRUPTCY—EFFECT.

The fact that plaintiff refused to try title before the referee in bankruptcy was not ground for prorating the damages, there being no reason why plaintiff should consent to such proceeding.

4. SAME—REFUSAL TO GIVE ADDITIONAL REPLEVIN BOND—EFFECT.

The fact that plaintiff declined to give an additional replevin bond to the trustees as a condition precedent to putting the books on the market for the benefit of the action was not ground for prorating the damages, the law not requiring any additional bond.

5. SAME—VALUE OF PROPERTY—EFFECT.

The fact that the books were of considerable value, and the case such as to justify the trustees in requiring plaintiff to prove title, was not ground for prorating the damages.

Petition to Review an Order of the District Court of the United States for the Southern District of New York.

This is a petition to review an order enjoining petitioner from issuing execution on a judgment entered in the supreme court of the state of New York March 13, 1901, against the trustees in bankruptcy of F. Tennyson Neely.

See 108 Fed. 371.

Henry W. Taft, for petitioner.

Duncan Edwards, for trustees.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. On October 17, 1899, the Syndicate Publishing Company, a Pennsylvania corporation, brought an action of replevin in the supreme court of the state of New York against Neely to recover possession of 2,000 sets of a book called the "Encyclopædia Dictionary," upon the ground that they had been obtained on credit by false and fraudulent statements made by the defendant concerning his financial condition, and that upon discovering such facts the plaintiff had rescinded the credit and sale. The summons, complaint, affidavit, and requisition on replevin, including a bond in the sum of \$13,000, were placed in the hands of the sheriff. That officer took into his own possession from Neely's actual possession 272 sets. There were 1,300 sets on deposit with a storage warehouse company, which the sheriff also levied on by serving a notice under the state act of 1895 (chapter 633). By the terms of that act, goods thus levied on could not be removed from the warehouse except by consent or by the order of the court after proof of title. Four days after such levy, and on October 21, 1899, Neely filed his petition, and was adjudged a bankrupt. On October 23, 1899, the district judge made an ex parte order restraining the prosecution of the action of replevin and various other actions pending against the bankrupt, and enjoining the sheriff from in any manner interfering with the property in question, which order was duly served on the plaintiff's attorneys and on the sheriff. On November 15, 1899, trustees of the bankrupt's estate were appointed and qualified. They took no steps to intervene or defend the suit until after the plaintiff in such suit had petitioned the court to direct them to do something, when an order was made March 20, 1900, authorizing them to intervene and defend if so advised, and thereupon vacating the order restraining the prosecution of the replevin suit. The trustees did intervene, and served an answer to the complaint in such suit denying all of its allegations and challenging the validity of the levy in replevin. At the same time they served a separate notice demanding the return of all goods replevied, or for the sum of \$8,000 damages for their detention. The restraining order being vacated, petitioner's counsel placed the cause on the calendar, and took the necessary steps to secure a preference on the trial calendar (pursuant to state statute). When it was apparent that the cause could not be reached for trial before autumn, petitioner made an offer to refer the cause, which was declined, and also offered, if defendants would consent to an order under the warehouse act, to take the goods and place them on the market for the benefit of the action. This also was declined. The replevin suit came on for trial in the state court February 11, 1901. The plaintiff's right to recover was vigorously disputed by the attorney for the trustees, but a verdict was rendered in plaintiff's favor awarding plaintiff possession of 1,572 sets of books, valued at \$7,948.50; also \$1,080 damages for detention thereof (being the

amount of storage thereon from October 17, 1899, to the time of trial, \$450, with interest at the rate of 6 per cent. per annum, amounting to \$630, and to \$1,080 in all), besides \$647.31 costs and disbursements; amounting in all to \$1,727.31. The district court thereupon enjoined the plaintiff in that suit from enforcing this judgment against the trustees. It directed that the costs—\$647.31—should be paid in full, but as to the \$1,080 directed that it should be treated as a claim against the bankrupt, and paid pro rata with the claims of other creditors.

Why the costs should be paid in full if the damages were to be prorated is not apparent. There is no logical difference between the two items. The various reasons suggested in the opinion and in brief and argument here for making such disposition of the case do not seem to us persuasive. It is said that the detention was the act of the bankrupt. This is inaccurate. For a period of four days from October 17th to October 21st he was responsible for their detention. Had he admitted the rightfulness of plaintiff's claim, the state court could have disposed of the cause so that the warehouse company would have delivered the books to the true owner. After Neely became a bankrupt, however, he could no longer control the situation. Nothing that he could do would release the books. His creditors, represented by trustees, and protected and controlled by the district court, were the only ones who could, by ceasing further to oppose a just claim, put a stop to the running up of a bill for expenses. It is said the trustees never had possession of the goods, and never detained them. Whether they had actual possession is immaterial. Their action and the action of the district court prevented the owner from getting them when he was entitled to them.

It is said that the plaintiff in the replevin suit refused to consent to become a party to some proceeding before a referee in bankruptcy to try the title. We know no reason why it should. It had brought a proper action in a proper court, which had jurisdiction, to which action the trustees, with the assent of the district judge, had been made parties, and in which all the issues could be fully determined. It is also said that plaintiff declined to give an additional bond to the trustees as a condition precedent to their consent to a delivery of the books to be put on the market for the benefit of the action. But no law required them to give any other bond than the one in replevin.

It is said that the property claimed was of considerable value, and the case was such as to justify the trustees in requiring the plaintiff in the replevin suit to show title. This is a perfectly good argument in support of the proposition that, as between the bankrupt's creditors and the trustees, the latter are entitled to charge the estate for any expenses they have incurred in the litigation, without being surcharged for any items on the theory that they were improvident. But it is difficult to see how it can be supposed to support the proposition that the individual who all along had good title to the property should be required to contribute to the expenses of the estate in conducting a litigation in which that individual was successful. And there would be such a contribution, if

the damages sustained by reason of a delay caused by the trustees' defense of the suit were not paid wholly by them, but were left to be borne in part by the successful party.

Reference is made to *Norton v. Switzer*, 93 U. S. 355, 23 L. Ed. 903, but in that case the judgment was on a claim against the bankrupt himself. Here no part of the \$1,080 represents any claim against the bankrupt (except the proportionate part for four days' detention). It is an amount awarded to reimburse the owner of the property for expenses which the conduct of the trustees has caused him to incur.

It is no doubt true that out of the 472 days during which the books were detained (October 17, 1899, to February 11, 1901) 4 days' detention was attributable to the bankrupt; but the case seems one for the application of the maxim "*De minimis non curat lex*," especially in view of the litigation which the petitioner has had to persist in since it established its title to the property.

Because we have discussed and disposed of this cause on the merits, it is not to be assumed that we have decided all the propositions of law which it presents in favor of the respondents, nor that we are prepared to hold that, when a suit is pending against a bankrupt in a state court of competent jurisdiction, and, with the assent of the bankruptcy court, the trustees intervene, and are made parties in his place, and thereafter contest the suit to final judgment adverse to themselves in the state court, the bankruptcy court may thereafter enjoin execution, open the judgment, and alter the verdict.

The order of the district court is reversed, and the trustees ordered to pay the \$1,080, with interest.

GRAY v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 58.

CUSTOMS DUTIES—ADDITIONAL DUTIES—UNDERVALUATION—CONSTRUCTION OF ACT 1897.

Tariff Act 1897, § 32, provides that, if the appraised value of any imported article subject to an ad valorem duty shall exceed the declared value in the entry, there shall be levied and collected an additional duty, proportionate to the excess, but not exceeding 50 per cent. of the appraised value; and by a proviso it is declared that if the appraised value shall exceed the declared value by more than 50 per cent., except when arising from a manifest clerical error, the entry shall be held presumptively fraudulent, and the collector shall seize the goods and proceed as in case of forfeiture. *Held*, that the fact that a case is within the terms of the proviso, and that the government has proceeded thereunder for the forfeiture of the goods, does not relieve the importer from liability for the duties imposed by the previous portion of the section.

In Error to the District Court of the United States for the Southern District of New York.

Action by the United States against Herbert W. Gray to recover additional customs duties. From a judgment in favor of the United States (107 Fed. 104), defendant appeals. Affirmed.

This cause comes here upon a writ of error to review a judgment of the district court, Southern district of New York, in favor of the United States against the plaintiff in error, who was defendant below. 107 Fed. 104. In January and February, 1898, the defendant made three importations from a foreign country of certain sheet music, and entered the same for duty at the New York custom house. The appraiser advanced the value of the goods 100 per cent. The United States thereupon began an action in personam, under section 7 of the customs administrative act, as amended by section 32 of the tariff act of July 24, 1897, to recover the value of these importations. That action was subsequently discontinued by the government. The entries were liquidated, and regular duties paid on the corrected valuation. The collector assessed an additional duty of 50 per cent. of the value of the merchandise, under section 7 of the act above referred to. To recover such additional duty, this action was brought. The case was tried upon an agreed statement of facts, in which it was stipulated that the defendant acted in perfect good faith in entering the music at the lower valuation, and did not know or believe the merchandise to be undervalued, and had no intent to defraud the United States. Judgment was rendered in favor of the United States for the additional duty.

W. Wickham Smith, for plaintiff in error.

Arthur M. King, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

LACOMBE, Circuit Judge (after stating the facts). The statute under consideration is section 7 of the customs administrative act of June 10, 1890, as amended by section 32 of the tariff act of July 24, 1897. It reads as follows:

"That the owner, consignee, or agent of any imported merchandise which has been actually purchased may, at the time when he shall make and verify his written entry of such merchandise, but not afterwards, make such addition in the entry to the cost or value given in the invoice or pro forma invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise the same to the actual market value, or wholesale price of such merchandise at the time of exportation to the United States, in the principal markets of the country from which the same has been imported; but no such addition shall be made upon entry to the invoice value of any imported merchandise obtained otherwise than by actual purchase; and the collector, within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the appraised value of any article of imported merchandise subject to an ad valorem duty or a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected and paid in addition to the duties imposed by law on such merchandise an additional duty of one per centum of the total appraised value thereof, for each one per centum that such appraised value exceeds the value declared in the entry, but the additional duties shall only apply to the particular article or articles in each invoice that are so undervalued, and shall be limited to fifty per centum of the appraised value of such article or articles. Such additional duties shall not be construed to be penal, and shall not be remitted nor payment thereof in any way avoided, except in cases arising from a manifest clerical error, nor shall they be refunded in case of exportation of the merchandise or on any other account, nor shall they be subject to the benefit of drawback: provided, that if the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such mer-

chandise, and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof, in the case or package containing the particular article or articles in each invoice which are undervalued. Provided, further, that all additional duties, penalties or forfeitures applicable to merchandise entered by a duly certified invoice, shall be alike applicable to merchandise entered by a pro forma invoice or statement in the form of an invoice, and no forfeiture or disability of any kind, incurred under the provisions of this section, shall be remitted or mitigated by the secretary of the treasury. The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value."

This section was before this court in the case of *U. S. v. 1,621 Pounds of Fur Clippings*, 45 C. C. A. 263, 106 Fed. 161, and was construed in view of the very question here raised. The argument in this case has been practically but a reargument of that case, which, indeed, was itself reargued soon after its decision. We there held that "under this statute the additional duties are payable, except in cases arising from a manifest clerical error, irrespective of any question of fraudulent undervaluation on the part of the importer." The plaintiff in error contends that the meaning of the section is that the additional duty of 1 per centum for every 1 per centum of undervaluation applies only to undervaluations of 50 per centum or less; that where the undervaluation exceeds 50 per centum, in lieu of assessing any additional duty at all, the collector shall proceed to forfeit the goods, and if he fail of success, because the importer may satisfy the jury that the undervaluation was without fraudulent intent, nothing at all—neither forfeiture nor additional duty—can be collected by the government by reason of the undervaluation. In other words, he asks to have the section construed as if the clause, "the additional duties * * * shall be limited to 50 per centum of the appraised value," read, "additional duties shall not be imposed where the appraised value exceeds the entered value by more than 50 per centum." In support of his contention, defendant refers to *U. S. v. 67 Packages of Dry Goods*, 17 How. 85, 15 L. Ed. 54. All that was held in that case is that provisions for forfeiture for undervaluation contained in the tariff act of March 2, 1799, were not repealed by the tariff act of July 30, 1846, which provided for an additional duty when undervaluation exceeded 10 per centum. At the close of the opinion in that case there is the statement that, "if this additional duty has been levied upon the goods by the government, it cannot forfeit them"; but such statement is wholly obiter, not called forth by anything in the case, and is supported by no suggestion of any reason for adopting such construction. The defendant, as a reason for such construction, contends that it is not to be supposed that congress intended to inaugurate a system of cumulative punishments; the customs officers having, prior to the amendment now under consideration, always elected to take one course or the other. And he points out that it would be a great hardship for an importer

who had established his good faith in a forfeiture trial to have to pay an additional duty nevertheless. It seems to us, as it did when the question was before us in the *Fur Clippings Case*, that the simple answer to all these arguments is that the statute is not one whose phraseology requires construction. Neither in its words, its phraseology, nor its general structure does it present anything dubious, uncertain, ambiguous, or obscure. It provides for an appraisement by government officers, and for an additional duty of 1 per centum of the total appraised value for each 1 per centum of undervaluation. It limits such additional duties to the particular article or articles in each invoice that are so undervalued, and to 50 per centum of the appraised value of such articles (under some earlier statutes the additional duty increased with the undervaluation indefinitely, and might run up to 2,000 or 3,000 per centum). Perfect good faith, or entire absence of any intent to defraud, is no defense to the exaction of this additional duty. With no language in any wise suggestive of an alternative, the same section provides for seizure and proceedings to forfeit when the undervaluation exceeds 50 per centum,—a proceeding which may be defeated by showing good faith; and, if forfeiture is made out, it shall apply to the whole of the merchandise in the case or package containing the particular article or articles in each invoice which are undervalued. This may be a harsh system for the honest importer, but its amendment should be sought in congress, not in the courts. It is, no doubt, true that, under the section as it reads, an innocent importer who has undervalued his goods 90 per centum may have to stand the burden of a trial of the forfeiture action, and, prevailing in that, nevertheless have to yield up 50 per centum of their value as additional duty; but that state of affairs is not so extraordinary that the courts are to assume that congress intended something different from what it said, and are to construe unambiguous language contrary to its plain meaning. It may be noted that, under the construction for which plaintiff contends, an innocent importer who undervalued his goods 90 per centum would pay no additional duty at all (and establishing his innocence would avoid forfeiture), while the equally innocent importer who unfortunately had undervalued his goods only 49 per centum would have to pay 49 per centum of additional duty. This would seem to be quite as unjust as the system of which defendant complains. Certainly it would be more unfair as between both classes of innocent importers. We see no reason to modify the opinion expressed in the *Fur Clippings Case*.

The judgment of the district court is affirmed.

BALDWIN et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 59.

CUSTOMS DUTIES — UNDERVALUATION — CONSIGNEE — LIABILITY OF CUSTOMS BROKERS.

Customs Administrative Act June, 1890, § 1, provides that merchandise imported in the United States shall, for the purpose of the act, be deemed the property of the one to whom it is consigned, but that the holder of any bill of lading consigned to order, and indorsed by the consignor, shall be deemed the consignee thereof. *Held*, that where merchandise is consigned to customs brokers for another, who is the owner, the brokers, having presented the invoice, made the entry, and received the goods, are liable for additional duties assessed because of undervaluation.

In Error to the District Court of the United States for the Southern District of New York.

Action by the United States against Austin P. Baldwin and others to recover customs duties. From a judgment for the United States (107 Fed. 104), defendant brings error.

The action was brought to recover \$285.58, balance of regular duties, and \$706 as additional duties, under the provisions of section 7 of the customs administrative act, as amended by section 32 of the tariff act of 1897. Plaintiffs in error are partners engaged in business as forwarding agents and custom-house brokers in the city of New York. The merchandise in question consisted of a case of dressed furs, and, upon the bill of lading accompanying the same, the said merchandise was stated to be consigned to the defendants for one Frank Norris. Norris was the owner in fact of the merchandise, and defendants had no interest therein, except to perform their duties as agents and licensed custom-house brokers. They entered the goods with the collector, making the declaration prescribed for consignees, importers, or agents, pursuant to the customs administrative act of June, 1890, stating the value at \$190, and specifying the said Frank Norris as the ultimate consignee and owner of such merchandise, and at the time of making such entry paid to the collector \$38 on account of duties. The goods were duly appraised at \$1,412. Forfeiture proceedings were instituted. No person appeared, intervened, or made claim. The goods were decreed forfeited, and were sold, and proceeds covered into the treasury. Action was brought in this court, as above stated, to recover regular duties, and also additional duties for undervaluation; recovery for such additional duties being asked only up to one-half the valuation, viz., \$706. Plaintiff had judgment for the full amount.

Arthur M. King, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

PER CURIAM. Most of the questions raised on this appeal are the same as those decided in *Gray v. U. S.*, 113 Fed. 213, the opinion in which is handed down herewith. Defendants contend that they are not liable as consignees, that they were merely forwarding agents and brokers, and that the consignee to whom the government must look for regular or additional duties is the "ultimate consignee" only.

The first section of the customs administrative act reads as follows:

"That all merchandise imported into the United States shall, for the purpose of this act, be deemed and held to be the property of the person to

whom the merchandise may be consigned; but the holder of any bill of lading consigned to order and indorsed by the consignor shall be deemed the consignee thereof," etc.

The government is not called upon to hunt up any ultimate consignee, when there is a primary consignee to whom the goods are sent, and who himself presents the invoice, makes the entry, receives the bill of lading, and gets the goods; thus being himself their "importer." *Knox v. Devens*, 5 Mason, 482, Fed. Cas. No. 7,905. In *U. S. v. Bevan, Crabbe*, 324, Fed. Cas. No. 14,588, referred to in defendants' brief, apparently there had been no consignment to the persons sued.

The judgment of the district court is affirmed.

DODGE v. DICKSON MFG. CO.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 4.

1. SALES—MANUFACTURED ARTICLES—IMPLIED WARRANTY.

Where a vendee has ordered an article of a manufacturer for a particular purpose, and has had the opportunity of inspecting it during the manufacture, and relies on his own judgment, there is no implied warranty against latent defects.

2. SAME—ACCEPTANCE—WAIVER OF DEFECTS—EVIDENCE.

A contract for the manufacture of a motor required the purchaser to furnish an inspector to pass on all workmanship, with power to reject such as should not conform to the agreement, and to signify acceptance before removal from the factory. Such purchaser, while claiming a failure to complete the contract in the time limited, and after his inspector had complained of defects in the construction and refused to accept the motor, accepted it in its condition, in order to get possession. The manufacturer subsequently sued for the contract price, and for extra work outside the contract. *Held*, that it was proper to exclude evidence as to the character of the tests made at the factory, for the purpose of showing their incompleteness, and, as to tests made after delivery, to show that alleged defects were such as not to be discernible until the motor was used, since the purchaser, by acceptance, waived the right to insist on a further test.

3. SAME—ACTION FOR PRICE—PRIMA FACIE CASE.

The contract price for the construction of a motor was not to exceed \$4,000; and the manufacturer, in an action for the price and for extra work, showed that, after the motor was shipped, it sent the purchaser bills aggregating more than \$4,000, and for extra work, and that the purchaser, having received and retained them, subsequently inclosed a statement of independent counter charges, which admitted the items for \$4,000, and \$388.68 for extras. *Held* sufficient to make a prima facie case for the aggregate of such items, since the claim by the purchaser that he was entitled to items in his claim did not affect his admission of the correctness of the manufacturer's charges.

In Error to the Circuit Court of the United States for the Southern District of New York.

Waldo G. Morse, for plaintiff in error.

Hamilton Wallis, for defendant in error.

Before WALLACE, Circuit Judge, and TOWNSEND, District Judge.

TOWNSEND, District Judge. This cause came here upon appeal from a judgment of the circuit court, Southern district of New York, entered upon a verdict in favor of the defendant in error, which was plaintiff below. The action was brought upon a contract to recover for machinery manufactured by plaintiff, and for extra work, labor, and materials outside of said contract. The defendant set up by counterclaim charges for materials furnished, and for expenses and damages by reason of imperfect work and failure to complete the contract within the time specified. The proposal contained in the following letter was accepted by defendant, and states the contract between the parties:

"New York, Feb. 15th, 1898.

"Arthur P. Dodge, Esq., 27 William Street, New York City—Dear Sir: We will build for you one of your class C, double truck, 8"x12" cylinder, motor cars, according to your plans, patterns, and specifications.

"I. We will furnish all labor and material, excepting as provided in paragraph II. below, at actual cost to us, plus 35% for superintendence, fixed charges, etc.; material furnished by us to be weighed as received by us from the manufacturers, or from our own forge and foundry. We will furnish you promptly with time cards showing the amount of work done by our workmen as the work progresses on the motor, as well as bills for all materials purchased by us, together with the weight of the same.

"II. We would not make the car body or furnishings, but would prefer to have you furnish material and build the same, to be delivered to us at our factory; and we will do whatever work is necessary to be done in connection with the completion of the motor car. You are at liberty to furnish the steel castings and condenser.

"III. We will agree to push the work of constructing the motor as fast as consistent with the furnishing of satisfactory materials and workmanship, and we estimate that we can complete it within two months from receipt of the necessary drawings and patterns. We will agree to complete the construction of the motor in accordance with drawings, specifications, and patterns, materials or parts, furnished us by you, within that time, provided no changes are made therein by you, or per your instructions, and that we are not delayed by failure on your part to furnish same to us as required for getting out the work, and also provided we are not delayed by strikes of workmen, or other causes beyond our control.

"IV. The payment for this motor to be as follows: On the above basis, and the total amount not to exceed four thousand (4,000) dollars for the completed motor, exclusive of the car body and furnishings; the same to be paid in full within three months after the acceptance of the completed motor; such acceptance to be based on your approval of materials and workmanship, as per drawings, specifications, and patterns, parts or materials, furnished by you, and to be given by you to us within ten days after the completion of the motor by us in accordance with such drawings, patterns, specifications, parts, and materials, and before the motor is removed from our works; this payment to be guarantied to us by the Metropolitan Trust Company of the City of New York, or otherwise satisfactorily secured.

"V. In view of the special nature of the work, we should require, that you have an inspector at our works during the construction of the motor, who shall be competent and authorized by you to pass upon all materials and workmanship as the work progresses, and he shall have the right to reject all such as shall not be in accordance with this agreement.

"Awaiting your early acceptance, we are,

"Very truly yours,

The Dickson Mfg. Co.

"Per _____,"

In accordance with the provisions of this contract, the defendant sent Hodges, one of its employés, to plaintiff's factory; and he

remained there during the whole progress of the work, inspecting the materials and workmanship. The correspondence between the parties shows that he was a representative of defendant, such as was provided for in said contract. During this time he made frequent complaints to plaintiff, alleging unreasonable delays in the progress of the work, and imperfect materials and defective workmanship. After the working parts of the machine had been put together, it was connected with steam power and tested in the presence of Hodges and another representative of defendant. Plaintiff then presented to Hodges a paper stating that he (Hodges) accepted the work and approved the bill, and plaintiff refused to ship the machine until Hodges should sign said paper. Hodges declined to sign it, stating that the work was poor, and the bills were not in a condition to be approved. Plaintiff then wrote defendant as follows:

"New York, May 31st, 1898.

"Arthur P. Dodge, Esq., Lords Court Building, New York—Dear Sir: Your representative at Scranton refused to-day to accept the motor car which we have built for you, and also said he was not in a position to approve the bills therefor. Of course, as it is a part of our agreement that we have such acceptance and approval before shipment of car from our works, we are holding it.

"Yours truly,

The Dickson Mfg. Co.,
"Per H. J. Davis."

Plaintiff replied as follows:

"June 1st, 1898.

"Dickson Mfg. Co., 40 Wall Street, New York City—Gentlemen: Your letter of 31st ult. just received, and I note that you say that my 'representative at Scranton refused to-day to accept the motor car which we have built for you,' etc. Mr. Hodges, my representative, writes me this morning that you refused to allow the car to be shipped after it was loaded, unless he would not only accept and approve all of the work and material, but would approve of your bill for the same, which account has not yet been presented or even made out, and which could not be approved, certainly, before presentation. There is nothing in our contract that requires the approval of your bills before you deliver to us the result of your work and material. All that we are required to do is to accept the work and material when ready to be delivered to me. Hence I hereby accept and approve of all the material and work as placed upon the car ready for shipment to Wilmington to-day, in accordance with our contract of February 15, 1898, and now request that you telegraph to have the car shipped to Wilmington at once. Whenever you have your account ready, together with the time cards, &c., I shall be very glad to receive the same, and will then consider the correctness of the account. Awaiting your prompt reply, I am,

"Very truly yours,

Arthur P. Dodge."

The motor car was then shipped to Wilmington in accordance with said request.

Plaintiff further showed that it had supplied extra work and materials upon the order of said Hodges, and that on June 2d it rendered to defendant a bill for \$4,000 for said motor, and for \$936.59 for extra work.

On August 12, 1898, defendant sent a letter and statement to plaintiff, the material portions of which are as follows:

"August 12, 1898.

"Dickson Mfg. Co., 40 Wall Street, City—Gentlemen: The total for the 'completed motor,' exclusive of the car body and furnishings, it is agreed

by the terms of your contract of February 15th, 1898, with me, is not to exceed \$4,000. From this \$4,000 should be deducted such bills as I have paid, which make up the cost of the 'completed motor.' * * * Inclosed find a statement showing what I make the balance due you to this date, viz., \$1,877.31.

"Yours very truly,

Arthur P. Dodge."

"Statement of Cost of Car No. 5.

1898.		
June 30.	See Pusey & Jones Co.'s bill for labor and materials at Jackson & Sharp Co.....	\$ 64 67
July 7.	do do	25 42
July 20.	do do	17 68
		<hr/>
July 26.	See Jackson & Sharp's bill extra work...	\$ 107 77
Mar. 28.	Paid Abendroth & Root Mfg. Co. for condenser	1,637 66
Mar. 25.	Paid Penn Steel Casting & Machry. Co. for castings used in the car.....	491 31
April 9.	Paid Crosby Steam Gauge & Valve Co....	207 60
July 5.	Paid C. C. Jerome Packing Co. for packing	6 00
		<hr/>
	Dr. Dickson Mfg. Co.....	40 00
		<hr/>
	Dr. Dickson Mfg. Co.....	\$2,490 34
		<hr/>
	Cr. Dickson Mfg. Co. as per contract.....	\$4,000 00
	Cr. Dickson Mfg. Co. as per bill of extras April 1, 1898.....	388 68
		<hr/>
		\$4,388 68
	Less Dr. Dickson Mfg. Co. as above.....	2,490 34
		<hr/>
		\$1,898 34
Less additional charges:		
	Labor and attendance in moving motor from Babylon, L. I., to Chesterfield, Mich.....	\$111 54
	Say same amount of cost in returning motor to Babylon, L. I.....	111 54
	Freight on motor from Babylon, L. I., to Chesterfield, Mich.	141 90
	Say same amount for returning motor.....	141 90
	Paid boiler inspector at Detroit, Mich.....	5 00
	June 13. Additional charge for insurance on motor and boiler at New Baltimore, Mich.....	9 15
		<hr/>
		521 03
		<hr/>
	Amount due Dickson Mfg. Co.....	\$1,377 31"

The court charged the jury that the plaintiff, on this evidence, had made out a prima facie case for \$4,388.68; that defendant, by its inspection and acceptance, had waived its right to object to defective materials and workmanship, and to charge for putting said motor car in condition in which it would work properly.

The defendant relies upon the rule that in a contract by a manufacturer there is an implied warranty of good materials and skillful workmanship, and, where the manufacturer is notified that the article is to be manufactured for a particular purpose, there is an implied warranty against latent defects arising in the process of manufacture which would render it unfit for the purpose stated. But defendant has failed to note the exceptions that, where a known and described article is thus ordered for a particular pur-

pose, there is no warranty that it shall answer the particular purposes intended by the buyer, where the manufacturer actually supplies the thing ordered (*De Witt v. Berry*, 134 U. S. 306, 313, 10 Sup. Ct. 536, 33 L. Ed. 896; *Seitz v. Machine Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837), nor where the buyer relies on his own skill or judgment. The foundation of the doctrine of warranty is the responsibility of a vendor for deception. *Hoe v. Sanborn*, 21 N. Y. 559, 78 Am. Dec. 163. Hence, where a vendor is a manufacturer, and the vendee has ordered an article for a particular purpose, and has not had an opportunity of inspecting it during the manufacture, the vendor is presumed to have had knowledge of latent defects produced by the process of manufacture, and must be held liable therefor. *Bridge Co. v. Hamilton*, 110 U. S. 108, 114, 3 Sup. Ct. 537, 28 L. Ed. 86; *Bierman v. Mills Co.*, 151 N. Y. 482, 490, 45 N. E. 856, 37 L. R. A. 799, 56 Am. St. Rep. 635. But where the vendee has an opportunity of inspection, and relies on his own judgment, there is no presumption of deceit, and no warranty is implied. *Cunningham v. Hall*, 4 Allen, 273, 274.

The defendant contended that under the written contract, Exhibit A, it was entitled to demand a final test of the completed motor at plaintiff's works, in order to determine its fitness for the purpose desired, and that inasmuch as it was incomplete when it was shipped to Wilmington, Del., the defendant had the right to make said final test at Wilmington; that the acceptance of the motor at plaintiff's works was only an acceptance of such material and workmanship as was there capable of determination, but that there was an implied warranty against latent defects which survived such acceptance; and that the question of compliance with said warranty could only be determined by such final test at Wilmington. In support of this contention, the defendant, upon the trial, offered evidence of the character of the tests made at Scranton, for the purpose of showing that such tests were necessarily preliminary and incomplete, because, *inter alia*, the parts necessary to a complete motor car had not been assembled; and of the character of the tests made at Wilmington, in order to show that the alleged defects were such as not to be discoverable until the body of the car was mounted upon and connected with said machinery. The court excluded this evidence on the ground that defendant, by its letter of June 1st, had expressly accepted the motor in its then condition at Scranton, and had thereby waived its right to insist on a further test. On May 10th the defendant had written to the plaintiff as follows:

"I believe that, by the terms of our contract, we were to inspect and accept at your works in Scranton the work you are constructing for us, when you say it is ready therefor, if found correct. By reason of the great delays, and for other reasons, it seems to be desirable that we go to the additional expense of shipping such work, namely, the trucks, boilers, condensers, etc., from Scranton to the Jackson & Sharp Co., at Wilmington, Delaware, for erection. I wish to ask if you will be willing to so modify our contract as to permit of such testing and acceptance by us after they shall reach the shops of Messrs. Jackson & Sharp, instead of at your own works, as previously arranged."

Plaintiff did not consent to this modification. Its only reply was contained in said letter of May 31st, where, after stating the refusal of the inspector to approve and accept, it says:

"Of course, as it is a part of our agreement that we have such acceptance and approval before shipment of car from our works, we are holding it."

Under the original agreement, defendant was to furnish his special inspector to pass upon all material and workmanship, with power to reject such as should not conform to said agreement; to build the car body and furnishings, and deliver the same to plaintiff at its factory, the plaintiff doing there whatsoever work might be necessary for the completion of the motor car; to pay after acceptance of the motor thus completed, such acceptance to be based on his approval of materials, workmanship, etc., according to the drawings, etc., furnished by defendant, and to be signified before the motor should be removed from plaintiff's works. Even if defendant, under his original agreement, might have claimed a further test, such right was waived by the subsequent acts and correspondence. Three months and a half after the making of the agreement, defendant, while claiming that plaintiff had failed to complete the contract within the time limited, and after his inspector had complained that there were serious visible defects in the construction of the motor, and after having learned from plaintiff that said inspector had refused to accept said motor, and after having failed to furnish the car body as agreed, the presence of which defendant admits was necessary to finally test the fitness of the motor, writes to plaintiff in response to its refusal to ship before acceptance as follows:

"All that we are required to do is to accept the work and material when ready to be delivered to me. Hence I hereby accept and approve of all the material and work as placed upon the car ready for shipment to Wilmington."

It cannot be said that plaintiff impliedly consented to a further test at some other factory, or that the alleged implied guaranty survived and was imported into the new contract. On the contrary, the correspondence shows that both parties understood the limitations of the original contract, and the effect of such modification. The defendant had the right to refuse to accept and approve said motor, provided it was not completed within the time limited, or because of defective workmanship and material. He might have had the right, if he had furnished the car body, to insist upon a final test of the completed motor car. He did none of these things, but elected to waive his rights, under conditions known to him, and to accept and approve what his inspector had refused to accept and approve, in order that he (the defendant) might obtain possession of the motor. There was no error in the exclusion of said evidence.

The defendant further contends that the court "erred in holding that there was sufficient proof of the value in the theory of the account stated." The facts in regard to this exception are as follows: The agreement provided that the total amount of payment for the motor should not exceed \$4,000. The plaintiff claimed that the cost of the motor to it, plus the agreed manufacturer's profit, exceeded

\$4,000. Instead of showing the cost of labor and materials, it proved that, shortly after the motor was shipped to Wilmington, it sent to defendant bills for the motor aggregating more than \$4,000, and for extra work aggregating \$936.59, and that defendant, having received and retained them, made no response until August 12th, when he wrote plaintiff, inclosing a statement of independent counter charges made by him, which statement and letter credited and admitted the \$4,000 item for car "as per contract," and \$388.68 of plaintiff's bill for extras. Thereupon the court charged the jury that in these circumstances, and upon defendant's admission that the \$4,000 limit had been exceeded by said bills, and the concession of the \$388.68, the plaintiff had made out a prima facie case for \$4,388.68. The defendant contends that "the whole statement or admission must be submitted,—both the favorable and unfavorable parts." The whole of said statement was admitted in evidence and submitted to the jury, except certain items for additional work to put the car in working condition, which were excluded on account of the acceptance by defendant already considered. The different parts of said account have no such connection that the admission of the amount due by defendant should entitle him to an allowance of the counter charges. The claim by defendant that he was entitled to the items therein in no way affects the admission of the correctness of plaintiff's charges.

The judgment is affirmed.

THE AUREOLE.

(Circuit Court of Appeals, Third Circuit. January 15, 1902.)

1. COLLISION—OVERTAKING VESSELS.

Evidence considered, and held to show that a collision between two steamships, one of which had overtaken and was passing the other in the Delaware river at a place where the water was shallow as compared with the draught of the vessels, was due to the fault of the overtaking vessel in passing too close to the other, so as to create a suction which caused the overtaken ship, which was the smaller of the two, and had slowed to half speed, to deviate from her course and draw against the other.

2. SAME.

Where an overtaking steamship is passing too close to another, so as to create danger of a collision, the latter is justified in slowing, or even in reversing, so as to shorten the time of passing, and such action cannot be charged as a fault by the overtaking vessel in case of collision.

3. SAME—CAUSE OF COLLISION—SUCTION.

The force called "suction," exerted by one vessel on another, due to the creation of currents by a moving vessel, and the effect of which is apparently greatest when a larger and faster vessel is passing another moving in the same direction in shallow water and a narrow channel, has been recognized in many cases by courts of admiralty; and a court is not justified in refusing to consider it as a cause in a case of collision between two steamships, one of which had overtaken and was passing the other in a river at a distance of not more than 75 to 100 feet, and where, under the evidence, it appears that the overtaken vessel, though with her helm hard a-port, suddenly sheered to port, and struck the other after the latter had nearly passed.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

J. Parker Kirlin, for appellant.

Henry R. Edmunds, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from a final decree in admiralty of the district court of the United States for the Eastern district of Pennsylvania (103 Fed. 699), made August 3, 1901, awarding to the libellant the sum of \$21,986.05 for damages sustained by the steamship *Willkommen* in a collision with the steamship *Aureole*. The collision occurred on January 13, 1898, at about 2 p. m., in the Delaware river, between Pennsville and Newcastle. The *Aureole* is a British tank steamer, 345 feet long and 46 feet in the beam, and was outward bound with a cargo of crude oil in bulk, taken on at Marcus Hook, about 15 miles up the river from where the collision occurred. Her draught was 25 feet aft and 23½ feet forward. The *Willkommen* is a German steamer, 325 feet long, 41 feet in the beam, and was also outward bound with a cargo of like kind. Her draught was 24 feet 3 inches aft, and 22 feet 5 inches forward. Both ships were in charge of regularly licensed Delaware Bay pilots. Both ships had weighed anchor at about noon on January 13th, and proceeded down the river in charge of their pilots. The *Willkommen*, starting first, had proceeded about a mile on her voyage before the *Aureole* left her anchorage grounds at Marcus Hook. The *Aureole* is the faster of the two vessels, and overtook the *Willkommen* at deep-water point, about eight miles from Marcus Hook, but, owing to a tow of barges then in the channel, was unable to pass the *Willkommen* until both vessels had hauled up on the deep-water-point range; the *Aureole* following in the wake of the *Willkommen* on the last-named range for nearly a mile, when she hauled out to the eastward to pass the *Willkommen* on the latter's port side. On this reach of the river, it appears from the evidence, as well as from the chart of these waters, made an exhibit in the case, that there was ample room for vessels to pass each other. According to the testimony of the pilot for the *Willkommen*, he ran the deep-water-point ranges a little open to the eastward; that is to say, it put his ship a little to the eastward of the range line. No whistles were blown by the *Aureole* as a signal that she intended to pass, and no signals were given by the *Willkommen*. No point is made of this, however, as both the pilot and the captain and the other officers of the *Willkommen* observed the *Aureole* hauling off to pass, and understood that she was about to do so. About the time that the stem of the *Aureole* lapped the stern of the *Willkommen*, the captain of the *Willkommen* was aft on the lower deck of the ship. He testified that he watched the *Aureole*, and knew what she was about to do, and that he waved his handkerchief to her captain, receiving a similar salute in return; that he then immediately went upon the bridge, where, besides himself, were the pilot and the first and second officers, and a competent and experienced man at the wheel. All the direct evidence tends to show

that all were attentive to their duties; the second officer standing near the man at the wheel to see that the orders of the pilot were properly carried out, the first officer standing near the telegraph signal to the engine room, and the pilot watching the course of the ship.

Upon the *Aureole*, the captain, pilot, and third officer were on the bridge, with a competent man at the wheel. All of them testified that they were attending to their duties and watching the ship. There is nothing in the testimony to convict the pilot or officers on either ship of unskillfulness or inattention, except the collision itself. The officers and men all testified strongly in favor of their own ships, respectively, and there is much variance in their testimony as to the facts and circumstances attending the collision. All the witnesses on the *Aureole* testify that, when she approached the *Willkommen* to pass, she was about 300 feet away, or about the ship's length away, and that while she was passing they continued at that distance apart on parallel courses, until the stern of the *Aureole* was about the bridge of the *Willkommen*, or between that and her fore rigging, when the latter ship suddenly sheered towards the *Aureole*, striking the *Aureole* with the bluff of her port bow, about 35 feet from her stern. The testimony, on the other hand, of those on board the *Willkommen*, as to the distance the ships were apart when the *Aureole* was passing, puts it, some at 150 feet; others, including the captain and pilot, at from 100 to 75 feet. The pilot of the *Willkommen* testifies (and there is no contradiction of his testimony) that before the *Aureole*'s bow was opposite to the *Willkommen*'s bridge he ordered the wheelsman to port the helm. He says he did this because he saw the *Aureole* was coming too close. When the *Aureole*'s bow got abreast of his bridge, he says, he told the captain to slow the ship down to half speed, and that when her stern got somewhere about halfway between the *Willkommen*'s fore rigging and the bridge he had the engine stopped; that he then asked the question if the wheel was a-port, and the chief officer replied that it was hard a-port; that he then went and looked himself, and found that it was so; and that the *Aureole* was at that time about 75 to 100 feet away. He also testifies that, when the *Aureole*'s stern got forward of his bridge, her helm was either ported, or else the ship took a sheer towards him. The pilot of the *Aureole*, on the other hand, testifies that, when he got squared down on the deep-water-point range, he gave the wheelsman, as a point to steer by, the end of the jetty pier, a mile or two ahead, and which extended about three-quarters of a mile out from the eastern shore; that, when he came abreast of the *Willkommen*, the ships were about a ship's length apart, which would be something more than 300 feet; that the ships continued in parallel courses until the stern of the *Aureole* was ahead of the bridge of the *Willkommen*. He says that the first intimation he had of any danger was the captain's calling his attention to the *Willkommen*, and that when he looked she was taking a sheer over towards the *Aureole*; that she came at an angle of three or four points off the course on which she had been going. It may be noted here what the pilot of the *Willkommen* says in regard to the position of the pilot and captain, when their bridge was abreast

or a little ahead of his, in accounting for the Aureole slanting across his bow:

"Q. What was the reason, do you suppose, of the Aureole attempting to cross your bow in this slanting way? A. The only reason that I can see, the pilot must have thought he was a little too far to the eastward. He had his wheel a-port and gave the man a mark ahead to steer at, I guess, and went on the port side of the bridge,—he and the captain both. Q. Did you see them on there? A. I could not see them. They were behind the wheel house. Q. If they had been on the starboard side of the bridge, would you have seen them? A. Yes, sir. Q. You saw everybody else, did you? A. I did not see anybody. Q. On the bridge? A. Not a soul, because the man at the wheel was in the wheel house, and the captain and pilot were on the port side of the bridge, right behind the wheel house. It was right in range of us, and I never saw them until we caught the suction. Then the pilot walked on the starboard side of the bridge first, and saw it right away; and that is when I suppose they must have starboarded the Aureole's wheel, because the captain came right across as fast as he could get there. The next I saw of him, he was aft of the pilot house, throwing his hands and hallooing. That was just before we struck. Q. Your idea, then, is that he was attempting to get back into deep water from the eastern side of the channel with the Aureole? A. No, sir; he had fully as good water as we had,—if anything, better, maybe. He wanted to get ahead of us, and hauled down on a line, and maybe thought he was a little further to the eastward than he wanted to be, I suppose; but, if the pilot and captain of the Aureole would have been on the starboard side of the ship's bridge when they got to our fore rigging, then they could have seen how close they were. Q. You are sure there was nobody on the starboard side of their bridge? A. No, sir; not when she got forward of our beam. Q. You mean there was not anybody there when you say, 'No, sir'? I asked you whether there was or was not anybody on the starboard side of the bridge? A. Not when she got forward of our beam. Q. Did you at any time see anybody on the starboard side of their bridge until after they got forward of your beam? A. Yes, sir; before they got up abeam of us they were on the starboard side of the bridge. Then when they got up abeam of us they walked on the port side of the bridge. Q. Then, when they got forward of the bridge, they were not there? A. No, sir. * * * Q. What is your theory of this collision? How do you say it occurred? A. The ships came too close, and we took her suction and drewed right together."

The testimony of the pilot of the Aureole, as well as that of the captain, seemed to confirm this statement, in so far that they were not in a position, when the stern of the Aureole had just passed the bridge of the Willkommen, to observe the latter vessel, by reason of the intervening pilot house of the Aureole. The pilot of the Aureole, as well as the wheelsman and officer on the bridge, testified that the Aureole was kept straight on her course, and did not go to starboard until she was struck by the Willkommen. The Willkommen struck a glancing blow upon the starboard quarter of the Aureole about 35 feet from the stern. The wind was blowing fresh from the northwest, which would be on the starboard bows of both ships, and the set of the flood tide was also somewhat against the starboard bows. The Willkommen and Aureole coming together in the manner described, the collision must have been caused either by the Aureole sheering to starboard at an angle that would take her across the Willkommen's bows (and the pilot and officers of the Willkommen testified that this did occur), or the Willkommen, from faulty steering or from some other cause, turned from her parallel course towards the Aureole. The pilot

and officers of the Aureole emphatically deny that the former was the case, and say that they observed the Willkommen, after the stern of the Aureole had passed her bridge, sheering at an angle towards the Aureole. Nothing could be more emphatic and specific than the testimony of the pilot, wheelsman, and first and third officers of the Willkommen as to the correct steering of their ship. The third officer testified that he stood near the wheel for the purpose of watching the direction of the indicator,—to see that the wheelsman obeyed the orders of the pilot. The pilot says that he was steering on the ranges, having them open a little to the eastward, and had given the wheelsman a clump of trees on the western shore to steer by. These were evidently the trees spoken of by the wheelsman, and about which, in his imperfect command of English, there was some confusion when he spoke of them as on the eastern shore. As the river, shortly ahead of the ship, turns sharply to the southeast, which was the eastern bank might for the moment be mistaken by a man unacquainted with the locality.

Counsel for respondent dwell much upon the fact that the wheelsman of the Willkommen, under cross-examination, said that, some two minutes before the stem of the Aureole came opposite to the bridge of the Willkommen, he had a starboard helm of about an inch on the indicator. This was afterwards sufficiently explained by the testimony that, as a matter of common knowledge among seamen, in steering a ship upon a straight course the wheel is never at rest, and is constantly moved a little a-port or a-starboard, to meet and counteract the sheering of the ship one way or the other. At all events, the testimony is positive, and as specific as human testimony can be, that the ship was kept upon her course parallel with the deep-water-point ranges, until just before the collision. The pilot of the Willkommen then says that, with his wheel hard a-port, the ship slowed down, and, with the engine stopped, she took a sheer to port, which immediately brought her in contact with the Aureole, which had sheered slantingly across the bow of the Willkommen, and thus diminished the distance between the two ships. This sheer of the Willkommen the pilot accounts for by what he calls "suction"; that is, the Aureole, by passing the Willkommen at full speed through shallow water, with so little distance between them, produced a current which drew the Willkommen's bow towards the Aureole with such a force as to overcome the influence of the helm hard a-port. This theory of the pilot of the Willkommen in accounting for the collision seems to us to accord more nearly with the probabilities created by the testimony than any other. Whether the Aureole had sheered to starboard or not, it would seem that the testimony of the Willkommen's officers as to the distance between the two ships is supported by this theory; and the testimony of the pilot and captain of the Aureole, when they suddenly saw the Willkommen coming at an angle towards them, is thereby explained.

On the face of the direct testimony as to the steering of the Willkommen, it is impossible to believe that the collision was caused by any mistake in that respect. She was not steered into the

Aureole. On the contrary, her helm was hard a-port. To say that the sheering of the Willkommen towards the Aureole was caused by suction does not necessarily contradict the testimony of the Aureole's officers as to the steering of that ship, although it makes necessary the inference that they were mistaken in their estimate of the distance between the two ships during the passing by the one of the other, and just before the collision. If the distance testified to by the captain, pilot, and other persons on board the Willkommen be correct,—that is, that it was not more than 75 or 100 feet, and latterly not more than 50 or 60 feet,—they were near enough to bring the smaller ship and slower ship, going at half speed, within the influence of any suction that might be created by the Aureole going at high speed through shallow water; and we think that it is established that such a thing is likely to occur under such circumstances.

It is claimed by the appellant that if the Willkommen had not slowed down, and afterwards stopped, but had kept at full speed on the course on which she was, the accident could not have happened; that by slowing down, and afterwards stopping the engines, she lost steerage way, and was beyond the control of her helm, against the set of the tide and wind. But the answer to this is that the Aureole was the overtaking ship, and, as such, had the burden placed upon her, by the laws and usages of navigation, of safely passing the slower ship; and, if she passed so close as to create a justifiable apprehension of peril on the part of those navigating the Willkommen, the latter ship would not be responsible for a mistaken judgment produced by such a situation. There is, however, nothing in the record to show that the slowing up of the Willkommen to half speed was an error, or transgressed the rules of navigation referred to. Under the circumstances, it seems to us, as it seemed to the pilot at the time, good judgment to slow up, so as to allow the Aureole the more quickly to pass; and the stopping of the engines just before the collision seems clearly justified by the situation in which the ships were. The pilot and captain of the Willkommen both say that it was necessary to slow and stop, in order to prevent a worse collision. Indeed, the judgment of the captain of the Aureole seems to have agreed in this respect with that of the pilot of the Willkommen, for the captain testifies to a conversation with Mr. Marshall, the pilot on the Willkommen, as follows:

"Q. What did you say? A. A very few words. Q. Tell us what they were. A. My words were these: 'Tom, why did you not slow that ship down when we were passing her?' He said: 'I did; I went half speed. I went slow. I stopped her, and I went back on her.' I said: 'How do you account for this collision?' 'Suction.' I said: 'Impossible!' I said no more."

Another fact which seems conclusive as to the distance between the two ships being much less than that testified to by those on board the Aureole is that, with the stern of the Aureole abreast the bridge of the Willkommen, or between that and the fore rigging, it would have been impossible for the Willkommen, going at half speed, to have overtaken the Aureole, going at full speed, so as to

strike her an angling blow at a point 35 feet from the taffrail, if 300 feet or more had separated them. And to this effect is the testimony of the pilot of the Willkommen:

"Q. If your vessel's bow was opposite the bridge of the Aureole, and you were going full speed and the Aureole full speed, and you were 300 feet away from each other, would it have been possible for you to have touched her? A. We never would have caught her. Q. You could not have caught her, even if you had changed your helm to go that way? A. No, sir; because, even taking us going half speed, we were not going over four miles an hour,—between four and five,—and the Aureole was going ten. She was going just twice as fast. We never could have caught her at that distance apart."

The direct testimony of no witness contradicts this opinion of the pilot of the Willkommen.

An attempt was made by the respondent to throw doubt upon, if not to deny, the existence of such a force as suction when ships are passing each other at full speed. The engineer of the Aureole testified that he had passed ships in the Seine much closer than he had passed the Willkommen, without any danger, and never knew one of them to sheer. He did not say, however, whether he had passed them going in the same direction, nor did he speak as to the depth of the water. The captain says that they were not passing close enough for suction to have had any influence on the Willkommen if she had kept her proper course. His statement seems to recognize, however, the possibility of such a thing as suction. Pilot Maull, of the Aureole, says he never had any experience that would enable him to form an opinion as to whether there was any such influence between passing vessels as suction, although he admits that he has heard of such a thing. Taking as true the facts testified to as to the steering and management of the ships while the Aureole was passing the Willkommen, and the preponderating weight of the evidence that the ships were much nearer than 300 feet, some other force or influence than the steering must be resorted to, to account for the sheering of the Willkommen towards the Aureole. Pilot Maull says that this force or influence is what he calls "suction," produced by the passing of the Aureole at high speed through shallow water close enough to the Willkommen to produce the effect. That such a force can be created, under the circumstances which we think probably existed in this case, seems to have been generally, if not universally, recognized among those experienced in the navigation of ships in the shallow waters of rivers and bays, and has been accepted as sufficiently proved in a number of adjudicated cases. The strength of this force undoubtedly will differ according to the locality, and is largely affected by the depth of water and the width of the channel through which the ships are passing. It seems to be established that this power or influence called suction is much greater and more dangerous when one vessel is passing another going in the same direction than when they are going in opposite directions. The *Alexander Folsom*, 3 C. C. A. 165, 52 Fed. 403; The *City of Cleveland* (D. C.) 56 Fed. 729. In the latter case the court says:

"The suction of two vessels passing each other in different directions is not very powerful. It is too short to have any particular effect upon the

action of the two vessels unless one is much larger than the other; whereas, if they are going in the same direction, and passing near each other, it has a more powerful effect to deflect the weaker vessel from her course."

The General William McCandless, 6 Ben. 223, 226, Fed. Cas. No. 5,321; The Mariel (D. C.) 32 Fed. 103.

The case of The City of Brockton (D. C.) 37 Fed. 897, is, on its facts, much like the present case. That was a case in which the Brockton, being the faster ship, was following the J. C. Hartt in the channel near Sandy Hook, and, overtaking her, attempted to pass her on the starboard side. The Brockton averred that she was passing at a safe distance, 250 feet away from the Hartt, but that, after her pilot house had passed the bow of the Hartt, the Hartt changed her course, which caused her bow to collide with the stern of the Brockton. The Hartt, on the other hand, averred that the Brockton was passing too close for safety, and several witnesses on board of her at the time testified that the ships were not more than 75 or 100 feet apart. The court thought this the more correct estimate of the distance between them. The court, after referring to the testimony of the sudden lurch or sheer by the Hartt towards the Brockton, says:

"Such language does not describe a change of course effected by the rudder, but points strongly to the presence of some other force outside of the Hartt, to which her change of course should be attributed. And such a force was present, namely, the force of currents created in the water by the powerful action of the Brockton's wheels driving so large a vessel through the water at high speed. Currents of water more or less strong are necessarily created by a vessel like the Brockton moving at high speed. They will differ according to the locality, and are largely affected, no doubt, by the depth of water. There is evidence that their power is increased when two vessels of about the same speed are passing each other. What the depth of water or the configuration of the bottom was at the place where the Brockton's wheels approached the bow of the Hartt is not proved. But the extent and power of the current actually created by the Brockton seems to me to be shown by what the Hartt did as the wheels of the Brockton neared her bow. * * * As it seems to me, therefore, the testimony given by the witnesses called in behalf of the Brockton warrants the conclusion that the change of course on the part of the Hartt testified to by Mr. Adams and Mr. Ohoate, and to which they attribute the collision, was not caused by the fault of the Hartt in porting her helm, as charged in the Brockton's pleadings, but was caused by the fault of the Brockton, charged in the Hartt's pleadings, namely, either by her sheering across the Hartt's bows, or 'that she did not come up to the starboard side of the Hartt at a sufficient distance from the Hartt to pass in safety.'"

This and the other cases above referred to, judicially recognizing the existence of the force called "suction," and its power, under favoring circumstances, to draw one vessel towards another, cannot be disregarded by this court in considering the denial on the part of the appellant that such a force can exist or be operative,—a denial for which there is no support, except in the testimony of the captain, pilot, and engineer of the Aureole that they had had no experience of such a force.

We are of opinion in this case that the sheering of the Willkommen towards the Aureole just before the collision was not caused by the steering of the Willkommen; for the evidence is clear that her helm was not a-starboard, except in the temporary adjustment

thereof in steering a straight course, while the Aureole was passing, and was put hard a-port some time before the collision. Such being the case, we are of opinion, also, that the Aureole was passing the Willkommen close enough, under the circumstances of the depth of the water and the set of the tide and wind, to bring the latter vessel within the influence of a force or current known as "suction." In other words, that the Aureole failed in her duty, as the overtaking vessel, to pass the Willkommen at a safe distance. As such overtaking vessel, the burden was upon her to show that the collision was occasioned by no fault on her part, but by some fault or neglect of duty on the part of the Willkommen. Such fault on the part of the Willkommen, in her situation, must have been through so steering with a starboard helm as to turn the vessel from her straight and parallel course towards the Aureole. Of this there is no proof whatever, and to the contrary we have the positive testimony of those on board the Willkommen. As we have already said, we think the weight of the testimony establishes the fact that a suction was produced by the rapid passing of the Aureole too close to the Willkommen, in water that was shallow, when compared with her draught of 25 feet.

The decree of the court below is therefore affirmed.

VILLAGE OF KENT et al. v. UNITED STATES ex rel. DANA.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1902.)

No. 991.

1. VILLAGES—TAX TO PAY INTEREST ON INDEBTEDNESS—OHIO STATUTE.

Rev. St. Ohio, § 2683, provides that a village council "may levy taxes annually, * * * [subdivision 22] to pay interest on the public debt of the corporation and to provide a sinking fund therefor a sum sufficient to satisfy the interest as it accrues annually, to be applied to no other purpose." Subdivision 24 provides that "the council shall determine the amount to be levied for each of the purposes herein specified," and section 2689a limits the total levy to eight mills. *Held*, that the word "may," as used in section 2683, must be read "shall," so far as it relates to subdivision 22, and that the council had no discretion, as against a holder of valid bonds of the village, to refuse to levy the amount required to pay the annual interest thereon, not exceeding eight mills, nor to divert any part of such amount to other purposes, notwithstanding the fact that the remainder of the levy might be insufficient to pay the current municipal expenses of the village.

2. SAME—MANDAMUS TO COMPEL PAYMENT OF INTEREST—DEFENSES.

It is no defense to an action for a writ of mandamus to compel a village to apply so much of such levy as is necessary to pay a judgment recovered against it on interest coupons that such application would leave the village without sufficient funds for ordinary municipal purposes, in view of Rev. St. Ohio, § 2687, which authorizes the levy of an unlimited tax by the village for any authorized purpose by a vote of its electors at a special election which the council is empowered to call.¹

¹ Mandamus to enforce payment of judgment against municipality, see note to *Holt Co. v. National Life Ins. Co.*, 25 C. C. A. 475.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

For opinion below, see 107 Fed. 190.

This is an action in mandamus. It was brought in the circuit court in November, 1900, by the filing of a petition on the relation of Edward Dana against the village of Kent, Ohio, and its council, clerk, and treasurer. The petition alleged that Dana had recovered a judgment in the circuit court against the village of Kent on certain interest coupons maturing in 1896 and 1897, representing certain installments of interest on 25 bonds, of \$1,000 each, issued by the village in 1892, and containing a recital that their purpose was to refund and extend the time of payment of certain general fund bonds theretofore issued, which, from its limits of taxation, the village could not pay at maturity. It appears that there was a sum of little less than \$2,500 in the hands of the treasurer of the village, which had been levied for the purpose of paying the interest on the said bonds in each of the years 1892 to 1895, inclusive. An alternative writ of mandamus having been issued, the village, in its answer, set up that said sum of money was on hand, levied and collected as aforesaid, under the supposed authority of the act of April 17, 1891, of the legislature of Ohio, authorizing the village council of any village which at any federal census may have a population of not less than 3,300, nor greater than 3,320, to borrow money and issue bonds for the purpose of making certain improvements; that the village authorities, on discovering said act to be unconstitutional and invalid, had ceased to make any extra levies for the purpose of paying the interest thereon; that said fund was ready to be paid as the court might order. Said sum of little less than \$2,500 was ordered to be paid over to the relator, and no controversy is now made about the same. As to making provision for the payment of such part of the judgment as might remain unsatisfied after applying the said fund, the answer alleged, in substance, that, aside from said interest fund, there are no funds in the treasury legally applicable to the payment of said judgment; that Kent is, and for more than 10 years last past has been, a village of the first class, limited by the law of Ohio to a maximum levy for village purposes of eight mills on the dollar; that no vote for increasing the same in accordance with the law has ever been had; that on or before the first Monday in June, 1900, the tax of eight mills was duly levied for that year, and its distribution provided for according to law among the several departments of the village in proportion to their needs, diversion thereof being forbidden by law; that the amount which would accrue therefrom in addition to all other financial resources of the village would fall short of the amount required for the proper maintenance and ordinary and current expenses necessary for carrying on the government of the village; that the revenue of the village arising from such eight-mill levy for the year 1901, the revenue of the village for 1900, and from any and every other source of revenue, will be insufficient to defray the ordinary, current, and necessary governmental expenses of said village for said period; and that no part of said revenues can be diverted for the payment of plaintiff's judgment without preventing the village from meeting its ordinary, current, and necessary governmental expenses. This answer was demurred to. The court sustained the demurrer, and, no further pleading being filed, a peremptory writ of mandamus was issued, requiring the payment to said Dana of said interest fund of little less than \$2,500, and the issue of a further peremptory writ requiring the council, at the time of making the annual levy for 1901, to provide in said levy for such amount as would be necessary to pay the balance of the judgment, and to then and there provide for the distribution and appropriation of said tax to the payment of such balance, and to proceed without undue delay to cause said tax to be collected according to law, and the proceeds to be applied to the payment of the balance of said judgment. No objection or exception was taken to the application of said fund on hand. That part of the order relating to the levy and application of the tax for the year 1901, and requiring the payment of the proceeds of such levy on the balance of said judgment, was duly excepted to.

W. E. Cushing, for plaintiffs in error.

H. H. Harris, for defendants in error.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

DAY, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The principles which shall control in determining the right of a creditor to have a mandamus against a municipal corporation for the purpose of requiring a tax for the payment of a judgment were fully discussed in a recent case before this court. *City of Cleveland v. U. S.* (decided at this term) 111 Fed. 341. The opinion of Judge Lurton in that case is so full and comprehensive that we are required to do little more now than to apply the principles therein enunciated to the facts of the case in hand. Judge Lurton said:

"It must, at the outset, be conceded that a mandamus cannot be awarded to compel the mayor and council of the plaintiff in error to levy any tax which they were not authorized to levy by the law of the state from which they derive their powers. The office of such a writ is not to create new duties, but to compel the discharge of those already imposed by the municipal law of the state. In other words, the power to levy the tax which the relator seeks to compel must exist in some legislation, or be plainly implied from some local statute or charter." *Carrol Co. Sup'rs v. U. S.*, 18 Wall. 71, 77, 21 L. Ed. 771; *U. S. v. Macon Co.*, 99 U. S. 582, 591, 25 L. Ed. 331.

Our first inquiry, therefore, is, do the statutes of Ohio confer upon the village of Kent power to levy a tax as the relator seeks to compel it to do for the satisfaction of his judgment? The Ohio statutes necessary to be considered in this connection are sections 2682-2684, 2689a, Rev. St. These sections are as follows:

"Sec. 2682. Rates of Taxation in Cities and Villages for General Purposes. The council of a city or village shall have power to levy, annually, for the general purposes of the corporation, such amount of taxes, on each dollar of valuation of taxable property in the corporation on the tax list, as may be determined upon by it, not exceeding the following rates: In a village, one-half of one mill. In a city of the first or second grade of the second class, one mill. In a city of the third grade, or third grade a, or fourth grade of the second class, two mills. In a city of the first grade of the first class, four and one-half mills. In a city of the second grade of the first class, two mills. In a city of the third grade of the first class, two mills.

"Sec. 2683. Levies for Special Purposes. In addition to the taxes specified in the last section, the council in each city and village may levy taxes, annually, for any improvement authorized by this title, and for the following purposes: (1) For the real estate and right of way for any improvement authorized by this title. (2) For sanitary and street cleaning purposes, and for street improvements and repairs. And in cities of the second grade of the first class, such part of the funds raised for any of these purposes as the council deems necessary shall, upon the recommendation of the board of improvements, be appropriated monthly for keeping in repair the paved streets of such cities. (3) For improving highways leading into the corporation. (4) For wharves and landings on navigable lakes and rivers, and keeping the same in repair. (5) For constructing levees and embankments, and keeping the same in repair. (6) For constructing and maintaining bridges. (7) For improving any water course passing through the corporation. (8) For the erection and maintenance of infirmaries, and support of

the out-door poor. (9) For the erection and maintenance of workhouses. (10) For erecting, enlarging, or improving corporation prisons. (11) For the erection of houses of refuge and correction, and for the expense of maintaining and administering the same, above the receipts arising from the labor of persons confined therein, such sum as may be necessary to meet the same. (12) For the erection and repair of market houses, and for lighting, watching, and cleaning the same. (13) For erecting, enlarging and improving hospitals. (14) For erecting, enlarging, and improving halls and public offices. (15) For the erection of school buildings, and such rate as may be prescribed by law for schools and schoolhouse purposes. (16) For the erection of buildings required by the fire department, the construction of reservoirs, the purchase of steam or other fire engines, and other apparatus, and for keeping the same in repair, and for the support of the fire department. (17) For erecting, enlarging, and improving water works, and for supplying the corporation with water. (18) For erecting, enlarging, and improving gasworks, and for lighting the corporation. (19) For grounds for cemeteries and park purposes, inclosing, improving, embellishing, enlarging and keeping the same in repair. (20) For the construction and repair of sewers, drains, and ditches; and where the corporation is divided into sewer districts the levy shall be by such districts. (21) For the payment of the marshal and police authorized by this title. (22) To pay the interest on the public debt of the corporation and to provide a sinking fund therefor, a sum sufficient to satisfy the interest as it accrues annually, to be applied to no other purpose. (23) For the purpose of keeping and maintaining a free public library and reading room; but no tax shall be levied for this purpose unless a suitable lot and building therefor, supplied with library furniture and fixtures, shall first be donated or leased to, or rented by the corporation. (24) The council shall determine the amount to be levied for each of the purposes herein specified, and such part thereof must be placed on the tax list and collected annually, as it shall by ordinance prescribe.

"Sec. 2684. Construction of Limitations. The limitations contained in section twenty-six hundred and eighty-two shall not be construed to prohibit special assessments for improvements provided for by this title, nor the levy of a tax to raise means for the payment of the principal and interest of the debts of the corporation, nor of any tax authorized by law for special purposes."

Section 2689a contains a general provision as to villages of the first class in Ohio,—that the aggregate of all taxes levied or ordered by such village, including the levy for general purposes above the tax for county and state purposes, and excluding the tax for school and school-house purposes, shall not exceed in any one year eight mills.

The plain reading of this section of limitation, as well as the construction put upon it by the supreme court of Ohio, makes it applicable to all village taxes, general and special, and requires that they shall be kept within the limit of eight mills on each dollar of the value of the property as valued for taxation on the county tax list. *State v. Humphrey*, 25 Ohio St. 520; *State v. Strader*, 25 Ohio St. 527; *Cummings v. Fitch*, 40 Ohio St. 56; *City of Cleveland v. Heisley*, 41 Ohio St. 670. The relator in this case does not seek to require a levy exceeding eight mills for municipal purposes. The contention is that out of the tax levied and collected within this limitation an amount sufficient to pay the judgment of the relator for interest upon the bonds must first be paid. These bonds were issued under section 2701 of the Revised Statutes, authorizing the issue of bonds to extend the time of payment of indebtedness which, from its limits of taxation, the corporation is unable to pay at ma-

turity. By the judgment rendered and affirmed in this court (Village of Kent v. Dana, 40 C. C. A. 281, 100 Fed. 56), the validity of the bonds is conclusively established, and the exact question is, is there power in the city council to pay these bonds out of the levy permitted by the statute, and are they required to exercise this power for the benefit of the creditor? In Ralls Co. Ct. v. U. S., 105 U. S. 733, 26 L. Ed. 1220, the supreme court said:

"It must be considered as settled in this court that, when authority is granted by the legislative branch of the government to a municipality or subdivision of a state to contract an extraordinary debt by the issue of negotiable securities, the power to levy a tax sufficient to meet at maturity the obligation to be incurred is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention."

In this case the claim is that not only is there authority which would be implied from the right to create the debt, but that express power is given in the sections quoted for this purpose. Section 2683 provides that in addition to the taxes specified in section 2682, limiting the taxation of cities and villages for general purposes, the council in each city and village may levy taxes annually for any improvement authorized by this title, and for the following purposes. After reciting a number of municipal purposes, subdivision 22 provides:

"To pay the interest on the public debt of the corporation and to provide a sinking fund therefor, a sum sufficient to satisfy the interest as it accrues annually, to be applied to no other purpose."

Subdivision 24 provides:

"The council shall determine the amount to be levied for each of the purposes herein specified, and such parts thereof must be placed on the tax list and collected annually, as it shall by ordinance prescribe."

Assuming that the subsequent general limitation of section 2689a applies to all municipal taxation, keeping the same within the limit of eight mills in villages of the first class, we find the legislature recognizing, under other sections of the law, such as section 2701, that a corporation may incur a debt, and empowering the council to levy a sum sufficient to satisfy the interest as it accrues annually, —not a part of the interest, nor such portion of the interest as the council may see fit to pay,—but here is direct authority to levy a sum sufficient to satisfy the interest; and it is made apparent that this sum, which must be equal to the interest due, is not to be apportioned among other municipal purposes, for we find the provision that this sum shall be applied to no other purpose. In other words, a distinct fund is here authorized to be raised sufficient to pay the interest on a public debt, not to be diverted or divided among other purposes, but, in terms, directed to be applied to this specific purpose. It is true that in subdivision 24 the council is authorized to determine the amount to be levied for each of the purposes specified in section 2683. These purposes are manifold, and the sums required may be more or less as the council may see fit to determine, as so much for highways, so much for bridges, so much for lighting, erection of schools, etc.; but in au-

thorizing the levy to pay the interest no such discretion is required or permitted to be exercised, but the levy is to be of a sum sufficient to satisfy the interest as it accrues annually. We think it plain that the discretion vested in the council to determine the amount to be levied for each purpose does not apply to a purpose, such as the payment of interest, which is merely a matter of mathematical calculation, not required to be fixed by the exercise of discretion on the part of the council. It is true, this section does not say the village shall levy a tax for this purpose; and it is argued that this statute is merely an enabling one, to permit the council to levy as much for this purpose as they shall see fit. But it is well settled in statutory interpretation that the word "may" may be read "shall." In *Rock Island Co. Sup'rs v. U. S.*, 4 Wall. 435, 18 L. Ed. 419, after a summary of the authorities on the subject, Mr. Justice Swayne says:

"The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us, or in equivalent language,—whenever the public interest or individual rights call for its exercise,—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.' The line which separates this class of cases from those which involve the exercise of a discretion judicial in its nature, which courts cannot control, is too obvious to require remark. This case, clearly, does not fall within the latter category."

This language seems to us applicable to the statute under consideration. The power to levy this tax is given for the benefit of creditors, in this case, to meet a demand adjudicated to be right and proper after full trial. It imposes a duty upon the council, which, in our judgment, they are required to exercise so long as they are able to do so within the limit imposed by the law upon the amount of taxation for any given year. We therefore construe this section as though it read, "The council shall levy a sum sufficient to pay the interest on the public debt to be applied for no other purpose." We find nothing in the case cited by counsel for plaintiff in error (*U. S. v. Thoman*, 156 U. S. 358, 15 Sup. Ct. 378, 39 L. Ed. 450) that is in conflict with this view.

It is contended, however, by the learned counsel for plaintiff in error, that this interpretation results in depriving the village of the means of carrying on its ordinary governmental purposes for which the municipality was organized, and will result in depriving the village of the means of protecting property, keeping order, providing against pestilence, and performing other primary duties which devolve upon municipalities; and it is contended that the case under consideration should be ruled by the case of *City of East St. Louis v. Zebley*, 110 U. S. 321, 4 Sup. Ct. 21, 28 L. Ed. 162, and of *Clay Co. v. U. S.*, 115 U. S. 616, 6 Sup. Ct. 199, 29 L. Ed. 482. Indeed, it is said, the answer in this case is drawn upon the au-

thority of those cases. In *City of East St. Louis v. Zebley* a tax authorized for all purposes was limited to 1 per cent. per annum, and the city council were required to levy a tax of three mills on the dollar on each assessment for general purposes, and apply it to the interest and sinking fund on its bonded debt. The supreme court held that the use of the remaining seven-tenths was within the discretion of the municipal authorities, and the court could not control the disposition of it so as to deprive the municipality of the right to use the fund for general purposes of the municipality during any given year. In the case of *Clay County v. U. S.*, 115 U. S. 616, 6 Sup. Ct. 199, 29 L. Ed. 482, the supreme court held that, where the state statute authorized a county to levy and collect a tax of six mills on the dollar for ordinary county revenue, mandamus would not lie to compel the county officers to set apart funds to pay the debt, where by the pleadings it was admitted that the amount of the tax for the current year was necessary for the ordinary current expenses of the county, and recognized the principle that where a tax was authorized within a certain limit for the ordinary county revenues, all of which were required for carrying on governmental purposes, the county authorities could not be compelled to apply part of such fund to the payment of a judgment held by a creditor against it. These cases and similar ones are to be distinguished from the case at bar, in that we have here direct authority in the statute requiring the levy of a tax to pay the interest on the bonded debt. It is not sought to absorb taxes provided for ordinary county or municipal revenue for debt-paying purposes, to the exclusion of their application for the necessary purposes of the county or municipality. The principle of *Clay Co. v. U. S.* and *City of East St. Louis v. Zebley* was recognized in the case before this court above referred to (*City of Cleveland v. U. S.*), in which it was held that the court, in a proceeding for a writ of mandamus, has no power to compel a city to pay a judgment in favor of the relator, so as to control the discretion of the city authorities in making appropriations from the taxes for current municipal expenses. In the case under consideration not only have we an express statute requiring a levy, but the principle underlying those cases is that, where the power of taxation to raise revenue for general purposes is exhausted in providing for the operations of the government, there is no power to disable the corporation from performing its necessary duties by withdrawing from such revenues sufficient sums to pay an indebtedness. There exists in the Ohio statutes ample power to meet such contingencies by a levy of taxes beyond the limit of eight mills imposed by statute. In section 2687 it is provided:

"Sec. 2687. Levy of a Greater Tax to be Submitted to Vote. A greater tax than that authorized by this chapter may be levied for either of the purposes mentioned therein, if the proposition to make such levy, shall have been first submitted to a vote of the electors of the corporation under an ordinance prescribing the time, place and manner of voting on the same, and approved by a majority of those voting on the proposition."

In our judgment, this section is a complete answer to the applicability of those cases which preserve the public revenue for general in preference to debt-paying purposes. We here find power given without limit to levy a tax for any of the purposes mentioned in the chapter, upon the approval of a majority of the electors of the corporation. It cannot, therefore, be said that the corporation has exhausted its tax-levying power, and must stop the wheels of its administration if the fund is to be appropriated for the payment of debts. Electors of the corporation are the real parties in interest. They have never been appealed to, and it is within their power to direct the levy of taxes for the necessary purposes of the corporation, as well as to meet its legal indebtedness. This aspect of the case was passed upon in *U. S. v. Sterling* (decided in the circuit court of the Northern district of Illinois Jan., 1871) Fed. Cas. No. 16,388. In that case the relator sought to obtain payment of a judgment on certain bonds held against a municipal corporation in Illinois. In answer to the writ of mandamus it was set up that by the act of incorporation the city authorities were only authorized to levy taxes at the rate of 1 per cent. per annum on the valuation of the taxable property of said city; that the expenses of the city government amounted to \$6,000 a year; that the total receipts from taxes, licenses, and fines, being all the source of revenue, were only about \$6,000 a year. The charter of the city contained a provision that the city council "may, however, levy and collect a tax for city purposes greater than one per cent. providing the same be done with the consent of the majority of the legal voters of the said city voting at a general or special election ordered for such purpose." On this feature of the case, Judge Blodgett, delivering the opinion, said:

"For the purposes of this case, I do not deem it necessary to discuss the abstract question as to what courts shall do in cases where there is a want of adequate power of taxation to pay a legally contracted indebtedness, as it seems to me the respondent has ample corporate power to meet this emergency. It has power to levy a tax of one per cent. on the assessed value of all real and personal property within its limits. And with the consent of its legal voters, expressed at any general or special election, it has an unlimited power of taxation. It seems, then, clear to me that, if the tax of one per cent. was not sufficient to raise the amount needed to meet this liability, it was the duty of the city authorities to call an election, and require its voters to vote a sufficient tax for the purpose. The duty of paying municipal debts is as obligatory upon the citizens as upon the officers of the city. Indeed, the city authorities are only the agents of the citizens. Besides, what right had the city officers to expend the entire income of the city from the one per cent. tax in payment of current expenses, and leave this indebtedness unprovided for? Why did they not, from the proceeds of this one per cent. tax, pay the bonds and coupons on which this judgment was rendered, and take a vote as to the expediency of raising a further tax to defray current expenses? The proceeds of this one per cent. tax are not specially set apart and dedicated to the payment of current expenses. The bonds for which this judgment was rendered had been legally issued, and the city authorities and voters were all chargeable with notice that they were due and ought to be paid. They should then have levied and collected an adequate tax in apt time to have the money ready when their obligations matured, and, having failed to do so, are guilty of a breach of duty which the writ of mandamus will compel them to perform."

This seems to us a sound view of the matter. The village has it within its own power to levy ample taxes for all purposes. Where a city has a discretion to levy a tax, yet, where that tax is required for the payment of a public debt, the city may be required to levy a tax if it refuses to do so. *City of Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560.

The answer to this feature of the case suggested in the argument was that the council had not required such a vote to be taken, but, as suggested by Judge Blodgett, it has had ample time to do so. Meetings of the electors for the purpose of voting taxes were a part of the earliest form of municipal governments in this country. The council are chosen by the electors. They are a representative body; and, so long as the electors have it within their power to levy additional taxes, the dire consequences predicated from the appropriation of the general revenue to debt-paying purposes cannot follow, unless such result shall flow from the refusal of the voters to exercise the power clearly conferred by statute.

We are of the opinion that the court below did not err in issuing a writ of peremptory mandamus, and its judgment will be affirmed.

ROYTIO v. LITCHFIELD.

(Circuit Court of Appeals, First Circuit. January 24. 1902.)

No. 411.

MASTER AND SERVANT—DANGEROUS WORK—SPECIAL SUPERVISION—NECESSITY.

Defendant operated, in connection with a quarry, a stone-crushing mill. Ledge stone of all sizes were dumped over a cliff, rolled from the dump to a level place at its foot, and thence carted to the mill. Plaintiff and others had been engaged in dumping the stone over the face of the dump, and were ordered by the superintendent to throw certain stones which had accumulated on the dump into the road. Half way down the dump, and opposite where the superintendent was standing, was a place where had been left an overhanging rock, and plaintiff was directed to work at a point several feet below it. Before he had time to pick up a stone, the rock dropped, and injured him. *Held* insufficient to justify a finding that the condition of the dump was other than would naturally have arisen from the acts of plaintiff and his fellow workmen in removing the stone, or that the superintendent knew that it involved a special hazard which the men on the dump could not meet more intelligently than he could, and therefore insufficient to show any reason for special and unusual supervision on the part of the superintendent, so that a verdict for defendant was properly directed.

In Error to the Circuit Court of the United States for the District of Massachusetts.

William A. Pew, Jr., for plaintiff in error.

Herbert Parker (Charles C. Milton, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This suit was brought under the employers' liability act of Massachusetts. The circuit court directed a

verdict for the defendant, and the plaintiff sued out this writ of error. The case is stated by him as follows:

"The defendant operated, in connection with a quarry, a stone-crushing mill. Stones of all sizes were brought from the quarry, and dumped over a cliff. The dump extended some distance along the face of the cliff, forming coves and promontories. At the foot of the dump was a level place upon which twelve or fifteen employes of the defendant broke up stones taken from the dump, and wheeled them to the crushing mill. At various times these stones were thrown or pried from the dump by the men, who cut them up, under the direction of one Tirrell, who was employed by the defendant as a superintendent to keep the men at work, and see that they did not get hurt. Two general methods were employed to get stones from the dump. When Tirrell wanted large stones, he sent three or four men with bars to pry the large stones down. When smaller stones were needed, Tirrell formed all the men in a line on top of the dump, and they came down, throwing and bowling such loose stones as they could lift in their hands, over the face of the dump and to the road. During this operation Tirrell watched the men from the road, to keep them steadily at work, and see that they did not get hurt. If there were dangerous places, he cautioned the men, ordered them to another part of the dump, or sent men to especially pry down the rocks that made the place dangerous. The plaintiff went to work July 6th, and was injured July 25th. In the afternoon of July 25th, under the direction of Tirrell, the men were rolling small stones over the face of the dump. Many of these stones accumulated on the dump, a few feet from the road. Tirrell ordered the men to come down, and throw these stones into the road. Half way down the dump, and opposite where Tirrell had been standing for half an hour, watching the men at work on the dump, was a place which had been quarried into some days before in such a way as to leave a large rock overhanging a cave, the entrance to which was seven or eight feet high. At the time of the accident this rock overhung and slanted in such a way that it appeared dangerous. This rock was on a part of the dump which projected between two coves. The plaintiff had never been in this place before. He did not work near it, and it was impossible to see the condition of this rock from above it, where the plaintiff had been at work. When Tirrell ordered the workmen to come down the dump, the plaintiff came down through a cove, where he could not see this rock, and when within a few feet of the road Tirrell directed him to come around from the cove, and work in a particular place, which he indicated by pointing first at the plaintiff and then at the place where he wished the plaintiff to work. This place was several feet below, and directly under, the overhanging rock. Tirrell did not warn or call the plaintiff's attention to this rock. The plaintiff came around the corner, and directly under this rock. He did not look above him to see what the character of the dump was, but attempted to go to work immediately, relying upon Tirrell, as was the custom, to warn him of any danger. The plaintiff was being hurried by Tirrell, and intended to begin work at once. Before he had time to pick up a stone, this overhanging rock dropped, and, after falling seven or eight feet, rolled down the dump, and pinned the plaintiff's leg against another rock.

"The plaintiff claims that, even if he had looked to see what sort of a place he was ordered to work in, he came so suddenly into the presence of danger that he did not have an opportunity to avoid the falling rock. The rocks generally lay on the dump as they were thrown over the cliff. As the men worked in removing these stones, the stones taken out might let down other stones above. This danger was incidental to the business, and was appreciated by the plaintiff. The plaintiff was not injured by a risk of this kind. Nothing was done by the plaintiff or his fellow workmen on July 25th, preceding the injury, to undermine the rock which fell. It was some distance above the plaintiff, and fell because it had been undermined and left hanging in such a position that some unnoticed cause, not apparently connected with the plaintiff's work, caused it to fall."

So far as the record before us is concerned, we must assume that Tirrell was superintending within the meaning of the employers' liability act. The plaintiff says that Tirrell was negligent in three respects, namely, that he gave the plaintiff an improper order; that he continued the work under dangerous conditions, and failed to exercise a reasonable supervision; and that he failed to act under circumstances which called for a positive action of a precautionary nature,—that is to say, warning.

The most of these propositions are easily disposed of. The order given was a usual one. The work was dangerous, but it was inherently dangerous, and this fact was apparent to every person of the most ordinary intelligence. The evidence is undoubted that Tirrell was in the habit of giving warnings, and did give the usual warning in connection with the particular order under which the plaintiff was working at the immediate time of his injury. This leaves no proposition to be considered except the one to the effect that Tirrell failed to exercise reasonable supervision.

The circumstances of the case are mainly within that common knowledge which, in jury trials, the court is not only entitled to share with the jury, but must so share, and which, in the absence of any marked peculiarities of the plaintiff,—and such the record does not disclose,—he must also be assumed to share. With the rest are the facts that from the nature of the work on this shifting slope of loose ledge rocks the circumstances involving danger were never exactly the same at different points or at different times; that the methods of avoiding danger were, therefore, necessarily never the same; and that both the existence of dangers and the ways of meeting them were best known to the men engaged on the slope, and could not be known with any degree of certainty to one standing below it, where Tirrell properly stood in directing the work. Consequently, from the necessity of the conditions, any supervision which could be given by Tirrell would be faulty, and could not take the place of the care and means which could be availed of by the men immediately on the slope for their own protection.

So far the case is entirely clear. But the plaintiff maintains that the condition which caused his injury was a particularly peculiar one, not common to the work, visible to Tirrell, and not visible to the plaintiff until he was immediately in the locality, and simultaneously with the falling of the stones which struck him. He therefore contends that there was a special reason for peculiar acts of supervision on the part of Tirrell at that particular time. He claims that Tirrell was in a position where he should have perceived that the situation was a very peculiar one; but on this record the jury would not have been justified in finding that the condition was other than would naturally have arisen from the acts of the plaintiff and his fellow workmen in removing stone in the usual way from the slope, or that Tirrell did in fact know, or should have known, that it involved a special hazard, which the men on the slope could not meet more intelligently than he could, in the way they usually met dangers, as we have already explained. Consequently, the jury would not have been sustained in finding that there was any call

on Tirrell for any special supervision. As, therefore, it would not have been justified in rendering a verdict for the plaintiff on the record before us, the circuit court properly directed one for the defendant.

The judgment of the circuit court is affirmed, and the defendant in error will recover the costs of appeal.

SWAN & FINCH CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 7, 1902.)

No. 69.

CUSTOMS DUTIES—FISH OIL.

Tariff Act 1897, par. 42, places a duty on seal, herring, whale, and other fish oils; and paragraph 568 exempts from duty grease and oils, excepting fish oils, commonly used in soap making, wire drawing, or for stuffing or dressing leather, and which are fit only for such purposes. *Held*, that oil known as "cod oil," made from putrid fish livers, which, while used principally for dressing leather, is fit for some other purposes not enumerated, and, while not technically known in the trade as a "fish oil," is subject to the duty; it not being within the exemption, and the phrase "fish oils" not having been employed in a technical sense.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal by the Swan & Finch Company from a judgment affirming a decision of the board of United States general appraisers affirming the classification by the collector of customs as to certain importations made by appellant.

This cause comes here upon appeal from a decision of the United States circuit court, Southern district of New York (109 Fed. 949), affirming a decision of the board of general appraisers which sustained the collector of the port of New York in assessing for duty certain oil extracted from the livers of codfish, and known as "cod oil." The article is made from the unhealthy, putrid livers of codfish, and in this respect differs from cod-liver oil, which is extracted from the fresh livers of such fish.

Wickham Smith, for appellant.

D. Frank Lloyd, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The collector assessed the article for duty under paragraph 42 of the tariff act of 1897, which reads as follows:

"(42) Seal, herring, whale, and other fish oil, not specially provided for in this act, eight cents per gallon."

The importers claimed free entry under paragraph 568 of the free list, which reads:

"(568) Grease, and oils (excepting fish oils), such as are commonly used in soap-making or in wire-drawing, or for stuffing or dressing leather, and which are fit only for such uses, and not specifically provided for in this act."

The record abundantly sustains the contention of the importers that cod oil is commonly used for stuffing or dressing leather. Indeed, but a small fraction of it is used in the arts for any other purposes. But "common use" or "predominant use" is not the only qualification. The oil must also be one "fit only" for the enumerated uses. It matters not that some other article is better fitted and more frequently used for the nonenumerated use, so long as cod oil is fit for such use. The evidence shows that it is fit, *inter alia*, for the manufacture of blacking, and has been so used to a substantial extent. This fact would remove cod oil from the designation of the main clause in the paragraph; but, if the evidence on that branch of the case were less persuasive than it is, we are still of the opinion that cod oil is not covered by the paragraph, being within the exception. The testimony as to commercial designation is voluminous, the importers undertaking to sustain the proposition that the words "fish oils" had a commercial designation which so restricted the class of articles they covered as to exclude cod oil. The witnesses are not entirely in accord, but the phraseology of the tariff indicates quite plainly the meaning which congress gave to those words, which must be assumed to have the same meaning in both paragraphs of the same act. One of the witnesses for appellant (a dealer in oils) indicated the use of the phrase in common speech:

"Any man who is not in the oil trade will say every oil that is made from the fish would be called 'fish oil,' though commercially different designations are used to distinguish one oil from the other."

Now, it seems quite clear that congress used the words "fish oils" in the sense in which they are used in common speech. Paragraph 42 provides for "seal, herring, whale, and other fish oil." Evidently these words are not used with technical precision; for neither the seal nor the whale is a fish, and therefore oil made from them, or from any part of them, is not technically fish oil. Nor are the words used with a close appreciation of commercial distinctions; for, if the evidence in this case be held sufficient to establish the proposition that cod oil is not known to the trade as a "fish oil," it is equally sufficient to establish the proposition that neither seal oil nor whale oil is fish oil in trade; but congress understood at least whale oil to be a fish oil, and therefore used the phrase "seal, herring, whale and other fish oil."

The decision of the circuit court is affirmed.

SPRECKELS SUGAR REFINING CO. v. McCLAIN, Internal Revenue Collector.

(Circuit Court of Appeals, Third Circuit. January 13, 1902.)

No. 17.

1. INTERNAL REVENUE—WAR REVENUE ACT OF 1898—CONSTITUTIONALITY.

Section 27 of the war revenue act of 1898, imposing a tax upon the gross receipts of refiners of oil and sugar, *held* constitutional.

2. SAME—TAX ON SUGAR REFINERS—GROSS RECEIPTS OF BUSINESS.

Under section 27 of the war revenue act of 1898, which imposes an excise tax "on the gross amount of all receipts" of sugar refiners "in

their business" in excess of \$250,000 annually, rentals from wharves owned by a corporation organized for and engaged in the business of sugar refining, and used as a necessary adjunct to said business, are receipts in the business, to be included in computing its gross income for the purpose of such tax.

3. SAME—INTEREST ON DEPOSITS.

Interest received by such company on corporate funds deposited or invested for the time being, while not in use, is also a part of its receipts in the business, and subject to the tax.

4. SAME—MODE OF COLLECTION—MONTHLY ASSESSMENTS.

War Revenue Act 1898, § 27, which provides that every person, company, etc., doing the business of refining petroleum or sugar, or owning a pipe line, whose gross annual receipts exceed \$250,000, "shall be subject to pay annually a special excise tax" on the amount of their gross receipts in excess of said sum, and which further provides that a true and accurate return of the amount of gross receipts as aforesaid shall be made and rendered monthly by such persons or companies, requires the payment of such tax annually, and on annual receipts; and a regulation of the commissioner requiring the assessment and collection of the tax monthly, on the monthly returns, is unauthorized.

Gray, Circuit Judge, dissenting in part.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

John G. Johnson, for plaintiff in error.

J. W. Thompson and James B. Holland, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. The plaintiff below (and here) is a corporation erected under the law of Pennsylvania for the purpose "of refining sugar, which will involve the buying of the raw material therefor and selling the manufactured products, and of doing whatever else should be incidental to the said business of refining." The defendant is the collector of internal revenue for the First district of Pennsylvania. The action was brought to recover certain sums of money which he had exacted under section 27 of the war revenue act of 1898, and which the plaintiff had paid under protest. That section is as follows:

"That every person, firm, corporation, or company carrying on or doing the business of refining petroleum, or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceed \$250,000, shall be subject to pay annually a special excise tax equivalent to one quarter of one per centum on the gross amount of all receipts of such persons, firms, corporations, and companies in their respective business in excess of said sum of \$250,000. And a true and accurate return of the amount of gross receipts as aforesaid shall be made and rendered monthly by each of such associations, corporations, companies, or persons to the collector of the district in which any such association, corporation or company may be located, or in which such person has his place of business."

The parties agreed upon a special verdict, the material portions of which are set out in the opinion of the court below (109 Fed. 76), and need not be here repeated.

1. The first and most important question raised by the assignment of errors is whether the above section is unconstitutional. This question, however, the learned judge of the circuit court declined

to discuss, because "the present suit is a test case, destined for the supreme court of the United States"; and for the same reason we also refrain from discussing it, and deem it expedient to merely state our affirmance of the constitutionality of the section, upon the ground that the presumption in favor of its validity has not been clearly confuted.

2. The use which the plaintiff really made of its wharves was in "carrying on or doing the business of * * * refining sugar." They were part of the plant of that business, and, as it was actually conducted, they were an essential condition of it. Consequently their receipts were its receipts, and as such they were properly comprised in the assessment. *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683.

3. The interest received by the plaintiff upon its corporate funds, either deposited in bank or invested in income-producing securities, was also rightly included. The special verdict states that it was "interest upon its investments of moneys and property as explained by the testimony of Mr. Ball"; and it appears from that testimony that the only business of the plaintiff was sugar refining, and that this interest was received by it upon investments or deposits of such part of the capital of that business as at the time being was not in active use therein. Mr. Ball, it is true, also testified that it did not have anything to do with sugar refining; but the question for our decision is not whether this interest was derived from the refining of sugar, which, of course, it was not, but whether or not it was received in the business of sugar refining, and upon this very different question the facts found are conclusive. The funds of the corporation, however any portion of them may have been temporarily applied or held, were all embarked in the sugar refining business, and to it, therefore, all receipts which those funds produced necessarily belonged. Any diminution of them would certainly have been its loss, and it seems to be equally clear that their augmentation, however occasioned, must have been its gain. Except in connection with and as incidental to that business, the plaintiff was neither an investor nor a depositor, and therefore, by becoming either the one or the other, it did not engage in an additional and separate business.

4. The learned judge, in deciding that the collector had been justified in demanding monthly payments, said:

"The tax is, no doubt, an annual tax, in the sense that it is paid each year; and, if provision for its assessment and collection had been made by the act, such provision would have been obligatory, both upon the government and upon the refiner."

But he was of opinion that the act contained no such provision, and that therefore the regulation of the commissioner of internal revenue directing its monthly assessment and collection was authorized by section 3447 of the Revised Statutes. We are unable to concur in the construction which was thus given to section 27 of the act of June 13, 1898. It is, of course, a possible one, but its correctness is at least so questionable as to render it inadmissible to impose a duty upon a citizen. *Hartranft v. Wiegmann*, 121 U. S.

609, 7 Sup. Ct. 1240, 30 L. Ed. 1012; U. S. v. Isham, 17 Wall. 496, 21 L. Ed. 728. But aside from this consideration, the meaning attributed by the court below to the phrase "shall be subject to pay annually" is not, we think, its natural meaning. The requirement, as directly and plainly expressed, is for payment annually, and upon annual receipts; and, this being so, there is, in our opinion, no warrant for inferring from the quite distinct provision for monthly returns that it was intended that monthly payments might also be demanded, and upon monthly receipts. The tax, moreover, is only on gross annual receipts in excess of \$250,000; and it cannot be supposed to have been contemplated that any person or company whose first return, as in the present instance, exhibited gross receipts exceeding that amount, would be subject to a different rule respecting the time of payment from that which would apply to others, whose gross annual receipts might be shown to be greater than \$250,000 only by a later return. We have already pointed out that it is not necessary to put an interpretation upon this section which might involve such inequality in its administration, and, except by necessity, no such interpretation could be justified.

Solely upon the ground that the circuit court erred in holding that the plaintiff was required to pay the tax in question otherwise than annually, its judgment is reversed, and the cause is remanded to that court for further proceedings to be there taken in conformity with this opinion.

GRAY, Circuit Judge. Agreeing with the opinion of the court as written in paragraphs 1, 2, and 4, I am compelled to dissent from that expressed in paragraph 3, to the effect that the interest received by the plaintiff in error upon its deposits in bank, and as dividends from investments in shares and other securities, should be included in the amount of gross receipts in its business of sugar refining, returned for assessment and taxation. Keeping in mind the well-settled rule that the citizen is exempt from taxation unless the same is imposed by clear and unequivocal language, and that, where the construction of a tax law is doubtful, the doubt is to be resolved in favor of those upon whom the tax is sought to be laid, I cannot assent to the affirmance of the judgment of the court below in this respect. I do not think that the income derived from such investment of funds is in any proper sense receipts in the business of sugar refining. The very term "gross receipts" in "the business" would seem to exclude all such receipts as the interest upon investments here referred to.

PILCHER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1902.)

No. 1,043.

1. CRIMINAL LAW—REMOVAL OF SPIRITS—BREAKING LOCK OF WAREHOUSE—EVIDENCE—FORMER ACQUITTAL OF BREAKING LOCK.

On the trial of one indicted under Rev. St. U. S. § 3296, for the removal and concealment of distilled spirits on which the tax had not been paid, testimony was offered that, on the night before the whisky was removed, accused broke the lock of the warehouse where it was stored. Defendant objected on the ground that he had been indicted under section 3268 for breaking such lock, and at the last term of the court had been tried thereon and acquitted. *Held* that, though such acquittal could be considered by the jury in considering the credibility of the witnesses, it was not ground for excluding the testimony.

2. SAME—IMPRESSION OF WITNESS.

On the trial of defendant for removing whisky on which the tax had not been paid from a distillery warehouse belonging to his father, a witness testified that he was employed by a revenue officer to get up evidence against the guilty parties; that, while concealed under the father's house, witness heard some men discussing the removal of the whisky, and the best way to get out of the trouble, and it was his impression that one of the voices was that of defendant, but he was not quite certain. *Held*, that the admission of such testimony was error.

In Error to the District Court of the United States for the Middle District of Alabama.

Wm. C. Oates, for plaintiff in error.

W. S. Reese, Jr., and J. Sternfeld, for the United States.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The plaintiff in error was indicted under section 3296 of the Revised Statutes of the United States, which reads:

"Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the distillery warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than two hundred dollars nor more than five thousand dollars, and imprisoned not less than three months nor more than three years."

There were five separate counts in the indictment, each charging different ones of the specific acts against which this section denounces a penalty. The verdict in the case was, "We, the jury, find the defendant guilty as charged in the indictment;" and the judgment and sentence ordered that the defendant be imprisoned in the state prison at Nashville, in the state of Tennessee, for the term of two years, and pay a fine of \$500 and costs. The defendant brought this writ of error. Numerous errors are assigned, but we notice only two.

The United States offered to prove by the witnesses Rees Pilcher and Henry Pilcher that, on the night before the whisky was removed from the warehouse, the defendant broke the lock of the warehouse, or drew out the staple to the lock with a road pick. To the admission of this evidence the defendant objected on the ground that he had been indicted for breaking the lock, and had been tried thereon at the previous term of the court and had been acquitted, and that this evidence was irrelevant in this case, and calculated to confuse, mislead, and prejudice the jury against him. The court overruled the objection, and the defendant duly excepted. He assigns this as one of the grounds of error. The transactions were so close together in point of time, and so nearly related in their character, that the evidence offered would have been clearly admissible if the case then on trial for a violation of section 3296 had been heard before the trial and judgment in the case against the defendant brought under section 3268, which reads:

"Every person who destroys, breaks, injures, or tampers with any lock or seal which may be placed on any cistern-room or building by the duly authorized officers of the revenue, or opens said lock or seal, or the door to said cistern-room or building, or in any manner gains access to the contents therein, in the absence of the proper officer, shall be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than one year nor more than three years."

While the judgment of acquittal in that case would be a bar against any further effort to punish him for a violation of section 3268, and could rightfully be considered by the jury in passing upon the credibility of the witnesses testifying on this trial, it was not ground for sustaining the objection to the introduction of the testimony offered. This assignment of error is not well taken.

The United States offered to prove by one John Harmon that about one week after the burning of the distillery warehouse, while he was in the employment of a revenue officer, and charged, as such employé, to get up evidence against the guilty parties, he crawled under Richard Pilcher's house one night, and overheard some other men talking with Richard discussing the removal of the whisky, the destruction of the warehouse, and the best way to get out of the trouble, and that it was his impression that one of the voices he heard talking was that of the defendant, with whom he was acquainted; but of this he was not certain, and he could not say it was the defendant's voice because he did not see him. The defendant objected to the admission of this evidence on the ground that it was too indefinite, and did not tend to prove the defendant's actual presence or participation in the conversation. The court overruled the objection, the evidence was admitted, and the defendant excepted. This action of the court is assigned as error. The bill of exceptions shows that the distillery warehouse was a legal one; that there were a number of packages of whisky therein, subject to the tax imposed by the laws of the United States, on which the tax had not been paid; that the warehouse was destroyed by fire on the night of July 5, 1899; that, soon after the burning, six or seven barrels of this whisky, which had been in the warehouse, and on which the tax had not been paid, were found concealed

in Rees Pilcher's potato patch; that this Rees Pilcher had also been indicted for removing and concealing this whisky, and on a day prior to this trial had pleaded guilty to that indictment; that the distillery at which the whisky was made, and the warehouse that was burned, belonged to Richard Pilcher, and that steam to run the distillery was supplied by means of a pipe from the boiler of the sawmill of the defendant, situated 300 feet distant from the distillery. The defendant's dwelling house, in which he and his family resided at the time the offense was committed, was situated half a mile distant from the distillery and the warehouse. The objection to the admissibility of John Harmon's testimony was that it was too indefinite, and did not tend to prove the defendant's actual presence or participation in the conversation. This seems to present, somewhat vaguely, two grounds of objection: (1) That the witness was not able to identify the defendant by his voice so as to show that he was present in the house under which the witness had placed himself in prosecution of his effort to get up evidence against the guilty parties; and (2) that the witness did not attempt to relate anything that the voice, which impressed him as being that of the defendant, uttered; did not testify to any language, or the substance of any language, used by the defendant, or others present, which would tend to incriminate the defendant, or to incriminate specifically any other person; and hence that the testimony was irrelevant, and should not have gone to the jury for any purpose. It is not expressly stated in the record what was the family relation existing between the various Pilchers mentioned in the record; but it seems to be clearly implied that Richard Pilcher, now deceased, the owner of the distillery and of the warehouse that was burned, was the father of the defendant and of the witnesses Rees and Henry Pilcher. There can be no question that a witness will be allowed to identify a person by his voice if able to do so; that is to say, the testimony is competent to be considered by a jury. And if the presence of the defendant at his father's house a week after the removal of the whisky and the burning of the warehouse was a fact which of itself would tend to charge him with the offense, the objection to the testimony that he was identified only by his voice, and that the witness would say no more than that it was his impression that it was the voice of the defendant,—was giving his impression, rather than stating a fact,—would not be well taken. The presence of the defendant at his father's house a week after the commission of an offense at another place does not tend to show that either the defendant or his father, or any other certain person, had committed the offense. The witness was allowed to testify that he, while under Richard Pilcher's house, overheard some other men in the house talking with Richard, and discussing the removal of the whisky, the destruction of the warehouse, and the best way to get out of trouble, and that it was his impression that one of the voices he heard talking was the voice of the defendant. The witness does not give any of the language, or the substance of the language, that impressed him as having been uttered by the voice of the defendant. He does not give any of the language of any of the other persons present in the house that would show, or tend to show, that the

speakers said or implied that the defendant was in the trouble, or that he had any connection with the destruction of the warehouse or with the removal of the whisky. The bill of exceptions shows that much other testimony given on the trial was sharply conflicting as to the guilt of the defendant. While this testimony did not tend to show his guilt, and should have been excluded because irrelevant, in the very nature of the case, and especially in the condition of the proof, it had a tendency to prejudice the minds of the jury against the defendant. The admission of this testimony seems to us to violate fundamental principles too well known to admit of discussion. For this error, the judgment must be reversed.

It is ordered that the judgment of the district court is reversed, and the cause is remanded to that court, with the direction to award the defendant therein a venire de novo.

UNIVERSAL SAVINGS & TRUST CO. et al. v. STONEBURNER et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 418.

1. COURTS—JURISDICTION—RESTRAINING ORDER.

Where a bill in chancery is filed with the court, it has jurisdiction to issue an order restraining defendants and appointing a receiver, though the bill is not lodged in the clerk's office and subpoena issued until two days thereafter.

2. INJUNCTION—RECEIVER—APPLICATION TO REMOVE—HEARING—DECREE—APPOINTMENT.

Where an order restraining defendants and appointing a receiver is awarded before subpoena is issued, if such award is improvident a decree, made after hearing on defendants' application to discharge the receiver and dissolve the injunction, denying such relief, amounts, in substance, to the granting of an injunction and the appointing of a receiver.

3. SAME—BILL—RIGHT OF STOCKHOLDERS TO SUE—JURISDICTION—EQUITY.

Complainants in their bill alleged that they owned full-paid stock in a building association, which, under the by-laws, they were entitled to withdraw and receive the value thereof; that they had given the prescribed notice and demanded such value repeatedly, but, though other stock on which notice was served after theirs had been paid, payment was refused them; that the managers of the association had squandered and mismanaged the funds, and conspired with the directors of a rival company to turn the assets and business over to such company, and, pursuant to such conspiracy, had caused the election of the majority of such directors as directors of the association, and officers thereof; that such new directors and officers were conducting the business for their own personal gain and in the interest of the other company, ignoring the interests of the stockholders; and that the association was wholly insolvent. Complainants prayed an injunction and receiver. *Held*, that the bill stated facts entitling complainants to equitable relief, and giving the court jurisdiction; application by them to the directors or a meeting of the stockholders for redress or leave to institute the suit being unnecessary.

4. SAME—DISCRETION.

Where, on the application for receiver and injunction, the allegations of such bill were fully supported by affidavits and exhibits, the court did not improvidently exercise its discretion in awarding such relief.

5. SAME--APPEAL--ERROR NOT PLAINLY APPARENT.

Where an injunction and receiver were properly awarded on the bill, affidavits, and exhibits presented by complainants, and the answer and testimony presented by defendants on their application to set aside such order did not materially change the case, and the application was denied, though the evidence is conflicting, it not being plainly apparent that the court erred in entering the orders, they should not be reversed.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

W. P. De Saussure and Wyndham R. Meredith, for appellants.

Robert Stiles, A. L. Holladay, and Emmett Seaton, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

GOFF, Circuit Judge. The appellees, who were complainants below, on the 25th day of May, 1901, tendered their bill to the circuit court of the United States for the Eastern district of Virginia, alleging, among other things, that they were the owners of stock in the defendant company to the amount of \$12,000, and that they had paid cash to said company for the stock to the par value of the same; that the appellee Stoneburner owned of said stock 50 shares of class E and 50 shares of class C, each share of said stock being of the par value of \$100; that the money invested in the stock of class E could be withdrawn at any time after 6 months from the date of the certificate therefor, and the money invested in class C stock could be withdrawn at any time, upon the holder thereof giving written notice of his purpose so to do, but that, in its discretion, the company could require the lapse of 60 days before making payment of the money due on class C stock; that the appellee Stoneburner on the 3d day of April, 1900, gave notice in writing to the company of his intention to withdraw the value of all his stock of both classes, and that shortly thereafter the appellee Young did also give such notice; that the receipt of such notices by the company was duly admitted; that both of said appellees repeatedly made demand upon the company for the payment of the withdrawal value of their stock, and that such payment was always refused, nor had the same been made when the bill was filed, that said failure so to pay was because of the improper manner in which the business affairs of the company had been theretofore managed; that it was the duty of the officers and directors of the company to make provision for the payment of withdrawing stockholders, and that many stockholders owning relatively smaller amounts of stock than said appellees held had been paid in full the amounts due them, to the prejudice of the appellees, since their said notices had been served; that within the two years immediately preceding the filing of the bill the business of the company had materially decreased, as also had its assets, but that during the same time its liabilities had increased; that the officers and directors of the company in office prior to January 23, 1901, formed a plan with the defendants other than said company, seven in number, that they would, by their votes, and the votes of others controlled by them,

deliver said company into the hands and management of said seven defendants, who constituted the board of directors of the Prudential Banking & Trust Company, then a competitor for the character of business the defendant company was engaged in; that on January 23, 1901, five of said defendants were elected directors of the defendant company, one of them secretary and treasurer, and the remaining one assistant secretary and treasurer, the old board and old officers then and there retiring; that after such election the new officials set to work to carry out their preconceived plan of personal gain to themselves, ignoring the interests of the stockholders of the defendant company, the control and management of which had been absolutely turned over to them; that said new officials did, by all means in their power, endeavor to prevent the payment of the cash value of the stock of those who had filed notices for withdrawal, their intention being, instead of paying cash therefor, to issue new stock that would not have the withdrawal feature; that their purpose was to combine the assets of said company with the assets of the Prudential Banking & Trust Company, of which they were then also directors; that said new directors, soon after their election, increased the expenses connected with the management by voting additional salaries to the officers thereof, and that they also passed a resolution reducing the stock of all stockholders 20 per centum; and that the defendant company was, at the time of the filing of said bill, insolvent. The prayer of the bill was that the complainants therein be paid the withdrawal value of their stock, and that the same be declared a lien upon the assets of the company, that a receiver be appointed to take charge of and administer the affairs of the defendant company under the direction of the court, and that the defendants be enjoined and restrained from disposing of any of such assets, and also for such general relief as, under the circumstances, to equity appertains. The bill was sworn to by both of the complainants, and with it were filed a number of exhibits containing the by-laws of the company, its plan of doing business, and copies of various statements published by its management, showing its financial condition. On the day the bill was so presented to the court, an order was made and signed by the judge thereof, after he had read and considered said bill and exhibits, by which it was decreed that the company show cause before the court on the 6th day of July, 1901, why an injunction should not be granted, enjoining and restraining it and its officers from disposing of or exercising control over its assets; and, it appearing to the court that there was danger of irreparable injury from delay, it was ordered that in the meantime, and until the further order of the court, a restraining order issue in accordance with said prayer, but it was provided that said company might at any time, on giving five days' notice to complainants, move to vacate such restraining order and discharge the receiver which the court then proceeded to appoint. The bill so filed in court on the 25th day of May, 1901, was lodged in the clerk's office at Richmond, Va., on the 27th day of May, 1901, on which day the subpoena in chancery summoning the defendants to appear was duly issued, as was also the restrain-

ing order; and likewise on that day one of the receivers gave bond as required by the order appointing him, and took charge of the assets of the defendant company. The restraining order was served on all the defendants on the 27th day of May, 1901, as was also the subpoena; and on that day the defendant company served a notice on the complainants that it would on June 1, 1901, move the court to set aside the order appointing the receiver and granting the restraining order. On the 1st day of June, 1901, the complainants and all of the defendants, by their respective counsel, appeared before the court,—the former to resist, and the latter to move, the discharge of the receiver and the dissolution of the restraining order. On that day the receiver filed a report, as he was required to do by the order appointing him, showing the condition of the defendant company, and the assets of the same that had come into his hands; and the defendant company, as well as the individual defendants, filed their several answers to the bill, as also the affidavits of accountants and bookkeepers, and certain statements purporting to show the financial condition of the company; and the cause was then argued by counsel and submitted on said motions. On the 4th day of June, 1901, the court below entered an order declining to dissolve the injunction and refusing to discharge the receiver. From this order, as well as from the order signed by the judge on the 25th day of May, 1901, the defendant company prayed an appeal, which was duly granted.

The assignments of error are many in number, but we find that the consideration of a few will dispose of all the questions really involved in this appeal. Appellants insist that when the order of May 25, 1901, was entered, the suit in which it purported to be issued had not at that time been instituted, and that therefore said order was null and void. This claim is based upon the fact that the bill was not lodged in the clerk's office until the 27th day of May, 1901, and that the subpoena did not issue until that date. In other words, the insistence is that a suit in equity has not been commenced until the subpoena has issued. Appellants, therefore, claim that the receiver was appointed and the restraining order granted before the suit was commenced. While it is true that no process of subpoena can issue from the clerk's office in any suit in equity until the bill has been filed in such office, still it does not follow that the court, or a judge thereof in chambers, may not enter an order on consideration of the bill before it has been so lodged in said office. Under the old English practice, from which our procedure is taken, all bills in equity were first presented to the judge, who determined whether process should issue thereon; and, if he so ordered, then the bill was filed in the clerk's office. Subsequent proceedings in such suits have been controlled chiefly by rules of court, and the practice established thereunder. We are not aware of any statute or rule of practice, nor of any authoritative decision, by which the contention of the appellants in this particular instance can be sustained. In this case the bill was presented to the court on Saturday, the 25th day of May, 1901; and one of the orders now complained of was on that day, after due consideration of the bill and

exhibits, directed to be entered. The bill, therefore, was in fact filed on the 25th day of May, though it seems that process thereon did not issue until Monday, the 27th,—a practice not at all uncommon in the courts of the United States. If, as a matter of fact, the order of the 25th of May by which the receiver was appointed was improvidently awarded, would not the decree of the court made on the 4th of June following, after subpoena had issued, after appellants had given notice to discharge the receiver and dissolve the injunction, and after the court had heard argument thereon, amount, in substance, to the granting of an injunction and the appointing of a receiver? We think so.

Nor do we find merit in the claim of appellants that the court below did not have jurisdiction in this controversy. We think that the appellees, on the allegations in their bill contained, were clearly entitled to be heard in equity. In the case as made by the bill, it would have been useless for them to have again asked the directors of the defendant company for the relief such officials had repeatedly refused to grant them,—relief complainants were entitled to, but the granting of which was antagonistic to the plans the directors had in view. Under such circumstances, it was not necessary that complainants, as stockholders, should have applied to the board of directors or to a meeting of the stockholders for redress, or for permission to institute a suit by means of which relief could have been secured; for, if complainants' charges are true, such procedure would have been little less than a farce, and such suit, if instituted, should not have been under the control of such directors. *Phosphate Co. v. Brown*, 20 C. C. A. 428, 74 Fed. 321; *Cook, Corp. v. McGeorge v. Improvement Co.* (C. C.) 57 Fed. 262.

Appellants insist that even if the case was properly before the court below, and if the order granting the injunction and the appointing the receiver were regularly made, nevertheless, on the motion to dissolve and discharge, and on the case as made by the answers and the exhibits filed therewith, the court below erred in refusing to dissolve the injunction and in declining to discharge the receiver. It must be borne in mind that this is an appeal from an order appointing a receiver and granting an injunction, as well as from an order refusing to discharge said receiver and declining to dissolve the injunction. The court appointed the receiver and granted the injunction on the allegations of a bill, duly verified, charging the improper and fraudulent management of the defendant company by its directors; that the company was running at a loss and practically insolvent; that such condition of affairs was well known to the old board of directors, and that they, because thereof, abandoned the management of said company; that the new directory, being also the directors of another company, were using the assets of the defendant company in the interest of that other corporation; that complainants were refused payment of the withdrawal value of their stock, although other stockholders, whose applications for withdrawal were filed after complainants had given their notices, were paid in full. Also, we should bear in mind that the affidavits and exhibits filed by complainants fully sustained the charges in the

bill, and demonstrated the insolvency of the defendant company. Such being the case, the judge who entered the order of May 25, 1901, did not improvidently exercise the legal discretion with which he was invested.

Nor did the court below err in its order of June 4, 1901; for the case, as made by the answers and the testimony filed with them, was not materially changed thereby. We would not be justified in reversing the orders complained of by appellants, unless it was plainly apparent that the court below committed errors in entering them. The facts were found by the judge who heard the case, from conflicting testimony, we concede; but we think he exercised his discretion wisely, and we cannot, on the evidence now before us, do otherwise than affirm his action.

We are not at this time disposing of the case as if the appeal were from a final decree on the merits, and it will now go back to the court from whence it came, for further proceedings therein to be had, when additional evidence will doubtless be offered, and the questions at issue be finally disposed of.

Affirmed.

HULL COAL & COKE CO. v. EMPIRE COAL & COKE CO.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1902.)

No. 414.

1. CONTRACTS—CONSTRUCTION—QUESTION FOR COURT.

The construction of a contract in writing is a matter of law for the court, and it is immaterial at whose suggestion particular clauses were inserted.

2. SAME—PERFORMANCE BY PARTY CLAIMING DAMAGES—NECESSITY.

A party suing for breach of a contract containing mutual dependent agreements must show a performance on his part.

3. SAME—STIPULATION QUALIFYING GUARANTIES.

A provision that the usual strike clause shall mutually govern in a contract for the purchase of all the coke manufactured by the seller during a fixed period (the latter guarantying a specified amount; the price, time of payment, and quality of the coke being agreed upon) qualifies only the guaranties that the purchaser will take all the coke manufactured, and that the seller will furnish a specified amount, during such period.

4. SAME—STRIKE CLAUSE—SUSPENSION OF DELIVERIES—EFFECT.

A provision in a contract for the purchase of all the coke manufactured by the seller during a fixed period (the latter guarantying a fixed amount; that in case of strikes, accidents, or other causes causing stoppage in the works of the seller, deliveries under the contract may be "suspended") relieves the seller from the obligation of its guaranty, where such causes have prevented it from furnishing the guarantied amount during the specified time, for the word "suspended" does not mean "postponed," and therefore the purchaser cannot demand delivery of coke, to make up the deficiency, after the expiration of the fixed period.

5. SAME—TIME—ESSENTIAL ELEMENT.

In a contract for the purchase of all the coke manufactured by the seller during a fixed period, time is an essential element, because of the fluctuations in the market, and the life of the contract must be limited to the time fixed by the parties.

6. SAME.

Where the intention of the parties to limit a contract to a certain period is manifest, time is of the essence of the contract.

7. SAME—CONSTRUCTION—GENERAL RULES.

The subject-matter and purposes of a contract, and the situation of the parties to it, are material to determine the intention of the parties and the meaning of the words used; and, where these are ascertained, they prevail over the dry words used.

8. SAME—BREACH BY ONE PARTY—REPUDIATION BY THE OTHER.

Where a buyer in a contract for weekly shipments of coke for a fixed period failed to pay on the 20th of the month for the coke received during the preceding month, as required by the terms of the contract, the seller might repudiate the contract; the latter not being in default.

9. SAME—CONDUCT CHANGING TERMS OF CONTRACT—SUFFICIENCY.

The terms of a contract for the purchase of all the coke manufactured by the seller for a fixed period, the seller guarantying a specified amount, are not changed by the buyer sending to the seller orders for delivery of coke in excess of the specified amount, where such orders are received in due course of business, but are not accepted.

In Error to the Circuit Court of the United States for the Southern District of West Virginia.

Lucian H. Cocke and Malcolm Jackson (A. J. Reynolds, on the brief), for plaintiff in error.

L. A. Anderson and G. E. Price (Rucker & Anderson and Flournoy, Price & Smith, on the brief), for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and PURNELL, District Judge.

PURNELL, District Judge. Plaintiff brought its action on the case in assumpsit, claiming \$10,000 damages for breach of contract. The Hull Coal & Coke Company, plaintiff below, a corporation with its chief office at Roanoke, Va., was engaged in purchasing and selling coal and coke in Virginia and West Virginia. The Empire Coal & Coke Company, defendant below, a corporation with its chief office at Landgraf, W. Va., was engaged in mining coal and manufacturing coke. On November 19, 1898, the plaintiff addressed a letter to the defendant, which was afterwards accepted, and mutually agreed should be a contract between them. This letter was as follows:

"We make you the following proposition for the purchase by us of all the coke you can make at your ovens at Landgraf, W. Va., from January 21st, 1899, to December 31st, 1899: We guaranty to give you orders enough to keep all of your ovens—one hundred (100)—running full. You to guaranty to furnish not less than twenty thousand (20,000) net tons of coke during the above-mentioned time. Orders and deliveries of coke to be made in as nearly as possible equal weekly installments. Price to be one dollar and sixteen cents per net ton, f. o. b. cars at ovens. Settlements to be made in cash on the 20th day of each month for shipments of the previous month. The usual strike, accident, and transportation clauses to mutually govern. Coke to be of standard quality, and you to ship no coke to others than ourselves, except as covered by attached memorandum. Your acceptance of this letter to constitute a contract between us."

It is agreed that the following was the usual strike, accident, and transportation clause referred to, or that part applicable to this controversy:

"In case of strikes, accidents, deficient transportation, or other cause, unavoidably causing stoppage or partial stoppage of the works of the manufacturer of this coke or its shipment, or in case of strikes or accidents unavoidably causing stoppage or partial stoppage of the works of the buyer, deliveries herein contracted for may be suspended or partially suspended, as the case may be, or, at the option of the party not in default, may be immediately canceled during the continuance of such interruption, by immediate notice to that effect given to the other party."

The Hull Coal & Coke Company made requisition upon the Empire Coal & Coke Company for coke to the capacity of the ovens, and in excess of the guaranteed output of 20,000 tons; and the defendant company failed to furnish the amount,—only furnished during the period contemplated by the contract 14,572 tons and 1,100 pounds, which was 5,427 tons and 900 pounds less than the 20,000 tons called for in the contract; and it is claimed that, acting on the faith of the contract, the plaintiff below (appellant) had made sales of the coke which it had purchased, and, in order to meet its obligations, purchased coke at \$2.50 per ton, being \$1.34 per ton in excess of the price under the contract; and, for the damages thereby caused, this suit was brought. The Empire Coal & Coke Company relied on several defenses; i. e., the failure on its part to furnish the amount of coke guaranteed by it was due to deficient transportation, a strike among its employes, a severe drought, which prevented it from securing the necessary water to manufacture the coke, and because plaintiff failed and refused to pay for the November delivery by the 20th of December. Under the ruling of the trial court these defenses were deemed sufficient, and under the instructions of the court there was a verdict for defendant.

It is conceded the Empire Company shipped to the Hull Company all the coke manufactured at its ovens, except that covered by the memorandum referred to, and under the strike clause the defendant was excused from deliveries at the particular times it failed to make such deliveries. The record does not disclose any complaint by or difference between the parties until December. The contract was executory, dependent on mutual agreements, containing guaranties, all governed by the strike clause as applicable. It can make no difference who suggested the strike clause, as argued. The contract is what the parties agreed to, and, being in writing, the construction is a matter of law for the court. Under a contract dependent on mutual agreements, the party alleging and claiming damages for a breach must allege and prove he has complied with his agreement and discharged his obligations. These are fundamental principles, which it is well to observe and keep in mind in considering the contentions in this case. What did the parties contract to do? Plaintiff agreed to purchase all the coke defendant could make at its 100 ovens from January 21, 1899, to December 31, 1899; to give orders enough to keep ovens running full; to make orders in as nearly as possible equal weekly installments; to pay \$1.16 per net ton f. o. b. cars at the ovens in cash on the 20th day of the month for shipments of the previous month. Defendant agreed to furnish all the coke it could make, except as noted in memorandum attached, not less than 20,000 net tons of standard

quality during the time specified. Plaintiff was a dealer—a middleman—securing a market for coke. Defendant was a manufacturer. The stipulations were important to the business of each. The defendant had no coke ovens at Roanoke, and there was no market for coke at Landgraf. The manager of each corporation understood the business it was engaged in, and also the difficulties which might arise in connection therewith. Strikes, accidents, and deficient transportation are not uncommon obstacles in this branch of business, and other contingencies which might arise were well understood. Hence the strike clause was adopted to “mutually govern.” To govern what? Not the price of coke, for that was fixed. Not the character of the coke, for that was also fixed at standard quality. Not the time of settlement, for that was to be on the 20th day of each month for shipments of the previous month. Why, then, insert this clause? Evidently to qualify the guaranties,—that of the plaintiff to give orders to keep all the ovens (100) running full, and the defendant to furnish not less than 20,000 tons, net, during the time specified. The second paragraph of the strike clause has no application, as the defendant was to deliver the coke f. o. b. cars, and paid no freight. This strike clause is a form used by the Hull Company in dealing with its customers, which it would be difficult to apply fully to the contract. Some of the stipulations have no application. This, however, does not affect the contention of the parties as presented by the record. A strike did occur; also an unavoidable accident, a drought in September, and a deficiency of transportation. There does not seem to have been any complaint on the part of the plaintiff of a failure to ship coke during the year, though for every month except May the shipments were short of the orders. About December 1st a correspondence, by letter and telegram was commenced, plaintiff seeking to obtain a similar contract for coke for 1900 at an advanced price. About the 8th of December a disagreement as to whether, under the contract, coke should be shipped after December 31st, arose; but the negotiations for a new contract continued until December 23d, when defendant canceled the contract because plaintiff had not paid on the 20th for November deliveries, and no shipments were made after this date. The contract was limited to the product of the ovens, and was expressly limited to such product from January 21 to December 31, 1899, and was so treated by both parties until December 8th, when the contention arose. That plaintiff regarded the contract as so limited is shown by the proposition to obtain or enter into a new contract for the purchase of coke after December 31st. Plaintiff contended the word “suspended,” in the strike clause, should be construed “postponed,” and shipments not made within the time should be made after December,—in short, that the guaranty of 20,000 net tons was absolute. The authority cited for this contention is not in point, does not sustain it, and we cannot take that view. The two words are not synonymous, and the presumption is the parties understood the meaning of the words used. *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, cited, and the following case in the same volume (*Filley v. Pope*, 115 U.

S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372), not cited, applicable to another branch of the case, are not in point as to this contention, but against it. In both cases it is held:

"In a mercantile contract, a statement descriptive of the subject-matter or some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty or condition precedent, upon the nonperformance of which, the party aggrieved may repudiate the whole contract."

Time may be an essential element in a contract, as in the case at bar. It is well known that coke fluctuates in price. When the contract was made it was \$1.16 at the ovens. At the end of the year it was worth \$2.50 in the market, and plaintiff on December 20th declined to accept a proposition to contract for the sale of its entire output at the ovens in 1900 at \$2.24 f. o. b. cars at ovens, but offered to enter into such contract at \$2.75 per ton, etc. Time is therefore of material importance in this class of contracts, both as to sales, delivery, and payments. Other business transactions of the parties for the year were dependent on the time element of the contract. Knowing this, the parties fixed the time within which the contract was to be operative, and to put a different construction on it would be to ignore the language of the contract itself, and the evident intention of the parties when it was made. That plaintiff subsequently made contracts with other parties in which losses were incurred cannot affect the construction of this contract. Defendant possibly lost, too, by being compelled to deliver coke at \$1.16, when the market price was much above that amount. There is nothing in the contract or strike clause which can reasonably be construed as extending the deliveries beyond December 31, 1899. Where the intention of the parties to limit a contract to a certain period is manifest, it is of the essence of the contract. *Carter v. Phillips* (Mass.) 10 N. E. 561; *Scarlett v. Stein*, 40 Md. 512.

The subject-matter of the contract, its purpose, and the situation of the parties, are material to determine their intention and the meaning of words used. When these are ascertained, they must prevail over the dry words used. *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; *Fox v. Tylor*, 109 Fed. 258, 48 C. C. A. 356. The authorities cited in these cases are numerous. It is clear, considering these material matters, what the intention was,—to limit the sale to the output of the ovens for a specified time, and to modify the guaranty of defendant to deliver not less than 20,000 tons by the strike clause. Hence there was no error in the following instruction of the trial judge, to which plaintiff excepted, and which is assigned as error:

"Under the contract, the defendant was obliged to deliver to the plaintiff all the coke the defendant could make at its ovens at Landgraf, W. Va., from January 21 to December 31, 1899, except what it was allowed to furnish to others by the terms of the contract, and covered by memoranda attached to said contract, but that the defendant was not obliged to deliver any coke under said contract after December 31, 1899. That defendant guaranteed to furnish not less than 20,000 tons during said period, but said guaranty was modified by what is called the 'Strike Clause' in said contract; and if the jury believe from the evidence that the defendant, by the exercise of

due diligence, was unable to make as much as 20,000 tons of coke at its said ovens during said period, by reason of stoppage or partial stoppage of its works by any or all of the causes hereinafter mentioned, and that it did make and furnish to plaintiff all that it could make at said ovens from January 21 to December 31, 1899, but at times during said period its works were stopped or partially stopped by a strike, by deficient transportation, by lack of water caused by a long-continued drought of such extraordinary severity that it could not have reasonably been anticipated or provided against, or by other unavoidable cause, then the defendant is relieved from liability under its guaranty for such quantity of coke as it was prevented from furnishing by reason of the stoppage of its works by any or all of the causes aforesaid."

Another exception pressed in the argument was as to the right of the defendant to cancel the contract on December 23d for the nonpayment of November deliveries. As before said, negotiations commenced about the 1st of December for a contract for coke; deliveries to begin on January 1, 1900. On December 8th the manager of the Empire Company wrote to the Hull Company that he was advised that by December 31st the entire amount of coke under the contract, except the deliveries prevented by causes within the relief stipulated in the contract,—the strike clause,—would be made, and offered to sell the Hull Company the output of the ovens for 1900 at \$2.75 per net ton, etc. Plaintiff claimed the entire amount guarantied had not been delivered, but should be delivered after, if not before, December 31st, but continued the negotiation for the 1900 product. The November deliveries were not paid for on the 20th, as provided in the contract; the reason alleged being because the Empire Company denied any obligation to deliver any coke after December 31st, and such claim was a breach of the contract. On the 23d of December, allowing three days of grace, the defendant canceled the contract on account of the plaintiff's failure to pay. Was this sufficient cause for refusing to pay according to the stipulation? The obligation to pay for the deliveries of the previous month by the 20th was a plain obligation of plaintiff. It is familiar law that under an executory contract, dependent on mutual obligations, the party asking damages must allege and show he has discharged his obligation,—is not in default. This was a contract for weekly shipments, which were made,—true, not in as great quantities as ordered, but, as has been seen, this shortage was not complained of, was provided for by the strike clause, and for the particular times condoned by plaintiff, if they amounted to a breach,—and for monthly payments. All the provisions of the contract were important to the parties. Defendant needed the money in its business, and that it should have it on the 20th day of the month was an express stipulation. Contracts of this nature are not governed by the same rule as simple debts, where the measure of damages is interest from the day the debt, whether bond or other form, is due. The day of payment is an essential element in the contract. The supreme court, in a recent case (*Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953), held, quoting the rubric:

"After a careful review of all the cases, American and English, relating to the anticipatory breaches of an executory contract by the refusal of one party to it to perform it, the court holds the rule laid down in *Hochster v.*

De la Tour, 2 El. & Bl. 678, is a reasonable and proper rule. That rule is that, after the renunciation of a continuing agreement of one party, the other party is at liberty to consider himself absolved from any further performance of it. The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time of performance, as well as a performance of the contract when due."

The other rulings refer to the question of damages. This is conclusive. The authorities cited in the brief sustain this view. *Reybold v. Voorhees*, 30 Pa. 116; 1 Whart. Cont. § 580; *Coal Co. v. Cox*, 19 R. I. 380, 35 Atl. 210; *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; *Rugg v. Moore*, 110 Pa. 236, 1 Atl. 320; *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248.

This was a deliberate failure to pay, not an inadvertence, because of a dispute as to the construction of the contract; not a breach, either actual or alleged, on the part of defendant. Even if plaintiff's contention had been correct,—that deliveries not made on account of strikes, drought, and deficient transportation were postponed, only,—it is not claimed there had been a breach of the contract by the defendant. Under these circumstances, the Empire Company had the right to cancel the contract; and there was no error in the charge of the court that if the plaintiff failed to pay the defendant on or before the 20th day of December, 1899, and up to the 23d of that month, for the coke furnished it by the defendant in the month of November, 1899, and has not yet paid for the same, then the defendant had the right to cancel the contract, and if the defendant did so cancel the contract on the 23d day of December, 1899, and notified the plaintiff thereof on that day, then the plaintiff cannot recover of the defendant any damages for failure to deliver any coke to it after said 23d day of December, 1899.

The other assignments of error are to the refusal of the court to give instructions asked by plaintiff which present reverse views to those heretofore considered and passed upon. Only one not herein decided which was pressed on the hearing and in the brief, as to the refusal of the court to give an instruction asked for, to the effect that, if defendant accepted orders for the deliveries of coke in excess of the 20,000 tons, then as to such orders it could not avail itself of the exemption provided for by the strike clause. This instruction was properly refused. Defendant company was under no obligation to ship coke to plaintiff, except under the contract, and there is no evidence to support the idea that the orders sent were accepted. The mere fact the plaintiff gave orders apparently in excess of the capacity of the ovens could create no obligation aliunde the contract. The guaranty was that it would give orders sufficient to keep the ovens running full. It bought the entire product of defendant's ovens, except as specified, and, it is conceded, received it. No ex parte act of either party could create any new obligation, and the evidence does not show any acceptance of these orders,—merely that they were received in due course of business. This could not deprive either party of rights under the contract, and the instruction asked for is inconsistent with other instructions of plaintiff,—the relief afforded by the strike clause, as herein decided, which was, in express terms, made a part

of the contract. This strike clause was furnished by, and is conceded to be the one used by, the plaintiff in dealing with its customers, and its terms are more applicable to such dealings than to those involved in the case at bar. If plaintiff followed its custom, and used this clause in the contracts for the sale of coke purchased from defendant, it then can avail itself of the protection therein afforded. It has the same protection under this clause. It can avail itself of the same defenses. It had it in its power to protect itself against strikes, deficient transportation, and unavoidable accidents well understood in its business. If it did so, the misfortune complained of is imaginary. If it failed to do so, or elected to not avail itself of its defenses, it was its own oversight in the one instance, and choice in the other.

There is no error. Affirmed.

SIMONTON, Circuit Judge (concurring). Under the contract in the record, the plaintiff agrees to purchase all coke defendant can make between January and 31st December, 1899. Defendant guarantees within that time to make not less than 20,000 tons. Deliveries and orders to be made weekly. If defendant could make the 20,000 tons within the time specified, and did not make it, there would be a breach of the contract. If the defendant could not make 20,000 tons, this is a breach of the guaranty. It seems that defendant could have made 20,000 tons, and did not make it. Is it protected by the strike clause? The causes mentioned in this strike clause did stop the manufacturer for a time. In this event the deliveries could be suspended; that is, cease temporarily, to be resumed when the cause of suspension was removed. What effect did this have on the total delivery? All the output of the plant—all the coke the defendant could make within the time specified—was purchased by plaintiff. If the weekly deliveries were suspended in whole or in part for causes within the strike clause, just as soon as they were resumed the whole output—all that could be made—belonged to plaintiff, under the contract of purchase. So none of it could be used by the defendant to make up any deficiency. This would be impossible, as the contract was that the plant must during this period be run to its full capacity, for the benefit of plaintiff, and it was entitled to all that could be made. If this be so,—that when the deliveries were suspended the deficiency could not be made up,—then the causes mentioned in the strike clause prevented the output of 20,000 tons within the period limited. This clause certainly excused the nondelivery in the weekly installments. The failure to deliver these weekly installments prevented the delivery of 20,000 tons in the time specified. Nothing is said in the contract of any delivery after 31st December. On the contrary, the contract applies only to the output between January and December 31st. Suppose that coke had fallen in price, and that, when 31st December came, by reason of the causes in the strike clause there was still 6,000 tons to be made to make up 20,000 tons; could the defendant compel plaintiff to take these 6,000 tons at the contract price, greatly above the market price? It cannot be said that plaintiff

could protect itself by canceling the contract. This cancellation must be during the continuance of the suspension. It appears, then, that the defendant contracted to deliver in weekly installments all the coke its plant could make, running full, between January and 31st December, 1899, guarantying that it would deliver at least 20,000 tons. The strike clause justified the suspension of the weekly deliveries. The deficit of such suspension could not be made up out of the subsequent output, because the plaintiff was entitled to all that could be made. Therefore the cause mentioned in the strike clause prevented the delivery of 20,000 tons, and excused its non-delivery. And as the contract applied only to the output up to 31st December, the deficiency could not be supplied by any output after that time.

For these reasons, I concur in the opinion of the court.

KALAMAZOO RY. SUPPLY CO. v. DUFF MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1902.)

No. 978.

1. APPEAL—SUFFICIENCY OF RECORD—RULINGS ON ADMISSION OF EVIDENCE.

Under the rules of practice of the supreme court and of the circuit courts of appeal, a ruling on the admission or rejection of evidence is not reviewable either on a writ of error or on appeal in equity, unless the record discloses the ruling made, and the taking of an exception thereto, and there is a specific assignment of error on that ground.

2. PATENTS—EVIDENCE OF INVENTION—PRACTICAL SUCCESS OF DEVICE.

Where the question of invention or patentable novelty is fairly open to doubt, the practical success of the device, with the fact that it displaced similar devices in previous use, is sufficient to turn the scale in favor of invention and sustain the patent.

3. SAME—VALIDITY AND INFRINGEMENT—LIFTING JACKS.

The Barrett patent, No. 312,316, for a lifting jack, claim 3, describes an improvement over previous structures, which, while narrow, shows merit, and, in view of its practical success, must be conceded invention and novelty. Also *held* infringed.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

This was a bill by the Duff Manufacturing Company against the Kalamazoo Railway Supply Company for an injunction and for an account and recovery of damages for the alleged infringement of letters patent No. 312-316, issued February 17, 1885, to Josiah Barrett. Claim 3 is the one specifically alleged to have been infringed by the defendant, and is as follows: "(3) In a lifting jack, a lever having its inner end composed of a stem provided with curved seats, and of side plates having openings in line with such seats, in combination with pawls 22 and 23, having their pivotal shafts formed integral with their lower ends, said shafts being constructed to fit in the openings in the side plates and in the seats in the stem, and having a firm bearing therein, substantially as set forth." The defenses relied on are: First, invalidity of the patent; and, second, noninfringement. Upon final hearing upon the pleadings and proofs the case resulted in a decree in favor of the plaintiff, adjudging that the patent was valid, and finding that claim 3 was infringed by the defendant, and the case is brought here on appeal for review.

See 100 Fed. 357.

Fred. L. Chappell, for appellant.
James I. Kay, for appellee.

Before LURTON and DAY, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after making the foregoing statement, delivered the opinion of the court.

Two points of advantage are insisted upon in the improvement covered by claim 3 as involving invention as distinguished from mere mechanical improvement, such as would be apparent to any one skilled in the art. The advantages are described by one of the machinists, introduced as a witness as being:

"The great strength and durability of the jack, the construction giving an extra length of bearing or wearing surface, and great strength between the pawl body and its shaft. The strength in the support for the pawl was obtained by the seating of this shaft for its full length in the handle, the pawl shaft being supported in a curved seat for the full width of the pawl, and, in addition to that, in the same seat extending into the bearings or side plates, which held the pawl into the seat."

With reference to this asserted improvement over anything found in the prior state of the art, the learned judge, presiding in the circuit court, said:

"The idea of a lever with its inner end composed of a stem with a curved seat presents no novelty, but this patent presents the first instance called to the attention of the court in which this seat is extended and the long bearing obtained by lengthening the pawl shafts so that they extend into the side plates. The play of the pawls in the complainant's device is not restricted. The pawls are held firmly in place, and the seat is extended by means of the side plates the full length of the bearings and pawls. This result had been sought, but not attained, before the issue of the patent to Barrett, and the proof shows that the lifting jack made after this patent practically displaced all previous jacks. In the Ostot patent there is no 'stem provided with curved seats and side plates having openings in line with such seats,' nor pawls 'having their pivotal shafts formed integral with their lower ends,' said shafts being constructed to fit in the openings in the side plates and in the seats in the stem and have a firm bearing therein. * * * The McIntyre and other patents introduced do not anticipate the third claim of complainant's patent, and, although the step from the previous devices was a short one, it was the all-important step, and shows more than mechanical skill which had been expended on the previous long line of lifting jacks displayed in the patent office. I find the complainant's patent valid."

And the circuit court disposed of the question of infringement by saying:

"The defendant's jack is a copy of the complainant's, except that the stem is split in the center, and then riveted together, and it has only one separable side plate instead of two; but everything contained in the third claim of complainant's patent is found in the defendant's jack, and the imitation has not even sought to be disguised."

The peculiar advantages in the handle and pawl construction in suit and relied on in the argument at bar were said to be in that feature of the construction by which the pawl shafts were made integral with the pawls and extended beyond them, resting in the curved seats in the hand lever and within side plates, by which they are held securely in the curved seats, thereby providing for a full and free swing of the pawls, and a solid support of the pawl upon the hand lever

directly under the body of the pawl, this being of greater width than the pawl body, because the pawl shafts extend out into the bearings; the combination making a firm and durable connection, capable of sustaining the heavy loads, jolts, and strains to which lifting jacks are constantly subjected in practical use. Stated in another form: It is claimed that in practical operation, by means of the broad seat for the pawl shafts, which are formed integral with the pawls and extend into the side plates, the combination sustains great weight and strain, and avoids "shearing strain" by retaining the pawl in position, and thereby avoiding the danger of breaking by striking against the sides of the seats for the pawl shafts. The evidence does disclose that the operative machine made under the patent in practical use does sustain great weight, and the danger of accident from breaking down, whether from direct weight or "shearing strain," is prevented, or much diminished. As the general construction and practical use of this and other lifting jacks are well understood, a more particular statement of the case or description of this and other devices is not deemed necessary.

Certain questions were made on argument in this court in relation to rulings in the court below on the admission of parts of the evidence. The record does not disclose, however, what ruling was made in the court below, nor does it disclose that particular exception was taken and reserved, and there is no specific assignment of error on this ground. It is assumed that the practice in this court is similar to what is said to be the practice on appeal in the supreme court of the state of Michigan in equity cases, under which error in the admission or rejection of evidence may be relied on for reversal without any assignment of error, and without the record showing any specific ruling in the court below on which such error is assigned. But the supreme court of the United States as early as 1791 adopted the system of appellate procedure of the court of chancery in England as outlines for its practice on appeals in equity, and the practice and procedure on appeals in equity are the same as those of the English system, as changed and modified by the rules of the supreme court of the United States or by act of congress. And the system of procedure on appeal in the supreme court of the United States, with such rules as have been adopted by the circuit court of appeals, constitute the system of procedure in the circuit courts of appeals; those courts having, by rule, adopted the practice in the supreme court of the United States, so far as the same shall be applicable. Under rule 35 of the United States supreme court (11 Sup. Ct. iii.) and under rule 11 of the circuit court of appeals (31 C. C. A. cxlvi., 90 Fed. cxlvi.) regulating the practice in this court, when the error alleged is to the admission or rejection of evidence, there must not only be an assignment of error, but this assignment is required to quote the full substance of the evidence admitted or rejected. It is needless to add what is plainly evident, and expressly declared on the face of the rule, that it applies equally to a case brought to this court for review on appeal in equity or on writ of error at law. Moreover, rule 13 of the supreme court of the United States (3 Sup. Ct. x.) declares that:

"In all cases in equity or admiralty heard in this court no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record, but the same shall otherwise be deemed to have been admitted by consent."

And this rule has been expressly adopted in rule 12 of the circuit courts of appeals (31 C. C. A. clii., 90 Fed. clii.), under which it has been decided that an objection made for the first time on appeal to the admissibility of any exhibit is unavailing. *Sugar Refining Co. v. Funch*, 20 C. C. A. 61, 73 Fed. 844. The purpose of these rules, and their bearing and effect on the practice in this court, are quite evident. As the record discloses no exception or ruling in the court below, and there is no assignment of error in this court, the questions suggested are not open to consideration on this appeal. *Randolph v. Allen*, 19 C. C. A. 353, 73 Fed. 23; *Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York*, 11 C. C. A. 96, 63 Fed. 48; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246.

With reference to the question of infringement we need only say that we concur in the view that the lifting jack made by the defendant is for every substantial purpose a mere copy of the complainant's structure. Practically speaking, it is quite evident that the stem is simply split in the center, the parts separately made, and then united by being firmly riveted together, and that the parts thus united effect the same result, and in substantially the same way. An infringement by the defendant is not thereby escaped. *Bundy Mfg. Co. v. Detroit Time-Register Co.*, 36 C. C. A. 375, 94 Fed. 524; *Sessions v. Gould* (C. C.) 49 Fed. 855. The fact of infringement is too plainly evident to admit of extended discussion or treatment, and this issue may be dismissed with the statement that infringement is quite clear upon the record.

In regard to the question of validity it is evident that the patent described in claim 3 is a very narrow one in view of the prior art, and must be so construed, and that the issue is close. In practical use it is obviously true and necessary that a lifting jack be constantly subjected to the strain of great weight and to the force of heavy jolts. It is of primary importance, therefore, that a lifting machine or device, such as the jack in question, should be so devised and constructed as to sustain much strain from weight and jolting. Inspection of the complainant's structure made in accordance with claim 3 will disclose that the lever with its inner end composed of the stem provided with curved seats and with the side plates into which the shaft of the pawls extend with a firm bearing in the openings in these side plates and in the seats in the stems is well adapted to enable the shaft to sustain, in practical use, the strain made necessary in heavy work. Furthermore, in considering the question of patentable novelty the fact that the complainant's device was at once successful, and that, to a large extent, it practically displaced all lifting jacks in previous use, must be regarded as a circumstance of decided significance. Such circumstance clearly discloses the meritoriousness of the device or invention. And it is well set-

tled that, when the question of patentable novelty is fairly open to doubt, the practical success of the device, with the fact that it displaced similar devices in previous use, is sufficient to turn the scale in favor of the invention, and to sustain it. *Smith v. Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Magowan v. Packing Co.*, 141 U. S. 333, 12 Sup. Ct. 71, 35 L. Ed. 781. In the case of *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 45 C. C. A. 554, 106 Fed. 693, Judge Sanborn, in speaking for the circuit court of appeals, said:

"The patent itself is *prima facie* evidence of the novelty of his combination, and, if that issue was doubtful, this presumption would entitle it to a construction which would sustain, in preference to one which would destroy, the grant it evidences. In five years after Hein disclosed his invention and obtained his patent, his brake beam was in use on 85 per cent. of the railroads controlling 85 per cent. of the cars using iron brake beams in this country, and in eleven years from the date of his patent more than 1,000,000 of his brake beams had been made and sold. It is true that the extensive use of a machine or combination which is clearly without novelty does not dispense with that statutory requirement, and that it will not alone sustain a patent. But, where the question of novelty is fairly open for consideration under the law, the fact that a patented device or combination has displaced others which had previously been used to perform its function, and has gone into immediate and general use, is pregnant and persuasive evidence that it involves invention."

Numerous cases are cited as supporting this statement of the law. In the case of *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* it was declared that an old result obtained in a more facile, economical, and efficient way may be protected by patent as securely as a new machine or composition of matter. This was going further than we need go in the case at bar. In *Hallock v. Davison* (C. C.) 107 Fed. 482, it was said, in effect, that the presumption in favor of the validity of a patent arising from its issuance is much re-enforced by the fact that the patented machine was the first of its class to accomplish successfully the purposes intended, and that it had been admittedly copied by the defendant. "It is often difficult," said Judge Coxe, "to draw the line between invention and mechanical skill; but when the court has to deal with a machine which, for the first time, has achieved success after a long line of failures, which accomplishes results never attained before, which is new and useful and in large demand, it is generally safe to assert that the man who made it is an inventor, and not a mere mechanic." The proposition that courts incline to sustain a patent to the man who takes the final step which turns failure into success was distinctly and emphatically recognized in the case of *The Barbed Wire Patent* 143 U. S. 275, 12 Sup. Ct. 450, 36 L. Ed. 161. "Under such circumstances," said Mr. Justice Brown, giving the opinion of the court, "courts have not been reluctant to sustain a patent to a man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins." So, in *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, in view of the extensive use made of the invention, which was for an improvement in connected carriage springs, the invention was held patentable and valid, although the question was regarded as by no means free from doubt. In *Krem-*

entz v. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558, the supreme court expressly approved the case of the Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co. (C. C.) 47 Fed. 894, in which Mr. Justice Brown had said:

"When the other facts in the case leave the question of invention in doubt, the fact that the device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, is sufficient to turn the scale in favor of the existence of invention."

And in the still later case of Manufacturing Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103, Mr. Justice Shiras, speaking for the court, said:

"It must be admitted that both of these patents granted to Augustus Adams, one in 1861, the other in 1866, describe mechanical contrivances closely resembling the invention in question, patented by H. A. Adams, October 15, 1872. There is present in all three machines a rotating shaft with spurs or wings, and the purpose sought to be effected is the same. But, as we have seen, when the test of practical success is applied, the conclusion is favorable to the last patent. Where the patented invention consists of an improvement of machines previously existing, it is not always easy to point out what it is that distinguishes a new and successful machine from an old and ineffectual one. But when, in a class of machines so widely used as those in question, it is made to appear that at last, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when the patent office has granted a patent to the successful inventor, the courts should not be ready to adopt a narrow or astute construction, fatal to the grant."

It is manifestly just to a patient and meritorious inventor that the court should be careful not to regard with too much importance the mere mechanical resemblance in the parts of the combination, or the combination as a whole, to the neglect of the result, and the success and efficiency with which the object aimed at is accomplished.

Upon the whole case, after examination of prior inventions and patents, we conclude that the structure described in claim 3 of the complainant's patent was not present in the prior patents relied on as anticipating, and that, practically, the desirable result accomplished by the complainant's patent and the method in which this is done are wanting in the earlier inventions of this class. While, as stated, the patent is a narrow one, we think it is valid and sustainable, and the decree of the court below is accordingly affirmed.

ERIE R. CO. v. MOORE.

(Circuit Court of Appeals, Sixth Circuit. February 10, 1902.)

No. 900.

1. RAILROADS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BRAKEMAN—TRACK—EVIDENCE.

Plaintiff was a brakeman. As his train approached a side track which it was to take to enable another train to pass, he, in the line of his duty, was to go forward to throw the switch. There had been a runaway at the side of the track on which brakemen were accustomed to travel, and when plaintiff saw it the summer before it and the track were in good condition. Shortly before the injury the track had been raised, and the ballast between the ties had not been replaced, but the spaces were

filled with snow. The runway was covered with piles of slag, and was very difficult to walk on. The engineer wanted to make the side track without stopping the train. When the train had slowed down to one or two miles an hour, plaintiff alighted from the pilot, and ran forward to open the switch. His foot slipped between the ties, where he was held fast, and he was run over and injured by the engine. *Held*, that the questions of defendant's negligence and of plaintiff's contributory negligence were for the jury.

2. SAME—SURROUNDING CIRCUMSTANCES—EVIDENCE.

Where a brakeman, while running on the ties in front of a moving train, the runway at the side of the track being blocked, to open a switch, fell, and was injured, testimony that the engineer told him to hurry up, and get off the front end of the engine, and get the switch over as soon as possible, so they could get in out of the way of another train without stopping, was competent as a circumstance showing the situation under which the brakeman was acting, though the engineer did not have authority to control the brakeman as his superior, within the terms of the Ohio statute.

On Rehearing.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This case was heard at the October term, 1900, and is reported in 46 C. C. A. 683, 108 Fed. 986. Upon that hearing we reached the conclusion that the court did not err in submitting the case to the jury upon the question of the negligence of the railroad company and upon the alleged contributory negligence of the defendant in error. The rehearing was granted upon the questions raised as to the admissibility of certain testimony. In view of the importance of the case, however, we have re-examined the record, and have again considered the case as developed by the testimony. We see no reason to change the conclusion previously reached that the case was one to be submitted to the jury, and that the charge of the trial judge was not open to objection by the plaintiff in error. The testimony tended to show that the defendant in error was a brakeman in the employ of the railroad company; that upon the day of his injury he was upon the front part of the train, which was proceeding westwardly from Youngstown to Kent on the line of the railroad of the plaintiff in error; that upon nearing Freedom station the train was to go upon a side track to permit the passing of an eastwardly bound train. The defendant in error, being the front brakeman, in the line of his duty, went forward for the purpose of throwing the switch. Approaching this switch, upon the northerly side of the track, there had been a runway upon which brakemen had been accustomed to travel. The summer before the injury, which occurred in December, the defendant in error had seen this runway, and it, as well as the track, was then in good condition. Shortly before the happening of the injury the track had been raised, and the ballast between the ties was not replaced. The runway, which sloped off at the point of the accident, was, for a considerable distance, covered with piles of slag, rendering it very difficult to travel upon. There was snow upon the ground at the time, which filled up the spaces between the ties. Standing upon the step of the pilot of the engine, the defendant in error observed this condition,

and when the engine had slackened to a very slow rate of speed—barely moving, as some of the witnesses say; going one to two miles an hour, as others say—alighted from the pilot, and stepped upon the ties in front of the engine, took three or four steps forward, when his foot slipped between the ties, where he was held fast, and run over by the engine, suffering the loss of the lower part of both legs. In view of this state of the case and the guarded charge of the court, we think now, as we did upon the former hearing, that it was not error to submit to the jury the question of the negligence of the railroad company in failing to provide a reasonably safe place for the defendant in error to work, as well also the alleged negligence of the defendant in error in stepping upon the track in front of an engine in view of the situation, and the fact that the testimony tended to show that the engine was running very slowly.

Upon the rehearing the question principally argued was as to the admission of certain testimony. The plaintiff, being on the stand in his own behalf, was permitted to answer the question as to what he did immediately before the accident:

"Q. What, if anything, did he [the engineer] say to you about making the switch? A. He told me to hurry up, and go out in front of the engine, and get off the front end of the engine, and get the switch over as soon as possible, so we could get in out of the way of No. 4 without stopping."

The weight to be given this testimony is carefully limited by the trial judge in his instructions to the jury. The judge said:

"The engineer had no right to direct him to do an obviously dangerous thing, and the engineer's direction would not justify him in doing an obviously dangerous thing. Nothing can justify that, unless, possibly, an emergency such as would justify a conductor in undertaking to save the lives of his passengers. But if he said he was in a hurry, that is simply a circumstance constituting part of the situation in the light of which you will look at this question. So that when you have taken all the circumstances just as they were, if you think he exercised that care and caution that ought to have been exercised and ought to be expected of a reasonably prudent man in just that situation, then he would not be guilty of negligence, and if he did not do that he would be; and, if he is guilty of it, it defeats his suit."

The trial judge was of the opinion that the engineer was not in authority over the brakeman in such wise that he would be a superior for whose negligence the railroad company could be held responsible under the Ohio statutes, and the testimony was admitted for the sole purpose of throwing light upon the alleged contributory negligence of the defendant in error. For this purpose, we think, it was competent. Negligence consists in the doing of that which a man of ordinary prudence, under the same or similar circumstances, would not do, or in not doing that which ordinary prudence requires in the same or similar circumstances. In order to judge of the conduct of an individual under given conditions, and to determine whether the same is or is not negligence, it is necessary that the trier should be advised of the very situation in which the person charged with negligence is placed at the time; for it is in the light of such circumstances that his conduct must be judged. The question of contributory negligence is usually one of fact, and only becomes one of law when the circumstances are such that fair-minded men

can draw no other inference than that of negligence from the conduct in question. There is no exact standard of conduct which will determine whether one is guilty of negligence, applicable to all cases. It is of the highest importance that the conduct of one charged with negligence shall be viewed in the light of the situation in which he is placed at the time. In this case it appears that the engineer who made this statement to the brakeman, although he may not have been a superior servant for whose conduct the company would be responsible under the Ohio law, nevertheless was clothed with authority to direct the front brakeman to turn the switch, to tell him when he wished this to be done, and upon receiving such directions it was the duty of the brakeman to go forward for that purpose. It is true that no such direction would justify the brakeman in exposing himself to certain injury or self-evident danger in the discharge of his duties. It was a circumstance, however, which, with others, was entitled to weight in enabling the jury to determine whether the defendant in error, in choosing to go upon the track in front of the locomotive was guilty of negligence or not. The condition of the runway, the apparent smoothness of the track, the slow rate of speed at which the engine was moving, the order of the engineer to act promptly in throwing the switch that the train might go upon the side track out of the way of the coming train, were all pertinent circumstances to enable the jury to determine the situation, and the conditions under which the defendant in error acted at the time of his injury. The charge of the judge carefully limited the admission of this testimony to this purpose. It was not admitted as a ground of recovery against the railroad company, but solely for the purpose of aiding the jury in determining the question of contributory negligence on the part of the defendant in error. In *Railroad Co. v. Herrick*, 49 Ohio St. 25, 29 N. E. 1052, the supreme court of Ohio held it competent to show that one who was charged with contributory negligence in crossing a railroad track to take a train upon another track of the company had been informed by a messenger not connected with the railroad company that the train which was expected upon the track which he was crossing was late. This testimony was admitted, not to show negligence on the part of the railroad company, but for the purpose of enabling the jury to weigh the conduct of the plaintiff in the light of the circumstances which surrounded him at the time. Limited as it was by the charge of the judge, we think the statement of the engineer was competent.

It is said that this conclusion is in direct opposition to two cases decided in the supreme court of the United States: *Railroad Co. v. Jones*, 95 U. S., 439, 24 L. Ed. 506, and *Coyne v. Railroad Co.*, 133 U. S., 372, 10 Sup. Ct. 382, 33 L. Ed. 651. In the former of these cases the plaintiff, who was a laborer on a work train, returning from work in the evening, rode upon the pilot of the engine, and while there was injured by some cars standing in a tunnel. He tried to excuse his alleged negligence in riding in such a place by showing that the foreman directed him to "jump on anywhere; that they were behind time, and must hurry." The supreme court held that such direction was no excuse for the plaintiff in getting on the pilot

of the engine when there was ample room for him in the car, and that he needlessly exposed himself to the injury which was due to his own carelessness and folly. In the Coyne Case the action was brought to recover for the alleged negligence of one McDonald, a boss, under whose directions the plaintiff, with others, was engaged in lifting rails to a flat car. McDonald ordered the plaintiff and others to make haste, and they commenced to lift the rails, which they were accustomed to raise by concerted action upon the order of McDonald, but, hurried, and agitated by the curses of McDonald, they threw the rail at one end with great force, and at the other with less force, so that it struck the end of the car, and fell, injuring the plaintiff. The supreme court held that there was nothing in this connection to show the negligence of McDonald, but that the testimony rather tended to show the injury to have resulted to the plaintiff because of the failure of himself and fellow servants to wait for the command and lift together. In the case of Railroad Co. v. Ege-land, 163 U. S. 93, 16 Sup. Ct. 975, 41 L. Ed. 82, Mr. Justice Peckham states the reasons upon which the case of Railroad Co. v. Jones, *supra*, was decided, and also holds in the case then under consideration that it was competent to show that a laborer who had jumped from a moving train, receiving injuries, had been ordered so to do by the foreman in charge, and that this direction was competent to be considered by the jury in determining whether the plaintiff had been guilty of negligence contributing to the injury. It is true that the direction to jump in that case was given by one in authority over the plaintiff. In the case at bar there was testimony tending to show such relation between the engineer and the brakeman that it seems to us competent to permit the jury to consider this statement as a circumstance in determining the alleged contributory negligence of the plaintiff.

We find no error in the record to the prejudice of the plaintiff in error, and the judgment will be affirmed.

TELLER V. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 30, 1901.)

No. 1,537.

1. PUBLIC LANDS—TIMBER—CUTTING—INTENT—MISDEMEANOR—CHARGE.

Under Rev. St. 1878, § 2461, 20 Stat. 89, and 27 Stat. 348, making it a misdemeanor for any person to cut timber on any lands of the United States situate in any of the public-land states with intent to export or dispose of the same, where the cutting is admitted, the only intent necessary to show is the intent to export or dispose of the timber.

2. SAME—EVIDENCE—PURCHASE OF OTHER LANDS.

On the trial of one accused of unlawfully cutting timber on land of the United States, evidence that about the time of the cutting defendant purchased and paid for the full quantity of similar land, which he could purchase under the act of June 3, 1878, is inadmissible to show that he would not intentionally commit a trespass.

3. SAME—VIOLATION OF LAW—CUSTOM.

On the trial of one accused of unlawfully cutting timber on land of the United States, evidence of a custom in that locality, known to the general land office, of entering on land and cutting the timber therefrom before patent was obtained, is inadmissible, since a custom to violate the law cannot justify itself.

4. SAME—HONEST INTENT.

Where defendant unlawfully cut timber on public land, the fact that he acted in accordance with a general custom in that locality is not evidence of an honest intent on his part.

5. SAME.

Where defendant unlawfully cut timber on public land, the fact that before cutting he endeavored to ascertain whether the land was surveyed, and also notified a special agent of the government that he was cutting the timber, and was not warned off for three weeks, is not evidence of an honest intent.

6. SAME—CHARGE.

On the trial of defendant for unlawfully cutting timber on public land, the court charged that, in order to convict, the jury must find that there existed in his mind a willful and wrongful purpose to obtain the timber in violation of law; and that if he entered on public land knowing it was such, without having complied with the provisions of law giving him a right to do so, and cut timber therefrom, they would be authorized to find the requisite criminal intent. *Held*, that such charge fairly stated the law, and was as favorable to defendant as he was entitled to.

7. SAME—EVIDENCE—INTENT.

Where defendant admits that he had cut timber on 300 acres of unsurveyed government land, to which he had no claim or color of title, and there is evidence that he was informed by the register of the land office that he could not acquire title because the lands were not open to entry, and that he promised his workmen that he would stand between them and the government, and that he had fully exhausted all his privileges of purchasing such lands, the intent constituting the offense of unlawfully cutting timber on government land, defined by Rev. St. § 2461, and Act June 3, 1878, is sufficiently shown.

8. SAME—APPLICATION TO PURCHASE—RIGHT TO CUT TIMBER BEFORE PATENT—LICENSE TO CUT.

An occupant of a mineral claim, who has applied for a patent before the purchase price is paid and before he receives a certificate, has no right to cut the timber on such claim with intent to export or remove the same, and a license from him to so cut the timber gives no protection to the licensee as against the government.

9. SAME—MINERAL CLAIM—SEPARATION FROM PUBLIC DOMAIN.

The exclusive right to occupy and work a mineral claim, given to the locator by the mining laws during his occupancy, does not segregate such claim from the public domain, so as to exclude such land from the operation of Rev. St. § 2461, 20 Stat. 89, and 27 Stat. 348, making it a misdemeanor for any person to cut timber on the public lands.

In Error to the District Court of the United States for the District of Wyoming.

Willard Teller (Clayton C. Dorsey, on the brief), for plaintiff in error.

Timothy F. Burke, for the United States.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge. On November 25, 1899, a criminal information was filed in the district court of the United States for the district of Wyoming against John C. Teller, the plaintiff in error, charging him with having, between January and September of the year 1898, willfully and unlawfully cut and procured to be cut 150,000 feet of timber growing on the public lands of the United States in said district, with intent to export and dispose of the same. In due course a trial was had, the defendant found guilty, and sentenced to pay a fine of \$1,000.

The statutes under which this information was lodged—Rev. St. 1878, § 2461; Act June 3, 1878 (20 Stat. 80); and Act Aug. 4, 1892 (27 Stat. 348)—make it a misdemeanor for any person to cut or procure to be cut timber growing on any lands of the United States situate in any of the "public-land States" with intent to export or dispose of the same. The defendant is accused of cutting timber from two certain tracts of public land in Carbon county, Wyo., one located on Cottonwood creek, and supposed to have been land subject to entry and sale under the act of June 3, 1878, commonly known as the "Stone and Timber Act," and the other being a certain mining claim known as the "Montezuma Placer." The record shows that an admission was made by the defendant at the trial "that he cut timber on 300 acres of unsurveyed government land to which he had no claim or color of title." This admission relates to the cutting on the first-mentioned tract, located on Cottonwood creek. The trial court charged the jury that, before they could convict the defendant, they must find that there existed in his mind "a willfull and wrongful purpose to obtain the timber in violation of the law"; and also that, "if the defendant entered upon the lands of the United States, knowing the same to be a part of the public domain of the United States, and without complying with the requirements of the statute, or attempting to do so, cut, or caused to be cut, timber growing thereon, you will be authorized to find that such cutting was willfull and intentional, and if you do so find the defendant would be guilty, and you should say so in your verdict." In other words, the trial court practically instructed the jury that the intentional cutting of timber found growing on lands known by the person cutting the same to be a part of the public domain constituted a misdemeanor denounced by law. The defendant takes issue with this declaration, and contends that the jury should have been told that there must have been an actual evil or criminal intent, or bad purpose, amounting to moral culpability, in order to convict, and that the court erred in excluding evidence tending to show that the defendant, although cutting timber from lands known by him to have been public lands, cut the same with an honest purpose. The particular facts offered to be proved and relied on by defendant to establish such honest purpose with respect to the cutting from the first-mentioned land are as follows: In June, 1898, the defendant entered 160 acres, and four other persons each entered 160 acres of the same character of lands lying in the near vicinity to those upon Cottonwood creek now in question, for which defendant paid to the United States the price required by the stone and timber

act, namely, \$2.50 per acre, or a total of \$2,400. Defendant's counsel contend that such purchase by him of similar lands and payment therefor at about the same time as is laid in the information is a circumstance which ought to have gone to the jury as evidence that he would not intentionally commit a trespass for the sake of obtaining timber of the same character a short distance away. We entirely fail to appreciate the force of this contention. The act of June 3, 1878, *supra*, provides in express terms that the timber lands therein contemplated may be sold to citizens "in quantities not exceeding 160 acres to any one person or association of persons." Defendant had already purchased his full limit of 160 acres, if, indeed, he had not indirectly secured the four other quarter sections above referred to; and, conceding that he had paid for that land, it cannot be that such fact would have any tendency to show that he had an honest purpose in trying to appropriate other lands. He had exhausted his right already, and he knew it, and such evidence, in our opinion, would tend to impugn the motive of defendant in trying to secure other forbidden lands, rather than palliate his conduct in so doing.

It is next urged that the court erred in excluding evidence of a custom prevailing in the vicinity where the offense was committed of entering upon land and immediately proceeding to cut timber therefrom before patent was obtained, and while proceedings to secure the same were pending, and that the custom was known to the general land office. This evidence of custom was offered in connection with an avowal by the defendant of his intention at the time he commenced cutting timber on the tract in question to purchase the same afterwards from the government. We entirely agree with the trial court that this evidence was incompetent. A general custom to violate the law cannot, on any principles of morality or law, justify itself. Neither can it justify an individual instance of violation of the law. Neither can knowledge of such violation by an agent of the United States excuse or justify it. If it were otherwise, then the register of the land office at Cheyenne, or any other agent of the government, and certainly the commissioner of the general land office at Washington, could annul any act of congress at pleasure. But it may be said these observations do not meet the argument that such custom, known to defendant, and acted upon by him, is evidence of an honest intent and purpose on his part in doing that which was customary. Every person is supposed and must be held to know the law. Any laxity in enforcing this axiomatic and fundamental rule would lead to endless disorder and crime. Teller, therefore, knew, or must be held to have known, that any such custom as is claimed in his behalf was an unlawful custom, amounting in and of itself to a violation of law, and it must also be held, in the light of the facts disclosed by this record, that any such custom, if lawful and competent in other cases, could not be of any avail to him, because, as just seen, he had already exhausted his full privilege of purchasing timber land under the act of 1878, and could not directly, in the manner prescribed by congress, or in any other manner, lawfully acquire any more. If

he could not do it directly or lawfully, it is impossible for us to conceive how he can shelter himself under a general custom, and thereby justify himself in the attempt to accomplish the same purpose indirectly and unlawfully.

In the case of *U. S. v. Mock*, 149 U. S. 273, 13 Sup. Ct. 848, 37 L. Ed. 732, the supreme court considered a case of trespass for cutting and carrying away timber from public lands. The trial court had charged the jury as follows:

"It is a matter of history that the government permitted the early pioneers, as they went ahead to make their homes for themselves, to go on the public domain, and take such timber as was necessary for domestic use; and, although there never was any law or license to that effect, it was done with knowledge of every department of the government, legislative, judicial, and executive. * * * While I wish you to understand that I am not aware of any license having ever been given in the last sixty years to any party to go on the public domain and cut timber, no court has ever held, and no court would be justified in holding, that these men were all criminals who went on and put up a little mill for the purpose of aiding their neighbors in procuring lumber for domestic purposes."

The court, speaking by Mr. Justice Brewer, commenting on the foregoing observations of the trial court, says:

"The specific portions [of the charge] to which the attention of the court was called at the time and exceptions taken are that which refers to the history of the attitude of the government towards pioneers and others who took timber from government lands for domestic use, and that which declared that no verdict could be returned in favor of the government except for the value of the lumber manufactured. In these there was obvious error. * * * Nor were the observations of the court in reference to the attitude of the government justifiable. Whatever propriety there might be in such a reference in a case in which it appeared that the defendant had simply cut timber for his own use, or the improvement on his own land, or development of his own mine (and in respect to that matter, as it is not before us, we express no opinion), there certainly was none in suggesting that the attitude of the government upheld or countenanced a party going into the business of cutting and carrying off timber from government land, manufacturing it into lumber, and selling it for profit."

The principles enunciated in that case are, in our opinion, irreconcilable with the claims of defendant's counsel in this case.

The defendant contends that the facts shown by the record that he endeavored, prior to cutting any timber on the land in question, to ascertain whether the land had been surveyed; that while at work cutting the timber he notified one Abbott, a special agent of the government, that he was so doing; that he received no notice to quit for three weeks thereafter,—constitute evidence of an honest purpose on his part, and should have been submitted to the jury on that issue. The principles hereinbefore discussed are, we think, entirely applicable to this last contention. The land was unquestionably unsurveyed public land, and, if defendant had prosecuted his alleged honest purpose far enough, he would have ascertained that fact. But whether he knew or could have known that it was unsurveyed public land was immaterial. All that he was required to know was that it was public land, surveyed or unsurveyed, and, if he knew that,—which unquestionably he did,—the fact that he endeavored to find out whether it was surveyed or not was quite immaterial; and certainly the toleration of a trespass for three

weeks—or for any time, for that matter—by a special agent of the government, whose duty it was not to tolerate it at all, can be of no avail to a trespasser by way of showing that his trespassing was done with an honest purpose.

So far we have treated the several contentions of defendant's counsel as if it was competent for him to disprove an actual bad purpose or evil intent; in other words, as if it was incumbent on the government to show a bad purpose or evil motive in the mind of the defendant in committing the trespass complained of. We have considered the excluded testimony on that theory (and even on that theory we have been unable to find any substantial error in the rulings of the court), but in so doing we have given the defendant the benefit of a position which, in our opinion, is unwarranted by the law. For the purpose of protecting the public domain from the invasion of trespassers, congress denounced as a crime the cutting of timber on public land "with the intent to export and dispose of the same." This is the intent that is made criminal by the law, and the only intent necessary to establish the crime in a given case. This intent is fully admitted in the present case. It is undisputed that the defendant cut the timber in question for the purpose of fulfilling a contract with the receivers of the Union Pacific Railroad Company for the delivery of 250,000 ties at Ft. Steele. It has been held by the supreme court in *Stone v. U. S.*, 167 U. S. 188, 17 Sup. Ct. 778, 42 L. Ed. 127, that it is necessary in prosecutions under the statute now in question to prove a criminal intent, "or at least that [defendant] knew the timber to be the property of the United States." The elements of the offense charged against the defendant are three in number: (1) Cutting timber; (2) from land known to be public land; and (3) with intent to export or dispose of the same. These three elements concurring, the crime, in our opinion, is complete, and the jury would be fully justified in finding—and, indeed, it would be their duty to find—all the criminal intent required by the act.

The trial court charged the jury that, in order to convict, they must find that there existed in the mind of the defendant a "willful and wrongful purpose to obtain the timber in violation of the law." Taken by itself, this portion of the charge would have been misleading; but, taken in connection with other portions of the charge, to the effect that, if the defendant entered upon public land knowing it was such, without having complied with the provisions of the law giving him a right to do so, and cut timber therefrom, the jury would be authorized therefrom to find the requisite criminal intent, it fairly stated the law to the jury, and certainly as favorable to the defendant as he was entitled. The admission of the defendant at the trial that he had cut timber on 300 acres of unsurveyed government land to which he had no claim or color of title; the evidence of E. M. Johnston, register of the land office at Cheyenne, that he had informed the defendant, prior to his cutting the timber, that he could not acquire title to the lands, because they were not open to entry; the testimony tending to show that defendant promised his workmen, when they called his attention to the fact that the

lands were public lands, to stand between them and the government; and the further important fact that defendant had fully exhausted all his privileges of purchasing land under the stone and timber act,—all conduce to show, and, in our opinion, satisfactorily show, that defendant well knew the land was public land, and had all the criminal intent required by section 2461, Rev. St., and the act of June 3, 1878, to constitute the offense there denounced. In our opinion, none of the facts relied upon by him as evidence of an innocent intent or purpose were relevant or material to the case.

The next assignments of error relate to the cutting of timber by the defendant on the Montezuma placer claim, and arise on the following state of facts: One Mullison had been in possession of the Montezuma placer claim, working the same for the precious metals therein, for about 30 years prior to 1898, but he had never applied for a patent, or taken steps to acquire title from the United States prior to that day. In October of that year Mullison and the defendant entered into a contract by which it was agreed that defendant, in consideration of being permitted to cut all the tie timber growing thereon, should pay all the expenses, including the government price of \$2.50 per acre, for securing a patent by Mullison to his claim. Pursuant to this agreement, Mullison, early in January, 1898, applied for a patent, and between that day and June 22, 1898, defendant proceeded to cut and did cut over about 300 acres of the claim, and advanced money amounting to about \$2,000 for the payment of the expenses and purchase price of the land from the United States. On June 22, 1898, the payment was made, and Mullison secured a receiver's receipt for the same, entitling him in due course to a patent for the lands. The contention of defendant's counsel, based on several assignments of error relating to the exclusion of evidence and the court's charge, to which particular reference need not now be made, is that his cutting timber from this land after the application for a patent was made, and before the money was paid and a receiver's certificate secured, does not constitute an offense under the statutes of the United States. His proposition is that the ultimate payment of the money and securing the receiver's receipt conferred upon Mullison a title to the land, which, by relation, operated as of the date of the application, and in fact as of the time of his original location of the claim, and therefore that the cutting of timber at the time in question with the consent of Mullison constituted no violation of the laws of the United States. It may be conceded that the payment for the land conferred upon Mullison an equitable title to the same, which entitled him to a patent, and that he was not required to wait for the actual issue of a patent converting the equitable right into a legal title before exercising all the incidents of ownership. This, we think, is the law as established by the authorities (*Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 839; *Stark v. Starrs*, 6 Wall. 402, 417, 18 L. Ed. 925; *Deffebach v. Hawke*, 115 U. S. 392, 405, 6 Sup. Ct. 95, 29 L. Ed. 423; *Cornelius v. Kessel*, 128 U. S. 456, 460, 9 Sup. Ct. 122, 32 L. Ed. 482; *Railroad Co. v. Whitney*, 132 U. S. 357, 361, 10 Sup. Ct.

112, 33 L. Ed. 363; *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762; *Barndon v. Railroad Co.*, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; *Bogan v. Mortgage Co.*, 11 C. C. A. 128, 63 Fed. 192), and the contention of the government in this case to the contrary is not well founded. The foregoing cases are, however, no authority for the proposition that lands cease to be public lands, or that a claimant secures an equitable right to a patent, until all the acts are performed and all the money is paid by the claimant, which are made by the law prerequisite to securing the legal title. Mullison, it appears, had located upon and worked his claim for some 30 years prior to 1898, and had thereby, under the mining laws, secured the right of possession to work the claim for precious metals as long as he desired to exercise that right, and had also acquired the option to apply for, and, on certain terms prescribed by law, to secure from the United States a patent conferring upon him title in fee simple to the lands contained in the claim, with all its incidental rights, privileges, and immunities. It is strenuously argued by defendant's counsel that the possessory title acquired by Mullison by virtue of the location, record, and working of his claim for so long a time segregated the same from the public domain, and conferred upon him such an equitable right as entitled him or his licensees to all the rights and incidents of absolute ownership. We cannot agree to any such proposition. Three separate rights or titles are recognized by the supreme court in and to public lands. In *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, supra, the court quotes approvingly from an opinion of the secretary of the interior, as follows: "By the laws of the United States, three distinct classes of titles are created, namely: (1) Title in fee simple; (2) title by possession; (3) the complete equitable title." Title by possession is the first one in order of time acquired. Possession of a mining claim, in accordance with the provisions of the statute, by well-settled authority, confers the right, subject to certain limitations and conditions, upon a locator, to work the claim for precious metals for all time, if he desires to do so; but confers no right to take timber, or otherwise make use of the surface of the claim, except so far as it may be reasonably necessary in the legitimate operation of mining. The next right in order of time is the equitable one, already defined. The last one in the sequence is the perfect legal title in fee simple absolute, created by the issue of the patent by the United States. The claimant may be entirely satisfied with his possessory title, and be neither able nor willing to perform the further acts or pay the further consideration requisite to securing the equitable or legal title. For reasons of public policy, and for the purpose of encouraging the mining industry, the United States gratuitously grants the privilege to any citizen, or person having declared his intention to become a citizen, of locating a claim for mineral lands and working the same for precious metals; but it has not seen fit to give away the land containing the minerals, but, on the contrary, has adopted the policy of selling the same to the locator, if he desires to purchase, on terms fixed by the acts of congress.

Mullison's location, record, and working of his claim secured to him the possessory title only. While his location so far segregated and withdrew the land from the public domain that no rival claimant could successfully initiate any right to it until his location was avoided and his entry was canceled (*James v. Iron Co.*, 46 C. C. A. 476, 107 Fed. 597, 603, and cases there cited; *Hartman v. Warren*, 22 C. C. A. 30, 76 Fed. 157, 160; *Pacific Ry. Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122), it gave him nothing but "the right of present and exclusive possession" for the purpose of mining. It did not divest the legal title of the United States, or impair its right to protect the land and its product, by either civil or criminal proceedings, from trespass or waste. While for the purpose of subsequent entry and location by private parties the lands which Mullison claimed were segregated from the public domain and appropriated to a private purpose, they were so segregated for that purpose only, and the legal and equitable title to them still remained in the government and they were still "lands of the United States" within the meaning of section 2461, Rev. St., and the act of August 4, 1892 (27 Stat. 348), which are under consideration in this case. *Shiver v. U. S.*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231. The case of *Belk v. Meagher*, 104 U. S. 279, 283, 26 L. Ed. 735, 737, relied on by defendant's counsel, clearly recognizes the limited character of the right conferred upon a locator. The court there says (page 283, 104 U. S., page 737, 26 L. Ed.):

"The language of the act is that the locators 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time.' Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States."

The two titles recognized by the United States confer totally different rights. The first one confers a right (and it may properly enough be said to be vested in the locator) to the possession of the land for the purpose of carrying on his mining operations as long as he performs the required conditions. This, however, he may at any time abandon by ceasing to perform the conditions upon which it depends. The second is a complete and absolute title, which may or may not be acquired by the locator, and, if acquired, is for other and valuable considerations moving from him to the United States. This title is dependent upon no conditions, but confers all the rights incident to an indefeasible estate in fee simple. Considerations like the foregoing conclusively show that there is no warrant for the contention that the locator's right of possession segregates the land from the public domain, and appropriates it to a private purpose in any such way as to withdraw it from the effect of the provisions of the criminal statutes under which the defendant was convicted. After the locator shall have applied for a patent, in the event in the exercise of his option he sees fit to do so, and after he shall have fully perfected his entry upon the land by the

payment of the purchase price, and not till then, has the land ceased to be a part of the public domain, and not till then has he acquired any vested right to the absolute title. *Witherspoon v. Duncan*, supra. When such an entry is made, the land is not only withdrawn from the public domain, but the entryman has acquired an equitable title, and thereafter, and not till then, the United States holds the legal title in trust for him.

This brings us to a consideration of the effect to be given to the application for a patent made by Mullison on January 5, 1898, and to the perfection of his entry by payment of the purchase price on June 22, 1898. Between these dates the trespass charged against the defendant was committed. Counsel strenuously urge that Mullison's actual payment for the land on June 22, 1898, and securing the receiver's certificate of such payment, conferred title on him by relation certainly as of January 5, 1898, when he applied for the patent. The argument need not here be repeated, nor the authorities again referred to, showing that the payment for the land and securing the receiver's receipt therefor operated to create a perfect equitable title in Mullison. "The equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued." *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, supra. But does this title relate to or become effective as of any day prior to the actual payment of the purchase price in any such sense as to entitle the applicant for a patent, or any one acting under or by his authority, to enter upon the land in the meantime, and appropriate the timber to his or their own use? The application for a patent in and of itself imposes no obligation upon the applicant to pursue his purpose to secure a patent. It is only the first step to that end. He is afterwards required by the mining laws to perform certain other prerequisite duties, and particularly to make payment for the land and secure the receiver's receipt therefor. At any time prior to the actual payment it is within the power of the applicant to abandon his purpose. Can it be possible that congress intended to open the door to such depredation and fraud as would be feasible on defendant's theory? According to it, Mullison might have made a formal application for a patent, proceeded to sell and dispose of the timber growing on the land, impairing its value accordingly, and then, without penalty, have abandoned his entry, leaving the land wasted, and stripped of its timber, which might have been its chief value, for the government to hold without the probability of sale. Unless congress by clear and unambiguous expression of its will has left this door open, we will not open it. We not only fail to find any such expression of legislative intent, but authority and reason alike conduce to the contrary. In *U. S. v. Nelson*, 5 Sawy. 68, Fed. Cas. No. 15,864, a case much like the present was considered. A locator of a placer claim had taken all the steps entitling him to a patent for the land, except the final payment of the price fixed by law. Afterwards he cut timber therefrom, not incidental to a bona fide mining operation, but for the purpose of selling it as firewood. The

court held that this constituted an offense, within the meaning of section 2461, *supra*, and among other things said:

"The defendant in this case occupies the premises under this law, and claims the right to cut and remove the timber therefrom as incidental to and in aid of his right to mine thereon; but he is not the owner of the land until he pays for it and obtains the United States patent. It is a part of the public domain. In the meantime the defendant is occupying it under a mere license from the government, which may be revoked at any time by the repeal of the act giving it. * * * If the land, or the greater portion of it, is of little or no value as mining ground, but valuable for its timber, the defendant might occupy it for a few years until he had stripped the tract of its timber and worked out the few acres that really contained valuable deposits, and then abandon it to the government. * * * The temptation to locate 160 acres of timber land as mining ground, and by putting a few dollars worth of labor upon it annually, and thereby be enabled to dispose of the timber upon it at from \$50 to \$100 an acre is very great; and, if the defendant's construction of the law is to obtain, there is nothing to prevent its being done. * * * The removal of timber from a mining claim, to be justifiable, should proceed *pari passu* with the operation of mining. Whoever wants to go further or faster than this, and for any reason appropriate the timber to his own use in advance of his mining operations, can only do so safely by paying the purchase price of the land and becoming the owner thereof."

The views so expressed by the district judge in that case commend themselves to our reason, and, it appears, so commended themselves to the reason of the supreme court of the United States that that court cites it in support of its decision in the case of *Shiver v. U. S.*, *supra*.

The law relating to the acquisition of homesteads is so akin to that relating to the acquisition of mineral claims that the principles governing the rights of claimants while engaged in perfecting their titles are conceded by counsel in their argument to be similar. The homestead settler acquires no title until five years after his entry. During these years he must, among other things, reside upon the land entered, and cultivate the same. The performance of such acts, like the final payment by a claimant of mineral land, entitles him to a patent. In homestead cases the rule is well settled that the settler may cut during those five years only such timber as is reasonably incidental to cultivation, and cannot, under color of exercising this right, denude the land of its timber for the purpose of selling the same and securing its purchase price. *Stone v. U. S.*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127; *Shiver v. U. S.*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231; *U. S. v. Cook*, 19 Wall. 591, 22 L. Ed. 210; *Conway v. U. S.*, 37 C. C. A. 200, 95 Fed. 615; *Grubbs v. U. S.*, 44 C. C. A. 513, 105 Fed. 314. In the case of *Shiver v. U. S.*, *supra*, the question turned upon what is meant by "land of the United States" within the meaning of section 2461, Rev. St., providing for the punishment of persons guilty of cutting timber upon such lands. After making a résumé of the provisions of the homestead act, Mr. Justice Brown, speaking for the court, says:

"It is evident: First, that the land entered continues to be the property of the United States for five years following the entry; * * * second, that such property is subject to divestiture upon proof of the continued residence of the settler upon the land for five years; third, that meantime such settler has the right to treat the land as his own so far, and so far

only, as is necessary to carry out the purposes of the act. The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously, the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation; and to that extent the act limits and modifies the act of 1831, now embraced in Rev. St. § 2461. It is equally clear that he is bound to act in good faith to the government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others, who may wish to purchase or enter it. * * * The settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes, but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation."

The supreme court in the last-mentioned case cites a large number of cases determined in courts of original jurisdiction wherein views were expressed in harmony with those stated by the court, and finally concludes that the land of a settler for homestead purposes "remained the lands of the United States, within the meaning of 2461, supra," until the settler had acquired the right to a patent by the performance of all the conditions necessary under the law to the acquisition of such title.

In our opinion, the principles announced in the last-cited case, as well as those recognized or announced in other cases above cited, control the determination of this case, and require us to hold that the defendant, Teller, cannot justify his cutting of the timber in question under license from Mullison prior to the payment by him to the United States of the purchase price of the land from which the cutting was done.

We have not, in the foregoing opinion, deemed it necessary to take up the assignments of error seriatim, but have adopted the course of discussing the principles contended for, believing that in so doing we could in a general way dispose of the assignments of error more satisfactorily than by considering each separately. The conclusions reached dispose of each and all of the assignments of error adversely to the defendant, and result in an affirmance of the judgment.

The verdict was a general one, and it cannot be ascertained from the record whether the jury found the defendant guilty of unlawfully cutting timber from the unsurveyed lands, or from the Montezuma placer, or from both, but the conclusion reached demonstrates that there was no error on either hypothesis. The undisputed facts show that the defendant intentionally cut growing timber from the lands in question, knowing at the time of so doing that they were public lands belonging to the United States; and, finding no error prejudicial to the defendant, either in the admission or rejection of evidence, or in the charge to the jury, the judgment of the trial court must be affirmed.

D. M. SECHLER CARRIAGE CO. v. DEERE & MANSUR CO.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1902.)

No. 816.

PATENTS—ASSIGNMENT—CONSTRUCTION OF INSTRUMENT.

An instrument by which a patentee conveyed to a corporation, "its assigns and legal representatives, the exclusive right to manufacture, use, and sell, and to sell to others to be used and sold, said improvements as patented, * * * throughout the United States and territories thereof, to the full extent of the term for which said patents are granted," is not merely an exclusive license, but constitutes an assignment granting all the patentee's right, and which authorizes the grantee to maintain a suit for infringement in its own name alone; and its character is not changed by the fact that the consideration to the patentee was to be a certain sum on each machine made by the grantee embodying the patented invention, designated in the contract as a "license fee," nor by reason of a clause in the nature of a condition subsequent authorizing the termination of the contract by either party in certain contingencies, nor because it provided that in case of infringement suits against the infringers should at once be brought "at the request of the company," maintained under the joint direction and at the joint expense of the parties, and that the damages recovered should be equally divided. While the language of some of such provisions is inapt and obscure, construing the instrument as a whole, as must be done, it cannot control the plain words of the grant.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This is a bill brought by the appellant, D. M. Sechler Carriage Company, against the Deere & Mansur Company for infringement of letters patent numbered 593,295, dated November 9, 1897, to Clarence H. Dooley, for "combined check row and drill corn planter." The bill was in the usual form, and set out at large the instrument by which it is claimed Dooley assigned the patent to the appellant. This instrument is as follows:

"This agreement, made this 18th day of February, 1898, between Clarence H. Dooley, of Moline, in the county of Rock Island and state of Illinois, party of the first part, and the D. M. Sechler Carriage Company, a corporate body under the laws of said state, located and doing business at Moline, county and state aforesaid, party of the second part, witnesseth: That whereas, said Clarence H. Dooley has invented certain new and useful improvements in combined check row and drill corn planters, for which letters patent of the United States No. 593,295 were issued to him November 9th, 1897; and whereas, he has also made further improvements in the type of planter shown and described in said patent, and contemplates making still others; and whereas, said D. M. Sechler Carriage Company is desirous of acquiring the exclusive right to make, use, and sell, and sell to others to be used and sold, planters embodying the improvements of said patent, and the improvements as yet unpatented: Now, therefore, these parties have agreed as follows:

"(1) The party of the first part hereby gives to the party of the second part, its assigns and legal representatives, the exclusive right to manufacture, use, and sell, and to sell to others to be used and sold, said improvements as patented, which are made but not patented, and other improvements which may be made and patented, by said party of the first part, throughout the United States and territories thereof, to the full extent of the term for which said patents are or may be granted, on the conditions hereinafter named, at its factory in Moline, Illinois, or at such other place or places as it may elect.

"(2) The party of the second part agrees to make full and true returns to the party of the first part, upon the first day of January in each and

every year, of all such improvements in planters made and shipped by it in the term or year last past and previous to the first day of November of the preceding year; and, if said party of the first part shall not be satisfied in any respect with such return, then he shall have the right, either by himself or his attorney, to examine any and all of the books of account of said party of the second part containing any items, charges, memoranda, or other information relating to the manufacture or sale of said patented or unpatented planters, and, upon request made, said party of the second part shall produce all such books for said examination.

"(3) The party of the second part agrees to pay the party of the first part fifty cents (50c.) as a license fee upon each and every one of said planters made and shipped by it, and containing all or either of the improvements of said patent hereinbefore referred to, or containing any or all of the further improvements hereinbefore referred to. Also the sum of fifteen cents (15c.) on each and every single corn or corn and cotton planter made and disposed of under said patents. The whole of said license fee for each term of one year, as hereinbefore specified, to be due and payable in one payment on the first day of January of each year, and, if not paid at that time, to be paid with legal rate of interest added thereto.

"(4) The party of the second part hereby agrees to use its best skill, efforts, and endeavors to make a good, practical, working machine of the planter, and further agrees to introduce said machine to the trade, and to supply all reasonable demands of the trade for the same.

"(5) In the event of the said party of the second part not using its best skill, efforts, and endeavors in making a good practical planter, or in not making and introducing the planters provided for herein to the trade as provided for in clause 4 of this agreement, then the party of the first part may terminate this license by giving the party of the second part thirty days' notice thereof in writing; but the party of the second part shall not thereby be discharged from any liability to the party of the first part for any license fee due at the time of said service.

"(6) Should the party of the second part conclude that the planter made by it and containing said improvement is not a salable or practical machine, it (the second party) may terminate this license by serving a written notice upon the party of the first part; but the party of the second part shall not thereby be discharged from any liability to the party of the first part for any license fees due at the time of service of said notice.

"(7) It is further agreed that, should suit be brought against the party of the second part for alleged infringement of any other patent, payment of royalty as provided for in this agreement shall cease until the final determination of the suit, the expense of which suit shall be borne equally by the parties hereto; and, should such suit result in defeating such charge of infringement, then the royalties accumulating during the pendency of said suit shall be paid to the party of the first part, the same as if no such litigation had taken place. It is hereby agreed between the parties hereto that this clause refers only to the seeding devices proper, and not to other features that may be included in or claimed by said patent.

"(8) Should that part of the patent issued, or of those to be issued, which part or feature relates to the seeding devices proper, be infringed by any person, company, or corporation, suit shall at once be brought at the request of said second party, and shall be vigorously prosecuted to a termination under the joint direction of the parties hereto, and at the joint expense of said parties; and, should damages or royalties be recovered for said infringements, said damage or royalties shall be equally divided between the parties hereto."

The appellee (the defendant below) demurred to the bill upon the grounds: (1) That it appears upon the face of the bill that Dooley is the sole owner of the letters patent, and that the D. M. Sechler Carriage Company, the complainant, is the owner of the exclusive right to manufacture, use, and sell, and to sell to others to use and sell, the patented improvements; (2) that the complainant has no authority to bring suits for infringements in his own name as such exclusive licensee; (3) that Dooley is not a party to the suit, either as complainant or defendant, nor does it appear that the

suit was brought with his knowledge and consent. On the 26th of June, 1901, a decree was entered sustaining the demurrer and dismissing the bill for want of proper parties.

C. E. Pickard and L. L. Bond, for appellant.

John R. Bennett, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

The only question presented is whether Dooley is a necessary party to the suit. This question in turn depends upon the further question whether the contract constituted an assignment by Dooley of his title to the patent, or was merely an exclusive license. An assignment or grant conveys (1) the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or (2) an undivided part or share of that exclusive right; or (3) the exclusive right under the patent within and throughout a specified part of the United States. "A transfer of either of these three kinds of interest is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer short of one of these is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for infringement." *Waterman v. McKenzie*, 138 U. S. 252, 255, 11 Sup. Ct. 334, 34 L. Ed. 923. See, also, *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504; *Pope Mfg. Co. v. Gormully & Jeffery Mfg. Co.*, 144 U. S. 248, 249, 12 Sup. Ct. 641, 36 L. Ed. 419. In the construction of this instrument, seeking to ascertain the intention of the parties to it, we must be governed by the familiar canons of interpretation. We must gather that intention from within the four corners of the instrument, giving to the language employed its usual signification, and, if possible, reconcile discrepancies and avoid repugnancy, having regard also to the ancient rule that general words in one clause may be restricted by the particular words in a subsequent clause. The preamble of the contract recites that Dooley has invented certain improvements, and contemplates making still others in the particular mechanism stated, and that the company is desirous of acquiring "the exclusive right to make, use, and sell to others to be used and sold" planters embodying the patented improvements and those as yet unpatented; and thereupon Dooley conveys to the company, "its assigns and legal representatives, the exclusive right to manufacture, use, and sell, and to sell to others to be used and sold, said improvements as patented, which are made, but not patented, and other improvements which may be made and patented, by said party of the first part, throughout the United States and territories thereof, to the full extent of the term for which said patents are or may be granted, on the conditions hereinafter named, at its factory in Moline, Illinois, or at such other place or places as it may elect." There is here no obscurity, ambiguity, or defect

of expression. Standing alone, the clause has no need of interpretation. It is a grant conveying the same right and all the right which Dooley acquired by virtue of this patent from the United States. The grant was "on the conditions hereinafter named." It is urged that the conditions specified control the language of the general grant, and convert the instrument into a mere license. The consideration to Dooley for the conveyance was the amount to be received by him upon the planters made and shipped by the company, and in the contract denominated a "license fee." Full and true returns are to be made to Dooley annually of the sales by the company, and with liberty to Dooley to examine the company's books of account. The company agrees to use its best skill and efforts to make a good, practical working machine, and to introduce it to the trade, and to supply all reasonable demands, and upon failure so to do Dooley "may terminate this license upon notice." So, also, the company, should it conclude that the planter containing Dooley's improvements is not a salable or practical machine, "may terminate this license upon notice." It is urged that the use of the expression "may terminate this license" qualifies the language of the grant, and converts it into a mere license. We cannot concur in this view. It is a circumstance to be considered in the construction of the instrument as a whole, and in ascertaining whether there be provisions subsequent to the granting clause which are so repugnant to it that both cannot stand together. But the calling of an instrument which conveys the whole title of the grantor a license cannot qualify or limit the grant. *Johnson R. Signal Co. v. Union Switch & Signal Co. (C. C.)* 59 Fed. 20; *Newton v. Buck (C. C.)* 72 Fed. 777. The provisions in paragraphs 5 and 6, authorizing the termination of the agreement, are conditions subsequent, and do not limit or qualify the character of the estate granted. By the seventh paragraph it is provided that, in case suit should be brought against the company for the alleged infringement of any other patent, payment to Dooley should cease until the determination of that suit, the expenses of which should be borne equally by the parties, and in case of a successful issue to the suit the sums due Dooley which had accumulated during the pendency of the suit should be paid to him as though no litigation had taken place. This clause only refers to the seeding device proper, and not to the other features of the patent. We see nothing in this paragraph which in any way conflicts with or should qualify the language of the grant. As compensation to Dooley depended upon the amount of manufacture and sale, and as the manufacture of planters embodying new and untried devices entailed upon the company a great outlay of money, it was but equitable that expense of a suit attacking the validity of the patent should be borne by both parties. The most obscure and the most difficult of interpretation of the clauses of the agreement is paragraph 8, which provides that, if that part of the patent issued, or of those to be issued, which relates to the seeding devices proper, be infringed, suit should at once be brought at the request of the company, and should be vigorously prosecuted to a termination under the joint direction of both parties and at their joint expense, and

that damages or royalties recovered for such infringement should be equally divided between the parties. It is said that, if title to this patent was wholly in the company, it needed no request on its part to bring suit, nor was the assent of Dooley essential; and that, as stated, is true. But it must not be overlooked that in any such prosecution the aid of the inventor was desirable, if not invaluable; that the company undertook at large expense to introduce this planter; that Dooley depended for the extent of his compensation upon the extent of the sales made by the company; that infringements might greatly affect the amount of sales, and so injure Dooley, who, for his compensation, was to receive a percentage upon the planters sold. It was therefore manifestly for his interest, as for the interest of the company, that he should assist, upon request, in the prosecution of such suits; and it was proper, in that view, that the damages recovered should be equally divided. The language employed does not forbid a suit by the company without the co-operation of Dooley, but gives to him the privilege, aiding the prosecution, to receive one-half the damages, paying one-half the expenses. While the language of this paragraph is perhaps inapt and somewhat obscure, it is not so obviously repugnant to the clear and well-defined expressions of the granting clause as to warrant the court in a forced and unnatural construction of the plain language which constitutes the grant. We are of opinion that Dooley is not a necessary party to the suit.

The decree is reversed, and the cause is remanded, with direction to the court below to overrule the demurrer.

BARTHOLOMEW et al. v. UNION PAPER & BAG CO.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1902.)

APPEAL—REVIEW—ORDER GRANTING PRELIMINARY INJUNCTION.

An interlocutory order granting a preliminary injunction is largely discretionary, and will not be reversed on appeal unless it appears to have been improvidently entered.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Thomas A. Banning, for appellants.

Charles K. Offield, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

PER CURIAM. This case is before us on an appeal from an interlocutory order restraining the appellants from selling, disposing of, or in any way incumbering a certain patent application filed by them in the patent office in January, 1901, and from issuing, or causing to be issued, a patent on such application, and from entering into any contracts or agreements or taking any steps which will jeopardize appellee's interests in certain inventions embodied in a contract entered into between the parties August 27, 1900, or in any improve-

ments upon such inventions. It is enough now to say that appellants have failed to show that the provisional order was improvidently entered; and, inasmuch as the case will probably be before us again on its final hearing, no further reasons for our judgment need be given.

The decree is affirmed.

KIRLICKS et al. v. INTERSTATE BUILDING & LOAN ASS'N.

THOMAS v. SAME.

(Circuit Court of Appeals, Fifth Circuit. January 21, 1902.)

No. 1,061.

1. ESTOPPEL — COVENANT TO PAY TAXES — SUBSEQUENT ACQUISITION OF TAX TITLE.

One who has obligated himself to a mortgagee of property to pay the taxes thereon, but fails to do so, by reason of which the property is sold for taxes, and he becomes the purchaser, takes the same subject to the mortgage, or as trustee for the mortgagee.

2. USURY—LAW GOVERNING—PLACE OF CONTRACT.

A contract of loan made by a building and loan association is not usurious, if valid under the laws of the state where it is made payable, by which, in the absence of a fraudulent intent, it is governed.¹

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

M. E. Kleberg and Jas. B. Stubbs, for appellants.

Edgar Watkins and W. A. Wimbish, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Under the conceded facts of this case, the appellant Thomas contracted with the Interstate Building & Loan Association and appellant Kirlicks to pay in installments the taxes on the mortgaged property due to the city of Houston, and having failed therein, whereby the city obtained judgment and caused the sale of the property, he must, in equity, be held to have purchased from the city of Houston subject to the mortgage of, or as trustee for, the Interstate Building & Loan Association. See *Mendenhall v. Hall*, 134 U. S. 559, 10 Sup. Ct. 616, 33 L. Ed. 1012.

The contract of loan was not usurious. See *Association v. Logan*, 14 C. C. A. 133, 66 Fed. 827; *Association v. Abbott*, 85 Tex. 220, 224, 20 S. W. 118; *Association v. Goforth* (Tex. Sup.) 59 S. W. 871.

The decree of the circuit court is affirmed on both appeals.

¹Statutory exemption of building and loan associations from operation of usury laws, see note to *Andrus v. Association*, 86 C. C. A. 843.

THE PECK BROTHERS & COMPANY v. PECK BROS. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1902.)

No. 818.

1. UNFAIR TRADE—ADOPTING SIMILAR CORPORATE NAME—RIGHT TO INJUNCTION.

"Peck Brothers & Co.," a Connecticut corporation, conducted business in that state as a manufacturer of brass and plumbers' goods for over 30 years, during which time its goods became widely known over the country, and attained a high reputation. Becoming embarrassed, a suit was instituted by stockholders for a dissolution and receivership, for the purpose of reorganization. The receivers continued the business until by order of the court the entire property, good will, trade-marks, etc., of the company, were sold to a committee representing all the stockholders, who reorganized under the name of "The Peck Brothers & Company" and the old corporation was dissolved. Prior to the receivership the company maintained a branch house for the sale of its goods in Chicago, which was in charge of three stockholders, one of whom, whose name was Peck, was vice president of the company, and one of the complainants in the receivership suit. Another of the number was appointed ancillary receiver of the Chicago property. Pending the receivership such parties, with the possible exception of the receiver, and joined by the attorney for the receiver and one other, procured a charter from the state of Illinois for a corporation under the name of "Peck Bros. Co." to engage in the same business, in which company the ancillary receiver also became a stockholder and officer prior to his resignation as receiver. The Eastern receiver, having learned such facts from outside sources, protested against the use of the name before the organization of the new company was completed, and directed the Western receiver not to recognize it. The new company purchased the Chicago stock of the old, but not its good will. There was but one person named Peck interested in the new company. Both companies continued in business in the same territory, and a considerable confusion of goods resulted, even with experienced purchasers, owing to the similarity of the names with which such goods were stamped. *Held*, that the name of the new company, which was unwarranted in fact, because there were no "Peck brothers" interested therein, was clearly adopted for the fraudulent purpose of obtaining the advantage of the reputation and established trade of the old company, and in violation of the duty which its organizers owed to the old company as stockholders, and that the carrying on of business thereunder in the manner shown constituted unfair competition, against which the old company was entitled to an injunction.

2. TRADE-NAMES—TRANSFER BY SALE OF GOOD WILL OF CORPORATION—RIGHTS OF SUCCESSOR.

The sale under a decree of court of all the property of a manufacturing or commercial corporation, including "its franchises, name, and good will," to a reorganization committee representing all its stockholders, passes to the purchasers and the reorganized company the right to the old company's trade-name, and to protection in its exclusive use to the same extent that such protection could have been invoked by the old company, had it continued in business.

3. SAME—SUIT AGAINST CORPORATION FOR INFRINGEMENT—EFFECT OF STATE CHARTER.

The fact that a corporation has been chartered by a state under a certain name, which it selected, does not afford it immunity from a suit in a federal court by a corporation of another state to enjoin it from prosecuting its business under such name, where the name was deliberately adopted by its incorporators in imitation of complainant's for the fraudulent purpose of deceiving the public and appropriating complainant's good will and reputation.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The appellant, a corporation of the state of Connecticut, filed its bill against the corporation "Peck Bros. Co." and the individual defendants, who are its officers and directors, to restrain (1) the use of the name "Peck Bros. & Co." or "Peck Bros. Co." or "Peck Bros." or names substantially identical therewith, in connection with the prosecution of the business of the manufacture, purchase, and sale of plumbing, gas and steam fitting materials and supplies, fixtures, brass and iron goods; (2) from holding out or representing that the goods manufactured by them are the same as those manufactured by the complainant; and (3) from using or interfering with the paramount right of the complainant to the name of "Peck Brothers & Co.," or "Peck Bros.," or "Peck Bros. Co.," in connection with the manufacture and sale of goods of the character stated; and seeking also to recover damages sustained by reason of the alleged unauthorized interference with the complainant's paramount right in the use of the names stated. The bill was answered to, and upon the evidence taken the court below on July 8, 1901, dismissed the bill for want of equity.

Elnathan Peck and his two sons, J. M. Peck and Henry F. Peck, under the firm name of E. Peck & Sons, in the year 1859, commenced the business of the manufacture of brass goods for plumbers and gas and steam fitters at New Britain, in the state of Connecticut. In the year 1862, the corporation "Peck Brothers & Co." was organized, and became the successor in business of the firm of E. Peck & Sons. This corporation was composed, in part, at least, of the two sons of Elnathan Peck, and the plant of the business at that date had been removed to the city of New Haven. The capital stock of the corporation was originally \$35,000. This was increased from time to time until in March, 1896, it was \$750,000. The business had greatly grown in volume, and its product had become well and thoroughly known to the trade throughout the country as "Peck Brothers' Goods." Branch offices for the sale of its product were established in the cities of New York, Boston, and Chicago,—in the latter city in the spring of 1889. The office in Chicago was placed in the charge and management of the defendants Oliver D. Peck and Albert D. Sanders. The former was then a stockholder in, and the secretary of, the Connecticut corporation, and was its vice president from 1894 to 1896, and is now the president of the defendant corporation. The latter was a stockholder in the Connecticut corporation, and conducted the branch on a salary, and is now the general manager of the defendant corporation. The defendant William A. Ratcliffe was also a stockholder in the Connecticut corporation, and was the principal salesman in the Chicago branch, and is now the secretary of the defendant corporation. On the 14th day of March, 1896, the corporation became embarrassed; and a bill was filed in the superior court of the county of New Haven, Conn., by the owners of a majority of the stock, against the corporation, for the appointment of a receiver. Oliver D. Peck, one of the defendants in this suit, was a plaintiff in that suit. Receivers were duly appointed, who took charge of the corporation and managed its business. On March 16, 1896, the defendant Oliver D. Peck, with others, filed an ancillary bill in the circuit court of the United States for the Northern district of Illinois, upon which the defendant Albert D. Sanders was appointed ancillary receiver of the corporation with respect to its property in the state of Illinois, for the benefit of the principal receivers, appointed by the superior court for the county of New Haven, Conn. On June 23, 1896, Henry D. Oughlan, W. J. Naughton, and George C. Morton filed with the secretary of state of the state of Illinois a certificate signed by them, respectively, in which they proposed to form a corporation under the name of "Peck Bros. Co.," for the manufacture and sale of plumbing, gas fitting, steam fitting, sewer pipe, sewer building materials and supplies, also hardware, brass, and iron goods, metals, and machinery, with a capital stock of \$75,000, divided into 750 shares; the principal office of the company to be located in the city of Chicago. A license was thereupon issued to them as commissioners to open books for subscription for the capital stock. On August 21, 1896, they re-

ported to the secretary of state that the stock was fully subscribed as follows: Oliver D. Peck, 100 shares, amounting to \$10,000; Henry D. Coghlan, 200 shares, \$20,000; William A. Ratcliffe, 72 shares, \$7,200; James L. Ratcliffe, 378 shares, \$37,800,—and that there had been elected as directors the four subscribers to the capital stock and George C. Morton, whereupon on that day the secretary of state issued his certificate "that the said Peck Bros. Co. is a legally organized corporation under the laws of this state." Mr. Coghlan, who subscribed for 200 shares, was the attorney of the Chicago branch and was one of the attorneys of the defendant Sanders as receiver, and is one of the solicitors of record for the defendants in this suit. The bill charges the fact to be "that, although the name of the defendant Albert D. Sanders does not appear as one of the incorporators of the defendant 'Peck Bros. Co.,' he was directly interested and contributed toward the payment upon the shares of its capital stock, and that as your orator is informed and believes, the two hundred shares of capital stock of said corporation subscribed by Henry D. Coghlan were in reality a subscription in trust for and in behalf of the defendant Albert D. Sanders; that the said Henry D. Coghlan was the confidential attorney of the said Albert D. Sanders both before and after his appointment as ancillary receiver; that said Albert D. Sanders immediately upon resigning his said receivership became the general manager of the defendant 'Peck Bros. Co.,' and has continued to be such general manager up to this time, and has taken an active part in the conduct and management of the affairs of said corporation from the time of its creation." To this allegation the defendant Albert D. Sanders answered that he "denies that on the 25th day of June, 1896, he conspired with the defendants William D. Peck and William A. Ratcliffe for the purpose of obtaining the name and good will and business of the firm of Peck Bros. & Company. He denies that he had anything to do with the organization of Peck Bros. Company, the defendant company. He denies that the subscription of Henry D. Coghlan to the capital stock of Peck Bros. Company was a subscription in trust for this defendant. He denies that the said Henry D. Coghlan was his confidential attorney, either before or after his appointment as ancillary receiver, but represents the fact to be that Henry D. Coghlan was the attorney for Peck Bros. & Company of New Haven, Conn., for years prior to its insolvency, and after its insolvency acted in connection with E. A. Otis as attorneys of the receivers in winding up the affairs of Peck Bros. & Company, and that everything done by the said Henry D. Coghlan in the organization of Peck Bros. Company was done for purposes and reasons unknown to this defendant, and in no way connected with him." All the defendants, except the defendant James L. Ratcliffe, "further answering, deny that the plaintiff has the exclusive right to the use of the name 'Peck Bros. & Co.,' 'Peck Bros. Co.,' or 'Peck Bros.,' or the name of 'Peck,' in connection with its said business. These defendants aver and charge that the defendant Peck Bros. Company is alone entitled to the use of the said name or names; that it was duly incorporated under the laws of the state of Illinois long prior to the complainant; that it purchased the assets and good will of the Western branch of Peck Bros. & Co.; that its company is headed by Oliver D. Peck, of the original firm of Peck Bros. & Co., who acts as its president; and that it had been in existence and doing business since June, 1896, and under the name adopted has built up a large business, which it alone is entitled to share and enjoy." No evidence was taken on behalf of the defendants below, except the deposition of one Wilson, the representative of the defendant corporation in the city of New York, touching the location of its office in that city.

There were negotiations in the spring of the year 1896, between the Connecticut receivers and Mr. Sanders, the ancillary receiver, on the one hand, and William A. Ratcliffe, representing a syndicate for the purchase of the property of the Connecticut corporation located in the city of Chicago. It was unknown to the Connecticut receiver who composed that syndicate. After some negotiation a price was fixed for the goods, and the sale was finally consummated in the month of September. The Connecticut receivers heard of the proposed new corporation in Illinois, not from the parties, but from some person on the outside, and on August 8th wired Mr. Sanders

as follows: "We object to title of new company. Avoid recognizing in any way,"—and on the same day addressed to him the following letter:

"New Haven, Conn., August 8, 1896.

"Mr. A. D. Sanders, Receiver, Chicago—Dear Sir: Since we heard of the organization of the new company to succeed to our business in Chicago, we have seriously considered the matter of allowing them to use the name Peck Bros. in any way, and in conversation with one of our prominent stockholders, Mr. W. H. Hart, he decidedly objected to it. While the intentions of the projectors might be all right, I can readily see where serious complications might arise from any company doing business in the same line under the name of Peck Bros., and we shall be under the necessity of refusing to recognize this company by making any sale of goods to them. I have just wired you to this effect, and I think, if you will stop to consider the matter, you will readily see the necessity of our entering the protest. I presume there may be some way by which the use of this name might be permitted under restrictions and limitations, but have not had an opportunity, as yet, of consulting our attorney in reference to the matter. I thought best to enter the protest, and will notify you and write you further after consultation with our attorney.

"Yours truly,

J. M. Peck, Receiver."

On August 14, 1896, he addressed a letter to "Mr. W. A. Ratcliffe, Agent for the Peck Bros. Co.," which contains the following: "We have talked over the matter of the name of the new company, viz., 'The Peck Bros. Co.' and we could see where it could and might be used by you to the detriment of the business of Peck Bros. & Co., but I had your assurance when in conversation with you that your idea in taking the before-mentioned name was to preserve the present channels of trade for Peck Bros. & Co.'s goods so far as possible, and so far as it could be made mutually advantageous. To this we can see no objection, but if at any time in the future Peck Bros. & Co. should find that goods were on the market not of their manufacture but marked 'The Peck Bros. Co.' we have no doubt but the name of the new company is, in our opinion, so near like the old that it would at least warrant a trial of the matter in the courts. As no such case is likely to arise during the receivership, we think the matter can probably be left to the future board of directors of Peck Bros. & Co. In the meantime we shall consider that you are to sell Peck Bros. & Co.'s goods in Chicago and vicinity, and that all orders for goods shall be referred to you, and that we will not give competing prices against you." On August 24th he addressed a letter to Mr. Sanders, receiver, with reference to an inventory of the property at Chicago. In which he stated: "I did say to both you and Mr. Ratcliffe that I did not think it best for you to have any connection with the new firm until the matter was fully closed out, and I distinctly said that this was for your own interest." The negotiations seem to have at first contemplated the acquirement of the good will and name of the Connecticut corporation. On September 23, 1896, the Connecticut receiver wired Mr. Sanders: "Receivers have no authority to sell good will nor make contracts extending beyond the receivership. Instructions of August 14th cover all we can do. If those terms are not sufficient, call the deal off, and we will advise you further."

On September 23, 1896, the defendant Albert D. Sanders, the ancillary receiver, filed his petition in the ancillary suit, representing that the stock of goods in Chicago was valued at \$37,665.60, and that the Illinois corporation, "Peck Bros. Co.," had offered to purchase the same for \$18,830.80 in cash; that he submitted the proposition to the principal receiver of the Connecticut corporation, and had been instructed to procure authority of the court to consummate the sale,—and an order was entered by the court authorizing the sale of the goods, which sale was consummated. The order did not authorize the sale of any good will or trade-name, but simply all the stock on hand. In December, 1896, Mr. Porter, the Connecticut receiver, visited Chicago, and called at the office of the defendant corporation. He then found the defendant Sanders engaged in the service of that corporation. Subsequently, and on December 31, 1896, Sanders resigned as ancillary



checks, and statements forwarded by mail. Upon the question of confusion of goods there is no dispute.

E. A. Otis and Henry C. White, for appellant.

H. D. Coghlan, for appellees.

Before JENKINS and GROSSCUP, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Upon the evidence in this case, we think we are warranted in saying of this defendant, as we had occasion to say of another corporation under circumstances not dissimilar, that "it was conceived in sin and brought forth in iniquity, that wrong attended at its birth, and that fraud stood sponsor at its christening, imposing upon the corporate child a name to which it was not entitled, and which it had no right to bear." *Kathreiner's Malzkaffee Fabriken Mit Beschraenkter Haftung v. Pastor Kneip Medicine Co.*, 27 C. A. 351, 82 Fed. 321. The original Connecticut corporation had builded up a large manufacturing interest. Its goods were of superior quality, and commanded higher prices in the market than the goods of other dealers. They were universally known to the trade as "Peck Brothers' Goods." The name indicated the origin, and was a guaranty of the superior excellence of the goods, and was so recognized by all dealing in them. The name and designation was a property right belonging to, and a valuable asset of, the original Connecticut corporation. Its financial embarrassment caused no suspension of its manufacture or trade. That was continued by the receivers appointed under the bill filed manifestly for the purposes of reorganization. The defendant Oliver D. Peck was at the time the vice president of the Connecticut corporation, and bound by his duty to abstain from injuring its good will and trade name. So, likewise, were the defendants Albert D. Sanders and William A. Ratcliffe thus obligated. Each of them was a stockholder in the Connecticut corporation; the former the manager, and afterwards the receiver, of its Chicago branch, and the latter its principal salesman. So long as they occupied those relations of trust, they were bound in honor to refrain from acts detrimental to the company, and which would undermine its business and affect the value of its trade-name. Mr. Coghlan, one of the incorporators of the Chicago company, was the counsel of the Connecticut company for its Chicago branch, and was one of its counsel in the receivership proceedings in the Northern district of Illinois; and while that confidential relation continued he also was bound by ordinary professional ethics to take no part in a proceeding which must necessarily prove injurious to his client. Pending the proceedings for reorganization, and before it was known whether the corporation would be reorganized, or its property and assets disposed of to others, Coghlan, with two companions, proposed to form a corporation under the title "Peck Bros. Co." to carry on a like business, and, as events have proven, within the territory occupied by his client. Peck, William A. Ratcliffe, and

three of the four subscribers to the stock of that were three of its five directors. They assumed a they had no warrant of right. There were no broth- ed in this new enterprise. There was but one Peck. ed was itself a falsehood, and we must believe that ed for a purpose. The fact of the proposed in- by these parties either designedly concealed from, known to, the officers or the Eastern receivers of corporation; but the fact that such incorporation identially came to the knowledge of the Connecticut early as August 8th they wired to the defendant anifestly was not unfriendly to the proposed cor- ing to the title of the new company, and directing gnizing it in any way. This was nearly two weeks orators met to elect a board of directors. On Au- nnecticut receiver addressed a letter to the defend- Ratcliffe, likewise protesting against the use of the ury of the Connecticut corporation. So that they his incorporation, assuming a name to which they th knowledge that they who were then in charge, e court, of the rights of the stockholders of the oration, protested against the assumption of the erefore, was no mere mistaken action, but a de- on of a name which, as we think, the corporation ear. We need not stop to inquire too curiously e real part played by the defendant Albert D. San- saction. That he was knowing to it all cannot be d his codefendants, it is true, deny all conspiracy hey content themselves with mere denial. Having swer, they should have answered fully. In view s of the bill, it was incumbent upon all of the de- knowledge to have informed the court whether iption was for himself or for others, or in part for art for others; whether his own money paid for o the stock, or whether it was in whole or in part s, and by whom. The fact that the defendant Al- was the general manager of the Chicago branch, few months after the incorporation, and while still either as general manager or in some responsible n the management of the affairs of the new cor- incumbent upon him not merely to deny without o fully explain, especially in view of the fact that at he is now a stockholder and officer of the new t no word of explanation comes. They refrain from y their answer. They refrain from testifying upon on this whole business, and with respect to their it, the defendants are as silent as the sphinx. We ve that the corporation was formed with a view to or wrongfully, the good will and trade-name of the ness. Indeed, the answer asserts that the company buy the assets and good will of the insolvent con-

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cern," and "for the purpose of taking off the hands of the receiver the assets and good will of the Western branch." This affirmative allegation required of them proof of the fact, but that evidence is not forthcoming. If, however, the allegations of the answer were true, while it might acquit the defendants of "original sin," the wrongful assumption of the name and the prosecution of the business thereunder would, as against the lawful proprietors of the name and business conducted under it, render the enterprise illegal. The new corporation did not acquire any right or title to the trade-name or the good will of the Connecticut business. The receivers declined absolutely to deal with the Chicago parties upon any such postulate, and instructed the defendant Sanders, if that were insisted upon, to "call the deal off." The order of sale by the circuit court of the United States for the Northern district of Illinois carefully omits any inclusion of the trade-name or good will, and all that the defendant corporation acquired by the sale was the stock of goods at Chicago. There is here either original wrongful intent, or, if the design were originally honest, it became wrongful upon failure to acquire by purchase the business and trade-name.

It is now so well settled, both by the decisions of the supreme court and of this court, that the wrongful use of one's own name to the injury of another, which results in the palming off upon the public his goods as the goods of that other, will be restrained, that it is not needful to review the authorities. We need only refer to a few: *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 675, 21 Sup. Ct. 270, 45 L. Ed. 365; *Meyer v. Medicine Co.*, 7 C. C. A. 558, 58 Fed. 884, 18 U. S. App. 372; *Pillsbury v. Flour Mills Co.*, 24 U. S. App. 395, 12 C. C. A. 432, 64 Fed. 841; *Stuart v. Stewart Co.*, 33 C. C. A. 480, 91 Fed. 243. See, also, *Tussaud v. Tussaud*, 44 Ch. Div. 678. While one may have the right to use his own name honestly in his own business, for the purpose of advertising he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business, firm, or establishment, or the article produced, and thus work injury beyond that which results from mere similarity of names. *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247. Here the artifice consisted not in using one's own name, but in assuming falsely the name "Peck Bros.," there being no brothers of that name in the incorporation. The name, manifestly, was thus assumed for the purpose of obtaining the good will of the established business of the Connecticut corporation, resulting, failing the acquirement by purchase of the business, good will, and trade-name, in fraud upon the public, and injury to the legitimate proprietors of the business and trade-name.

The stockholders of the original Connecticut corporation "Peck Brothers & Co.," including the defendants Peck, Sanders, and William A. Ratcliffe, reorganized under the corporate name of "The Peck Brothers & Company," and, under the proceedings in the Connecticut court, acquired the business, good will, and trade-name of the old corporation. Beyond question, the right to the trade-name passed by the proceedings to the complainant corporation. *Kidd v. Johnson*, 100

. Ed. 769; Chemical Co. v. Meyer, 139 U. S. 547, 11
 5 L. Ed. 247; Nervine Co. v. Richmond, 159 U. S.
 Ct. 30, 40 L. Ed. 155; Sarrazin v. Tobacco Co., 35
 3 Fed. 624, 46 L. R. A. 541; LePage Co. v. Russia
 C. C. A. 555, 51 Fed. 941, 17 L. R. A. 354; Bank of
 ren, 94 Wis. 151, 68 N. W. 549; Warren v. Warren
 4 Mass. 247.

It is, however, that equity cannot extend its preventive
 is wrong, because the defendant acquired the right
 tion from the state of Illinois, and that its name was
 the state, and that, since a foreign corporation can
 ness in a state only by comity, it cannot obtain an
 a federal court against the formation of a domestic
 aring the same name. In support of this contention,
 stated, reliance is placed upon the case of Hazelton
 Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E.
 ase, in the year 1881, one Hazelton, having invented
 ements in steam boilers, joined with one Kennedy
 of manufacturing and selling boilers containing such
 h of them being then residents of the city of New
 usiness was conducted under the name of Hazelton
 nd on July 10, 1884, Hazelton assigned his interest
 usiness, including three patents with all reissues and
 eef, or improvements in relation thereto, and all in-
 he might thereafter make in relation to steam boil-
 er of his partner. On June 23, 1888, the business
 meantime been actively carried on by Kennedy and
 corporation was organized by the three Kennedys, un-
 the state of New York, under the name of the Hazel-
 In February, 1888, Hazelton organized a corpora-
 laws of the state of Illinois, under the name of Hazel-
 ler Co., to manufacture and sell tripod boilers of the
 as those invented by him the patents for which he
 e Kennedys, except some minor changes in the struc-
 The statement of the case asserts the following:

"The complainant nor the defendant corporation has ever been
 business of disposing of its steam boilers by placing the
 market; both having confined themselves to dealings directly
 purchasing for their own use, and not for sale, the sales
 tion being all made upon orders of customers addressed to
 w York or Chicago, as the case happened to be; and neither
 tory, warehouse, or sales room for the disposition of its
 at its home office."

It is held that there were two obstacles to recovery by the
 which were insuperable: The first, "that the complain-
 corporation seeking to contest with a senior corpora-
 of the latter to the use of its corporate name"; the
 foreign corporation sought to contest with a do-
 tion the right of the latter to the corporate name
 overignty which created it. Upon these propositions
 that, as the incorporation of the defendant antedated

that of the complainant by nearly four months, if there was any infringement, the complainant, and not the defendant, was the aggressor; overlooking, as it seems to us, the fact that if Hazelton, as was claimed, had by the transfer to Kennedy several years before of the assets of the business transferred also the right to use his name in connection with the manufacture of boilers, he could not rightfully, under any guise or pretense, either individually or by imposing that name upon a corporation, use it in connection with the same business, if thereby the public was imposed upon by reason of the confusion of goods naturally resulting from such use. It may be that the court supposed that the facts above stated with reference to the conduct of the business prevented such confusion. The court also seemed to have overlooked the fact that the New York corporation was composed of the Kennedys, and was merely successor to them in the business, and possessed all the rights which they had thereto, including trade-names. Upon the second proposition the court remarked:

"But the complainant is in the attitude of a foreign corporation coming into this state and seeking to contest the right to the use of a corporate name which this state, in furtherance of its own public policy, and in the exercise of its own sovereignty, has seen fit to bestow upon one of its own corporations. For such a purpose a foreign corporation can have no standing in our courts. Such corporations do not come into this state as a matter of legal right, but only by comity, and they cannot be permitted to come for the purpose of asserting rights in contravention of our laws or public policy. It is competent for this state, whenever it sees fit to do so, to debar any or all foreign corporations from doing business here, and whatever it may do by way of chartering corporations of its own cannot be called in question by corporations which are here only by a species of legal suffrance."

We are compelled, with deference, to differ with the learned court, if it intended to hold that incorporation under the laws of the state of Illinois protects one from the consequences of his own wrong. In a certain limited sense the sovereignty of the state had conferred the name. There is, however, in the term "sovereignty," no magic to conjure by. It can confer upon individuals no right to perpetrate wrong. Nor do we think that the sovereignty of the state of Illinois sought to do that. It has a general law of incorporation, by which any body of men combining for the purpose of business may incorporate under any name they may select. The name is not imposed by the law, but is chosen by the incorporators. With that selection the sovereignty of the state has nothing to do. The act of sovereignty allowing incorporation is permissive, not mandatory. It sanctions the act of incorporation under the name and for the business proposed, if that name and that business be otherwise lawful. The sovereign by the act of incorporation adjudges neither the legality of the business proposed, nor of the name assumed. That is matter for judicial determination by a court having jurisdiction of the subject when the legality of the business or of the name is called in question. If one may not use the name imposed upon him in invitum so that it shall work wrong to another, by what token may he become incorporated under a name selected by himself to effect like wrong? And how is the sovereignty of

unpungned by the denial to incorporators of a right to do a wrong? Is it possible that a sovereignty of a state is invoked to perpetrate a fraud? If it may be, then that sovereignty stand for oppression, and not for justice. Would one who, in connection with a business to which he had been attached and had given value to it, having no right to use that name to another, and so by the law of the state using it in connection with a like business under circumstances which would work a fraud, be enabled to effect the fraud by having himself incorporated under that name under the sovereignty of Illinois. We cannot bend our judgment to the idea that a sovereign state designed thus to confer immunity. The court, in a review of the evidence, further found that the trade-name and good will of the business were, as a result, not transferred by an assignment which merely transferred the business of the vendor to the business, "its assets, profits, and losses," and that the negotiations for a sale did not constitute a transfer. Whether this legal conclusion be correct, we do not require; but the fact seems to have had influence, for the court to distinguish the case then in hand from its decision in *Frazer Lubricator Co.*, 121 Ill. 147, 13 N. E. Rep. 73, in which that court held that one selling under a trade-name, and with it his own name to be used in connection with the business, cannot afterwards assume it in connection with another business; and this upon the ground that the instrument in that case expressly authorized the vendee to use the trade-mark, or as indicating the material or product manufactured by the vendor, and conferred upon the vendee the exclusive authority to use his name for such purpose. The court seems to have been also influenced by the fact that as the goods were made for use by those ordering them, and were not offered for sale, there could be but little, if any, confusion or interference. If that fact be potential, it is unavailable to the defendants in hand. Here the defendants reach out into the West, East, and persistently and deliberately place goods on the market, selling them under such names as experienced dealers are imposed upon. With respect to the supreme court of Illinois of the right of a foreign state to contest in the courts of that state the right of a corporation to the corporate name given it by the state of incorporation, even if that name be selected in fraud to perpetrate a wrong, we are not concerned. The state has the undoubted right to regulate its own courts in such a manner, if it so will, to turn a deaf ear to a demand for justice. The court, however, is organized in part to listen to the claims of citizens and corporations of one state against citizens and corporations of another state, and its doors may not be closed by the ruling of a state tribunal. We study the decisions of the supreme court of a state with respectful deference, but cannot thereby in such a case as the present one, when the court, in our judgment, works a grievous wrong. We can-

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not follow the decision in the Hazelton Case. The doctrine of the Illinois court, as we conceive, is not in accord with the decisions of the federal and of other state courts. *Celluloid Mfg. Co. v. Celonite Mfg. Co.* (C. C.) 32 Fed. 94; *Rogers Co. v. Rogers Mfg. Co.*, 17 C. C. A. 576, 70 Fed. 1017; *Publishing Co. v. Dobbison* (C. C.) 72 Fed. 603; *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; *Holmes, Booth & Hayden v. Holmes & Atwood Mfg. Co.*, 37 Conn. 278, 293, 9 Am. Rep. 324. In the first of these cases Mr. Justice Bradley, of the supreme court of the United States, observed:

"As to the imitation of the complainant's name, the fact that both are corporate names is of no consequence in this connection. They are the business names by which the parties are known, and are to be dealt with precisely as if they were the names of private firms or partnerships. The defendant's name was of its own choosing, and, if an unlawful imitation of the complainant's, is subject to the same rules of law as if it were the name of an unincorporated firm or company. It is not identical with the complainant's name. That would be too gross an invasion of the complainant's right. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another."

The whole contention is well summed up by Mr. Hopkins in his recent work upon Unfair Trade:

"Where the defendant is a corporation whose corporate name includes a proper name, and was selected by its incorporators with the intent and for the purpose of deceiving the public into the belief that its goods are the goods of the plaintiff, such frauds will, of course, be enjoined." Hopk. Unfair Trade, 108.

Here the right to the name belongs to the complainant by virtue of the sale of the right to that name under the proceedings in Connecticut. The stockholders of the original corporation, including three of these defendants, are stockholders of the complainant company. The proceeding was a mere reorganization, and the complainant succeeded to all the rights of the old company, and to the equitable rights of the stockholders representing that company. The court below denied relief because the defendant company was incorporated two years prior to the incorporation of the complainant, overlooking the fact that the complainant corporation does not claim by virtue of its incorporation, but in right of the first corporation and its stockholders to the name it had acquired in the business. The right does not spring from the incorporation, but from the transfer of the trade-name and good will. The status of the complainant is precisely the same as though the original Connecticut corporation, continuing to exist and to prosecute business, was the party here complaining of the wrong. The assumption of the name "Peck Bros. Co." was of itself the utterance of a falsehood, for there were no brothers Peck interested in the incorporation. The name assumed was voluntarily selected, and, as we must believe, for the purpose of appropriating the good will and trade-name of another. If not originally so designed, it is clear that, upon failure to procure the right by purchase, the name was afterwards used for the purpose of misleading the public, and appropriating to itself, without right, the valuable trade-name of another. That wrong has been

er wrong should be prevented. The remedy, if the
onest, is simple. They have but, under the law, to
e which they selected, and which has wrought the
event, they should be enjoined from further perpetra-
g.
reversed, and the cause remanded, with a direction
w to decree for the complainant in accordance with
e bill.

ADAM V. NEW YORK LIFE INS. CO.¹

ourt of Appeals, Fifth Circuit. January 10, 1902.)

No. 1,037.

ACTION TRIED TO COURT.

y is waived by stipulation in an action at law in the
nd no exception is taken to any ruling made during the
exceptions being to the findings and conclusion of law,
l to find conclusions of law as requested, the only ques-
e in the appellate court is whether the judgment is war-
pleadings and the findings of fact.

e Circuit Court of the United States for the Eastern
s.

ski, John Lovejoy and Alex. Sampson, for plaintiff

, for defendant in error.

EE, McCORMICK, and SHELBY, Circuit Judges.

M. In this case a trial by jury was waived in writing,
tried by the judge. In the progress of the trial no
al judge appear to have been excepted to. The bill
und in the record merely shows that the plaintiff
o all the conclusions of fact and law as found by the
cepted to the refusal of the court to find conclusions
ed. See *City of Key West v. Baer*, 13 C. C. A. 572,
nder this state of the record, the only question for
in this writ is whether the pleadings and the findings
er warranted the judgment rendered in the trial
s we have no doubt.

of the circuit court is affirmed.

ed March 15, 1902.

HARDING v. HART et al.¹

(Circuit Court of Appeals, Seventh Circuit. January 7, 1902.)

No. 438.

1. APPEAL—REVIEW—FINDINGS OF FACT.

Findings of fact made by the trial court in a suit in equity on conflicting evidence, while not absolutely conclusive upon an appellate court, are very persuasive, and will not be disturbed except on a very satisfactory showing.

2. CORPORATIONS—INSOLVENCY—UNLAWFUL PREFERENCE OF OFFICER.

A finding in a creditors' suit against an insolvent insurance company and its former president and director that a transfer of securities by the company to the president on a settlement between them was made after the company had become insolvent, and was void as against other creditors as an unlawful preference, *held* sustained by the evidence.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

George F. Harding and William J. Ammen, for appellant.
Frederic Ullmann, for appellees.

Before BROWN, Circuit Justice, WOODS, Circuit Judge, and BUNN, District Judge.

PER CURIAM. This cause was heard in this court at the June term for 1900, before Mr. Justice BROWN, one of the Justices of the Supreme Court, WOODS, Circuit Judge, and BUNN, District Judge. The case is an elaborate one, the testimony being very voluminous and filling many volumes. This, and the circumstance that Mr. Justice BROWN, since the hearing of the case, has been very steadily and laboriously occupied with work in the supreme court, has caused some delay in the decision of the case. The cause was begun in the United States circuit court for the Northern district of Illinois by a bill in equity filed on May 5, 1876, and has been pending in that court and in this for over a quarter of a century; thus rivaling in point of duration some of the most celebrated chancery cases existing either in fact or in fiction. The bill was a creditors' bill charging that the defendant Harding, who had been intimately connected with the Globe Insurance Company as director, stockholder, and president, had in his hands a large amount of assets and securities, aggregating over \$100,000, belonging to the insurance company, which ought in equity to be applied in satisfaction of the company's debts. The bill sought a discovery, and the defendants were required to disclose what assets they had, if any, and the circumstances under which they received the same, with a view to the application of such assets to the payment of the general creditors of the company. The defendant Harding answered, setting forth the securities that he had taken from the company, and the circumstances under which he received them; and the principal contention in the case has been whether he could rightfully hold these securities as against the rights of the

¹ Rehearing denied February 27, 1902.

ors. One of the principal contentions related to the company became insolvent, as bearing on the question's right to a preference over other creditors to the hands. The court below found upon these questions an elaborate opinion filed in March, 1882,—six years after commencement of the suit,—in favor of the complainants. The case was referred to Henry W. Bishop, as master in chancery, for a mass of testimony taken, which consumed many years and was filed in court on May 30, 1880, upon which the case came to a hearing before Judge Dyer holding the circuit court. The hearing was held by him until February 14, 1882, when an opinion was filed by him after long and careful consideration of the case, finding the facts and conclusions in favor of the complainants and against the defendant Harding. Judge Dyer states in an examination had before the circuit court in February, 1898, in his testimony in the proceedings in the case had before him, that he spent months of hard work upon the case after the hearing was over, and is well believed from the great mass of evidence in the case of the nature and importance of the issues involved, and the carefulness and care with which the opinion was prepared. After the filing of the opinion an interlocutory decree was made in favor of the complainants and against the defendant Harding. The court held that the settlements between the defendant the Globe Insurance Company and the defendant George F. Harding, made in 1882, by virtue of which said defendant Harding obtained and claimed title to the securities hereinafter described, were hereby are, adjudged and decreed invalid and void as to the valid claims of other bona fide creditors of said Globe Insurance Company, and the said settlements are hereby adjudged invalid and void as aforesaid, not only inasmuch as they embraced the interest of said defendant Harding in the debt, but also the sum of \$116,000 to the extent of the cash advances of said defendant Harding amounting to the sum of \$47,743.52; and the said decree is hereby ordered, adjudged, and decreed to be of full value of the said securities. The cause was thereupon remanded to the master to ascertain the value of the securities in Mr. Harding's hands properly subject to the claim of the general creditors. A rehearing was made by the defendant Harding, and by the court, Judge Dyer still presiding, and in the course of the hearing the motion the court says:

"A rehearing has been urged in behalf of defendant Harding with a view to, and in view of the importance of the questions involved, upon the present occasion, not only to consider the particular question of the rehearing (which related to the time the company became insolvent) but to go anew over the case, and is unable to take any other course than to announce in its former opinion, and its judgment, that the cause should proceed upon the basis of that opinion."

"After a full examination of the case and of the many assignments, this court concurs with this view. The cause was

carefully and elaborately tried, was held under consideration by the court for nearly two years, and the opinion of the court below is so full and satisfactory that we are content to affirm the decree upon that opinion contained in the record. We do not find that the opinion, which covers some 52 closely-printed pages in the record, has ever been published, as it well deserves to be, and no doubt will be.¹ The questions were mainly questions of fact depending upon the evidence, and, while the findings upon the facts by the court below are not absolutely conclusive and binding upon this court, they are, in a case like this, very persuasive, and not to be disturbed except upon very satisfactory showing. Upon the coming in of the master's final report the case was argued before the circuit court, Judge Grosscup presiding, after Judge Dyer had, to the regret of all, retired from the bench. In that opinion Judge Grosscup says:

"Much of the argument of defendant and his counsel has been devoted to the proposition that the interlocutory decree heretofore entered by Judge Dyer was mistaken in fact in this: that the insurance company was not at the time then found in reality insolvent. It is claimed that events coming to consummation since the entry of that order disprove this finding. I do not feel at liberty to disregard that order, or to take up the question again as to whether the company was at the time insolvent, and have not pursued as carefully as if the question were before me de novo this specific inquiry."

It is proper to say that this court has considered that question, and finds no reason to disturb or question the correctness of the finding and conclusion of the court below upon that question. Although the assignments of error are numerous, being 121 in number, we have been unable to find any substantial error in the record which should suffice to affect the decree of the court. The cause was kept in the circuit court upon various motions and references until the final order was made by Judge Grosscup on February 28, 1899, upon the filing of which an appeal was taken by the defendant Harding, but the case was not heard in this court until the June session of 1900.

It may be proper to say that though WOODS, Circuit Judge, who participated in the hearing of the case, died in July, 1901, before this memorandum of opinion was prepared, he concurred in the decision.

The decree of the circuit court is affirmed.

¹ Since published in 113 Fed. 307.

HART et al. v. GLOBE INS. CO. et al

U. S. District Court, N. D. Illinois. February 14, 1882.)¹

PERSONS CONCERNED—CREDITORS' SUITS.

Creditors of an insolvent insurance company filed a creditor's bill in the federal court against the company and one H., a former director of the company, to set aside a transfer of securities made by the company to H. as constituting an illegal preference, and in the receiver was appointed for the company, to whom it conveyed. Two days prior to the commencement of such suit a bill was instituted in a state court by a simple contract creditor against substantially the same defendants, over whom the state court had priority of jurisdiction. Subsequent to the appointment of the receiver by the federal court, H. filed a cross bill in the state court, which, on final hearing, the court adjudged the validity of the transfer by which the company transferred the securities to him, and ordered the amount due him from the company, and ordered a sale of the securities to pay the same. Prior to such decree the company was adjudged a bankrupt, the receiver had been elected assignee, and H. was named as a co-complainant in the suit in the federal court, and H. filed a similar cross bill therein. *Held*, that the decree of the state court was not a bar to the further prosecution of the suit in the federal court; neither the original complainants therein, nor the assignee, as representative of the general creditors of the company, were made parties to the cross bill upon which such decree was

INSOLVENCY—ILLEGAL PREFERENCE OF OFFICER.

Defendant purchased from two of the officers and directors of an insolvent insurance company stock of the company to the amount of \$75,000, and in payment therefor advanced the amount made at the same time the sellers advanced the purchase money for the stock and defendant a substantially equal loan to the company to make good its impaired capital, and in consideration of the advances, which consisted of cash and securities, the company agreed to hold the advances as assets of the company, and subject to its debts, to return or repay, with interest, when the company was able to do so, in full, to the persons from whom he received the advances, and to justify it. Defendant became president and director of the company. A year later, when the company was in fact insolvent, defendant resold his stock to the persons from whom he received the advances in payment an assignment of the identical cash and securities which he had paid therefor, and which had been advanced to the company. Subsequently, and while defendant was still president of the company, negotiations were entered into between him and the company, which resulted, either prior to or just after his retirement, in a settlement of his entire claim against the company on account of the advances made and others, and the transfer to him by the company of securities amounting to about \$200,000, either absolutely or as collateral for the company's note, through which he afterwards obtained title to the securities, that the advances having been expressly made and accepted by the company, subject primarily to its outside creditors, the attempted repayment of such advances in the insolvent company and under the circumstances shown was void as to the other creditors, and that defendant was accountable to such creditors for the value of the securities so transferred to him.

VIOLATION OF CONTRACT FOR FRAUD—LACHES.

Defendant, by which defendant became a purchaser of the stock, and made advances to the company, having been expressly

has not been heretofore reported, and is now published in this volume therein all circuit and district court cases which have been omitted from the Federal Reporter or the Federal Cases.

entered into by the sellers as individuals, and not on behalf of the company, which was not the owner of the stock sold, any fraud or misrepresentation on their part was not available by defendant to entitle him to rescind the contract as against the company, even if he had seasonably asserted his claim to such right; and for still stronger reason he could not assert it, after the company's insolvency, to the prejudice of its creditors, and after he had actively participated in the conduct of its affairs as president for a year.

In Equity. Creditors' suit against the Globe Insurance Company and George F. Harding.

Frederick Ullman and D. J. Schuyler, for complainants.

Lyman Trumbull and Geo. F. Harding, for defendant Harding.

The Parties.

DYER, District Judge. This is a creditors' bill, filed originally by Cynthia C. Hart and John S. Hart against the Globe Insurance Company, George F. Harding, the Firemen's Insurance Company, and V. A. Turpin. The bill was filed May 5, 1876, and on or about the 13th day of May of that year the Erie & Western Transportation Company intervened, and by order of court became a party complainant to the bill. On the 9th day of May, 1876, Robert E. Jenkins was appointed receiver of the insurance company, and on that day filed his bond, and on the 12th day of May the company executed to him a conveyance of all its property and property rights and interests. Subsequently the insurance company was adjudicated a bankrupt, and Jenkins was elected assignee, and on the 15th day of July, 1878, as such assignee, he was made a co-complainant in this suit with the Harts and with the transportation company. On the 5th day of January, 1877, by stipulation of the parties on file, the bill was dismissed as to the Firemen's Insurance Company. It was stated on the argument, and not denied, that the bill had been also dismissed as to Turpin, and it is understood that the insurance company and Harding are now the sole defendants.

The Pleadings.

The bill alleges the recovery of a judgment by Cynthia C. Hart against the Globe Insurance Company on the 4th day of May, 1876, for the sum of \$1,028.15, and also the joint recovery of a further judgment by Cynthia C. and John S. Hart against the insurance company for the sum of \$1,026.65; and that on the day last named executions were issued upon these judgments, which were, on the 5th day of May, 1876, returned nulla bona. The bill then charges as to the defendant Harding, on information and belief, that he has in his hands or under his control assets and securities of some nature or description belonging to the insurance company, or in which the company has some legal or equitable interest, which ought to be applied to the complainants' demands, and discovery is claimed and asked. The prayer of the bill, among other things, is that a receiver of the company may be appointed, and that Harding be decreed to account for the property of the company in his hands,

over to the receiver for satisfaction of complain-

On the 9th day of May, 1876, the defendant Harding filed a bill, and on the 15th day of February, 1877, filed a supplemental answer. On the same 9th day of

Insurance Company and the Firemen's Insurance Company separately answered, but the issues to be here developed wholly upon the answers of the defendant Harding and the plaintiffs' bill. Some time after this suit was begun, the defendant filed a cross bill in the nature of a bill of interpleader against the insurance company, Robert E. Jenkins, one of the plaintiffs herein, alleging that he (Harding) owned and claimed to own as his own property some property to over \$40,000, signed by the South Chicago Fire Insurance Association, and secured by a trust deed or mortgage on property in this county; that said notes and mortgage were signed by said Jenkins and by said Fawsett; that Fawsett had brought a suit in trover for the value thereof against Harding, and that they might be decreed to interplead concerning the same. It appears, however, that Jenkins has filed a bill of interpleader in said notes, and, as between Fawsett and Harding, the matter has been settled in Harding's favor (at least for the purpose of this suit is concerned) by a trial of the trover suit, and the cross bill is now out of the case.

Statement of Facts of Case.

It appears, greater difficulty in determining what are the facts in this case in some of its branches than in determining the principles of law applicable to the facts. The contentions are of more than usual magnitude, and the court has not been unmindful of the necessity of thoroughly investigating the case in all its complicated details, to the end that the issues might be reached upon the material issues in the testimony is very voluminous, but portions of it are quite irrelevant, since certain of the issues originally presented ceased to be the subject-matter of contest. Upon the accuracy of the printed abstract of the testimony the court was much questioned by counsel on both sides. The court has therefore felt it to be its duty to carefully examine the entire mass of original testimony as it came before the master, and as the result of such examination the material and important facts of the case are found to be

and for several years prior thereto, the Globe Insurance Company was and had been engaged in the business of fire insurance in the city of Chicago. George K. Clark was then the president, and Sydney P. Walker was the secretary of the corporation. In consequence of very heavy losses sustained by what is known as the Chicago fire of July 14, 1874, the capital of the company became greatly impaired, and the impairment was undoubtedly more serious than in any other of the transactions about to be narrated then, and in order to restore the company to a sound condition,

Clark and Walker set on foot measures to obtain additional capital, and to that end opened negotiations with Harding, McCoy & Pratt, a law firm in Chicago, with a view to enlisting them in the enterprise. A trial balance of the company was exhibited to those parties, or some of them, for the purpose of enabling them to determine whether the purchase of stock would be a good investment. There is some conflict in the evidence upon the question of the extent to which the defendant George F. Harding examined this trial balance and investigated the affairs of the company at this time. To some extent, undoubtedly, he examined the statements exhibited to him, though the circumstances of the transaction tend quite strongly to show that the principal examination, so far as any was made, was left to Mr. Pratt. I do not, however, deem this very material. Whatever the facts may be in that regard, the negotiations between the parties resulted in a contract between Harding, McCoy & Pratt of the one part and Clark and Walker of the other, dated July 28, 1874, by which the parties formed a copartnership so far as related to their contemplated interests in the company, and which in its material parts was as follows:

First. Clark and Walker agreed to sell to Harding, McCoy & Pratt \$75,000 of the stock of the company at par, and the purchasers agreed to pay therefor as follows: \$25,000 in cash, \$25,000 in real estate mortgages, and \$25,000 in other securities.

Second. It was agreed that Harding, McCoy & Pratt should have the right to buy, and Clark and Walker were to aid them in purchasing, stock on the best possible terms until the interests of the respective first and second parties in the stock of the company should become equal in amount, it being declared in the contract that Clark and Walker then held, after selling \$75,000 of the stock, \$110,000 of the stock of the company.

Third. It was further agreed that in case Clark and Walker should retain their own stock and give to Harding, McCoy & Pratt the stock of other parties, Harding, McCoy & Pratt should have the right at any time within one year to demand from Clark and Walker an equal amount of their own stock at par, on like terms, but not to exceed the sum necessary to equalize the several amounts of stock of the several parties to the contract, and that after such equalization of stock all purchases made by either party should be shared by them fairly, dividing the stock and paying therefor according to the terms of said purchase.

Fourth. It was agreed that within 30 days, and before Harding, McCoy & Pratt should be obliged to pay more than the cash payment of \$25,000 upon the stock then purchased, they might name and have elected three persons as directors of the company, and should have the right to name the vice president, and also the chairman of the executive and finance committee, which should consist of the president and vice president of the company and such chairman.

Fifth. It was further agreed that the several parties to this contract should unite in the election of the next and each succeeding board of directors of the company, each party naming one-half of

that, if any odd number should be the number of the additional director for the odd place should be settled by agreement or the place remain vacant.

It was declared that the object of the contract was to make the company a first-class company, and that all the power and influence of the company and its several stockholders should be represented by the parties thereto, should be subject to that end.

That nothing contained in the contract should have the effect of making the several parties liable for each other as in the case of a copartnership, nor beyond the scope of the contract, the intention being that the several interests should be reserved for the purpose of management only.

Several features of this contract which should be particularly observed; and first it is to be observed that Clark and McCoy & Pratt were making the contract on their part and in selling the stock in their individual capacities. Harding, McCoy & Pratt were acting as individuals, and not in any representative capacity, in the purchase of stock in the execution of the contract.

Then it is evident that the parties contemplated by the contract Walker might retain their own stock, and give to McCoy & Pratt the stock of other parties, and, in that case, McCoy & Pratt should have certain rights with respect to the stock coming from Clark and Walker at a future time and on the same terms of their own stock at par, on like terms. Further, it is contemplated that a large control over the affairs of the company should be exercised by Harding, McCoy & Pratt. This is evident from the provisions in the contract for the future election of directors and officers of the company, the executive and finance committee, and, as will be seen, the subsequent action of the parties carried these provisions into effect. Lastly, it is observable that, so far as related to the control of the parties in the company, and for purposes of the corporation, the contract created a copartnership, the object of the agreement to put the company on a new basis, and the assets of the company, so far as they were contributed by the parties to the contract, were pledged to that purpose. The stock thus contracted to be sold to McCoy & Pratt it is understood had belonged to Fawcett, Brown, and Owen, three stockholders in the company, who had agreed to lend the funds of Clark and Walker to be used by them as the company might require; and it should have been noted that at a meeting of the directors of the company in 1874, the president was authorized to take such steps as might be deemed advisable to restore the impairment of stock, and to put the company in a position to meet its obligations and maintain its credit.

Under the contract before mentioned there was paid to Harding, McCoy & Pratt stock to the amount of \$25,000 in cash, \$30,000 in stock, and the security furnished by McCoy or McCoy and Pratt, and the securities furnished by Harding. The last-named

securities consisted of \$10,000 of first mortgage bonds of the Chicago, Burlington & Quincy Railroad Company and \$10,000 of first mortgage bonds of the Burlington & Missouri River Railroad Company. The stock thus paid for was delivered to the purchasers in the following proportions: To Harding \$30,000, to McCoy \$22,500, and to Pratt \$22,500. This was followed by a meeting of the directors of the company held August 1, 1874, at which Harding and Pratt were elected directors and members of the executive and finance committee to fill vacancies occasioned by resignations tendered at said meeting. On the 25th day of August, at a meeting of the directors held on that day, the resignation of Clark as president of the company was received and accepted, and Mr. Harding was elected president. At the same meeting Mr. Clark, on motion of Mr. Pratt, was chosen chairman of the executive and finance committee. The next step in the proceedings was to remedy the impairment of the credit of the company occasioned by previous losses, and on the 11th day of September, 1874, at a meeting of the reorganized board, Mr. Harding presiding, the following resolutions offered by Mr. Pratt were adopted:

"(1) Resolved, that this company requires additional assets in order to overcome impairment, and to properly conduct its business. (2) Resolved, that this company will, out of its surplus earnings, pay to any person or persons who will furnish such assets a dividend of not less than 10 per cent. per annum thereon, and also a dividend of a sum equal to the amount of interest collected on the securities or assets aforesaid. (3) Resolved, that such assets shall be held by this company subject to the payment of all indebtedness of this company to policy holders, and that the honor and good faith of this company shall be pledged to keep said assets intact, and return the same, with the amount of the interest collected thereon, less the amount of the dividend paid for said interest to the several persons who shall advance the same, exhausting first all other assets, as well as the individual liability of the stockholders, before said assets shall be touched or impaired. (4) Resolved, that the amount wanted, the time when wanted, and the period for which the assets are wanted, and the return or surrender of the same, or other details of the arrangements for said assets, shall be determined by the executive committee. (5) Resolved, that the stockholders of this company, in proportion to the amount of stock held by them, respectively, shall, in the first instance, be entitled, and are hereby earnestly requested, to advance said assets; and the executive committee are instructed to give them a preference, fixing a date within which they shall severally exercise said privilege. (6) Resolved, that the secretary advise the several stockholders of the above resolution at once, in order that they may accept, if they desire, the offer in number five above."

Under the terms of these resolutions, Harding, McCoy & Pratt advanced to the company: In cash, \$46,918.75; \$5,000 Great Western Telegraph bonds, market value, \$4,500; \$14,000 stock of Second National Bank of Peoria, value, \$21,000; \$5,000 stock of Union National Bank of Chicago, \$7,500,—making a total of \$79,918.75 thus contributed by Harding, McCoy & Pratt. Clark and Walker also paid in under the resolutions the following sums: Cash, \$15,000; bonds of Chicago, Burlington & Quincy Railroad Company, \$10,000; bonds of Burlington & Missouri Railroad Company, \$10,000; real estate security, \$30,000,—making a total of \$65,000 contributed by Clark and Walker; and of the money and securities thus advanced by them, it should be said that they were the same

curities paid and delivered to them by Harding, McCoy & Pratt for the stock which the latter purchased on July 28, 1874. There seems to be some question as to these advances made by Harding, McCoy & Pratt and Walker, and aggregating in all \$144,918.75, were made by the company just prior to, or at the time of the passage of the resolutions of September 1874, they were advances made for the benefit of the company under the resolutions, and the circumstances indicate that the contract of July 28, 1874, was made, it was an advance which would be made by the parties to that contract in case of the impairment of the stock of the company, and to enable the company to successfully conduct its business. These contributions by Harding, McCoy & Pratt and Clark and Walker, were not, as claimed by complainants' counsel in their brief, to be held subject to the payment of its indebtedness to the company, but they were still to occupy a higher plane than the contributions to capital, since provision was made for their payment out of the company in case they should not be paid. "They were midway between the company and its stock, subject to the debts, but not to the stock." And therefore these advances came to be spoken of in the company as the "preferred debt," and are thus hereafter referred to in this opinion, to distinguish them from other advances subsequently made by the company. In the case of these advancements of money and securities, there was on September 18, 1874, a meeting of the executive committee, Messrs. Clark, Harding, and Pratt participated in which the following resolutions were adopted:

Resolved, That the amount required to make up the impairment and place the company in a strong financial condition is about the sum of \$150,000. And that this committee accept of Geo. K. Clark and S. P. Pratt's securities, to wit [abbreviating the statement of the

.....	\$15,000 00
Mort. bonds.....	10,000 00
St. bonds.....	10,000 00
Clark's mortgage.....	30,000 00
	<hr/>
	\$65,000 00

Accepted of George F. Harding, A. McCoy, and L. G. Pratt the same as above [abbreviating as before]:

.....	\$ 46,918 76
Preferred bonds, \$5,000 par value, worth.....	4,500 00
Clark, par \$14,000, worth.....	21,000 00
Clark stock, par \$5,000, worth.....	7,500 00
	<hr/>
	\$ 79,918 76
	65,000 00
	<hr/>

Adding to the sum of..... \$144,918 76

"That said securities were offered by the parties in response to the resolutions of the board of directors of the Globe Insurance Company passed September 11, 1874, and are accepted by the executive committee to be owned, held, and used under the terms of said resolution, the interest thereon to be allowed from the time the money and securities were deposited with the company."

On the same 30th day of September this action of the executive and finance committee was approved by the board of directors by resolution as follows:

"Whereas, by resolution of the board of directors of the Globe Insurance Company of September 11, 1874, it appears that the capital stock of said company was impaired, and had to be made up, and the amount, time when wanted, the period for which the assets were wanted, their surrender, etc., was left to the executive committee to determine; and whereas, the executive committee have fully considered the whole subject-matter, and have fixed the amount required at a sum not exceeding \$150,000; and whereas, George K. Clark and Sidney P. Walker propose to furnish the following moneys and securities, to wit [naming the same moneys and securities as contained in the resolution of the executive committee], and George F. Harding, Alex. McCoy, and L. G. Pratt, the following [naming them as in the executive committee's resolution], in all amounting to the sum of \$144,918.76, and the said securities having been examined and accepted by said executive committee: Now, resolved, that the action of said committee in the premises be approved by this board, and the said securities be accepted and held in conformity with the resolutions of September 11, 1874."

Subsequent to all of these transactions the defendant Harding became the owner of additional stock to the amount of \$41,500, which had been pledged to certain Chicago banks by Clark and Walker, and at a later period Harding, McCoy & Pratt purchased still other stock to the amount of \$8,000, two-fifths of which belonged to Harding; so that ultimately Harding held of the stock of the company the following amounts:

All of the \$41,500.....	\$41,500
Of the \$8,000 his share was two-fifths.....	3,200
Of the original stock purchased by Harding, McCoy & Pratt under the contract with Clark and Walker of July 28, 1874, his share was two-fifths	30,000

Making in all \$74,700

As before stated, Harding, McCoy & Pratt advanced to the company under the resolutions of September 11, \$79,918.76. Of this amount, the several parties contributed the following shares:

McCoy and Pratt jointly, the Peoria Bank stock.....	\$21,000 00
McCoy and Pratt owned three-fifths of Union stock, \$7,500.....	4,500 00
McCoy and Pratt owned three-fifths of telegraph bonds, \$4,500....	2,700 00

Making the amount contributed by them..... \$28,200 00

Harding advanced cash	\$46,918 75
Also two-fifths of Union Bank stock.....	3,000 00
Also two-fifths of telegraph bonds.....	1,800 00

Making the amount contributed by him..... \$51,718 75

At some time after the adoption of the resolutions of September 11, 1874, the insurance examiner for the state of Michigan, in his examination of the assets of the company, made some objection

the resolutions, and therefore, at a meeting of the October 10, 1874, certain supplementary resolutions which, with the original resolutions, were declared to be for the advance of assets made by Harding, McCoy and Walker. The supplementary resolutions are

resolved, that in no event shall the interest be paid as stipulated in the resolution aforesaid, except out of the surplus earnings; and it is further resolved, that nothing herein contained shall be construed to change the fundamental fact that the said above-defined assets shall be the assets of the said company; and it is distinctly resolved, that the assets must always be held to be the absolute property of the company, free and clear from any liens or claims thereon, and the said assets shall be irrevocably pledged to the payment of all the debts of the company. It is further resolved, that the phrase 'surplus earnings' in the second resolution aforesaid shall be strictly construed; and that no dividend be declared which shall reduce or impair the assets of said company below the highest standard required to meet all liabilities, estimating reinsurance reserve according to the requirements of the various states in which the company does

business. On, the insurance company continued to prosper until its final collapse in 1876, but its history was marked by losses and financial embarrassments; and it is undoubted from time to time after October, 1874, Mr. Harding advanced moneys and securities to relieve the company from temporary embarrassments. These moneys and securities which were advanced in pursuance of the resolutions of September 11, 1874, are known in the records herein referred to as the defendants' "cash advances." What was the amount of these cash advances is a disputed question in the case, and one that will be considered hereafter. Mr. Harding continued to be the president of the company from the time of his election, August 25, 1874, until his death in 1875; and the records show that he attended all the meetings of the board at which any business was done while he was president. In this connection it should be stated that it is claimed by the defendants that he tendered his resignation as president August 1, 1875, and the record, which shows that his resignation was accepted, must, I think, control.

At the end of 1875—and probably in June—the insurance companies in certain eastern states began to threaten to exclude the business of the company in those states. In consequence of this threat in the affairs of the company, and for the purpose of preventing its expulsion from the states referred to, Mr. Harding made a trip to the East, and had a conference with the insurance authorities concerning the financial condition of the company. Nothing, however, was accomplished, except to secure an opinion in which the company might retire from those states. Defendant Harding then knew that the company was in a precarious position, and that it is a disputed question, but it can hardly be doubted

that he became alarmed, and believed its situation to be precarious. McCoy testifies that upon Mr. Harding's return from the East he came to his (McCoy's) house, and stated that he was satisfied the stock was worth nothing, and that they ought to shape the company so as to save the preferred claims. This is controverted, but it is very clear that steps were speedily taken to protect Mr. Harding against loss to the extent that the circumstances of the case and the situation of the company permitted. On the 24th day of July, 1875, he transferred to Clark and Walker the entire amount of his stock, \$75,000, and received from them an assignment of the identical securities and moneys which Harding, McCoy & Pratt had delivered and paid to Clark and Walker on account of their original purchase of stock in July, 1874. The contract evidencing this transaction is as follows:

"This agreement, made this 24th day of July, A. D. 1875, by and between George K. Clark and Sidney P. Walker, of the first part, and George F. Harding, of the second part, witnesseth: That George F. Harding hereby sells to said parties of the first part seventy-five thousand dollars of the stock of the Globe Insurance Company. And said parties of the second part hereby agree, in consideration thereof, to sell and deliver to said George F. Harding the following moneys and securities which were put and placed in the hands of the Globe Insurance Company in the name of George K. Clark and Sidney P. Walker, as shown by resolution of the said company of September 30, 1874, to wit: 1st. Cash (greenbacks), twenty-five thousand dollars. 2d. Chicago, Burlington and Quincy R. R. bonds, ten thousand dollars. 3d. Burlington and Missouri River R. R. bonds, ten thousand dollars. (Said bonds being first mortgage bonds of denomination of \$1,000 each, and twenty in number.) 4th. Mortgage of Lorin G. Pratt and Alexander McCoy, securing their note to the Globe Insurance Co. for thirty thousand dollars, described in said resolutions. It is further agreed that, inasmuch as said securities are all in the hands of the Globe Insurance Company, or subject to its control in the payment of the indebtedness of the company, and are, with said moneys, pledged for the indebtedness, or some part of it, of said company to policy holders, and hence cannot now be delivered to said Harding, and for like reason and other good reasons, said moneys cannot be paid to said Harding, it is therefore agreed that said stock shall be transferred to U. P. Smith as trustee, to be held by him in trust, to hold the same as security for the performance of this contract on the part of said first parties by the payment and delivery of said moneys and securities above referred to to said Harding; and, after that is satisfied, then in trust for E. R. Bowen, O. P. Axtell, and A. F. Fawsett, according to their several interests as hereinbefore stated. It is further agreed that said Harding shall receive from said parties of the first part, and each of them, a full and careful transfer and assignment of their several and joint or joint and several interests in said moneys and securities, which shall be delivered to him with this agreement; and careful and full obligations of said company shall also be obtained to deliver and pay said moneys and securities (or their value in money) to said Harding free and clear from all claims, demands, and equities whatsoever, save such obligations as are created by the contract of September 30, 1874, and the resolutions of that date forming part thereof. by and between said parties of the first part, or some of them, with said company; and that said parties of the first part shall unite in and take the proper steps to terminate the liability of said securities and moneys for future indebtedness or policies hereafter issued by said company, and to contract its business and reduce its capital so far as needed for that purpose. It is further agreed and stipulated that A. F. Fawsett is the owner of forty-four thousand dollars of said stock, that E. R. Bowen is the owner of twenty-one thousand dollars of said stock, and that O. P. Axtell is the owner of ten thousand dollars of said stock, and the same is to be delivered to them

and upon the conditions of the foregoing agreement; said and pledged as security in the hands of said Smith, trustee, and payment to said Harding of said moneys and securities further agreed that A. F. Fawsett shall resign his position and company, and said Smith shall be elected in his place.* and that said Harding and Smith shall hold the proxy of said Bowen, Axtell, and Fawsett, irrevocably, to vote and votes entitled to be cast in the name of said Smith, as trustee of said stock, at all future meetings of the stockholders until said moneys and securities are paid and delivered to Smith, in addition to executing this agreement as a proxy, and deliver to said Harding, at any time, on demand, a paper power to him and said Smith, in the same terms, to vote touching said stock. It is further agreed on the part of Fawsett, E. R. Bowen, and O. P. Axtell that they assent to this and will assist in carrying it out as far as their influence and holders and directors of said company, *and will look to as said insurance company is concerned, and not to said return to them of said stock or its proceeds.*

Geo. K. Clark. S. P. Walker.

"A. F. Fawsett. Geo. F. Harding."

George F. Harding that he will look to Geo. K. Clark only so much of said securities as the pro rata of Fawsett stock, and this he does with the consent of S. P. Walker.

Geo. F. Harding."

ed to. S. P. Walker."

s marked (*) were apparently erased by pencil lines and was drawn, before execution.

from Clark and Walker is as follows:

gived, we jointly and severally assign and transfer to Geo. following moneys and securities, and all our right under and it:

Greenbacks.....	\$25,000
& Q. R. R. bonds.....	10,000
R. R. bonds.....	10,000
Share of McCoy and Pratt.....	30,000

the resolution of September 11, 1874, of the Globe Insurance and securities for the preferred stock, so called, of said company being to place said Harding in the same position touching all the rights touching the same under said resolutions, for either of us, and especially of the said Clark and Walker; said insurance company to treat said Harding as the owner July 24, 1875."

Harding never got from Clark and Walker or the of these identical securities and moneys, for they had been issued by the company, and were beyond its control or and Walker. But he did get by this transaction all of Walker's interest in the so-called preferred debt, for the interest assigned to him consisted of Clark and Walker's interest in the resolutions of September 11, 1874.

of the transactions of the parties and of the company and of the order, it is found that on the 29th day of July, 1875, of the board of directors of the company was held, following resolutions, which the secretary's record reflected by Mr. Harding, were adopted:

that the moneys and securities advanced under the resolution of September 11 and 30, 1874, be returned to the parties from whom

the company received them, as soon as the obligations contracted on the faith of them shall be paid. (2) Resolved, that the company will make no claim to set off indebtedness of said parties to said company against the said securities and moneys on the obligation to return the same, but will recognize the right of them or their assigns to the same, without set-off, diminution, or discount. (3) Resolved, that no more obligations of any kind be contracted on the faith of said securities and moneys, but said contract touching the same be regarded as terminated so far as future obligations of this company are concerned, and immediate steps be taken to enable the company to return the same, and stop the payment of interest thereon. Also, whereas, A. F. Fawsett, O. P. Axtell, and E. R. Bowen, acting by Geo. K. Clark and S. P. Walker, put into the Globe Insurance Company certain securities and moneys under the terms of the resolutions of September 11 and 30, 1874: Now, therefore, resolved, that said moneys and securities be returned, as soon as the terms of said contract are completed, to the said Fawsett, Axtell, and Bowen, in the proportions of \$44,000 to Fawsett, \$21,000 to Bowen, and \$10,000 to Axtell, provided the claims of all creditors of Clark and Walker against the same be first discharged and defeated. And whereas, the losses by fire of the company in July, 1874, impaired its capital stock to a sum exceeding twenty-five per cent. thereof; and whereas, on September 11, 1874, the company resolved to make good said impairment, and undertook so to do on September 30, 1874, by an advance then made to this company of securities and moneys by parties in interest as will more fully appear by the records of this company of September 11 and 30, 1874; and whereas, objections have been made to said mode of making up said impairment, and it is deemed advisable to terminate the same, and to proceed under the general insurance law of this state by first reducing the capital stock, and gradually returning, as fast as good faith will admit, the moneys and securities so advanced, and then increase the capital stock as soon as possible: Therefore resolved, that the capital stock and par value of the shares of the Globe Insurance Company be reduced to \$200,000, and that the auditor of public accounts of the state of Illinois be requested to make an examination of its affairs, and grant a certificate that it is proper, and is justified by the property and assets of said company, to reduce the capital stock and the par value of the shares of said company to said sum."

Then, on the 12th day of August, 1875, at a meeting of the executive and finance committee, a committee consisting of Messrs. Clark and Kimball was appointed "to confer with Mr. Harding in regard to disposing of preferred debt and his account." It is claimed by complainants that a settlement was immediately negotiated between Clark, acting for the committee, and Harding, of the latter's entire account, including "preferred debt" and cash advances, and this claim is supported by the testimony of Clark, which, in substance, is as follows:

Witness says he was on that committee. Mr. Kimball was also on the committee, but gave it no attention. "I transacted the business of the committee. Met Harding on the subject of his account, which embraced his interest in the preferred debt and his cash advances. This resolution was passed in order to get a settlement with Harding. I had previously had a number of interviews with him relative to his account. Mr. Harding was anxious to get some pay for what he had put into the company. He became alarmed about its solvency, and the matter of a settlement had been talked over before the committee was appointed. It was talked over directly after he had acquired Clark and Walker's rights under the resolutions. We had a number of conversations on the subject as to how it could be done. We could not pay him back in kind. The money had been expended in paying losses. The cash securities had been hypothecated for nearly all they were worth, and paying him back in kind was out of the question. But he expressed a willingness to accept other securities in place of those that had been put in, and a committee was appointed to agree upon values and ad-

That was the object of the committee. His claim was, and Walker preferred account, \$75,000.00; amount put in the resolutions, \$51,718.75,—total preferred debt, \$126,000,—he claimed somewhere from \$9,000 to \$12,000 cash exclusive of the interest provided for by the resolutions, stock he purchased, and a little discrepancy between the which he had furnished to the company of \$24,500 and \$25,—as before explained. Met Mr. Harding at his residence, in the evening, in the latter part of August, 1875, no one present excepting Harding and witness. No other committee was there. Made settlement of his account at the same basis of settlement, the details of which were subsequently carried out. Q. 91. Well, give us the basis. A. By settlement Harding was to receive of the company certain fixed values, to be agreed upon between the committee and payment of his entire claim against the company. Values were fixed by Harding and myself at that interview upon the following basis owned and held by the company:

Notes and mortgage for \$52,500 and interest at....	\$ 55,000
with mortgage at.....	18,000
Mortgage at.....	2,000
Company mortgage at.....	6,000
Other mortgage at.....	9,000
Mortgage for \$10,000 and interest simple, unsecured, at.....	15,000
Att's mortgage (which had previously been taken.....)	30,000
	<hr/>
	\$135,000

with the Great Western Telegraph bonds, valued at \$1,800, the entire indebtedness, except the interest on the preferred in the resolutions, and the profit on the stock he had purchased.

denies that this alleged settlement was effected between him and Clark as thus testified to by Clark, or that any settlement was delivered to him, or that there was any settlement on the 30th August following. Whatever the facts may be, and so far as this issue in relation to the time of the settlement is concerned, it will be considered that on the 30th of August, 1875, there was a meeting of the board of directors, at which Mr. Harding presented himself as president, as before stated, and at which the following resolutions were adopted:

Resolved, That the settlement made by the executive committee with Mr. Harding be approved with the following corrections, viz.: That the bonds and stock shall be allowed Mr. Harding, instead of the same were allowed; second, that Mr. Harding shall receive the Great Western Telegraph bonds at par; third, that the interest account of Mr. Harding shall be calculated correctly, and such amount shall be added to the sum of the item as reported."

Resolved, That at a second meeting of the directors, held, on the 30th day of August, the following resolutions be adopted:

Resolved, That the president and secretary of this company be directed to pay to Mr. Harding the sum of (\$47,743.52) forty-seven thousand seven hundred and fifty-two one-hundredths dollars, due to him by the company, and secure the same by the following

collaterals, to wit: The notes of Geo. K. Clark, payable to the Globe Insurance Company, two in number, dated December 28, 1872, due five years after date, with interest at 8 per cent., payable annually, secured each by trust deed, one for each note, made by said Clark and wife to Sidney F. Walker, trustee, conveying certain premises therein described; also the note of said Clark payable to said company, of same date and tenor, secured by trust deed made by said Clark and wife conveying premises owned in fee by his wife to said trustee,—all three of said notes being for the sum of \$5,000 each; also two notes made by said Clark to said company, dated March 11, 1873, payable five years after date, with 8 per cent. interest per annum,—one for the sum of \$4,000, and the other for the sum of \$8,000,—each secured by trust deeds, one for each note, conveying certain premises to Walker, as trustee; also a note of said Clark to said company, dated July 1, 1873, payable five years after date, with 8 per cent. interest, payable semiannually, for \$4,000, secured by a trust deed conveying certain premises to said Walker, as trustee; also two notes of said Clark, made to said company, dated March 9, 1874, payable five years after date, with 8 per cent. interest, payable annually; one for \$15,000 and one for \$2,000, each secured by independent trust deeds, conveying certain premises to said Walker, as trustee; also a note of said Clark to his own order, dated August 13, 1874, payable five years after date, with interest at 8 per cent., payable semiannually, for \$40,000, secured by a trust deed to Alex. McCoy, as trustee, and assigned and indorsed by said Clark; also eleven notes made by Elmer F. Westcott to Asbury F. Favsett, for \$47,772.73 each, due on or before three years from date, with interest at 8 per cent. per annum, and the mortgage securing the same on the premises therein described; also the note of Michael Smith to the Globe Insurance Company for \$20,000, dated December 13, 1871, and payable on or before April 1, 1873, with interest at the rate of 8 per cent. per annum, payable annually, and the sale mortgage securing said note, \$4,000, having been indorsed thereon; also the note of Obadiah Huse to said company for \$2,000, dated March 25, 1873, five years after date, with 8 per cent. interest, payable annually, and the trust deed securing the same; also three \$1,000 bonds of the Omaha & Southwestern Railroad Company and six \$1,000 bonds of the Wisconsin Valley Railroad Company; also the note of W. S. Waller to Geo. K. Clark, dated September 16, 1873, for the sum of \$8,500, payable one year after said date, with interest at 8 per cent. from date, and the trust deed securing the same; also the note of M. O. Walker, now deceased, in favor of said company, dated March 24, 1871, for the sum of \$10,000, due five years after date, with interest at the rate of 6 per cent. per annum, payable annually, and the trust deed or mortgage securing the same; also the note of M. O. Walker for \$2,500, to the order of said company, dated September 24, 1872, payable on or before August 1st after date."

These securities thus to be transferred as collateral to the demand note amounted on their face to over \$200,000, and, as it will be observed, were to secure the payment of a note of about \$47,700. The demand note was immediately executed, and the collaterals were delivered. It was at this time, as the defendant Harding claims, that a settlement was made. Just what items made up the amount of the demand note is not clear. The testimony of Clark is to the effect—and this is the claim of complainants—that the object of the several transactions before recited was to secure to Harding the payment of the entire amount of the so-called preferred claim and cash advance, and that, after crediting the company with the mortgages and securities alleged to have been turned out to him in settlement prior to the meeting of August 30, 1875, there was, on account of interest and some other items, a balance due him of about \$37,000, which balance, for some reason unexplained by Clark, and apparently not understood by him, was ultimately

2; that for the purpose of perfecting his title to
 eged to have been previously delivered to Hard-
 by a sale under the power that should be annexed
 note it was arranged that such a note should be
 testimony on this point Clark says:

that was talked there for quite a while,—canvassed very
 us. I really wanted to accomplish it; that is, if he
 s title to his securities by a sale under the power in the
 willing he should do it. If he got into any litigation or
 eemed to anticipate], why, he wanted to be in a position
 up his moneyed claim against the company, and hold
 d that was paid. That was the conversation between

Harding denies. His version of the transaction is

tlement made at that time. One of the first things done
 r to produce my account. He did produce an imperfect
 unt, amounting to \$12,000 and over. It was on a small
 oks of the company. After producing the vouchers and
 er, it was found that my account would have to be
 amount to somewhere from \$25,000 to \$30,000, and the
 stock would swell the amount to about \$35,000. Then
 computed upon my cash advances, which in all amounted
 0, I think. Then the amount of interest was counted
 putations made, and coupons collected, and the premiums
 ounted to the sum of \$47,000. I was willing to take
 as they were ready to give them to me, upon my cash
 that there was a larger sum still due me upon my cash
 is was on August 30, 1875."

y of August—the day after the demand note was
 ing gave to the directors of the company the fol-

"August 31, 1875.

' Directors of the Globe Insurance Company: You will
 hat as a stockholder, as a creditor, and as a party in-
 ances made under the resolutions of September, 1874, I
 object to the surrender and delivery to any individual
 any securities in lieu thereof, of those formerly given
 held by the company under the resolutions of September,
 claiming that the honor and good faith of this company
 the same until the terms of the contracts under which
 shall have been satisfied; and I inform all parties in
 ot and will not waive any rights which I may have to
 es for the payment of any moneys due me.

George F. Harding."

ote contained the usual form of sale found in col-
 in October, 1875, Mr. Harding sold the collateral
 Hough, a lawyer in Chicago. The substance of
 y relating to the sale is this:

the fall of 1875,—I should think in October,—he (Harding)
 se some securities. I am unable to state in detail what

Could not tell the amount precisely, but it was some-
 even \$150,000 and \$200,000. They were notes secured by
 ollection is that Geo. K. Clark figured more than any
 curities. One mortgage was by Mr. Smith. Don't recol-
 the Clark or Smith mortgages. Harding had the notes
 is office in the Kent Building. I had possession of the

securities two or three months, perhaps. I should not say it was over three months. The circumstances under which I purchased were these: Harding told me he had some securities that he wanted to sell me, and he showed me the securities. I looked them over, and told him I had no money to purchase them, and he said I need not pay any money; he would take my note. I asked him if the securities were good, and he said they were. The note is destroyed. My recollection is that it amounted to something over \$60,000. That is a mere impression upon my mind. I can't recollect more definite than that it was payable to Harding's order, and, I think, was due some six months after date. I sold the mortgages back to Mr. Harding. Neither of the sales (Harding to Hough or Hough to Harding) was public. Both were private sales. In payment he surrendered to me my note, and gave me \$250; that is, he allowed it to me on a claim that he had against me. I don't recollect anything more that he said except that he wanted to buy those securities. It took place at his office. It was some time in the winter of 1875-76. Harding and I were officing in the same suite of rooms at the time I purchased; also at the same time I sold back the securities. I put up no collateral with my note. I understood that, if Mr. Harding wished to buy those securities back, that I would let him have them. Harding stated that he might want to purchase them back, and I said he could have them back if he wanted them. I don't think I should have purchased them and given the note if I had expected to keep the securities and meet the note, but I was abundantly secured in giving my note. It was the understanding on my part, that Harding was to purchase them back. He did not exhibit to me any collateral note under which he held them. I think he said he got the securities from the Globe Insurance Company. (Witness is shown the resolution of August 30, 1875, giving a list of the securities said to be collateral to the demand note, and recognizes the general character of them as the same with those he bought of Harding.) Cross-examination: "Q. Didn't Mr. Harding, at the time of this sale, tell you that he could not and would not have any understanding with you whatever of any kind that would invalidate the sale, and could not and would not have any understanding with you, but that he wanted to make a sale of the property, and that it was a good purchase, and you were to hold the property? Wasn't that the understanding? Wasn't that the statement? A. I think there was some conversation substantially to that effect."

This sale to Hough and the sale back to Harding the complainants insist was a sham proceeding, by means of which Harding sought to strengthen his own title to the collateral securities, while Mr. Harding claims that it was a fair and valid sale, without any understanding at the time that he would buy the securities back. Difficulty arose, according to the testimony of Mr. Harding, in transferring the collaterals, as they did not bear the indorsement of the company. Thereupon Mr. Harding applied to Mr. U. P. Smith, then president of the company, for indorsement of the securities, and, as he hesitated to indorse them, Mr. Harding wrote him the following letter:

"Chicago, October 4, 1875.

"U. P. Smith, Esq., President of Globe: I respectfully request the indorsement of the notes and mortgages described in my demand note of August 30, 1875, and the guaranty as to such of said paper as I hope to get on without putting Globe indorsements upon. My object in this is, I wish my titles to the collaterals to be perfected. I have sold them all, and wish to deliver them to the vendee. As I have advised Mr. Clark and others, I will buy the Clark mortgages of the vendee, and will sell them to the Globe for the amount of said demand note, and I will give you an opportunity to pay for them by giving me the Globe paper with them as collateral, due in two, four, six, and eight months from September 30, 1875, as a condition of confirming the title of my vendee to said collaterals. I will, upon said contracts

ing made and carried out, give to said company a receipt
nces under the agreement of September, 1874, containing
he title of my vendee to said collaterals stands good and

Geo. F. Harding."

were then indorsed, and upon their purchase from
sold back to the company the Clark mortgages,
company its four notes, all dated September 30,
940.38, one for \$7,239.16, one for \$12,609.99, and
ue respectively in two, four, six, and eight months,
ng \$50,274.53; and says that he gave a release
liability to him under the agreement of Septem-
wing the alleged sale to Hough it appears by the
of the company that on the 12th day of October,
meeting of the executive and finance committee,
wing resolution was passed:

ne secretary of this company give to George F. Harding
show the sale of the securities pledged to him on August
was made to David L. Hough on the 9th day of October,
nd consented to by this company on condition only that
purchase back from said Hough the securities called the
and shall release the company from all liability to him
uts of September 11 and 30, 1874, and shall accept the
any to be made to him for the following sums, to wit
our notes last before mentioned]; said notes bearing in-
nt. per annum after maturity, and to be paid when due
f the several periods as above stated; and shall resell
es for the total amount of said notes, taking said Clark
eral security; and the said secretary and president of
ereby authorized and empowered to make said notes to
lso the several parts of the above transaction."

ears on the secretary's book the record of a meet-
rs held October 13th, reciting in detail the giving
ote in obedience to the resolution of August 30th,
als mentioned in that resolution; a report by the
order of the executive committee dated October
signed a paper approving of the sale by Harding
a report by the president and secretary that they
ne purchase from Harding of the Clark securities
50,274.53, being the amount of purchase, with in-
maturity of the notes which were given for the pur-
ecord then proceeds:

It is moved and seconded that the above report of the
tive committee of this board and also of the president
cepted, and that the same is hereby fully approved."

not paying the four notes given for the Clark se-
curities were sold for the sum of \$20,635.07, Mr.
ne purchaser. Thus he acquired by virtue of this
y virtue of the proceedings in connection with the
entire body of securities which it is sought by the
ompel him to surrender and account for for the
holders who are now unpaid creditors of the Globe
ny.

Immaterial Matters.

In considering the case in its legal bearings and in the light only of material facts, it is evident that there may be eliminated therefrom a number of matters upon which considerable testimony has been taken. Among other things, it is disclosed that in the course of proceedings taken by Mr. Harding in connection with his withdrawal from the company, and to secure an adjustment of his supposed rights, controversies arose between himself and McCoy and Pratt, which have been made the subject of much discussion in this investigation. It was probably unavoidable that in developing the details of the various transactions involved this should be somewhat prominently brought out, but I regard the difficulties which arose between the parties named as quite extraneous to the issues here to be settled, except as the relations which were engendered between them may affect their credibility as witnesses. Again, there is much testimony in the case relative to the so-called Fawsett mortgage, which I understand to be the South Chicago Land & Building Association mortgage. From what was said upon the argument in relation to this mortgage and the litigation between Fawsett and Harding concerning it that has occurred since the present bill was filed, I conclude that the controversy between those parties touching the ownership of that mortgage has now no relevancy to the present contention. Further, it appears that on the 5th day of March, 1876, the insurance company gave to the defendant Harding its note for \$7,640.75, with certain notes and trust deeds, executed by Dewey and Lay as collateral security. The items of which this note was made up appear in an account annexed to the original answer, marked "Exhibit 4"; and it is to be further remarked that the debited part of the same items appear under date of March 5, 1876, in the defendant's corrected account as shown in his amended answer. Reference is only made to this note of \$7,640.75 and to the items of which it was composed for the purpose of observing that no claim is made by complainants on account of them nor to the Dewey and Lay securities, and this note and the securities may be regarded as out of the case.

The Bradner, Smith & Co. Decree.

The question first encountered on the threshold of this case is, are complainants' rights barred by the proceedings in the suit of Bradner, Smith & Co. against the Globe Insurance Company and others, which was commenced and prosecuted in the state court in 1876? The bill in the case at bar was filed in this court May 5, 1876. The original complainants therein were Cynthia C. Hart and John S. Hart, judgment creditors of the insurance company, and the defendants were the Globe Insurance Company, the Firemen's Insurance Company, George F. Harding, and V. A. Turpin. The return of the marshal shows service of the subpoena of the Globe Insurance Company, George F. Harding, and the Firemen's Insurance Company May 13, 1876, and on V. A. Turpin May 24, 1876.

endants, however, except Turpin, appeared and answered on the 9th day of May, 1876, so that on that day the court exercised jurisdiction over the answering defendants. On the 10th day of May this court appointed Robert E. Jenkins receiver of the insurance company, and on the 12th day of May, in obedience to the order of the court, the company executed an assignment of all its property and effects. On the 15th day of May, 1876, the Erie & Western Transportation Company intervened as a judgment creditor of the insurance company, and made a party to the suit. On or about the 2d day of June, 1876, leave was also granted to Jenkins, as assignee of the insurance company, to intervene in this suit, and on the 1st day of July, 1878, an order was entered making him a party complainant therein. On the 5th day of January, 1877, the court dismissed as to the Firemen's Insurance Company, and on the 1st day of February, 1877, the defendant Harding filed an amended supplemental answer to the bill. This was the state of the case at bar, so that in 1876 the parties thereto were John S. Hart and John S. Hart, complainants, the Globe Insurance Company, the Firemen's Insurance Company, George F. Harding, A. Turpin, defendants, Robert E. Jenkins, receiver, Erie & Western Transportation Company, intervening judgment creditor. On the 3d day of May, 1876, Bradner, Smith & Bradner, simple contract creditors of the insurance company, obtained judgment, filed in the circuit court of Cook County, which was in the nature of a creditors' bill against the insurance company. Their claim, as set out in the bill, was for a loss by fire of property insured by the insurance company, and the insurance company was the sole defendant in the cause. The Globe Insurance Company entered its appearance on the 4th day of May, 1876. On the 5th day of May the complainants in the cause asked leave to amend their bill making new parties defendant, and an order was entered granting leave to file such amended bill. On the 6th day of May an amended bill was filed as of the last-named parties, George F. Harding, the Firemen's Insurance Company, and the Erie & Western Transportation Company, as codefendants in the suit with the Globe Insurance Company. Mr. Harding, by W. A. Barnes, his attorney, and the Firemen's Insurance Company, accepted service of the summons on the 6th day of May, and amended bill as of the 5th day of May. In the proceedings the apparent object of the suit was to reach the property and assets of the Globe Insurance Company, and in the possession of the other defendants, and to decree that the same be applied in satisfaction of the claim of the Firemen's Insurance Company. On the 8th day of May the court granted the suit moved for the appointment of a receiver of the insurance company. On the same day the Erie & Western Transportation Company entered its appearance for the sole purpose of opposing said motion. The motion was overruled on the 23d day of May, 1876, Harding and the Firemen's Insurance Company filed answers to the original and amended bills, denied the allegations therein, and alleged the facts

of the case to be as set forth in their several cross bills filed on the same day. The defendants in the cross bill of Mr. Harding were Bradner, Smith & Co., the Globe Insurance Company, Isaac Crosby, First National Bank of Chicago, Treasurer of the State of Mississippi, the Firemen's Insurance Company, V. A. Turpin, Robert E. Jenkins, receiver of the Globe Insurance Company, and Frank A. Follansbee, receiver of the Mercantile Insurance Company. The matters set up in this cross bill were substantially such as are interposed as a defense in the case at bar, and affirmative relief against the Globe Insurance Company was prayed. On the 27th of May, 1876, Bradner, Smith & Co. disposed of their claim against the insurance company, upon which the suit was founded, and received on account thereof \$100. Their interest in the litigation then terminated. The assignment was executed in blank, and the transaction was conducted by J. C. Latimer, who was the solicitor of record for Bradner, Smith & Co. in the bill filed by them against the insurance company. Latimer testifies that he presented the assignment to Smith for execution, and paid him \$100, which he received for the purpose from Barnes, who, I infer, was the same person who, as attorney for Mr. Harding, accepted service of the summons that was issued upon the amended bill filed by Bradner, Smith & Co. against the Globe Insurance Company, Mr. Harding, and others. Latimer further testifies that Barnes also paid him attorney's fees in addition to the \$100, on condition that the suit could be prosecuted in the name of Bradner, Smith & Co. to a decree in their favor; and it clearly appears that thereafter they incurred no expense in the suit and realized no benefit therefrom. On the 7th day of June, the Globe Insurance Company filed nunc pro tunc, as of June 1st, its answer to the original and amended bills of Bradner, Smith & Co., which consisted of a denial of the allegations in the original bill, and also a denial that the complainants were entitled to the relief prayed by them either in their original or amended bill. On the 21st day of June Mr. Harding filed an amendment to his cross bill, correcting and amending the latter in various particulars, and among other things striking out the names of Isaac Crosby, First National Bank of Chicago, Treasurer of the State of Mississippi, V. A. Turpin, Robert E. Jenkins, receiver of the Globe Insurance Company, and Frank H. Follansbee, receiver of the Mercantile Insurance Company, and the Firemen's Insurance Company. Thereafter the defendants in that bill were Bradner, Smith & Co., the Globe Insurance Company, and the Firemen's Insurance Company. On the 31st day of May the Firemen's Insurance Company filed its cross bill making the same parties defendants therein as were originally named in the cross bill of Mr. Harding, in which cross bill it was alleged that the Firemen's Insurance Company had contracted to reinsure certain risks on policies issued by the Globe Insurance Company, in consideration of the payment to it of certain sums of money by the last-named company; the payment of which was secured by certain notes and collaterals delivered to the reinsurer; and the prayer of the cross bill was, among other things, that the validity of said contract of reinsurance might be determined.

nts of the complainant in said cross bill in and to claimed by virtue of the contract of reinsurance ed. On the 21st day of June this cross bill of the nce Company was amended by striking out the e persons as defendants therein as were struck out of Mr. Harding, including Robert E. Jenkins, re-be Insurance Company. Answers to the cross bill denying its allegations, were duly filed by the Globe any and the Firemen's Insurance Company. Mr. Globe Insurance Company also answered the cross en's Insurance Company, denying the allegations milar answer was also filed in the name of Brad-o. Final issue was joined by replications to the to the original and cross bills, and a decree was 2d day of June, 1876. That decree was in favor h & Co. for the sum of \$987.77, and in favor of nfirming his transactions with the Globe Insurance djudging that there was still due to him from that .65, and that upon nonpayment of that sum, the d to in his cross bill be sold by a master in chan-ction, to the highest bidder. The decree also con-ct of reinsurance made with the Firemen's Insur-and adjudged that it was entitled to be paid \$44,000 uch reinsurance, and to hold the securities trans-e Globe Insurance Company to secure the payment a the 1st day of July, 1876, Robert E. Jenkins, re-be Insurance Company, moved to vacate this de-th day of the same month he withdrew his motion. of October, 1876, a further decree was entered, of the securities held by the Firemen's Insurance ppointing George Willard receiver of the assets and lobe Insurance Company. On the 16th day of e master appointed to make sale of the securities r. Harding's cross bill, consisting of certain of the amounting to \$32,000, reported that he had sold rding for the sum of \$10,000. On the 16th day 76, the master also reported the sale of the prop-es mentioned in the decree of October 12th, from ppears the aggregate amount realized from said d that Mr. Harding was the purchaser of most of d property. Subsequently final orders were made sales and directing delivery of the securities and the master, to the purchaser. are urged in support of and against the claim nvolving in the case at bar were duly adjudicated & Smith case, and that the present complainants, er creditors of the Globe Insurance Company and ives, are bound by the proceedings in that case. his court acquired jurisdiction of the defendants inants' bill on the 9th day of May, 1876, and that n the amended bill of Bradner, Smith & Co. be-

came parties to that case, certainly on the 8th, and perhaps on the 5th, day of May. But, admitting this to be the state of the record, and saying nothing about other objections urged against the proceedings referred to, I regard the fact that neither the complainants in the case at bar nor any of the creditors of the Globe Insurance Company, except Bradner, Smith & Co., Mr. Harding, and the Firemen's Insurance Company, nor the representatives of the creditors, were parties or privies to the Bradner, Smith & Co. case, as a conclusive answer to the defense here made that the present suit is barred by the proceedings and decrees in that case. Any other conclusion is, to my mind, unsustainable upon any correct principles of law applicable to the question. The Harts, the great body of general creditors of the Globe Insurance Company, and the receiver of the company appointed by this court were strangers to the litigation in the state court. Even Bradner, Smith & Co., four days after Mr. Harding filed his cross bill, ceased to have any further interest in that litigation, and it is patent that thereafter the real parties to that suit were Mr. Harding, the Firemen's Insurance Company, and the Globe Insurance Company. Mr. Jenkins was appointed receiver by this court in the case at bar on the 9th day of May. The appointment of a receiver in the Bradner & Smith case was refused by the state court until October 12, 1876, when George Willard was appointed such receiver. The receiver appointed by this court in this cause was never brought in as a party to the suit in the state court; and before all the decrees were entered in the last-named suit the Globe Insurance Company was in bankruptcy, and the assignee, Mr. Jenkins, who subsequently became a co-complainant in the case at bar, was not made a party to that suit. It will not do to say that the bill of Bradner, Smith & Co alleged that it was filed in behalf of all the creditors of the Globe Insurance Company, and therefore that they became bound by the proceedings in that case. Parties cannot be bound or tied up in their rights in that way. Nor will it do to say that the parties to the present suit might have come into the suit in the state court. They were not obliged to do so; and, if the parties to that litigation were seeking an adjudication that should be conclusive against the world, it was their duty to make all parties in interest parties to the suit. It is true that the record in the Bradner, Smith & Co. case shows that the Erie & Western Transportation Company at one time intervened for the sole purpose of resisting the appointment of a receiver by the state court, and that, after decree passed, Mr. Jenkins, as receiver, intervened by motion to vacate the decree. But the latter motion was withdrawn, and neither of these proceedings on the part of the transportation company and Jenkins connected them with the suit, so as to bind them as parties privy thereto. It is evident also that the real subject-matter of the Bradner & Smith case, which formed the substantial basis of the decrees which were ultimately entered, was introduced into the case by the cross bills of Mr. Harding and the Firemen's Insurance Company; and these cross bills were filed a considerable time after those parties had answered the bill of complainants in the case at

the same subject-matter was here brought into contact it is perhaps a serious question whether this court should take cognizance of the real controversy between the state court subsequently undertook to adjudicate, an examination of the record in the *Bradner & Smith* case, I think, that the decree in that case did not embrace a large mass of the securities in controversy in the case at hand. That decree could only embrace such matters as were brought up to the issues raised by the bill and cross bills and answers thereto, and those issues, I think, only legitimately involving mortgages and such securities and property of the Finance Company as were held by the Firemen's Insurance Company. Without considering any other points made in the proceedings in the *Bradner & Smith* case, I control my decision of the question, I am of the opinion that the proceedings and the decree rendered in that case do not adjudged a bar to the relief sought by complainant's bill.

Secretary's Records.

In every matter it should be remarked that the correct-ness of the secretary's records touching various proceedings of the Finance Company and the finance committee has been quite seriously questioned by the witnesses. This dispute, on the one hand, is based on the part of Mr. Harding that the record corrects the amount of his advances under the resolutions of the Finance Company, and, on the other hand, it involves the accuracy of the records, as recorded, relative to the giving of the alleged approval and confirmation of the sale to the Finance Company concerning the resale of the Clark mortgage to the company. And it is claimed in behalf of the Finance Company that the record of the latter proceedings is false, and was made up without the knowledge of the Finance Company, whom the record states participated therein; and that the purpose was to fabricate a record which should, on the one hand, give regularity to proceedings between Harding and the Finance Company, which were in fact, illegal and irregular. But I think the testimony is not sufficient to impeach the records. It is true Mr. Pratt offered the resolution in relation to giving Harding and other members of the board have no recollection relative thereto, and of the recorded action of the Finance Company in the Hough sale, and the resale to the company of the mortgages. But some of the witnesses who thus disown the records, admit that there was talk in the Finance Company, about giving a demand note, and understood that such a note was to be given; and it is found that a considerable time has elapsed since the question, and that, of necessity, the alleged non-existence of the proceedings rests in the recollection of the Finance Company, after such lapse of time, may be unreliable. The

alleged proceedings appear to have been recorded in the usual manner and form by the proper officer, and, after careful examination of the records and evidence, I am not convinced that the records have been impeached, and they will be regarded throughout as evidence of the transactions between Mr. Harding and the board. According to the paging of the book of records, it appears that some of the leaves are missing, and it was claimed by complainants' counsel that this was strong evidence of improper tampering with the book. But there is no proof to show whether the missing leaves were intentionally or accidentally removed, nor by whom, nor is it shown that they were in the book when its use as a book of record was begun, and on the whole I think there is an entire failure to show that the imperfection of the record in the particular referred to is chargeable to the defendant.

Effect of Resolutions of September 11 and 30, 1874.

It is too clear for argument that the money and securities put into the treasury of the company and made part of its capital by Clark and Walker and Harding, McCoy & Pratt under the resolutions of September 11 and 30, 1874, were pledged beyond recall, if the situation of the company should so require, to the payment of indebtedness to policy holders. The object of those advances was to put the company on a sound financial basis, so that it could hold itself out to the world as able to meet its engagements with those who should thereafter trust to the security against loss which its policies of insurance might afford. The resolutions of September 11th declared that the assets required to overcome impairment and to properly conduct the business should be held by the company, subject to the payment of all indebtedness of the company to policy holders; and the resolutions of September 30th asserted that the securities received from Clark and Walker and Harding, McCoy & Pratt, amounting to \$144,918.76, were accepted and held in conformity with the resolutions of September 11th. Again, in the supplementary resolutions of October 10th it was declared that nothing therein contained should be held to modify or change the fundamental fact that the assets advanced to remedy impairment should be the assets of the company, and it was therein resolved that they must always be held to be the property of the company, free from any liens or claims thereon, and irrevocably pledged to the payment of all the creditors of the company. Mr. Harding participated in these proceedings. He, of course, understood the conditions under which he and his associates made their advances of money and securities; and we find him as late as August 31, 1875, as an alleged creditor of the company, by letter to the directors, invoking the rule of action which was plainly required by the resolutions of September, 1874. It is true that the resolutions of September 11th contemplated the ultimate return of the advances made under the resolutions to the parties making them. But it was meant and understood that such return could be made only in case the assets so advanced were not required to meet the obligations of the company. It is clear, therefore, that when the com-

condition of insolvency neither Clark and Walker, McCoy & Pratt, nor either of them, could, by any whatever with the company, withdraw the moneys and under the resolutions, nor could they withdraw in place of those they originally contributed, if such would weaken the power of the company to meet its policy holders, without violating the spirit of the resolution, 1874.

and Legal Effect of the Transactions in Dispute.

The question in the case is, what were the real meaning of the transactions which took place between the company and the company in July and August, 1875, and what, accomplished thereby? The court can have no knowledge of all the facts and circumstances developed by what took place before and at the time of the meeting of the company, 1875, Mr. Harding regarded the situation of the company as precarious, and believed that his interests were in jeopardy that he says the books of the company were so defective that he could tell its condition. But Walker, the secretary, that they were purposely thus kept to prevent interference of officials; and, as Mr. Harding was president of the company and a member of the finance committee, it may be a fair inference, under the circumstances, he was not in law charge of the company's affairs and situation. However, we find that Mr. Harding says in his testimony that he returned from the East in July, 1875, he entered upon the management of the affairs of the company, and endeavored to find means by which the company might continue its operations. He says he then thought the stock was worth about 25 cents per share, and it is shown that his investigation of the company's affairs, however limited it may have been, was occasioned and excited in his mind by conversations with Walker upon their eastern trip. Failure to succeed in any relief of the company in its extremity was followed by the meeting with Clark and Walker of July 24th. This was the first meeting then inaugurated for the protection of the company and was undoubtedly prompted by the apprehension, that at the loss of his entire investment was threatened. In the succeeding month of August he certainly knew that the company was in a crippled condition, and believed it to be so. This is established by his own testimony. By the meeting of July 24th and the assignment concurrently executed, as we have seen, disposed of his stock, and acquired for all of Clark and Walker's interest in the premises. This was followed by the meeting of the directors of the company provided for the return of the moneys and secured under the resolutions of September 11 and 30, 1874. At the meeting of the executive and finance committee of September 15, when a subcommittee, consisting of Clark and Walker, was appointed "to confer with Mr. Harding in regard to

disposing of preferred debt and his account." Mr. Harding was then a member of the finance committee, and was yet president of the company. As before stated, it is claimed by the complainants that a settlement in full was actually consummated between Mr. Harding and Clark, after the special committee was appointed, and before the 30th of August; that by this settlement Harding was to receive from the company certain of the securities here in question at fixed values, amounting to \$135,000, in payment of his entire claim; and that nothing thereafter remained to be done but to secure the ratification of the company. All this is denied by Mr. Harding. It must be admitted that the resolution passed by the directors at their meeting of August 30th, whereby they resolved that the settlement made by the executive committee with Mr. Harding be approved with certain corrections, tends to corroborate with not a little force the claim of complainants that a settlement had been previously agreed upon. But, regarding it as a doubtful question, it is clear that the settlement which was ultimately consummated between Mr. Harding and the company was set on foot when the executive and finance committee took action on the subject; that negotiations in detail were carried forward by Mr. Harding and Clark, and that these negotiations contemplated not only security to Mr. Harding on account of his cash advances, but also for his interest in the so-called preferred debt; and after much consideration of the case in all its aspects it has become my conviction that the various steps thereafter taken, including the giving of the demand note with the accompanying securities, the sale of the securities to Hough, the ratification of that sale by the company, the repurchase of the securities by Harding, the sale back to the company by him of the Clark mortgages, and the execution to him of the company's notes therefor, the record proceedings of the board of directors in relation to these transactions, and the ultimate purchase of the Clark mortgages by Mr. Harding under the power of sale which was annexed to the notes, constituted a series of acts whereby, so far as was possible, Mr. Harding should obtain security on account of his entire claim against the company, which consisted of his interest in the preferred debt and his cash advances, and by means of which he should become vested with the title to the entire mass of securities which it is sought by the present bill to reach for the benefit of the general creditors. It is to be observed that in the negotiations which preceded the execution of the demand note it had been proposed that Mr. Harding should take from the company a large part of the same securities which he ultimately received as collateral to the demand note. Mr. Harding testifies that during those negotiations he thought it questionable whether he could take those securities from the company, and hold them in the manner proposed, and I think the evidence as a whole sustains the conclusion that the immediate object of the demand note was to give the transaction such outward form and character as would enable Mr. Harding, in the most effectual manner possible under the circumstances, to hold the securities which were delivered to him as collateral to the note. Mr. Harding drew the resolution of August

the demand note. He asked that the record should show the resolution, and the directors asked him to prepare it. The amount of the securities was greatly in excess of the note. As to the demand note, Mr. Harding testifies that he knows the company did not pay it, and he should sell the securities. He would make with the company such a contract as he saw fit, as expressed in his letter of October 4, 1875, to U. S. President of the company, which was in part a contract to sell Clark mortgages back to the company, and give it to the company for his advances under the resolutions of September 1875. The demand note was given for Mr. Harding's securities outside the resolutions, but I cannot doubt that it was given for the securities transferred as collateral should be taken, in amount to cover and secure his interest in the demand note. The transactions which follow the giving of the demand note tend to strengthen this view.

The Hough Sale.

The transaction between Mr. Harding and Hough was a sale of securities and a transfer of the title to Hough, but the fact that it was in fact only a sale in form. The amount of the securities was large,—Hough says between \$150,000 and \$200,000. Hough had no money with which to buy them, and states that he was told by Mr. Harding. Still Harding appears to have been urgent to make them, and finally Hough gave his unsecured securities to him, and took possession of the securities. The parties were in the same suite of rooms. The alleged transaction, under the power contained in the demand note, was very clear that the transaction was not intended to be a mere transfer. It is true Hough testifies that there was some conversation to the effect that the parties were in some understanding that would invalidate the sale, and that Mr. Harding wanted to sell, and that Hough gave the securities. But he also testifies very decisively that he knows that, if Mr. Harding wished to buy the securities, he would do so, and that Harding stated at the time that he would purchase them back, and that Hough replied that he would give them back if he wanted them. Further, Hough testifies that he does not think he should have made the purchase of the securities if he had expected to keep the securities and meet the demand note, as he was abundantly secured in giving the note. Hough held the securities for two or three days, and then delivered them back to Harding, his \$60,000 note was given to him as a sort of payment in the demand note, and the claim that Harding held against him. The real question is this is not doubtful. It was form, not substance. The duty, whose duty it is to look into the real meaning of the transaction when they become the subject of investigation, it is not a mere device by means of which it was sought to transfer Mr. Harding's title to the securities, and it cannot, therefore, be held to have improved his title. His position

with reference to legal rights and liability was not changed by anything which transpired between himself and Hough.

Sale of Clark Mortgages.

It is evident from Mr. Harding's letter to U. P. Smith of October 4, 1875, that he did not then regard his title to the securities as perfect, and he therein formally proposes, according to what was undoubtedly the previous understanding, to sell the Clark mortgages to the company for the amount of the demand note, and take new notes from the company, to be due in two, four, six, and eight months from September 30, 1875, as a condition of confirming the title of his vendee to the collaterals. And upon such contract being carried out he proposed to give to the company a receipt in full for his advances under the agreement of September, 1874, containing the condition that the title of his vendee to the collaterals should stand good and unimpeachable. This arrangement was, in effect, carried out. The Clark mortgages were sold back to the company, and it gave to Mr. Harding therefor its notes, aggregating in amount \$50,274.53, with the Clark mortgages as security for their payment when due, and he released the company from all liability under the agreement of September, 1874. It is quite incredible that the parties supposed, in the then condition of the company, that those notes could be paid at maturity. They were not paid, and the collateral mortgages were sold to Mr. Harding under the power of sale annexed to the notes. By this form of transaction Mr. Harding acquired the ultimate title to the Clark mortgages, and by his alleged repurchase from Hough he acquired his ultimate title to the other securities in question, and to that extent his claims against the company were satisfied, and the company was discharged from its agreement of September, 1874, to return to him the advances which he had made under the resolutions of that date. Unless, therefore, other grounds of defense than such as have been heretofore indicated are established, I am of the opinion that to the extent of Mr. Harding's interest in the so-called preferred account, he cannot hold the securities in question against the claims of general creditors of the company.

As to Fraud and Misrepresentation of Clark and Walker.

But it is insisted by Mr. Harding that he was induced by misrepresentations and fraud to become a stockholder in this company, and to make advances of money under the resolutions of September, 1874; that on discovery of the alleged fraud he had a right to rescind all contracts under which he acquired stock and made advances; and that his agreement with Clark and Walker, of date July 24, 1875, in connection with the resolutions of the board of July 29, 1875, was a valid rescission, by virtue of which he became entitled to the return or to a resale to him of his original securities or other securities sufficient to make him good. Limiting the consideration of this point to the purchases of stock and to the advances covered by the resolutions of September, 1874, and saying nothing about the advances made outside those resolutions, there are,

several conclusive reasons why the supposed right could not be exercised against the policy holders and the company. And first, as before observed, the contract, 1874, under which the defendant Harding made purchases of stock, was made with Clark and Walker. It is true that they were officers of the company at the time they nevertheless contracted, and Harding dealt with them as individual capacities, and not otherwise. This is apparent from the face of the contract, and for any fraud practiced by them in the transaction they, and not the company, were responsible. The company did not sell the stock. Clark and Walker sold the stock, and the defendant had brought himself within the rule of the company in promptness in rescinding a contract on the ground of fraud. It does not assent to the proposition that he could rescind the contract and reclaim the money he paid for stock thus acquired from the hands of policy holders and creditors of the company. The court is constrained to hold that Mr. Harding did not act with due diligence that would enable him to rescind or cancel his contract, and this observation is equally applicable to the money made under the resolutions of September, 1874. It is not sufficient of the fact that Mr. Harding insists that he did not know of the alleged fraud until August, 1875, and that, therefore, the attempted rescission was seasonably made. But he was the principal officer of the company from August 25, 1874, until August 30, 1875, and participated in its affairs as its principal officer and as a member of its finance committee, and, notwithstanding the claim that he was at the time ignorant of the condition of the company and the manner in which its business was being conducted and the value of its securities, I cannot, in view of his relations to the company, uphold his claim in this behalf as tenable. He certainly had every opportunity to learn all those facts of which he now alleges that he was ignorant, and as president of the corporation he had participated in acquiring the necessary knowledge; and if he had not, he was himself of those opportunities and facilities the law imputes to him that negligence which estops him now to assert that he was ignorant of the contracts in question on the ground of fraud until the attempted rescission was made in 1875. It is true that he went into the company that its capital had been impaired, and he knew that one of the objects of the reorganization was to restore the capital after he and his associates became stockholders was to restore the capital. It is true that Mr. Harding alleges that the impairment of the capital was due to the alleged fraudulent representations made to him that the company was required to put the company upon a sound financial basis, and that he was required to put the company upon a sound financial basis that concurrently with advancements of money to the company by Clark and Walker and Harding, McCoy & Pratt, amounting to \$14,000, the board of directors, of which Mr. Harding was a member, by resolution declared that \$150,000 was needed to restore the company from previous impairment of capital, and all the facts appear to have proceeded upon that understanding; and with that knowledge, Mr. Harding continued his business with the company, and it cannot be successfully denied

that he was an active participant in the efforts subsequently made, and which he must have known it was necessary to make, to maintain the company as a solvent corporation entitled to public confidence. Moreover, I do not find from the testimony, that at the time of his transactions with the company in August, 1875, he then asserted to the company his right to rescind contracts previously made on the ground of fraud. Indeed, it appears to have been Mr. Harding's view, when negotiations were in progress looking to a direct surrender of securities in payment of his share of the preferred debt, that the company's right to make such surrender and his right to receive the securities were questionable. Upon the general question under consideration, the cases of *Ogilvie v. Insurance Co.*, 22 How. 380, 16 L. Ed. 349, and *Upton v. Tribilcock*, 91 U. S. 53, 23 L. Ed. 203, are instructive, and not without force. I have examined the cases cited on the argument in support of the claim made by the defendant on this branch of the case. In *Bank v. Addie*, L. R. 1 H. L. Sc. 145, it was held that, where a person has been drawn into a contract to purchase shares by the fraudulent misrepresentations of directors, and where the directors, in the name of the company, seek to enforce such a contract, or where the person who has been deceived institutes a suit to rescind it, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract. In this case the bank owned the shares of stock that were sold. The purchase was made on the faith of reports made by the manager of the bank, who caused the shares thus owned by the bank to be sold upon fraudulent representations made by an authorized subagent. The bank sought to enforce the contract to purchase the shares. The case in its essential facts is plainly distinguishable from the case at bar. In the case of *Mining Co. v. Smith*, L. R. 4 H. L. 64, the directors in their official capacity issued a prospectus concerning an American mine, which contained false and fraudulent representations, and the respondent purchased from the company shares on the faith of the prospectus; and upon such a state of facts it was held that he should be relieved from liability upon his purchase. *Wright's Case* and *In re London & Mediterranean Bank*, 7 Ch. App. 55, were of the same nature. These cases are so dissimilar in their facts to the case at bar that they cannot be held controlling upon the question as it is here presented. If I correctly understood the learned counsel for the defendant, he contended that the case of *Upton v. Tribilcock*, *supra*, sustained the view here argued that the alleged fraud of Clark and Walker in selling the stock to Harding gave to the latter the right to rescind his contracts of purchase, without regard to the rights of the general creditors of the company. I am unable to concur with counsel in that conclusion. There was a strong dissent in that case, and the views of the dissenting justices, so far as they were expressed, lend some support to the contention of the defendant here upon this point. But the principal opinion, which is, of course, to be accepted as the law of the case, as I understand it, supports the views I have expressed upon this question.

he claim that the agreement created by the resolution, 1874, constituted a pledge of securities in favor of those securities on the faith of that agreement, that this claim was undoubtedly well founded as between the company and the parties who made the advances; but it was not a claim that could be enforced to the prejudice of policyholders, especially in view of the fact that by virtue of the resolution the moneys and securities advanced became part of the company, subject to the payment of all indebtedness of the company to policy holders. Thereby the pledge in favor of the policyholders became paramount to that in favor of the parties who made the advances. Having determined that to the extent of the interest in the preferred account he cannot hold the proceeds of the sale of the securities against other creditors of the company, it becomes necessary to inquire—First, what was the consideration advanced by him under the resolutions of 1874; and secondly, what was his entire interest in the so-called preferred account on the 10th day of August, 1875?

by the complainants that Mr. Harding's individual advances covered by the resolutions of September, 1874, which includes \$25,000 known as the "Monmouth Call Loan." The defendant denies that this item of under the resolutions, or that it ever was part of the debt, and it appears in his account against the subsequent advances made outside the resolutions, on January 4, 1875. That Mr. Harding owned two-fifths of National Bank stock, \$3,000, and two-fifths of the \$1,800, put in under the resolutions, there is no doubt it appears from the records that the sum of \$46,918.75, in cash, and it cannot be claimed, and is not by Mr. Coy and Pratt made any part of this cash advance to Mr. Harding. The three items of \$3,000, \$1,800, make the before-mentioned aggregate of \$51,718.75. If wrongfully, the Monmouth Bank loan of \$25,000, \$6,918.75. Now, is Mr. Harding right in his claim, in position to claim that that item should not be treated as \$46,918.75, and as advanced under the resolutions? when the \$25,000 was paid to the company. The defendant says it was paid in at an earlier date than when it is charged in Mr. Harding's account. Indeed, it was paid a considerable time before November 3, 1874. It is shown that he was paid interest thereon by the amount of \$430.50 on that day. The testimony is that the original draft of the resolutions of September was not filled up as to amounts when passed, and that all the advances then intended to be made had

not yet been made. The \$46,918.76 is named in the recorded resolutions as advanced in cash. As before stated, there is no doubt it included the \$25,000 in question. Now, as the resolutions in effect declare that that amount was advanced to remedy the impairment of capital, and was received under the resolutions, is it permissible for Mr. Harding, as against policy holders whom it was intended to protect by the resolutions, now to assert that in fact that money was not advanced for the purpose declared in the resolutions? I think not. It seems to me that he is now estopped so to do. The resolutions were adopted at a meeting of the board at which he presided. The original draft was filled up as to amounts before it was placed upon the secretary's record. That record appears to be complete, and is signed by the secretary. The testimony of both Walker and Clark tends to show that the \$25,000 was paid in under the resolutions. It seems to have been so understood at the time by both of those parties. It is true that there is other testimony to the effect that Mr. Harding, at some time subsequent, insisted that the amounts as stated in the resolutions were incorrect, and that the Monmouth Bank loan ought not to have been included therein. But the resolutions were suffered to remain unchanged, and all the parties appear to have subsequently acted thereon. If the resolutions were wrong, they should have been corrected at the time, and should not have been permitted to remain as the basis of the company's future action. It is stated in the testimony on this subject offered in behalf of the defendant, that the resolutions of September 30th wherein they name amounts were subsequently corrected, but I am not able to find a record of any such correction. Of course, no improper increase of the amount advanced by Mr. Harding under the resolutions should be made or permitted; and if the records showed that such correction of the resolutions was made as would place the \$25,000 in question outside the resolutions, I should not hesitate to allow defendant's claim upon this point. That the \$25,000 was in fact at the time classed with the advances under the resolutions, and was so treated by Walker as well as Clark, there can be no doubt. Even Exhibit Z; which is the best evidence produced of the basis on which the final settlement was made, declares that the whole amount received under the resolutions of September 30, 1874, as per record, was \$144,918.74; and the acceptance of this amount as correct necessarily includes the Monmouth Bank loan. The testimony quite strongly shows that Mr. Harding permitted other parties to arrange the so-called preferred debt account, and without perhaps fully understanding at the time of what items the aggregate was composed; and I am constrained to think that he must be held bound by what was done at the time by the record as it has ever since been permitted to stand. The resolutions of October 11, 1874, provided that no interest should be paid as stipulated in the second resolution of the series adopted September 11th, except out of the surplus earnings of the company, and it is claimed that on November 3, 1874, interest to the amount of \$430.50 was paid to Mr. Harding by the company on the Monmouth Bank loan; and this is urged as

tending to show that the amount of that loan was under the resolutions. But this item of interest ap-
 charged to Mr. Harding on the debit side of his ac-
 company, appearing on the "memorandum pass book"
 and giving to the circumstance that this payment of
 as claimed, its proper weight. I do not deem it
 nt to overcome the facts that the item in question
 dealt with as advanced under the resolutions, that
 in the amount declared by the records of the board
 o advanced, that it was thereby made part of the
 h the company proceeded in its business, and that
 us originally established was never changed.

Harding's Interest in the Preferred Account.

question is, what was Mr. Harding's entire interest in
 preferred account on the 30th day of August, 1875?
 hesitation in holding that the principal of his claim
 was \$101,718.75. His individual advances under
 as has just been determined, amounted to \$51,718.75.
 contract with Clark and Walker of July 24, 1875,
 to them his \$75,000 of stock, and took from them
 of the moneys and securities which Harding, Mc-
 d paid to Clark and Walker on account of their origi-
 stock, amounting to \$75,000, and which were treated
 of July 24th and in the last-mentioned assignment as
 company under resolutions of September, 1874. But
 n by the resolutions, Clark and Walker put in but
 is was their actual interest in the preferred debt,
 regarded as the interest in fact transferred to Harding
 Walker in exchange for the former's stock. Adding,
 to the \$51,718.75, and we have an aggregate of
 but this did not ultimately represent Harding's inter-
 rred debt on August 30, 1875, because, as appears
 with McCoy and Pratt of August 9, 1875, made after
 Harding with Clark and Walker, McCoy and Pratt
 ut to exchange \$15,000 of common stock of the com-
 o of the securities put in under the resolutions by
 ker, which right was, by the settlement then made,
 ; and when this \$15,000 is deducted from \$116,718.-
 \$101,718.75 as the defendant Harding's interest in
 account. The same result was reached in a some-
 form in the contract of settlement with McCoy and
 , in satisfaction of their share of the securities put
 resolutions, and of their right to exchange common
 ities advanced by Clark and Walker, \$43,200 were
 securities and cash; which amount, deducted from
 whole amount put in under the resolutions of 1874,
 76; and this, it will be noticed, is stated in Exhibit
 as the principal of Mr. Harding's claim under the
 nt, added to which, as appears in that exhibit, is the
 , \$15,121.79, making a total of \$116,840.55; and to

this extent and amount I hold that the securities in question or their proceeds may be reached by complainants for the benefit of creditors, subject, however, to a further ascertainment of facts as to the amount and character of creditors' claims entitled to share in said securities or their proceeds.

Amount of Harding's Cash Advances Outside the Resolutions.

That Mr. Harding made large advances of money to the company outside of the resolutions of 1874 must be admitted, but the amount of those advances is a much-controverted question. According to his account, appended to the amended answer, the amount of the principal of those advances prior to August 30, 1875, was over \$175,701.83. He allows in the account certain credits amounting to \$72,018.75, which would leave a balance of \$103,683.08. This, however, leaves in the account, and as part of such advances, the Monmouth Bank loan, amounting to \$25,000, which, as I have held, must be regarded as representing part of his interest in the preferred debt, and therefore should not be included in the advances outside the resolutions. Then the account contains also an item of \$24,500 cash value of railroad bonds, of which it is shown that \$21,918.76 was originally advanced under the resolutions of 1874; for it is part of the item of \$46,918.76 named in the resolutions of September 30th as advanced by Harding, McCoy & Pratt. The \$25,000 and the \$21,918.76, making in the aggregate \$46,918.76, should, therefore, not be included in the advances outside the resolutions, and should be deducted from the before-mentioned amount of \$103,683.08; and, when so deducted, the balance is \$56,764.32. There is serious controversy over the items in Mr. Harding's account which are part of the last-mentioned sum, it being claimed by the complainants that some of the largest of those items consist of moneys used by Mr. Harding in the purchase of additional stock of the company. It appears that no accurate account was kept of Mr. Harding's advances as the advances were made. The account which he now presents I understand to have been prepared after this bill was filed, and from the best data at his command, but not from the memoranda made when the moneys were advanced. Certain checks drawn by Mr. Harding in favor of the company are produced, which, of course, are evidence that he made advances, but the exact amount of the advances is still left in doubt, unless his present account is accepted without qualification. It is evident that at the time of the action of the board of directors on the 30th of August, 1875, with reference to a settlement with Mr. Harding, none of the parties were able to state the exact amount of his cash advances. Some incomplete memoranda were furnished, showing a cash balance in favor of Harding of from \$9,000 to \$12,000, and there is testimony in the case to the effect that it became necessary to make various additions to the amount at first supposed to represent the cash balance; but all the testimony of this character is manifestly unsatisfactory. After much examination of the evidence, I have come to the conclusion that Exhibit Z should be accepted as furnishing the basis for a conclusion upon

It is a statement of account made at the time of payment in August, 1875. It was prepared by the secreter, and I can have little doubt was made the basis by all the parties in interest. It shows that Mr. Harding's cash account against the company was then \$38,376. It is suggested on the part of the defendant that the statement of account contains only items of advances to and that, as appears by the account now submitted, he made advances down to and including August 30, 1875. It is argued, therefore, that Exhibit Z cannot be correct because there are evidently errors of date in Mr. Harding's presentation, and it is to be noticed that, although some of the items in the account are dated August 30, 1875, the same items are not on the credit side of which, so far as it covers Harding's account, closes June 24, 1875. This shows that in preparing the account, attention and effort were to bring the account down to the final settlement. Then, as before stated, the defendant claims that Harding's cash balance on account of advances is shown in Exhibit Z to have been at that time \$38,376. This does not agree with the amount of the demand note, which was \$47,743.52, the balance being \$9,367.52. But the evidence shows that correct computations of interest were made, and that the defendant's bonds were added, so that it is not unreasonable to hold that the parties at that time, for the purpose of the ultimate settlement, adopted the amount of the demand note as the basis of the defendant Harding was entitled on account of advances and interest. And it is my conclusion that, in the event the bonds transpired, those advances should be held not to be due on the 30th of August, 1875, \$47,743.52. It is urged by the defendant that these advances should include \$10,000, part of which was \$25,000 paid by Harding, McCoy & Pratt for their stock in the company. I think this claim is not well founded. Whether that claim is due into the so-called preferred account or not, it was not due to Harding, or Harding, McCoy & Pratt, for stock in the company, but for purchase, and I do not think it can be legitimately included as part of the cash advances.

Parties with Reference to Harding's Cash Advances.

The defendant Harding hold the securities in question until the 30th of August 30, 1875, in payment of his cash advance and security therefor? This question was urged by counsel with the evident understanding that, if this branch of the case should be decided adversely to the defendant, the rights of the plaintiff so far as the defendant's cash advances were concerned would be finally determined. I am constrained to say, however, that even if the question before stated be answered in the affirmative, it may still remain not only the inquiry whether Mr. Harding's case would not be entitled to share pro rata with the other parties in the securities, or their proceeds, to the extent of their advances, but the further question whether, on marshaling the assets against the company, he would not be entitled to be

paid his advances in full from the assets of the company, in preference to policy holders, without regard to any previous attempted settlement. Without, at this stage, pursuing these suggestions, I proceed to consider the question first stated. That Mr. Harding and his co-directors to the time when he ceased to be an officer and director of this insurance company, in a strong sense, held the position of trustee of the assets of the company for the benefit of its creditors, cannot be successfully disputed. 2 Story, Eq. Jur. 1252; Bliss v. Matteson, 45 N. Y. 22; Bartlett v. Drew, 57 N. Y. 587. "The directors of a corporation stand in confidential relations to its creditors, towards whom they are bound to act with perfect fairness. They are at least quasi trustees for the creditors, and where the corporation is insolvent good faith forbids that the directors should use their position to save themselves or one of their number at the expense of the other creditors." Coons v. Tome (C. C.) 9 Fed. 534. "The directors of an insolvent corporation, while it is under their management, hold the position of trustees of its assets for the benefit of its creditors, and, if themselves creditors, cannot secure to themselves any preference or advantage over the other creditors." Bradley v. Farwell, 1 Holmes, 433, Fed. Cas. No. 1,779. "The managers and officers of a company where capital is contributed in shares are, in a very legitimate sense, trustees alike for its stockholders and its creditors, though they may not be trustees technically and in form." Jackson v. Ludeling, 21 Wall. 616, 22 L. Ed. 492. See, also, Drury v. Cross, 7 Wall. 299, 19 L. Ed. 40, and Koehler v. Iron Co., 2 Black, 720, 17 L. Ed. 339, for recognition of the same general principle. Undoubtedly an insolvent debtor, whether a corporation or individual, may at common law prefer one of its creditors. Bradley v. Farwell, supra; Drury v. Cross, supra. But this is a principle only applicable to transactions which in no manner involve advantages secured in whole or in part by virtue of a fiduciary relation. To further point out the relations which Mr. Harding bore to this company when the settlement between them was negotiated, and the circumstances of the transaction, would be to repeat much that has been stated. There is no doubt whatever that the advances of money represented by the demand note in evidence were made by Mr. Harding in good faith, and at times when the exigencies of the company demanded that its resources be strengthened. There is no doubt that on the 30th day of August, 1875, there was an actual and valid indebtedness owing by the company to Mr. Harding on account of these advances. Nevertheless the law forbade Mr. Harding and his co-directors, at a time when they knew the company was in extremis, and when his relations to the company were such as to enable him to exercise his power as a member of the corporation for his own protection, to appropriate the assets of the company to the payment of his individual demands, in the manner in which such appropriation was attempted here, however honest and just those demands were. In such circumstances the only safe and true position he could take was that of a creditor, who, in the ultimate distribution of the assets of the corporation, might insist upon

o far as his advances were concerned, and, if need
awful appeal to the courts for the establishment of
equity might permit him to assert. As has been
erved, while yet Mr. Harding held the position of
director of this company, and at a time when he
pany was insolvent, measures were set on foot for
protection and security. His associates in the man-
nerated with him in the accomplishment of this ob-
latory steps were taken a considerable period before
n the presidency of the company. That he took to-
pany the position of an adversary, I think can make
As between himself and the company, he may have
e demands against the company, but as to general
aw must treat the combined action of the directors
tion in the transaction as collusive. It is true that
s in relation to the demand note were not passed,
was not executed, and the securities were not de-
after Mr. Harding had resigned as president. But
red at one and the same meeting. It is evident that
a was tendered in view of the culminating act, which
ded by a series of steps which led up to it, and which
place while Mr. Harding held a trust position in the
en admitting that a settlement had not been fully
before Mr. Harding's resignation, yet the negotiations
stantially concluded before that event, and there was
on the 30th of August but to provide for details and
ransaction by execution of the note and delivery of
I do not think the resignation, in view of all the
can be regarded as effectual to so far relieve Mr.
relation of trust to the assets of the corporation as
thus to secure a personal advantage. As we have
ferences to the records already made, the executive
committee of the company on the 12th day of August,
mal action on the subject of a settlement with Mr.
pointing a special committee to confer with him "in
osing of preferred debt and his account," and Mr.
cipated in the proceedings of this meeting; and at
the board on August 30th, when Mr. Harding re-
sident, it was resolved that the settlement made with
ved, with certain corrections, thereby implying that
a settlement had been previously agreed upon, and
ormal ratification. The evidence shows, as before
r. Harding, desiring that the records would show a
norizing the demand note, at the suggestion of the
the resolution, and the demand note was executed
cies were delivered on that day. It may be true that
ense Mr. Harding was occupying a position antag-
company, but it seems very plain that the transaction
on the 30th of August was brought about by the
ation of the directors of the company, and I am un-
the conclusion that the influence and power of Mr.

Harding before he terminated his connection with the company were potent in the accomplishment of the desired object. Cases in England and this country in which the principle of law here applicable was enforced are numerous, yet, of course, as cases differ in their particular facts and circumstances, no one of them that I have examined is exactly like the present. In *Koehler v. Iron Co.*, 2 Black, 715, 17 L. Ed. 339; in *Drury v. Cross*, 7 Wall. 299, 19 L. Ed. 40; and in *Jackson v. Ludeling*, 21 Wall. 616, 22 L. Ed. 492,—the general principle is recognized and enforced that the managers of a corporation have no right to enter into or participate in a combination or agreement to promote their own advantage at the expense of the company, its stockholders, or its creditors. See, also, *Ex parte James*, 8 Ves. 337; *Ex parte Lacy*, 6 Ves. 625; *Fox v. Mackreth*, 1 White & T. Lead. Cas. Eq. pt. 1, *151; 12 Wkly. Rep. (V. C. W.) 510. *Bradley v. Farwell*, 1 Holmes, 433, Fed. Cas. No. 1,779, decided by Judge Shepley, is an instructive and well-considered case. In the opinion of the court it is, among other things, said:

"Courts of equity were established for the purpose, among others, of enforcing the execution of such matters of trust and confidence as are binding in conscience, though not cognizable in a court of law. Such courts will not permit trustees, in the exercise of the powers of their trust, or in dealing with the trust estate, to obtain any benefit or advantage for themselves to the injury or prejudice of those for whom they are acting in the fiduciary relation, or to protect, indemnify, or pay themselves at the expense of those who are similarly situated in relation to the fund. * * * The fiduciary relation between the directors and the creditors being established, and the fact that the trustees in dealing with the trust fund have secured to themselves a benefit or advantage to themselves as creditors over and above the other creditors, taints the transaction, and invokes the aid of a court of equity to see to the right execution of the trust. Not that the trustees cannot prefer one creditor to the others at common law, * * * but that, in equity, a trustee cannot contract with himself as he may with third parties. If he exercises in his own favor the powers he may rightfully exercise in favor of another, the court does not stop to inquire whether he gained or lost. It is enough that the beneficiary is dissatisfied with the transaction for the court to set the transaction aside, without requiring the beneficiary to prove actual loss or actual fraud. * * * Especially in the case of insolvent corporations are the acts of the managing officers to be free from the imputation of having been influenced by the consideration of any interests adverse to those they are bound only to regard. Standing in a fiduciary relation, as it were, at the bedside of a dying patient, if they are subsequently found in possession of a portion of his effects, they must show title by a conveyance untainted by the exercise of that power which the trust relation gave them to influence the disposition made by the decedent of his property in their favor and to the prejudice of others having equal claims to the inheritance."

Without further prolonging the discussion upon the question under consideration, I am of the opinion that Mr. Harding cannot, by virtue of the settlement consummated on the 30th of August, 1875, hold the securities in question, or the proceeds thereof, in payment of his advances represented by the demand note. It will remain, however, an open question, to be determined on marshaling and distribution of the assets of the company, what may be the rights of Mr. Harding, so far as his cash advances are concerned, as between himself and general creditors, the attempted settlement

any being now held unsustainable in equity; and which I regard an important one, will be reserved for consideration at the proper time.

Pledge of Securities to Harding for Cash Advances.

Of the contention in behalf of the defendant Harding that the securities in question in pledge to secure him for the money to the company. In the light of the testimony considering the relations of Mr. Harding to the company, I doubt whether such a pledge of the securities could enable him to hold them against the claims of the company or as would strengthen his title under the settlement finally made. I am certainly not prepared to hold that the pledge can be upheld by virtue of what is claimed to be a previous pledge. In what manner the rights and claims of Mr. Harding as a creditor asserting a preference to his cash advances may be strengthened or affected by the pledge of securities is a question that may arise which I do not now decide.

The Claim of \$27,000.

A claim made against the defendant Harding of \$27,500. To entitle the complainants to a decree for that amount against him, the proof should be as clear as the proof for money had and received. The testimony on this point is confused and unsatisfactory. Of course, if Mr. Harding had not the money on the paper of the insurance company as a personal accommodation, and if the company ultimately paid it and Mr. Harding was never charged with it, then the amount for the amount he thus personally realized. It is conceded that the insurance company took up the balance on the bank, and that this was done after the settlement on August 1st, 1875. But I am not satisfied that this item was included in consideration in the settlement. It is charged against Mr. Harding in the so-called "little red book." All that Clark and the complainants know of the transaction is that the \$27,500 was paid to the bank after the settlement. Other than that he knows nothing with certainty about the item, although he included it in the estimate or account made at the time of the settlement and of the account he knew nothing except what was entered in the "little red book." The entry of the \$27,500 was made in the little red book on the 1st of December, 1874, and of the same date is a charge against Mr. Harding in Exhibit Z of \$12,923.75, which, the complainants indicate, was such part of the \$27,500 as was regarded as being the settlement chargeable to Mr. Harding. Mr. Harding denies that this matter entered into the settlement of August 1st, 1875. The only charge against him growing out of the settlement of the Bank loan was \$12,923.75; and that it was so understood at the time, and was charged to him accordingly. I am not in doubt as to all the facts of the transaction, but, after weighing the testimony as we have on the subject, my mind

inclines to the conclusion that the item in question entered into the settlement of August 30, 1875.

Extent of the Defendant's Liability.

Counsel for the complainants take the ground in their brief that Mr. Harding, to the extent that he is liable to the creditors of the insurance company, should be charged with the amount of the so-called "Westcott securities" at their face, and without regard to their actual value. This is on the theory that he absolutely agreed to take those securities at their face value. I am of a different opinion, and shall hold him chargeable to the extent that he is required to account with the actual value of the securities to be hereafter ascertained, or the proceeds of such of the securities as have been converted into money.

Objections to Testimony.

Specific objections have been made to the testimony of J. C. Latimer and C. M. Smith on the ground that it is not competent under any issue in the case. I have not considered that testimony with reference to the claim that there was fraud and collusion in the prosecution of the Bradner, Smith & Co. case, but only as showing the termination of Bradner, Smith & Co.'s interest in the suit, and for the purpose of showing that fact. I think it is competent. The objections to the testimony of Webster, Kimball, Wilmarth, and Jenkins are overruled.

Proof of Losses.

The proofs that have been presented as to the indebtedness of the company and as to the extent of losses sustained by policy holders, the validity of their claims, and the different classes of creditors entitled to share in the assets of the company are not such as to enable the court to make a final disposition of those questions, and the case will have to be sent to a master for ascertainment of further facts before final decree.

Character and Form of Decree.

An interlocutory decree will now be entered adjudging the settlement between Mr. Harding and the company under which the securities in question were delivered to him invalid to the extent of the valid claims of other bona fide creditors of the company, and inefficacious to vest the title thereto in him as against such creditors, and requiring him to account for the value of such securities; this decree to cover such settlement not only so far as it embraced his interest in the preferred debt, amounting to \$116,840.55, but also to the extent of his cash advances, amounting to \$47,743.52; and the case will be referred to Henry W. Bishop, as master, to ascertain and report:

First. What was the actual value of the securities in question on the 30th day of August, 1875, stating separately the value of each specific security on that day; and also what sum or sums of money, if any, as the proceeds of said securities, or any of them, Mr. Hard-

realized therefrom, with the dates when such sums d. The master will also report any enhancement or value of any of the securities not converted into y have occurred subsequent to August 30, 1875.

master will also ascertain and report the amount, validity of the existing and unpaid claims of policy her creditors of the company, including losses occur- August 30th, and September 30, 1875, and now un- losses under policies issued prior to August 30, 1875, after that date, and losses under policies issued prior 30, 1875, and occurring since that date.

ascertain and report what assets the Globe Insurance if any, at the time it ceased to do business, other ties in question, and what disposition has been made

ascertain and report what amount or amounts of mon- ing advanced to the company, if any, at the time of tlement. As it is claimed that further advances were ade by him, it is deemed proper that the proposed ref- cover that question.

will be at liberty, in prosecuting said reference, to make petent testimony heretofore taken and now in the ke such further and additional testimony as the par- e and as he may deem essential to a full development the ascertainment of which this reference is intended. a of Mr. Harding's ultimate rights, if any, to a prefer- from the assets of the company of the amount of ces as a creditor of the company, irrespective of the y decreed to be invalid, and also the question to what l, the rights and position of Mr. Harding as a cred- a preference to the extent of his cash advances may the manner in which the securities of the company h at the time the advances were made, are reserved on on the coming in of the master's report, and the specifically state.

UNION PAC. R. CO. et al. v. ALEXANDER et al.

ircuit Court, D. Colorado. December 30, 1901.)

No. 4,251.

OF FEDERAL COURTS—SUITS AGAINST STATE.

with constitutional amendment does not exclude from the ju- a federal court a suit against individuals holding official der a state to prevent them, under color of an unconstitu- e, from committing by some positive act a wrong or trespass e plaintiff has a legal interest.¹

isdiction of suits against state, see note to *Tindall v. Wesley*,

2. EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.

A bill by railroad companies to enjoin a board, created by a state statute alleged to be unconstitutional, from assessing the property of complainants for taxation, states a cause of action of equitable cognizance.

3. FEDERAL COURTS—DETERMINING VALIDITY OF STATE STATUTES.

While a federal court will not willingly pronounce a state statute unconstitutional in advance of a decision thereon by the supreme court of the state, it cannot avoid the duty of determining the validity of an act where the question is properly presented for its decision.

4. TAXATION—ASSESSMENT—POWERS OF COUNTY ASSESSORS UNDER COLORADO CONSTITUTION.

Under the constitution of Colorado, which creates the office of county assessor, but without specifying his duties, his powers are limited to the performance of the well-understood duties incident to such office, which consist of the assessment of the taxable property within his county. He has no power to act outside the county of which he is an officer, nor can he be vested with such power by the legislature.

5. SAME—TAXATION OF RAILROAD PROPERTY—VALIDITY OF COLORADO STATUTE.

The act of legislature of Colorado of 1901, which requires all the county assessors of the state to meet annually, and elect from their number a "state board of assessors," which shall assess for taxation all of the property in the state owned, used, or controlled by railroad or telegraph companies, etc., is unconstitutional and void, since the assessors, as such, have no power to make assessments outside their respective counties, and the constitution empowers the legislature to create new officers only for counties, townships, or municipalities.

In Equity. On motion for preliminary injunction.

This case was brought by the Union Pacific Railroad Company and by the Atchison, Topeka & Santa Fé Railway Company, both companies engaged in operating railroad lines passing through several counties of the state, under and by virtue of the laws of the state of Colorado; and by the complainant the Pullman Company, as owner of railroad cars which are run over the lines of railroad of nearly all of the railroad companies of the state. These complainants say that prior to April 1, 1901, they have paid all the taxes levied against their property assessed under the provisions of the revenue law of 1891. This law provided that the various railroad companies doing business in the state of Colorado should furnish to the state board of equalization a sworn statement showing in detail the respective property owned, operated, or controlled by each of the railroad companies in the state, as well as the proportion and value of the property owned by them in each county. This statement was to be made to the said board of equalization prior to the 15th day of March, 1901. It then became the duty of the board to assess the property of these complainants for the purpose of taxation for the year 1901, and to also assess the property of the other railroad corporations in the state for a similar purpose. As a means to that end, it became the duty of the state board of equalization to transmit, prior to the 1st day of May, 1901, to each county clerk of each county through which the tracks of these complainant companies ran, a statement showing the main track of such railway, its assessed value per mile, and to fix a pro rata distribution per mile of the assessed value for each county of the state through which the railroad ran. The state board of equalization refused to make any assessment because of an enactment of the general assembly of the state of Colorado, known as "House Bill No. 1," passed the 1st day of April, 1901, and which the board claims deprived them of the right to make such an assessment. Thereupon these complainants, in conjunction with several other railroad companies, began in a state court a suit for mandamus, setting up the claim that the law of 1891 made it the duty of the state board of equalization to assess their properties, the refusal of the board to assess their properties, and the reasons given for such refusal. In the suit for mandamus complainants claimed that house bill No. 1 was not

tionally passed, and upon the hearing of the complaint the court issued a peremptory writ of mandamus commanding equalization to meet, and proceed to assess the property of and other companies under the law of 1891. Section 111 No. 1 provides that all the county assessors of the county shall meet at the capitol, and compare their assessments, and if, upon comparison, the assessment of property is too high or too low, they shall correct the same. "It shall be the duty of the assessors of the state to meet to elect of their number thirteen assessors who shall constitute the 'State Board of Assessors;'" section 112 provides for this board of assessors meeting in August of each year "to assess all the property of this state owned, used, or leased by any company, telegraph, telephone, and sleeping or dining car companies." In the present suit the complainants claim that the state sets forth the duty of the county assessors to assess several and respective counties the taxable property in the county, but that the legislative assembly had no power to authorize the county assessors to assess property except that situated within the county of the elected assessor. The bill prays for an injunction restraining the respondents from transmitting to the county clerks of the county the assessment made under the provisions of the revenue

and Clayton C. Dorley, for complainant Union Pac.

ert & Ellis, for complainant Pullman Co.

st and Henry T. Rogers, for complainant Atchison,
Co.

dict Judge. This case is before the court upon the complaint of the complainants for a temporary injunction. The case presents important questions, and was argued with distinguished ability on both sides. The court wishes to acknowledge its indebtedness to the counsel for valuable assistance in the investigation of the facts and for determination. It was intimated at the conclusion of the argument that it was a matter of importance to all parties that a speedy decision be announced in the case. In compliance with this suggestion, I cannot take the time necessary at this length, in the form of a written opinion, the several points so ably discussed at the argument. I have, however, considered the arguments of counsel, both oral and written, and the course of my investigations have examined all the authorities cited, and have reached a conclusion which I will

of the court is challenged, and this is the first question presented. The bill in this case, upon its face, contains allegations of diverse citizenship, etc., to give this court jurisdiction over the state really, though not nominally, a defendant, and the case within the eleventh amendment to the constitution of the United States, which prohibits this court from taking jurisdiction only in suits brought against the state by name, but not against its officers, agents, and representatives, though not named as a defendant, is the real party in interest. Relief is asked and the judgment will operate? The purpose of that amendment was to prevent the indignity of subjecting the state to the coercive process of judicial tribunals at

the instance of private parties. In other words, it takes away from the individual the power to bring a state of the Union, invested with the sovereignty not delegated to the United States, into court as a defendant to answer his complaint, and this whether he be a citizen of another state or an alien. The reason is that the course of a state's public policy and the administration of its public affairs should not be subject to and controlled by the mandates of judicial tribunals without its consent, and in favor of individual interests. Therefore it is that the supreme court of the United States has held that the amendment covers not only suits brought against the state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is nevertheless the real party against which in fact the relief is asked, and against which the decree effectively operates. This provision of the constitution, however, does not take away from the citizen the right to bring a suit in the federal court against individual defendants, who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs; nor to forbid suits against officers in their official capacity, either to arrest or direct their official action by injunction or otherwise, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. The rule is perfectly well settled that in the construction of the constitution and laws of a state the federal court will follow the decisions of the highest courts of the state, unless they conflict with or impair the efficacy of some principle of the federal constitution, of a federal statute, or a rule of general commercial law. The reason for this rule is that it avoids confusion and disorder, and avoids making the claims and rights of suitors depend, not upon settled law, but upon the contingency of litigation respecting them being before a state or a federal court. Conflicts of this sort are certainly to be avoided, if possible; and this can best be done by leaving the courts of one sovereignty within their legitimate sphere to be independent of those of another, each respecting the adjudications of the other on subjects properly within its jurisdiction. There is a wide difference between a suit against individuals holding official positions under a state to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officials of a state merely to test the constitutionality of a state statute in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In this case no act of political administration is challenged, no contract of the state is involved, and no judgment can be rendered which affects it as a corporate entity. It is affected and interested only as it is interested and affected by the welfare of its citizens. The legislation involved is governmental in its nature, not contractual. No obligation that the state has entered into, no contract or promise that it has made is questioned. The bill rests solely upon the proposition that the property rights of the complainants are involved by the threatened actions of the defendants, and this is a judicial inquiry to see whether they have authority for their actions,—whether the law

rely is valid and constitutional, or sufficient to justify they are taking. It was insisted at the argument that the state had an adequate remedy at law, and therefore the court had no jurisdiction. The rule, as I understand it, is that jurisdiction in equity attaches unless the legal remedy, to the final relief and the mode of obtaining it, is the same as the remedy which equity would afford under the same circumstances. Within this rule, I think, the bill states a case of equity, and the conclusion reached is that the court

is not to be taken to the consideration of the second question, viz.: whether the legislature in controversy in this case conflict with the constitution of the state? It was insisted at the argument that the federal courts will not willingly pronounce, in such a case, an act unconstitutional. This is quite correct. It preceded in one of the briefs handed to me by defendant that the supreme court has not passed upon the constitutionality of the act, and in the language of Chief Justice Marshall in *McCulloch v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257, the court said that as the legislature may, avoid a measure because it is unconstitutional, the court cannot pass it by its own authority. With whatever doubts, with whatever difficulties, we must decide it if it is brought before us. We have no more right to decline the exercise of jurisdiction than to usurp that which is not given. The constitution of Colorado authorizes the election of a governor, secretary of state, state treasurer, state auditor, attorney general, and a superintendent of public instruction, who shall constitute the executive department. It further provides that they shall keep the public records, books, and papers, and perform such duties as are prescribed by the constitution or by law. It makes provision for the election of certain county officers, to-wit: county commissioners, clerk (who shall be ex officio), sheriff, coroner, treasurer, superintendent of schools, and county assessor, in each county. These county officers shall be elected every alternate year. A vacancy occurring in the office of any of the county commissioners of a county is to be filled by appointment of the governor, and a vacancy occurring in any other office is to be filled by the board of county commissioners of the county in which the vacancy occurs. Section 12 of article 14 of the constitution provides:

"The board of county commissioners shall provide for the election or appointment of township, or municipal officers as public convenience may require. The terms of office shall be as prescribed by law, not in any case exceeding four years."

The constitution further provides that the governor, auditor, treasurer, attorney general, and superintendent of public instruction, and that the county commissioners of each county shall constitute a board of equalization for the county in which they are elected. It is made the duty of the state board of equalization to adjust and equalize the values of real and personal

property among the several counties of the state, and it is made the duty of the county board of equalization to adjust and equalize the valuation of real and personal property within their respective counties. The boards are further required to perform such other duties as may be prescribed by law. By an act of the legislature of Colorado passed in 1877 power was conferred upon the state board of equalization to assess railroad property within the state, and this was held by the supreme court of the state to be a valid exercise of legislative power, because of the constitutional provision that the board may perform "such other duties as may be prescribed by law," and that its effect was to take away from the county assessors the right to assess this class of property within their respective counties. The act under consideration attempts to transfer the power of assessing this class of property from the state board of equalization to what is termed in the act a "state board of assessors"; this board to be composed of 13 assessors, to be selected from the assessors of the several counties in the state, of which, I think there are 56 or 57. The act provides that the assessors of each of the several counties in the state of Colorado shall on the first Tuesday of August in each year meet at the capitol, and elect 13 assessors out of their number, who shall constitute a board known as the "State Board of Assessors." It further provides that the board so selected shall organize and convene immediately upon their election, and proceed to assess all the property in this state owned and controlled by railroad companies, telegraph, telephone, and sleeping or other palace car companies, except real estate owned by any railroad company not used for the convenient and proper operation of its railway. This property is to be assessed in the same manner as other real estate in the county where the same is situated. The manner of choosing the 13 who constitute the board is as follows: The counties of the state are divided into classes. Those of the first class are to elect one assessor, those of the second class two, those of the third class three, those of the fourth class five, and those of the fifth class two. They are to be chosen by vote of the assessors from their respective classes out of the counties from which they were elected. While the constitution does not define in express terms what the duties of an assessor shall be, yet those duties are well understood. He is to assess the taxable property within his county, and I think it is perfectly well settled that beyond that he has no power to act, unless such power is expressly conferred. Being a constitutional officer, his powers are such as are defined by the constitution, or such as are necessarily incident to the duties of his office. No authority is conferred by the constitution upon assessors to perform duties other than the duties of county assessors. These duties he must perform within his county, and must assess all of the taxable property in his county, unless that power is taken away and lodged elsewhere by virtue of some legislation enacted under express authority of the constitution. The only power so conferred is that which authorizes the state and county boards of equalization to perform such other duties as may be prescribed by law. I find no authority whatever in the constitution empowering an assessor to perform the duties of his office outside of

which he was elected, and I conclude that the legislature without power or authority to clothe the assessors' body with the right to select and appoint 13 of their officers which they could not do by virtue of their office under the provisions of the constitution. Having concluded, it becomes unnecessary to notice the points discussed.

An injunction will issue in accordance with the terms of the court's order. The complainants will be required to pay within four days in the sum of \$25,000 to answer all damages claimed by the defendants or the persons injured by the order may be finally decided that the order was improperly

SNOW V. NELSON.

Supreme Court, D. Nevada. January 20, 1902.)

No. 704.

POINTS OF SALE—TIME OF PAYMENT—ESSENCE OF CONTRACT—WRITTEN MEMORANDUM—STATUTE OF FRAUDS.

A written memorandum of an oral contract of sale of mining property is certain as to the time when the first payment is to be made and sufficient to take the contract out of the statute of frauds. The essence of contracts relating to such properties.

POINTS OF TERMS OF THE MEMORANDUM.

A written memorandum is made of an oral contract for the sale of mining property, and the terms of the contract are afterwards agreed upon by the parties, the whole thereupon becomes a contract.

POINTS OF PURCHASE—WHEN NOT ASSIGNABLE.

A contract, not assignable in terms, to purchase mining property by one who represents himself to be the agent and acting for the owner, and to whom he desires to sell, such contract is not assignable.

POINTS OF WAIVER OF OPTION.

When the owner gives an option to purchase his mines, he may waive the option at any time before its acceptance.

John and James A. Williams, for plaintiff.

Ed and Wm. H. King, for defendant.

The District Judge (orally). This is a suit for the specific performance of a contract for the sale of certain copper mining property in Humboldt county, Nev. It is, among other things, the second amended bill of complaint: That on May 15, 1899, the defendant entered into an oral or verbal agreement with the plaintiff, A. Nelson, for the purchase of certain mining claims in Humboldt county, Nevada, for \$2,000,—\$200 to be paid by Edwards to Nelson upon the execution and delivery by Nelson of a bond and lease for said claims and upon the execution and delivery by Nelson of the claims, delivered into escrow, \$800 six months after said date and \$11,000 within fifteen months from said date. The defendant agreed to do the unfinished location work on

said claims as provided by the laws of the state of Nevada. That afterward Nelson agreed to do said unfinished location work for \$175. That a deed was to be executed and placed in escrow and delivered to Edwards or his assigns upon the final payment of said \$12,000. That pursuant to said agreement defendant Nelson made, executed, and delivered to Edwards the following memorandum thereof, to wit:

"Jackson Creek, Humboldt County, Nev., May 15th, 1890.

"This is to certify that I, J. A. Nelson, do hereby agree to lease and bond to W. H. Edwards the following described mining claims: The 'Olympia,' the 'Humboldt,' the 'Tiger,' the 'Alta,' the 'Grand,' the 'Deer Spring,' the 'Lucky,' the 'Crown Point,' all situated in the Jackson Mountains, on the north side of Jackson Creek canyon; also three claims in Black Rock Mountains, namely, the 'Copper Nugget,' the 'Crescent,' the 'Black Jack,' all three situated in Humboldt county, north of Battle creek,—for the sum of \$12,000.00; two hundred dollars cash when the lease and bond is accepted and the deed is put in escrow, eight hundred dollars in six months from date, the balance within fifteen months from date. All location work to be done by J. A. Nelson, and recorded with the records at the recorder's office, in Winnemucca, Nevada; the unfinished location work to be done by me, W. H. Edwards, providing the company accepts the proposition in proper time.

"J. A. Nelson.

"Witness: P. M. O'Brien."

That the proof of the acknowledgment of said memorandum was thereafter duly made, and the said memorandum was on the 21st day of May duly recorded in the recorder's office of Humboldt county. That the proviso contained in the last two lines of said agreement referred to James A. Williams, Charles Dupont, and J. W. Langley, said Edwards' associates at Salt Lake City, and furnishing him money for expenses on a certain mining venture in the state of Nevada. That the said associates accepted the proposition immediately, and confirmed the making of the said contract by Edwards. That Williams, Dupont, and Langley duly assigned and released to the plaintiff all their right, title, and interest in said contract and in all the property therein described before the bringing of this suit, and the plaintiff is now the owner and holder thereof. The written memorandum is not the contract, but it is evidence of it. No lease, bond, or deed was ever executed by the defendant.

Is the alleged contract enforceable? Is the written memorandum signed by Nelson sufficient to take the case out of the statute of frauds of this state (sections 2696, 2700, Cutting's Comp. Ann. Laws)? The law requires that the note or memorandum must contain the essentials of the contract as completed. Browne, St. Frauds, § 371a; Pom. Cont. § 86. It must contain the terms of the contract, and must be so reasonable, certain, and definite in itself that the contract can be made out without requiring additional proof in parol. 1 Reed, St. Frauds, § 392. It must "contain such words as will enable the court, without danger of mistake, to declare the meaning of the parties. It must obviate the necessity of going to oral testimony and relying on treacherous memory as to what the contract itself was." Scarritt v. Episcopal Church, 7 Mo. App. 174, 178. It must appear that there was a "clear accession on both

the same set of terms," that the minds of the party point, and that nothing was left open for future Langellier v. Schaefer, 36 Minn. 361, 31 N. W. 690; Verlain, 57 Neb. 220, 77 N. W. 665. The general form of such memoranda is expressed in Wood, as follows:

"A memorandum contains all the essential elements of a contract, the contents of which is of no account, as any instrument, however informally constructed, which describes the property, the price therefor, if the price has been agreed upon, the parties, and the terms of the agreement, either by its own terms or by reference to other evidence, is not necessary to establish or explain the contract. A memorandum is binding as the most formal instrument which could be made by statute only contemplates that such a note or memorandum made as men in the hurry of business may be supposed to make; but, nevertheless, of such a definite character in all respects that the intention of the parties, their names, and the other under the contract, can be gathered from the memorandum itself, leaving nothing to be supplied by parol. But a memorandum is deficient in any of these respects is insufficient to take the effect of the statute."

Wood, St. Frauds (4th Ed.) §§ 345a, 371, 371a. The oral contract in the present case relates to an option of mining property, whereby the party obtaining the option to secure the first privilege of purchasing the same time upon complying with certain terms embodied in the contract are a number of people, generally known and designated as "prospectors," who travel through the mining regions for the purpose of obtaining such options from the owners of a mine, and "prospectors" to be able to market the same in the money market. Others often represent moneyed men who furnish the means to enable their agents to obtain such options by furnishing the money for the purchase, provided the title and inspection of the property prove it to be of sufficient value to warrant the purchase. In the very nature of such oral contracts, it is thought always, in order to prevent fraud, deception, and fraud, where the contract is not in writing, to require that the memorandum which is relied upon to take the contract effect of frauds should be reasonably clear, definite, and certain. A written memorandum contains several of the essential elements of the statute. It describes the property; the price to be paid therefor. It is signed by the party to be bound. But the time when the first payment is to be made is not certain. The date is not fixed. It might, however, be inferred from the law would imply that it should be within a reasonable time, or, the mere failure to name the date would not of itself prevent enforcement. The authorities upon this point are not uniform. The discrepancies which exist may, to some extent, be attributable to the different kinds of contracts. The question has been separately discussed in Pom. Cont. §§ 374, 387, 388, and the conditions holding that, with reference to unilateral contracts, the time is necessarily must be, essential in the strict sense of the word, while another group holds that time is merely material.

rial, but not absolutely essential. The authorities generally declare that, where mines or mining properties are the subject of the contract, time is of the essence. In 2 Lindl. Mines, p. 1111, § 859, the author says:

"The necessity for a strict adherence to the rule that in all contracts for the purchase of mines time is of the essence is apparent. Were the rule to be relaxed, and the owner of the mine executing the option or contract of sale, which is ordinarily unilateral, and not mutual, to be compelled to resort to the courts to terminate the equities of the proposed vendor, or remain in a state of uncertainty awaiting the lapse of an indefinite period called 'reasonable time,' his property would remain practically unmarketable. The holder of the option would be given unreasonable opportunities to speculate without the fear of incurring any loss. The law would place him in a position to interdict a sale to any one else, or to exact an unearned consideration for a surrender of phantom equities."

The written memorandum is in many other respects so uncertain and indefinite in its terms as to require oral testimony to explain it in order to enable the court, "without danger of mistake," to judicially determine its true intent and meaning. In Pom. Cont. § 71, the author, speaking of the statute of frauds, says:

"The controlling motive of the statute is one of expediency and convenience, and this motive has always been kept in view by the ablest courts in their work of interpretation. As its primary object is to prevent mistakes, frauds, and perjuries by substituting written for oral evidence in the most important classes of contracts, the courts of equity have established the principle, which they apply under various circumstances, that it shall not be used as an instrument for the accomplishment of fraudulent purposes. Designed to prevent fraud, it shall not be permitted to work fraud. This principle lies at the basis of the doctrine concerning part performance, but is also enforced wherever it is necessary to secure equitable results."

Acting under these general principles, the courts have held that, if the plaintiff's conduct in obtaining an option or contract, or in acting under it, has been unconscientious, inequitable, or characterized by bad faith, a court of equity will refuse him the remedy of a specific performance. Pom. Eq. Jur. § 400.

Specific performance is not a matter of absolute right, but rests entirely in judicial discretion, to be exercised according to the settled principles of equity so as to reach the ends of justice. *Newton v. Wooley* (C. C.) 105 Fed. 541, 544; and authorities there cited. The memorandum signed by Nelson agrees "to lease and bond" to Edwards the mining claims therein described, "providing the company accepts the proposition in proper time." But this last clause is claimed by plaintiff to have been inserted for the purpose and intention that it should be applied only to the assessment work that was to be done upon the mines, and has no application to the agreement of sale. By a literal reading of the last clause it would seem to apply only to the unfinished assessment work to be done in order to secure a title to the mines, but Edwards was to do this work "providing the company accepts the proposition in proper time." There is no pretense in the pleadings or evidence that Edwards did any of the location work. On the contrary, the complaint alleges and the proofs show that after the execution of the written memorandum the agreement as to this work was orally changed, and that Nelson agreed to do said unfinished work "at an agreed

The proofs show that neither Edwards nor the aid or tendered to Nelson the sum of \$175, or any whatever, for location work. It is evident that it at the location work should be done either by Nelson within the time allowed by law. The proofs show, prior to that time, done the location work on some, the claims, and that upon several of the claims the work was never done, and they have since been relocated. The testimony shows that Williams, Dupont, and it is alleged were Edwards' associates, "furnishing expenses," never accepted the proposition in "proper time, but as a matter of fact declined to act in the

at the last clause in the memorandum only applied work, the question remains whether it was not an of the memorandum? Would Nelson have signed had been left out? If the bars are thrown down, compelled to examine all the oral testimony, it clearly would not. But of that more anon. Does not the the complaint that Nelson and Edwards afterwards change its terms in such a manner as to depart from ned by Nelson reduce the agreement between the level of a verbal contract, which cannot be enforced? § 164, the author says:

ly in writing and partly oral is, in legal effect; an oral rs where an incomplete writing, or one expressing only a meant, is by oral words rounded into the full contract; or at a written contract, and afterward it is changed orally."

ie of the memorandum it speaks of the "company." The name of the company is not stated. Nor are e individuals comprising the company disclosed. It parate one part of the memorandum from the other. one memorandum. It must be construed in its ent clause sheds some light on the whole transaction. t Edwards was not acting for himself alone. It remony to show who the company was, and the tesais point is nearly as uncertain as the written note n. On one side the testimony is to the effect that nt, and Langley were to be equally interested with he other side it is claimed that it was Judge Burbecause he put up the money to pay Edwards' exis a decided conflict in the evidence upon all mateas the contract, if such it can be called, assignable? reliability of the oral testimony shows that Edwards the facts and concealed the truth as to the parties as acting, and thereby induced Nelson to sign the nd enter into a contract. He represented that he McCornick & Co., bankers at Salt Lake, whom Nelson responsible, and possessed of large means. Nelson owned other mining claims in the vicinity of those ne written memorandum, and that he wanted to dis-

pose of those mentioned to parties who had the means to work and would develop the same, believing that it would increase the value of his other claims; that he stated this fact to Edwards, and that Edwards then made the statement that he was representing McCornick & Co.; that Nelson believed such statement to be true, and would not have signed the memorandum if he had not believed these representations made by Edwards. The law is well settled that contracts of this character, entered into by one party upon the representations of the other as to the responsibility and solvency of the other party or parties, are not assignable. 2 Am. & Eng. Enc. Law (2d Ed.) 1037, and authorities there cited. In *Arkansas Val. Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 387, 8 Sup. Ct. 1308, 1309, 32 L. Ed. 246, 248, the court said:

"Every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.' *Humble v. Hunter*, 12 Q. B. 310, 317; *Winchester v. Howard*, 97 Mass. 303, 305, 93 Am. Dec. 93; *Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *King v. Batterson*, 13 R. I. 117, 120, 43 Am. Rep. 13; *Lansden v. McCarthy*, 45 Mo. 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: 'Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' *Pol. Cont.* (4th Ed.) 425."

Section 3100, *Cutting's Comp. Ann. Laws*, relied upon by plaintiff, does not change the rule as to the assignability of such contracts. The statute does not enlarge the right of assignment, nor authorize it "in cases where it did not before exist." 7 Enc. Pl. & Prac. 757, and authorities there cited; *Pom. Rem. & Rem. Rights*, 145; *Wheeler v. Walton & Whann Co.* (C. C.) 64 Fed. 664, 667. The option had no binding force until it was accepted in compliance with its terms. *Pom. Cont.* §§ 59, 60; *Hackley v. Oakford*, 39 C. C. A. 284, 98 Fed. 781; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Erickson v. Wallace*, 45 Kan. 430, 432, 25 Pac. 898. The oral testimony satisfactorily shows that Nelson, after he signed the memorandum, upon learning that Edwards had misrepresented the facts as to McCornick & Co. being the parties for whom he was acting, and before there was any acceptance by the company, repudiated the contract, and declined to have anything more to do with Edwards, and, among other things, accused Edwards of having deceived him and lied to him, etc. Nelson, under the facts of this case, had the unquestioned right, before any valid acceptance, to withdraw the offer. In *Pom. Cont.* § 61, the author said:

"As the offer is not in any sense binding, the person who makes it may, at any time before a valid acceptance has changed its character, withdraw it, and thus put an end to the negotiation. He can do this whatever be its form, whether promissory or not, and without any reason except his own will. Although the person to whom the offer was made may have intended, and even attempted, to accept, still if the acceptance was for any reason imperfect, and not binding, so that no contract was concluded, the power of withdrawal remains unaffected."

shows that the plaintiff bought the interest of the par-
 he claims with full knowledge of all the facts and
 s in the premises, and is, of course, bound by them.
 e to the question of part performance, relied upon
 enough to say that, in my opinion, there is no suffi-
 f any such part performance by plaintiff, or of any
 nder whom he claims, as would justify this court
 ific performance on this ground.
 ave expressed are conclusive that plaintiff has failed
 h a case as entitles him to any decree. It is there-
 y to consider any of the other questions discussed

is entitled to a judgment for his costs. Let a de-
 accordingly.

et al. v. COLUMBIA SAVINGS & LOAN ASS'N.

ircuit Court, D. Utah. January 13, 1902.)

No. 349.

LOAN ASSOCIATION—STOCK—LOAN—PLACE OF CONTRACT.

plaintiff subscribed for stock in a Colorado building and loan
 and borrowed money thereof, giving a mortgage on property
 are the payment, the notes and interest to be paid in Colo-
 rado was a Colorado contract.

—RATE—PAYMENTS.

borrowing from a building association, plaintiff gave a
 to pay the principal, with interest and installments, ac-
 cording to the by-laws, and no rate of interest was fixed by the by-laws,
 the by-laws used in inducing plaintiff to join the association, and
 part of the contract, by illustrations, showed the amount of
 payments, each, of the borrowing and the nonborrowing
 excess paid by the borrowing member as so illustrated
 construed as payments of interest and not as payments on

—WITHDRAWAL OF STOCK.

statutes of Colorado, a stockholder who has borrowed from
 a building and loan association cannot withdraw his stock until the

—MORTGAGE—FORECLOSURE.

the time of borrowing from a building and loan association
 that the stock will mature and pay the loan in six years,
 given, payable in six years, a mortgage given to secure
 may be foreclosed at the expiration of six years if such stock
 has not matured.

—FORECLOSURE—ATTORNEY'S FEE.

an action to have a note canceled, defendant, by cross bill,
 sought the return of the trust deed given to secure such note, alleging
 that the plaintiff refused to act, on recovering such relief defendant is not
 liable for attorney's fee provided in such deed to be paid to such
 party in case of foreclosure.

—ASSOCIATION—SALE OF STOCK.

an action by a building and loan association to foreclose a
 mortgage given by a borrowing stockholder, it is prayed that the stock

of such borrower be sold, the court may require that such stock be not sold for less than its withdrawal value.

7. SAME—WITHDRAWAL VALUE OF STOCK—ASCERTAINMENT.

Where, in an action by a building and loan association to foreclose a trust deed and sell the stock of a borrowing member, the withdrawal value of such stock is not ascertained or stipulated by the parties, the decree should be withheld until such value has been ascertained and reported by a master.

In Equity.

C. S. Varian, for plaintiffs.

A. J. Rising and Jabez Norman, for defendant.

MARSHALL, District Judge. The defendant is a building association organized on the plan usually affected by such associations. It issues stock to subscribers, of a par value of \$100 per share. A small entrance fee is required, and the subscriber promises to pay to the association 70 cents per month on each share so issued. The funds accumulated by these monthly payments are used by the association—First, for the payment of its expenses; and, secondly, for the making of loans to its shareholders. When the profits made by the association from its loans and the monthly payments made by the shareholders aggregate \$100 for each share of stock subscribed, the shares are said to be matured. They are then canceled, and their par value paid to the subscribing shareholders. The defendant was organized as a corporation under the statutes of Colorado. Section 2 of the statute of that state entitled "An act concerning building and loan associations," approved April 17, 1889 (Sess. Laws 1889, p. 41), provided, in substance, that any shareholder of such a corporation should have the power to withdraw his shares upon giving 30 days' notice of an intention to do so, and should on such withdrawal be entitled to receive the amount provided by the by-laws of the company or determined by the board of directors, less all fines and other charges, provided, however, that no shareholder should be entitled to withdraw the stock held in pledge for security. The defendant issued a prospectus, on the faith of which subscription to shares was solicited and taken, and in which it was stated that "stock may be withdrawn at any time, and the member will be entitled to receive for each share the money paid into the loan fund in monthly payments on such shares, together with six per cent. annual interest after one year. Members who have obtained loans cannot withdraw their shares until loans are paid." The complainants are husband and wife. On the 12th day of June, 1890, Antoinette B. Kinney, for the benefit of herself and of her husband, subscribed for 25 shares of the capital stock of the defendant, paid the required entrance fee, and the stock was issued to her. This subscription was made with the intention of procuring a loan of money from defendant. On the 22d day of November, 1890, the complainants borrowed from the defendant \$2,500, and made to it their promissory note as follows:

"No. ———.

Salt Lake City, Utah, November 22nd, 1890.

"On or before six years after date, for value received, we, or either of us, promise to pay to the Columbia Building and Loan Association, at its office in Denver, Colo., twenty-five hundred (\$2,500.00) dollars, with interest and

ing to the by-laws of the association, payable on or before
and every month.

Antoinette B. Kinney.
"Clesson S. Kinney."

ay they executed to a trustee a deed of trust of cer-
tuated in Salt Lake county, Utah, to secure the pay-
ment, "with interest and installments thereon, according
to the rules of said association." At that time the formal
association contained no provision as to any rate of in-
terest. The association had issued a prospectus which contained
the terms of the association. In the bill it is alleged that the
deed in which the shares of stock were issued to Mrs. Kinney
was made in accordance with the representations of
the parties in accordance with the representations of
which by agreement of the parties were made a part
of the subscription," and this is admitted in the defend-
ant's prospectus in question contained the following
the cost of shares to a nonborrower, and of the cost

"Illustration.

to the nonborrower of ten shares of stock:

\$1.00 on each share.....	\$ 10 00
Interest, \$7.00 per month for 72 months.....	504 00

to the investor.....	\$ 514 00
at maturity.....	1,000 00

on ten shares.....	\$ 498 00
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a shares, of \$100 each, to the borrower:

\$1 on each share.....	\$ 10 00
Interest.....	1,000 00

Interest last Saturday of each month $\frac{1}{12}$	13 75
Membership fee.....	2 50

Interest will have paid.....	\$1,170 00
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Interest on fee as stated above.....	10 00
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Interest on \$1,000 loan.....	\$1,180 00
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of shares, having matured, is worth \$1,000 which pays the
borrower has had the use of \$1,000 six years, and has paid
at 3 per cent. interest per annum for the use of the same."

provided that "once in six months the profits arising
from the business, and other payments are divided among the shares
of the association. All members receive the same per cent. of profits
as are declared on the entire business, and not on any

is further alleged, and the answer admits, that prior
to January, 1901, the by-laws of the defendant were
so, in part, at least, conform to the representations
in the prospectus. The material part of such amended by-laws

shareholder, for each share named in his or her certificate,
a loan of \$100 from the association. * * * All shares

must be in force three months before said shareholder shall be entitled to a loan."

"Sec. 7. Shareholders having obtained loans shall, on or before the last Saturday of each and every month, until the stock borrowed upon shall have matured, and the loan is thereby repaid, make, or cause to be made, payments as follows: One seventy-second of the sum borrowed (less the membership fee); also interest at the rate of 8 per cent. per annum upon the original amount of the loan."

"Sec. 9. All shareholders shall pay, or cause to be paid, a monthly installment of seventy cents on each share named in his certificate; said installments to be paid to the association on or before the last Saturday of each month during the continuance of the certificate, unless a loan has been obtained on the stock, when payments shall be made according to section 7. Shareholders are required to pay all monthly installments without notice."

The original by-laws provided that:

"Sec. 14. Three or more shareholders may associate, and form a local board, elect officers,—one as a secretary, to visit the home office, or any office of the association, and examine the books and affairs of the association, and report the same on his return; elect a treasurer, who, upon giving bond, can receive all installments, and any payments in the locality in which he resides, as agent of the shareholders, but not of the association, and remit the same to the home office." And further: "Monthly payments should be paid at the office of the association." And that "all remittances for admission, monthly installments, fines, penalties, interests, dues, and all other payments, shall be made to the association at its principal office."

The shareholders of the association within Utah elected a local board of directors and the requisite officers, and the payments made as hereafter stated by complainants were made to the local treasurer, and by him remitted to the home office of the association. Commencing with the 5th day of July, 1890, and until January 1, 1891, the plaintiffs paid as installments on their stock \$17.50 each month, which was at the rate of 70 cents per share. From the 1st of January, 1891, until the 1st day of August, 1896, they paid to the association the sum of \$40.63 each month. No further payments were made until the 2d day of August, 1898, when the sum of \$40.63 was paid, and a similar payment made for September, October, and November of that year. In December, 1898, they paid the sum of \$17.50, and no further payments have been made.

It is stipulated by the parties that prior to the filing of the original bill "the plaintiffs demanded of the defendant that it satisfy said loan and deed of trust, and cancel and deliver their promissory note, and reassign their policy of insurance, and that it permit them to withdraw the said shares of stock, all of which the defendant refused, and still refuses, to do." The suit was filed by the complainants, claiming that they had overpaid their indebtedness to the defendant. They asked that the deed of trust be canceled, and their note surrendered; that an accounting be had to determine the amount due by the defendant to them by reason of their overpayment; and that the defendant be required to pay any amount found to be due upon the accounting. The bill also contained an offer on the part of the complainants to pay any sum found to be due from them on such an accounting. The defendant filed its answer, in which any overpayment is denied, and also, by a cross bill, seeks to foreclose the deed of trust so executed by the complainants. The defendant claims that the

and a large part of the interest of the indebtedness. It is alleged and shown that the trustee named in and also his successor in trust, have declined to act. Between these parties was to be performed in the deed, and is to be construed as a Colorado contract. That this was, in effect, admitted. It is settled by the case of *Bedford v. Association*, 181 U. S. 227, 21 Sup. Ct. 834; *Association v. Rector*, 38 C. C. A. 686, 98 U. S. A. 336, 94 Fed. 575; *Association (C. C.)* 101 Fed. 12; *McIlwaine v. Ellinger*, 1 Fed. 578. It is not claimed that, so considered, there is any objection to the validity of the contract, whether the defendant's construction of it be accepted. The question is that they borrowed money of defendant, and interest thereon at the rate of 3 per cent. per annum; that the monthly payments made by them were either part of the principal debt, or monthly payments on their stock; that when they exercised their option to receive from the defendant in monthly payments on their shares, with interest after one year; and that, if the sum so due on withdrawal of their stock is applied in payment of the principal, or are suffered to accumulate in the company until the withdrawal of the stock. This is unless the contract rate of interest was as assumed. The plaintiffs did not specify the rate of interest. They agreed to pay the principal sum, with interest and according to the by-laws of the association. The deed provided that the note was made for the principal sum of \$1000 on or before six years after date, "with interest and according to the by-laws and rules of said association," as they existed when the note was made, but as to any rate of interest, but the prospectus contained the required payments on a loan contained all the terms. The plaintiffs assert, and the defendant admits, that the prospectus formed a part of the contract by which the loan was made. The plaintiffs further allege, and the defendant admits, that shortly after the loan the defendant made them conform to the requirements of the prospectus. Sections 7 and 9 of the amended by-laws, among others, as particulars in which the amended by-laws were to conform to the prospectus. The right to the loan was based on the subscription for shares. In the circumstances surrounding the parties, the reference to the by-laws and in the trust deed to the rules of the association, to be held to refer to the prospectus, which contained, on the subject of interest, the only requirement on the subject of interest. The practical construction placed on this contract

by the parties. For many years after the loan payments were made in exact accordance with the requirements of the prospectus. It also seems to accord with the theory of both the plaintiffs and of the defendant. What is the true construction of the prospectus as to the rate of interest? It there appears that it was estimated that each share of stock would mature, or be worth par, at the expiration of six years after the subscription. This was an estimate, and not a warranty. The illustrations given of the cost of shares are based on this estimate. The cost to the borrowing and to the nonborrowing shareholder is itemized. The nonborrowing shareholder receives the par value of his shares at maturity, and the shares are then canceled. The borrowing shareholder receives the par value of his shares at the date of the loan, and his shares, when matured, pay the principal of the loan. Evidently the excess of all sums provided to be paid by the borrower over that exacted of the nonborrowing shareholder constitutes the cost to the borrowing shareholder of the use of the money as a loan. In the illustrations given, the nonborrowing shareholder of 10 shares, of the par value of \$1,000, pays to the association \$7 per month. The borrowing shareholder, to whom the par value of his stock, \$1,000, has been advanced, pays \$16.25 per month until his stock matures, when the stock is applied in satisfaction of the loan. It is evident that \$9.25 per month is what such a borrowing shareholder pays for the use of the money borrowed, or is the interest paid on the debt. It is true that in the illustration the monthly payment of \$16.25 is stated in two items. The first item is $\frac{1}{12}$ of \$1,000, less membership fee,—\$13.75; the second, the monthly proportion of interest on \$1,000 at 3 per cent. per annum,—\$2.50. But the terms used are immaterial. The monthly payment to be made by the borrower is distinctly stated, and it is just \$9.25 more than the monthly payment exacted of the nonborrower. As stated in End. Bldg. Ass'ns, § 336:

"The fact that in some loans by building associations interest upon the advance is not reserved as such can make no difference in the essential nature of the transaction, where its equivalent is added to the borrowing member's stated contributions, the payment of which, thus increased, is secured by his mortgage. Thus, if the par value of a share be \$200, the monthly dues upon which, for an investing member, are \$1, but, after he has taken a loan of \$200 from the association, become \$2, it is evident that the additional \$1 per month exactly represents the interest he would have to pay, at six per cent. per annum, upon the \$200, whether it be called 'dues,' 'interest,' or 'redemption money.' Calling it by another name does not make it another thing."

It is true, that the plan of the association is somewhat disingenuously stated in the prospectus. It carefully avoids stating the actual rate of interest. It was apparently prepared for the purpose of concealing from the ignorant that a very large rate of interest was exacted, —in this case, over 11 per cent.,—and of also concealing from such a person the fact that the mortgage required from the borrowing shareholder secured the monthly payments on his stock, as well as the principal and interest of his loan. But the sums the borrower was required to pay were distinctly stated. It needed but a simple calculation to ascertain the rate of interest. In the case at bar it was en-

at \$17.50 per month was the requisite 70 cents per stock, and that the remaining \$23.13 of the required interest on the loan. Nor can any part of the monthly payments be considered as a part payment of the principal of the loan by the illustration, neither the 3 per cent. annual interest nor the residue of the monthly payment, decreased in payments were made. At the maturity of the note the defendant, was to be surrendered in payment of the principal, though all of the monthly payments had then been made. At maturity would equal the full amount of the original principal debt. Nor was it a part of the contract that any porportion of the monthly payments of the borrowing over the borrowing shareholder should be considered as paid toward the debt. The defendant was organized to do business on the basis of the prospectus.

In the prospectus (a part of the contract of subscription) expressly provided that the profits arising from interest, dividends, and payments should be divided among the shareholders equally, and that all members should receive the same per cent. This shows that there was an equality of right on the part of a shareholder in proportion to the shares held. In *Kinney* occupies a twofold contractual relation to the company. Her position as a shareholder is entirely distinct from her position as a borrower. *Association v. Price*, 169 U. S. 45-54, 18 L. Ed. 655. She gained no advantage as a shareholder from her character as a borrower. Her right to an interest in the funds of the company, and her right on the part of her shares, was precisely the right of any other shareholder who owned the same number of shares. She can only claim a dividend on her shares the sum required of her as a shareholder, as a borrower. No effect can be given to the attempt of the defendant to withdraw their stock. At the time of this attempt the note had not matured, and was held as collateral security by the statute of Colorado forbade the conferring of such a lien. The prospectus of the company, on the faith of which the subscription was made, expressly provided that "members who have not paid cannot withdraw their shares until loans are paid." It was made by the plaintiffs that the stock be withdrawn was not a part of the loan, and embraced no offer to pay it. When the loan was fully paid, the defendant had a right to insist that the shares be preserved, and to refuse to release the defendant from her obligation to make future monthly payments. It follows from what has been said that the plaintiffs have shown that the principal of the loan made to them, and that they are entitled to relief under their bill.

The defendant, under its cross bill, to a foreclosure of the loan must follow. More than six years have lapsed since the loan was made. The debt has matured. Its maturity did not depend on the maturity of the shares. It was estimated that the shares would not mature, and the illustration given in the prospectus contemplated that the shares at maturity would pay the note. But the note was payable absolutely on

or before six years after its date, and not upon condition that the shares had been matured.

Claim is made by the cross complainant for an attorney's fee upon the foreclosure. This is based upon the provision in the trust deed by which the trustee is to be paid a reasonable counsel fee in case of any suit to which he is a party. Such provisions are to be strictly construed. The cross complainant gains no right to a counsel fee from the fact that the trustee would have had such a right, and has declined to act. *Fowler v. Trust Co.*, 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786. The trustee was a representative of both parties, and it was reasonable that he should be indemnified for his costs, but the borrowers did not promise to pay the counsel fees of the cross complainant, and are not liable for them. *Payette v. Association*, 27 Ill. App. 307; *Improvement Co. v. Whitehead*, 26 Ill. App. 609.

The cross complainant also prays a judicial sale of the 25 shares of stock pledged as security for the debt. It is within the power of the court to fix an upset price on the sale of these shares. In *Association v. Junquist* (C. C.) 111 Fed. 645, Judge Riner entered a decree in a similar case in which he directed that the pledged shares be sold for a price not less than their withdrawal value. The present withdrawal value of the 25 shares issued by the defendant to Mrs. Kinney does not appear, and, unless the parties to the suit stipulate as to this value, the case will be referred to the master in chancery, with direction to ascertain it upon a hearing upon notice to the parties, and from evidence produced by them.

A final decree of foreclosure will be withheld until the coming in of the master's report.

In re MESSENGILL.

(District Court, E. D. North Carolina. January 27, 1902.)

BANKRUPTCY—COMPOSITION—ACCEPTANCE—MAJORITY OF CREDITORS—DETERMINATION.

Bankruptcy Act, § 12, declares that an application for the confirmation of a composition may be filed in a court of bankruptcy after it has been accepted by a majority in number of all creditors whose claims have been allowed, etc. *Held* that, in determining whether a majority have accepted an offer of composition, an assignee of a large number of claims should be counted as one creditor only, and not as the number of creditors who have assigned claims to him.

In Bankruptcy.

Clifford & McLean, for bankrupt.

PURNELL, District Judge. The referee for the Fourth division of the district certifies the following as having arisen in the course of the proceedings to consider a proposition of composition pertinent to the proceedings. The facts are certified that the creditor purchased several claims after the debts had been allowed. No pleadings or evidence accompany the referee's certificate. The question for consideration is thus stated:

"In determining whether or not a majority of the creditors, whose claims represent a majority of the indebtedness of this estate in bankruptcy, have

agreement in writing to accept 80 % offer of composition, and, to whom a large number of creditors have sold their claims as one creditor, or as the number who have assigned them. The referee holds that he should be counted as one creditor, and that his claim should be allowed. The referee's decision is affirmed. Section 12, of the Bankruptcy Act, should be strictly construed. In re Rider, 96 Fed. Bankr. R. 178. Where a claim has been assigned after the owner alone can vote. In re Frank, Fed. Cas. No. 10,000, Bankr. § 105. He is one creditor, holding several claims. A claim does not come up in the form required by section 12 of the bankruptcy act, which requires all pleadings raising a claim to be verified. It is passed upon, but this action is taken as evidence the court is inadvertent to, or will disregard, the provisions of the statute in this respect. Attention is especially called to the statute.

THE NORANMORE.

District Court, E. D. Virginia. January 21, 1902.)

RY TO STEVEDORE—INDEPENDENT CONTRACTOR.
 not liable to a longshoreman employed by a stevedore, an independent contractor, to assist in loading, for injury caused by falling portions of hatch cover, because of failure to have in place the crossbeams on which such athwart portions rested; the portions having been turned over to the stevedore, and he having received the portions of the hatch cover, including the crossbeams, and to work without properly fastening them.

SAFE APPLIANCES.
 of a ship to a longshoreman in the employ of a stevedore, relative to suitable appliances, in the furnishing of a hook is fulfilled where the hook is reasonably safe for the work.

by
 antosk and Theodorick A. Williams, for libelant.
 Barnett and Whitehurst & Hughes, for claimant.

District Judge. The libelant, Richard Skinner, a seaman, was employed by the South Atlantic Export Company, doing business as stevedores, to assist in loading the steamship Noranmore with flour, at the port of Norfolk, on the 9th day of April, 1900. At the time of sustaining the injury, the libelant was working in the fore-castle of the ship, and was injured by the athwart portions of the hatch cover falling in upon him. Said hatch cover consisted of three sections, and at the time of the injury the middle section only was open, the other portions thereof closed on account of the covers and sections to the hatch rested upon two transverse beams extending from side to side, and fitting in iron shoes,

with bolts to hold the beams in place. The negligence assigned consisted in the failure of the ship to furnish a safe place for the libellant to work, together with safe and suitable appliances with which to perform the duties required of him; the specific allegations being that the bolts holding the beams aforesaid were not in place at the time of the injury, and that the hook fastening into the sling in which the flour was loaded into the hold was in a defective condition, in that it was a protected hook, with the lip or flange broken off, and that in using it by means of a tackle operated by the winch it caught under the beam supporting the covers of the hatch, thereby throwing the same down.

The first question presented is whether any liability attaches against the steamship by reason of the injury, the libellant being an employé of the stevedore, an independent contractor, in loading the ship. Such liability clearly does not exist, unless there be some exceptional reason in this case for holding the ship liable. The *Indrani*, 41 C. C. A. 511, 101 Fed. 596, 598, 599 (United States circuit court of appeals, Fourth circuit), and cases there cited; *Hughes*, Adm. 188-191. The exceptional causes of liability insisted upon are the failure of the ship to furnish a safe place to work in, and a suitable hook with which to perform the duties required,—it being admitted that the particular hook was that of the ship, and not of the stevedore. The insecurity of the place where the work was being performed arose, not from any defect in the ship, or its proper structural condition, but because of the failure to have in place the bolts to hold the beams upon which the athwart portions of the cover of the hatch rested. This failure cannot be imputed, under the circumstances of this case, as negligence on the part of the ship; as the evidence conclusively shows that this ship had been turned over to an independent contractor; that on the day and night previous to the injury all the sections of the hatch cover and the two crossbeams had been removed, in order that the stevedore might properly do the work in hand; and at 7 o'clock in the morning on which the injury was sustained at 10 o'clock the foreman of the day force of stevedores, upon returning to work, found that the hatch, with the exception of the middle sections, had been closed by the night force, and proceeded to use that section. The absence of the bolts through the beams was patent and obvious, and could have been seen by the day foreman aforesaid, or any other person observing the same. On getting into port, the custom is for the ship's carpenter to remove the bolts from the hatch beams, and the stevedore in charge takes control. On this occasion the stevedore had the management and direction of the hatches, opened and closed them, as found desirable for the convenient dispatch of the work to be done. No liability arises against the ship by reason of the negligence of the stevedore, an independent contractor, in removing the hatches and beams, or putting them in place improperly. If negligence exists in this respect, the stevedore, an independent contractor, is liable, and not the ship. *The Picqua* (D. C.) 97 Fed. 649, 651; *The Auchenarden* (D. C.) 100 Fed. 895; *The Willowdene* (D. C.) 103 Fed. 678; *The Aldborough* (D. C.) 106 Fed. 90.

ner or not the hook in question was defective, and that caused the injury to libelant, considerable evidence, including that of the foreman of stevedores, on the part of the libelant, who testified that he called the attention of the officer of the ship to its condition when working in that way the day before the accident. Whether any liability against the ship, arising from the use of this hook by the stevedore, may be doubted (*The Mary Stewart* [D. C.] 10 Fed. 2d [C. C.] 31 Fed. 574), though it is unnecessary to question in this case. While it is true the hook was not one of the appliances of the ship, it seems that the stevedore should have used his own tackle, which he failed to do. But, be it what it may, the ship's liability what it may, and placing the case in the most favorable light to the libelant, that is, treating it as the ship's fault to furnish the appliances, and making it liable for the accident, under the facts in this case, as viewed by the court, the ship would nevertheless not be entitled to recover, as appears from the evidence that the hook used was not a safe and suitable one for the work then engaged in. It was not such a hook as was in general use in this and other cases for the purpose of loading ships; the evidence being that an open hook is preferable to a protected one; that a particular hook, a protected hook, with the lip out, is not really the same as an open hook. It is true that the evidence failed to show that to some extent there was a slight difference in the hook, but none appreciable. The measure of duty required of a ship in furnishing appliances is not that all the latest, the most improved, indeed, the best appliances that can be had, shall be furnished, but that they are reasonably safe for the purpose of the particular work to be done. It is not expected that appliances can or will be furnished, of which an accident may not happen, but those from the exercise of proper care and caution on the part of persons handling them, no injury will likely result. *Shear. & R. Neg.* § 92; *Railroad Co.,* 100 U. S. 213, 218, 25 L. Ed. 612; *Railroad Co.,* 107 U. S. 454, 459, 460, 2 Sup. Ct. 932, 27 L. Ed. 618; *Co. v. O'Brien,* 161 U. S. 451, 457, 16 Sup. Ct. 618, 40 L. Ed. 1018. The hook used was reasonably safe for the work in hand, and the ship exercised proper care and caution in supplying the hook. It would not be held liable for an accident to those handling the beam when such accident would not have happened but for the negligence of others, for whom the ship was not responsible, in fastening and keeping in place the beam to the hatch.

From what has been said, that the libel should be dismissed, and an order may be accordingly so entered.

UNITED STATES v. FREEMAN et al

(District Court, D. Washington, N. D. January 13, 1902.)

1. EMINENT DOMAIN—DAMAGES—EVIDENCE—ADMISSIBILITY.

On an issue as to the damages sustained by owners of property taken by the government in condemnation proceedings, evidence showing the price fixed by agreement and paid by the government for an adjoining tract several years back should be excluded, as likely to be misleading.

2. SAME—INSPECTION OF PROPERTY BY JURY—MISCONDUCT.

In a condemnation proceeding, where the jury impaneled to assess the damages were taken to view the land, the fact alone that they were also conducted over adjoining property was not ground for setting aside their verdict, where it did not appear that they were misinformed as to the identity of the land, or that there was any intentional misconduct on the part of the engineer accompanying them.

3. SAME—SETTING ASIDE VERDICT—POWER OF COURT.

The statutes of the state of Washington, respecting condemnation proceedings prescribe a special procedure distinct from the practice in civil actions, and the provisions of the civil practice act authorizing courts in which actions are tried to set aside verdicts for error in assessment of damages are not applicable, and do not authorize the same courts to grant new trials in condemnation cases.

4. SAME.

2 Ballinger's Ann. Codes & St. Wash. § 5616 et seq., relating to condemnation proceedings, does not in express terms nor by any fair implication authorize a court of original jurisdiction to set aside the verdict of the jury for error in assessment of damages or to grant a new trial.

5. SAME.

The laws of Washington requiring the compensation to be paid to an owner of property condemned for public use to be determined by a jury, by authorizing an appeal and specially conferring power on the appellate court to pass on the justness of the award, in effect denies the right of a court of original jurisdiction to set aside the jury's verdict.

6. SAME—CONSTITUTIONALITY OF STATUTE ALLOWING APPEAL.

The statute of Washington relating to condemnation proceedings, in so far as it authorizes an appeal to the supreme court of the state and empowers that court to consider the justness of the compensation awarded, is constitutional whether or not the provision authorizing the court to determine finally the compensation is invalid, the provisions being separable.

E. E. Cushman, Asst. U. S. Atty.

Sachs & Hale, Tucker & Hyland, R. E. Moody, A. R. Coleman, W. W. Felger, and A. W. Buddress, for defendants.

HANFORD, District Judge. This proceeding was instituted by the government of the United States for the purpose of appropriating a number of lots and parcels of land required by the government for military purposes, and to enlarge Ft. Worden. A special venire was issued for jurors, from whom 12 were selected and impaneled in the usual manner of selecting jurors, and sworn to determine all disputed questions of fact as to ownership of the property, and fix the valuation thereof, and assess any damages resulting to the owners from the taking of their property. As provided by the act of congress authorizing the condemnation of land re-

fications (see 1 Supp. Rev. St. [2d Ed.] pp. 601, 780),
 s were conducted as near as practicable according to
 prescribed by the laws of this state. On the trial
 t and the jury there was no controversy as to the own-
 property, and the jury was required only to determine
 assess the damages. Witnesses, including business
 ownsend, were called on the part of the government,
 the owners, who gave their estimates of the value of
 f the improvements thereon, and the court and jury
 nises for the purpose of viewing the same, and, after
 the court room, arguments were made to the jury by
 enting all the parties, and the case was submitted to
 nstructions by the court that they were to determine
 value at the present time of the land sought to be
 d the improvements thereon, and assess damages in
 the owners who were shown by the evidence to have
 by the taking of their property, and afterwards the
 nto court a separate verdict as to each of the different
 s of land appropriated. Compared with the estimates
 the witnesses on the part of the government, the sums
 ast and reasonable, but, measured by the testimony
 the defendants, the sums awarded are in some in-
 much below the reasonable value. The defendants are
 n the verdicts, and have moved the court to set the
 grant a new trial on a number of specified grounds,
 y disregarding legal verbiage, may be resolved into
 (1) Error in law committed by the court on the trial
 evidence offered by the defendants to prove the price
 nds, which was fixed by agreement, and was paid
 ment. (2) Misconduct on the part of a superintending
 employment of the government at the time the jury
 view the premises, in this: that said engineer con-
 y to and upon lands other than the land to be con-
 Error in the findings of the jury, in this: that the
 by their verdicts are inadequate, and not sufficient to
 compensation for the property taken.

which a purchaser pays for one piece of property is not
 a by which to determine the value of an adjoining
 years after the transaction, for the reason that the
 purchaser, the disposition of the vendor, and peculiar
 and conditions may be such as to oblige a purchaser
 erever exactions in order to consummate a purchase
 Therefore evidence of a particular transaction is
 leading unless all the circumstances and conditions are
 it is not practicable for parties to be ready on the
 e witnesses to explain transactions not involved in
 was for this reason that the court excluded the tes-
 by the defendants, and I believe now, as I believed
 at the evidence was incompetent. It is not shown by
 iled that the jury were misinformed with respect to
 the land to and upon which they were conducted

It was fair to all parties that the jury should have an opportunity to see the land, and the mere circumstance of their being conducted over adjoining property would not necessarily, nor probably, be prejudicial to the defendants. The intelligence and good sense of jurymen must be appealed to when they are called upon to determine questions of value and assess damages; and an opportunity to see the property which is the subject of controversy, and also to see and compare other property in the immediate vicinity, cannot reasonably be presumed to have diminished the knowledge, experience, and common sense which qualifies jurymen to discharge their functions in cases of this character. I do not think there was any intentional misconduct on the part of the engineer, nor that any error which he may have committed in conducting the jury justifies a suspicion that the land condemned was appraised lower than it would have been if the jury had not been permitted to see other land contiguous thereto. I adhere to the ruling made by this court in the case of *U. S. v. Tennant* (D. C.) 93 Fed. 613, to the effect that in condemnation cases in this state the law does not authorize the court of original jurisdiction to set aside the verdict of a jury on the ground that the appraisal was erroneous or unfair. Upon a re-examination of the question I am confirmed in the opinion that the statutes of this state as expounded by its supreme court prescribe a special and peculiar mode of procedure distinct from the practice in civil actions. Therefore the provisions of the civil practice act authorizing courts in which actions are tried to set aside verdicts for error in assessment of damages are not applicable, and do not authorize the same courts to grant new trials in condemnation cases. See *Railway Co. v. O'Meara*, 4 Wash. 17, 29 Pac. 835; *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847; *Long v. Billings*, 7 Wash. 267, 34 Pac. 936; *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158. The act prescribing a special method of procedure in condemnation cases (section 5616 et seq., 2 Ballinger's Ann. Codes & St. Wash.) does not in express terms, nor by any fair implication, authorize the court to set aside the verdict of a jury, nor to grant a new trial; and, as the law providing for new trials in civil actions does not apply, there is no statute giving the court power to grant a new trial. If the court has the power, it exists not by virtue of any statute, but because it is necessarily one of the inherent powers of the court. I believe that the court has inherent power to correct its own errors, but by the constitution and laws of this state the compensation to be paid to the owner of property condemned for public use must be determined by the verdict of a jury; and if a jury errs in assessing damages the law does not confer upon the court of original jurisdiction power to correct the error, nor leave the court free to exercise any inherent and unnamed power to resubmit the case to a second jury, but allows an appeal to the supreme court of the state, and provides that the propriety and justness of the award shall be for the consideration of the appellate court; and I hold that by authorizing an appeal and specially conferring power upon the appellate court to pass upon the propriety and justness of the award the legislature in effect

right of the court of original jurisdiction to interfere
t of a jury.

ed on the part of the defendants that a statute author-
llate court to determine finally the amount to be
mpensation for property condemned to public use
section 16, art. I, of the constitution of the state of
nd to the seventh amendment of the constitution of
es. It does not help their side to argue that the act
re is unconstitutional. Its provisions are separable,
must uphold the validity of the statute as to all of its
ch are not repugnant to the constitution, and only
particular provisions which are repugnant; and this
ar as it authorizes an appeal to the supreme court
Washington, and in so far as it authorizes that court
propriety and justness of the amount of compensa-
y a verdict, is not unconstitutional, and it confers the
oon an appellate tribunal which the defendants are
urt to exercise without statutory authority. If the
cannot, by its decree, increase or reduce the amount
n without violating the constitution, then a serious
arise as to the proper method and means by which
exercise its power to pass upon the propriety and
of the award. Upon that question this court does
xpress any opinion. It is enough to say that the
may be encountered in the appellate court may or
surmountable, but it is safe to assume that, if the
a new trial exists at all, it belongs to the tribunal to
d parties who may have grounds for disputing the
ustness of the amount of damages awarded to them
authorized to appeal. The national government does
omit this controversy to the decision of the supreme
ate, but there is an appellate court to which the case
ed; and, as congress has adopted the procedure pre-
e laws, the practice of the appellate court as well as
t be governed thereby, and the parties must be con-
verdicts unless they can be avoided by the judgment

ried.

THE LAUREL.

ct Court, D. Washington, N. D. February 3, 1902.)

IGATION—MARITIME CONTRACT.

ent by which one of the parties undertakes the responsi-
gating a vessel on the ocean and bringing her back to her
r a stipulated compensation is essentially a maritime con-

CT TO EMPLOY MASTER—BREACH—DAMAGES—LIEN.

ter plaintiff had contracted to take charge of a vessel as
before he commenced performance, the owner refused him
ment, plaintiff has no lien on the vessel to secure his
such breach of contract, either under the maritime law,

which gives no lien to a master for his wages, or under 2 Ballinger's Ann. Codes & St. Wash. § 5953, which gives a lien only for services rendered on board, and for nonperformance or malperformance of a contract for the transportation of passengers or property.

In Admiralty.

Libel to recover damages for breach of a contract by which the libellant was engaged to serve as master of the schooner Laurel on a fishing voyage, the allegations being that a contract was fully agreed to, and that, after the libellant had entered upon the performance thereof, it was, without his consent, repudiated by the owner of the vessel; that by his engagement he missed opportunities of going as master of other fishing vessels, and has been deprived of employment in his profession during the fishing season of the year 1900. Heard on exceptions to the libel alleging that the contract is not a maritime contract.

James M. Epler, for libellant.

Preston & Bell, for claimant.

HANFORD, District Judge. The ground alleged for the exceptions is not well chosen. An agreement by which one of the parties undertakes the responsibility of navigating a vessel on the ocean and bringing her back to her home port for a stipulated compensation is essentially a maritime contract,—that is to say, it contains all the essential elements of a maritime contract,—and no good reason has ever been given for excepting it from the class of contracts which in law are denominated maritime contracts. I am bound to decide, however, that a suit in rem for the cause stated in the libel cannot be maintained, for the reason that the law does not entitle the libellant to a lien upon the vessel. It is settled by the determinations of the courts in this country that the general maritime law does not subject a ship to a lien for the wages of her master. 19 Am. & Eng. Enc. Law (2d Ed.) 1116. As a lien does not attach for wages earned, a fortiori there can be none for an unliquidated claim for damages against the employer for breaking a contract to hire. The statutes of this state make all boats and vessels liable "for services rendered on board," without any exception, and in my opinion entitle a master as well as mariners subordinate to him to a lien for wages earned by services actually rendered; but the rule of strict construction applies, and the courts have no right to extend the law so as to confer a lien for damages claimed for breach of an unperformed contract. The same section of the Code gives a lien upon a vessel for nonperformance or malperformance of a contract for the transportation of passengers or property. 2 Ballinger's Ann. Codes & St. Wash. § 5953. These provisions clearly indicate the limitations of the statute. In one case a lien is given "for services rendered." This excludes demands based upon any other ground than services rendered. The other gives a lien for nonperformance of a contract for transportation of passengers or property, and this excludes every other kind of contract from consideration.

For the reasons above stated, I direct that a decree be entered dismissing the case, and awarding costs to the claimant against the libellant and the sureties upon his stipulation.

PRIMROSE v. FENNO et al.

Supreme Court, D. Massachusetts. February 7, 1902.)

No. 934.

COSTS—CONFORMITY TO LOCAL PRACTICE.
Act Feb. 26, 1853 (10 Stat. 161), the taxation of costs in the courts in the various districts conformed to the practice of the district in which the district was situated, and the same since its enactment, except costs not specially covered thereby.

DECISION OF COURT.
The federal courts in taxing costs are to follow the local practice so far as modified by statute or by special usages, they are not bound thereby as to be embarrassed in doing justice.

EXPENSES OF AUDITORSHIP—MASSACHUSETTS PRACTICE.
According to the practice in Massachusetts, the taxable expenses of an auditorship are all charged on the defeated party, except so far as they are public authorities.

During the opening of this case the court of its own motion, on the party objecting, discharged the jury and appointed an auditor. Coming in of his report plaintiff moved to amend his writ so as to embrace all matters which he maintained were within the scope of the report, and, his motion being disallowed, submitted to a decision. Afterwards each party paid one-half of the auditor's fees. That, under the circumstances, no part of the fee paid by plaintiff should be taxed in his favor against the other.

WITNESS FEES.
Under the general rule, the fees of witnesses appearing before an auditor are taxed against the losing party.

CERTIFICATE OF WITNESS—AFFIDAVIT.
The certificate of the witness in the usual form is sufficient without an affidavit.

PREPAYMENT—NECESSITY.
The certificate of the witness need not show that his fees have been paid by the successful party, but they may be taxed against plaintiff notwithstanding, the successful party being alone liable for them.

Whears & Ogden, for plaintiff.
Hornbake & Palmer, for defendants.

Circuit Judge. The plaintiff has requested us to review the taxation of costs. The questions relate to one-half of the auditor's fee of \$1,515, and the travel and attendance of witnesses attended before him. The manner in which the auditor's report appears by the following extract from the record:
"by the plaintiff to the second jury. After hearing the opening, neither party objecting, the court discharges the jury from the case, appoints Frederick Dodge, Esq., auditor, with liberty to make findings, and orders that attendance of counsel before the auditor be regarded the same as attendance in open court before this court. That the auditor's report be filed on or before the 15th day of March."

Coming in of the report, the plaintiff moved to amend the purpose of covering all matters which he maintained were within the scope of the auditor's findings. This motion was denied. Thereupon the plaintiff submitted to a discontinuance,

which carried costs to the defendants. Afterwards one-half of the auditor's fee was paid by the plaintiff. The defendants, having also paid one-half, claim that the same should be taxed in their favor, as well as the travel and attendance of their own witnesses before the auditor, in accordance with the usual certificate, signed by the witnesses and filed with the clerk.

Both of these items were allowed by the clerk. There can be no question that the clerk's taxation is in all respects in accordance with the ordinary practice in this circuit, and that it must be confirmed, unless the court can exercise discretionary powers with reference to taxing the compensation of an auditor, and of the travel and attendance of the witnesses incidental to the hearing before him.

Many propositions have been submitted by the plaintiff, but they are all resolved by the few which we will state. Prior to the act of February 26, 1853 (10 Stat. 161), which is now scattered through the Revised Statutes, the taxation of costs between party and party in civil suits, in the various districts, conformed to the practice of the state in which the district was situated. The Baltimore, 8 Wall. 377, 390, 391, 19 L. Ed. 463. Since its passage, and, especially, since the decision in 1867 in *Nichols v. Brunswick*, 3 Cliff. 88, 90, 91, Fed. Cas. No. 10,239, and in 1869 in *Jordan v. Woolen Co.*, 3 Cliff. 239, 243, Fed. Cas. No. 7,516, the practice in this circuit has been uniformly the same as it was before the act of 1853, except so far as in terms restricted by that statute. It seems to have been accepted that the act of 1853 was intended, not to cover the entire subject-matter, but merely to obviate some uncertainties, and to prevent the continuance of certain irregularities, among which was the allowance of counsel fees in admiralty cases, as early approved by the supreme court. Consequently, for all items of costs not specifically covered by the act of 1853, we must look primarily to the practice of the local courts.

It is to be remembered, however, that the general rule in the federal courts arose from the provisions of what is now section 914 of the Revised Statutes, adopting the practice of state courts of record. But this section provides only that the practice in the federal courts shall conform "as near as may be" to that of the local tribunals. It is also to be remembered that the whole subject of taxation of costs, except so far as in terms directed by statute, is controlled by usage, and that all statutes are assumed to be embedded in that usage. It would be impracticable to take up items of costs and dispose of them theoretically, without regard to the reasonable and actual limitations arising from the usages of the courts, without thereby establishing rules which, under some circumstances, would render costs so burdensome as to be comparatively ruinous. Consequently, while, on the one hand, we are to follow the local practice, except so far as it has been modified by statute or by special usages of this court, we are not required to hold ourselves so far bound by it as to embarrass us in doing justice between parties. We could not freely accomplish this, and should unduly hesitate in instituting incidental proceedings of our own motion, if thereby we might burden too heavily one party or

this particular case these considerations cannot be

ing that the extract which we have made from the hat neither party objected to the appointment of t it is apparent that the appointment was the act its own motion. It follows that it made the ap- in the interest of either party, but for its own relief. conceded that the court, in thus appointing an au- motion, on the opening of the trial to the jury, pro- pparent state of the case, by which it may have been in truth it may have been that, notwithstanding the at such an appointment was necessary to the orderly se, the fact was otherwise, and the case might have of without involving the parties in the costs incident much more clear that the charges connected with the er such circumstances arose from the attempt of the tself than from any act of either party of that class y casts upon it the entire costs of litigation in the oves futile. Therefore, under the circumstances of ot clear that there is any equity which should cast of the auditorship on either party. The condition is ferent from what it would have been if the losing ed for the appointment of the auditor, or if there , and he had there used his report.

no question that, in the practice of the local courts ts, the taxable expenses of an auditorship are all he defeated party, except so far as they are borne uthorities. Pub. St. c. 159, §§ 51-55. In view of the ditor in the present case was given liberty to make ngs, it may be that he did not come strictly within ndependently of any statute, the ordinary local rule e losing party with the taxable expenditures arising ing. Therefore, ordinarily, that rule should govern is district; but, looking at the other considerations, y justly follow Mr. Justice Story, who in *Whipple v. Co.*, 3 Story, 84, 86, Fed. Cas. No. 17,515, divided n the parties the cost of a survey ordered by the so, under the ordinary local rule in Maine, in which se was pending, would have been borne entirely by y. Consequently, inasmuch as each party in the s already paid one-half of the fees of the auditor, we ar as that item is concerned, no part thereof is to be of either against the other.

e witnesses before the auditor are concerned, it is e ordinary rule that their fees follow that of the e taxed against the losing party. Inasmuch as the us does not show under what circumstances these called, it is impossible for us to say that there are any class which we have explained in connection with auditor, or any other equities which would authorize om the ordinary rule. Moreover, the objection to

the allowance of the witness fees is based on only two propositions,—one that the certificate in this case, which is in the usual form, should have been supported by an affidavit, and the other that the certificate does not show that the witnesses have been paid their fees. So far as the first objection is concerned, it has been settled in Massachusetts, longer than the memory of man runneth to the contrary, that a certificate in this form is *prima facie* sufficient. *Cook v. Holmes*, 1 Mass. 295; *Howe*, Prac. 332. The certificate never shows that the witness has been paid. There is no necessity that it should, because, whether paid or not, the witness has no claim at law against the losing party after the allowance of his fees. Moreover, in a case involving a successful litigant of moderate means in large expenditures, it is not impossible that recovery of witness fees from the losing party may be necessary in order for him to make payment thereof. However this may be, the clerk's allowance of the fees on the certificate filed is in accordance with the practice of more than a century, and cannot now be questioned. The mere fact that section 983 of the Revised Statutes uses the word "paid" is not to be unreasonably construed, as intended to establish a new and stringent rule in this regard. So far as the losing party is concerned, the fees are paid in law, because they stand in such position that the winning party alone is liable for them. On the whole, while the clerk is directed to revise the taxation so far as to disallow the amount paid by the defendants on account of one-half of the auditor's own fees, his taxation must stand in all other respects.

Inasmuch as, with reference to the item which the clerk is thus directed to disallow, the defendants claim to stand on a strict legal right, they will be entitled to a writ of error, as explained by the court of appeals for this circuit in *The City of Augusta*, 25 C. C. A. 430, 80 Fed. 297, 303. Therefore, on the coming in of the revised taxation, the defendants will be entitled to have allowed a bill of exceptions so far as our ruling is adverse to them.

COONROD v. KELLY et al.

(Circuit Court, D. New Jersey. January 29, 1902.)

1. MORTGAGES—PRIORITY OF RECORD—FAILURE TO RECORD—EFFECT.

Under Rev. St. N. J. p. 2106, § 22, providing that a mortgage shall be void against a subsequent bona fide mortgagee for a valuable consideration without notice, a party asserting priority for a mortgage recorded after the recording of a subsequent mortgage must prove that the subsequent mortgagee did not pay a valuable consideration, or that at the time of taking the mortgage he had notice of the prior mortgage.

2. SAME—SUBSEQUENT MORTGAGE—NOTICE—CONSIDERATION—EVIDENCE—SUFFICIENCY.

In an action demanding that a mortgage be a prior lien to a mortgage subsequently executed, but recorded before the former mortgage, the mortgagor testified that he did not inform the subsequent mortgagee of the existence of the prior mortgage. The mortgagee testified that he had not heard of such prior mortgage, and that he paid the consideration for the mortgage. He admitted knowledge of another mortgage.

the evidence on notice and payment of the consideration. This evidence be disregarded on the ground of its improbability, express testimony cannot be rejected solely on that presumption of want of notice of the prior unrecorded mortgage. Payment of the consideration is not overcome, and the mortgage, having priority of record, constitutes a prior lien.

OF FORMER MORTGAGE—SUBROGATION.

One in a mortgage prior in date and subsequent in record to a subsequent mortgage in date and prior in record, who pays a former mortgage at the time of the recording of the subsequent mortgage, is subrogated to the rights of the paid mortgagee, as assignee of the subsequent mortgage, the latter relying on and believing the mortgage to be a first lien.¹

OF RECORD—ORDER OF PRIORITY.

One of a mortgage subsequent in date and prior of record to a mortgage prior in date and subsequent in record, who finds on the record at the time of the recording of the subsequent mortgage, does not notice of such prior mortgage, so as to put him on inquiry, is not showing the order of priority of the two mortgages.

well, for complainant.

for defendant Kelly.

for defendant Dime Savings Inst.

WICK, District Judge. The complainant in this case seeks the foreclosure of his certain mortgage for \$10,000, in the county of Somerset, in the state of New Jersey, made May 1, 1899, executed by George Booth, and Ella, his wife, the same day, delivered to complainant on the 3d day of May, 1899, and lodged for record in the clerk's office of Somerset county on the 3d day of May, 1899. The bill also prays that the mortgage may be declared to be a prior lien on the property described to another certain mortgage given by said George Booth, and now held by assignment by the Dime Savings Institution, of Plainfield, N. J., and which, while bearing date of May, 1899, was lodged for record in the clerk's office of Somerset county on the 3d day of May, 1899, three days before the date of record of complainant's mortgage. The following facts are undisputed, and they clearly appear from the record: That complainant agreed to loan to defendant Booth the sum of \$10,000, secured by mortgage on the property described in the bill. The mortgage was drawn on May 1, 1899, executed by George Booth and his wife on May 1, 1899, and the money paid on the morning of May 1, 1899, \$2,498 in cash, \$2,400 by receipt of admitted indebtedness of George Booth to complainant, and \$5,102, the amount due on a mortgage on the premises, held by the Mutual Life Insurance Company of New York; that the complainant's mortgage was sent by mail to the clerk of Somerset county, where the bill is filed, to be lodged for record; and that, because the mortgage was not properly stamped as required by the United States laws, it was returned to complainant's attorney, who, on the same day, returned it again to the clerk, so

as to rights of mortgagee, see note to *Rachal v. Smith*, 42 O. C.

that it was recorded on the 6th of May, 1899. Upon the same day upon which Booth delivered the mortgage to complainant, viz., May 3, 1899, and about two hours later, he and his wife executed and delivered another mortgage upon the same premises to one Frederick J. Howlett to secure the sum of \$8,000. This mortgage Howlett, on the same day, lodged with the clerk of Somerset county for record, and it was so recorded May 3, 1899. Afterwards the complainant, through his attorneys, paid the mortgage upon said premises given by one Day, a former owner of the premises, held by the Mutual Life Insurance Company of New York, from the money left in his hands for that purpose, and the same was, on the 8th day of May, 1899, canceled of record. The record then stood (i. e., on May 8, 1899) in this way: May 3, 1899, mortgage, Booth and wife to Howlett; May 6, 1899, mortgage, Booth and wife to Coonrod; May 8, 1899, mortgage, Day to Mutual Life Insurance Company, canceled. On the 12th of June, 1899, Frederick J. Howlett, the mortgagee above named, made an application to the Dime Savings Bank, of Plainfield, N. J., for the sale to them of his said mortgage, and represented the same to be a first lien on the said property; and the said institution afterwards purchased the said mortgage, and paid therefor the full amount of principal and interest due thereon, taking the precaution, however, to have made a search of the records of the county to ascertain the title, and finding it to be as above set out. The General Statutes of the state of New Jersey (Rev. St. p. 2106, § 22) provide:

"That every deed of mortgage, or conveyance in nature of a mortgage, of or for any lands, tenements or hereditaments, which shall have been made and executed after the first day of January, in the year of our Lord one thousand eight hundred and twenty-one, or shall hereafter be made and executed, shall be void and of no effect against a subsequent judgment creditor, or bona fide purchaser, or mortgagee for a valuable consideration, not having notice thereof, unless such mortgage shall be acknowledged or proved according to law, and recorded or lodged for that purpose with the clerk of the court of common pleas of the county in which such lands, tenements or hereditaments are situated, at or before the time of entering such judgment, or of recording or lodging with the clerk as aforesaid, the said mortgage or conveyance to such subsequent purchaser or mortgagee: provided, nevertheless, that such mortgage, as between the parties and their heirs be valid and operative."

So that upon the face of the record in the office of the county clerk the mortgage given to Howlett was a prior lien on the property to that of the mortgage of Coonrod, though the latter was first in date and delivery. To give Coonrod priority for the lien of his mortgage, it was necessary for him to show that Howlett was not a mortgagee for valuable consideration, or that at the time he took said mortgage he had notice of complainant's mortgage. These matters are not presumed. The burden of proof is upon the party alleging them. *Semon v. Terhune*, 40 N. J. Eq. 364, 2 Atl. 18. The complainant charges them in his bill, but the proofs do not sustain him. The only witnesses examined on part of complainant touching these matters were Booth, the mortgagor, and Howlett, the mortgagee. Booth swears that he did not say anything to Howlett of having mortgaged the property to complainant; that he had pre-

Howlett of the mortgage to the Mutual Life Insurance Company and that on the day the Howlett mortgage was executed he gave him a search, which had been prepared by Mr. Badger, showing the title up to that date, and upon which the Mutual Life Insurance Company's mortgage appeared, but not that of the Howlett. Howlett testified that he had never heard of the mortgage; that he examined the search given him by the clerk, but that he personally took his mortgage to the clerk's office, where he might continue the search to the time his mortgage was filed for record. Howlett also swore that he paid the consideration money, and that he paid it partly (\$7,000) in cash, partly (\$300) in bills, and partly (\$700) receipted bill rendered. Booth testified to the same effect as to the consideration, and gave a detailed statement of how he gave the gold coin, which he said he had received as part of the consideration.

Both of these witnesses were called by the complainant. Their testimony is all that is presented to the court on the issue of notice and consideration. Counsel for the complainant attacked the probability of this story told by these witnesses, but they were not contradicted, and, if their testimony were disregarded as untrue, there is nothing in the case which would overcome the presumption of want of notice of existence of complainant's mortgage or of the payment of the consideration. Express testimony that the mortgage was rejected on the sole ground of its improbability. *Berckmans, 16 N. J. Eq. 122; Kelly v. Burroughs, 102 Pa. 109.* The Howlett mortgage, so far as the evidence shows, was a valid mortgage, given for a valuable consideration, accepted without notice of complainant's mortgage, and having priority of record, a prior lien to the mortgage of the complainant. The complainant insists that, inasmuch as Howlett gave the mortgage with a knowledge of the existence of the mortgage of the Mutual Life Insurance Company of Philadelphia, and that that mortgage was paid with his money, he is entitled to the rights of the Mutual Life Insurance Company. The answer is that Howlett has parted with his mortgage to the present holder, relying upon the record made by the Mutual Life Insurance Company, has taken title to the same, believing it to be a first lien on the property. The mortgage of the Mutual Life Insurance Company has been canceled of record by the complainant, and the Mutual Life Insurance Institution was, because of such cancellation, induced to give the Howlett mortgage as a first lien on the property. It was injured by the act of complainant. The act of cancellation of the Mutual Life Insurance Company's mortgage was voluntary on the part of the complainant, made without any examination of the record, and he should not now be permitted to revive it to the detriment of the holder who was misled by his acts. *Keely v. Cassidy, 93 Pa. 401; Gring, 89 Pa. 336.*

It is contended that because the Dime Savings Institution, in its title, found upon the record a mortgage subsequent in date to that of which they took the assignment, they had actual notice of its existence, and that they were

put upon an inquiry. But this point is not well taken. The record shows the order of priority, and there was, as I have said, no presumption that the Howlett mortgage came within the excepted class which made it a subsequent lien. The complainant is entitled to a sale of the premises subject to the lien of the mortgage owned by the defendant, the Dime Savings Institution, and without subrogation to the rights of the Mutual Life Insurance Company.

Let a decree be drawn accordingly.

WILLIAMS v. NORTHERN LUMBER CO.

(Circuit Court, D. Minnesota. October 8, 1901.)

1. MASTER AND SERVANT — RAILROADS — MINNESOTA STATUTE RELATING TO FELLOW SERVANTS.

Rev. St. Minn. 1894, § 2701, providing that any railroad company owning or operating a railroad in the state shall be liable for injury to any agent or servant occurring through the negligence of a fellow servant, without contributory negligence on his part, is limited in its application to quasi public corporations having franchises from the state, and operating railroads open to public travel or use. It does not apply to a logging road built and operated only for private purposes, and not as a common carrier.

2. SAME—INJURY OF SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate was employed by defendant as head brakeman and conductor of a logging train, in which capacity it was his duty to superintend the loading of the cars and the making up of the train, and to see that the logs were properly loaded, having reference, among other things, to their different lengths, so that the cars could be safely coupled together. While making up a train so loaded, he was fatally injured by a log which fell or was thrown from a car. There was no evidence to show negligence on the part of defendant in respect to the place where the work was done or the appliances, or in the employment of fellow servants, nor was there any direct evidence of the manner in which the injury occurred. *Held* that, if it was not due to the negligent manner of loading, it resulted from a danger of the employment, of which deceased assumed the risk, and, if there was negligence in loading, being charged with its superintendence, he was guilty of contributory negligence, which precluded a recovery for his death.

At Law. Action by plaintiff, as administratrix, to recover damages for the alleged wrongful death of her intestate.

After the plaintiff had rested her case, counsel for defendant moved the court to instruct the jury to find a verdict for the defendant, on the following grounds: First. That there is no negligence shown on the part of the defendant by the evidence. Second. That from the evidence on the part of the plaintiff it appears that the injury was caused by one of the risks incident to the business in which the plaintiff had engaged. Third. That the evidence shows that the deceased was guilty of contributory negligence. Fourth. That, if there is any negligence at all shown here aside from that of the plaintiff's intestate, it was the negligence of a fellow servant. Fifth. That the danger and risk of a log falling off from one of these cars was open and apparent, and was one of the hazards of the employment, the risk of which was assumed by plaintiff's intestate.

Robert C. Saunders, for plaintiff.

Howard T. Abbott, for defendant.

District Judge (orally). This is a motion to direct a verdict for the defendant. A motion of this kind does not require the exercise of discretion on the part of the court. It is a matter of right. If the evidence tends to sustain any claim on the part of the plaintiff, the plaintiff would be entitled to a recovery in damages. If such facts from the evidence (and upon a motion for a directed verdict, the evidence must be construed most strongly in favor of the plaintiff) show that there is a question for the jury, and the motion for a directed verdict must be granted. The fact that the son of the plaintiff died, by a calamity which occurred while he was in the service of the defendant, is sustained by the evidence, and is not controverted. The only question is whether there is any evidence to show that his death, or the injury which caused it, was caused by negligence which is imputable to the defendant, which the defendant is in law responsible. If there is no evidence, there is nothing to support a verdict, if one is directed in favor of the plaintiff. Now, negligence is the failure to do what a party is by law required to exercise under the circumstances of the case. If a party fails to exercise ordinary care, and the result is an injury to another person, then the party is liable for the negligence. The negligence is liable to the person injured for the injury, providing there was no negligence on the part of the person injured which would prevent his recovery. The duty of the master under the statute which has been referred to, is to exercise ordinary care in respect to the place where the employé is put to work, and in respect to the appliances to be used, and the surroundings, so that they shall be safe; and with respect to fellow servants who are engaged in the same business the duty of the master is to use ordinary care to see that only careful, competent, and suitable men are engaged in the business. On the other hand, the employé assumes the ordinary hazards and risks of the business about which he is engaged in work. Some kinds of business are more hazardous than others, whatever the degree of hazard, that which is attending to the business that he engages in, is assumed by him, and he also assumes the risk of carelessness on the part of his fellow servants. If the master uses ordinary care to select his servants, and, notwithstanding this, a fellow servant is guilty of negligence or carelessness which injures another, the master is not liable, because he had done all that was required of him if he selected competent and suitable servants. Experience shows that, notwithstanding that defendants will be guilty of negligence which may injure their fellow servants. Now, with respect to this particular business in which the deceased was injured is a hazardous business. The handling of logs, loading and unloading them,—they being ponderous articles, liable, if mishandled, to do him great injury, and hazard his life in the business which, in its nature, is a hazardous one. The hazard is increased by the danger of carelessness on the part of the employés who are engaged in the business,—in

this case, in the loading of the logs. Aside from the statute, as I stated before, all these hazards are assumed by all of the employes who hire themselves out and engage in that business; and if, by reason of the negligence of themselves or their fellow servants, an injury occurs, and the master has used due care, and there is no fault in the appliances, the master is not responsible, and the injury that one may sustain is his own misfortune. In this case there is no evidence that there was any fault on the part of the master in respect to the place at which the work was being done, or in respect to appliances that were furnished by the master; nor is there any charge that the servants were known to be careless or ignorant, or that they were ordinarily so; so there is no lack of care cast on the selection of the fellow servants. Aside from the statute I have referred to, there would be no evidence making the master responsible for the injury which the employé suffered in this particular instance; and one thing to be considered is whether that statute applies to a case of this kind.

Section 2701 of the Revised Statutes of Minnesota of 1894 provides that any railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof without contributory negligence on his part. That would include responsibility on the part of a railroad corporation for negligence of a fellow servant, and it changes the law in that respect, but it does not change it with respect to the effect of contributory negligence. This statute, as stated in several decisions, would be unconstitutional, as being in the nature of class legislation, imposing a responsibility upon railroad corporations that is not imposed upon other employers of labor, if it were not from a consideration that it is a peculiar regulation with respect to quasi public corporations which have franchises from the state, granted for the reason that the public is interested in the business of these corporations, and for that reason the legality of such regulation by the state is maintained as a proper regulation for the safety of individuals and of the public generally with respect to corporations of this kind. It is perhaps a long stretch of the power of regulation to impose upon these corporations a liability for the acts of their servants that is not imposed upon other corporations or upon individuals, but the courts have sustained this particular regulation. It has been sustained by the supreme court of this state, and like statutes have been sustained in other states, and also by the supreme court of the United States; so it is beyond question now that this is a proper regulation, as far as the scope of this statute extends. So one question presented now is whether this statute applies to a railroad of this kind, which is not a public railroad, used by the public, and which is not a common carrier; for no person has a right to require that he be carried upon it, or to have his private goods carried upon it. It is a private concern, belonging to individuals, or to a company which is not a railroad corporation, and therefore does not come within the category of bodies who are invested with franchises for the use of the public, which

te the right to make peculiar regulations for public
es not come within the language of the statute, be-
t a railroad corporation; and the proviso in the statute
the statute is intended to apply only to corporations
ter to which I have referred, possessed of franchises,
c travel or use, because the proviso is that they shall
for damage during the construction of a new road
public travel or use. It is said by counsel for defend-
cannot apply to a railroad of this kind, because there
railroad in operation at the time of the passage of the
nd therefore it could not have been considered by the
I do not know what the fact is as to that. My im-
at counsel is right as to the fact that there was no
in operation at the time in this state, but I am not
I not assume, whether that is the fact or not. The
his statute indicates that it was not intended to in-
of this kind. But, if it were the fact that these rail-
existence in the state, as they are now, then the pre-
uld be still stronger that they were not intended to be
hat act, for the reason that the language of the act
e them; and, if they were in operation, it must be
t the fact was known to the members of the legis-
time. The fact that language was used which would
clude would be stronger evidence that they were in-
excluded than if there were no such railroads in oper-
time, and therefore they were not considered. I think
t an act may take effect upon business that was not
the time when the act was passed if the language of
h that it will include that kind of business, although
not known at the time. But it seems to me the lan-
statute does not include railroads of this kind; there-
nstrained to hold that the ordinary doctrine with re-
gience on the part of the fellow servants applies in
l that such negligence is a part of the risk taken by
and cannot be imputed to the employer.
her branch of this case I think that the same result
d that is the matter of contributory negligence. There
vidence as to how this accident or calamity occurred.
ence as to how this particular car was loaded, and
re loaded in general. It appears the car was brought
idways to which the logs are hauled from the woods
se of being loaded; that the cars were placed opposite
ys. But, as I understand the testimony, the cars are
hese skidways, and are not coupled together, so that
d be loaded separately against the skidways, and after-
d together for the purpose of being taken out. It ap-
ese cars are about 20 feet in length, and the logs to
y from 10 to 12 feet up to 22 or 24 feet. I think 24
t that the testimony mentions. I do not know but
itnesses mentioned 26 feet, but I am inclined to think
4 is the longest. So these logs are longer than the

cars, and necessarily project beyond the ends of the cars. If the logs were all of that length, it is evident they could not be loaded on cars of that length, and the latter be coupled together as cars are ordinarily coupled. But the long logs project over the ends of the cars, and, if they are opposite the ends of shorter logs, which do not reach the end of the car adjoining, of course they can be made to ride in that way. It appears from the testimony that the ordinary way of loading these cars with logs is to place as many as can be conveniently put on the bed of the car, and then logs are laid on top of these sloping up towards the center for a certain height, when chains are put around the logs, and drawn and hooked together; and then logs are laid on top of these chains, for the purpose of holding them down, and making them taut, so they will hold the logs properly; and it further appears that these logs on top of the chains sometimes, by reason of the motion of the cars, are liable to slip off or drop off. Now, the testimony is that the deceased was a young man of 19 years of age, industrious, and had been in the habit of working and earning wages from the time he was 13 years old; that he was of good habits, good disposition, and inclined to support his mother's family; and that he sent some of his wages to his mother from the time he commenced to earn wages, and to a considerable amount. Of course, as he had not yet reached the age of 21, his father would be entitled to the wages he would earn until he reached that age. So there is no question that the father was damaged by the death of the son. It seems that the deceased was employed as a brakeman upon that train. Up until a short time before that he had been employed upon another train with the witness Carl Johnson; Carl Johnson being the head brakeman, and the person who acted as conductor, and the deceased acted as his assistant. After that he had been changed to another train, where he assumed the duties and position of head brakeman and conductor, and he was in the discharge of these duties at the time he was killed. The testimony on the part of the plaintiff is that he had charge of the making up of the train; that the engineer moved according to his signals and directions in pushing the cars to which the engine was attached so as to connect with the other cars; that it was his duty to examine the loading of the cars, and see that they were safe when loaded and put into the train, before coupling them; further, that, if he was not satisfied with the loading, it was his duty to see that they were unloaded, and properly reloaded. It seems that these logs loaded on the cars were in plain sight, easy to be seen, some 12 feet in height, the body of the car being about 3 feet high; so that in passing from one car to another the position of the logs on the cars was plain to be seen, and in clear view. It was the duty of the deceased himself to see that the cars which he was about to hitch onto the train were properly loaded, so they could be safely attached to the other cars. There was nothing, so far as the evidence shows, to prevent his seeing the projection of any of the logs (if they did project) as he approached them. It was his duty to see that they were in proper position, so there would be no danger from them. I think

ty so strictly that, if he attached cars that were im-
l, it would be such negligence on his part that, if
had been injured, the injury would have been im-
master, if the case came within the statute of this
e, he being negligent himself, and being the person
d by that negligence, it comes under the head of
gligence, which would prevent a recovery.

ne, upon both of these grounds, there is no evidence
e jury can lawfully find a verdict in favor of the

the jury, the court directs that your verdict be for

THE PLANET VENUS et al.

ct Court, E. D. Pennsylvania. January 14, 1902.)

No. 44.

INDER OF DEFENDANTS—SUIT ON CONTRACT OF AFFREIGHT-

its charterers may be joined as defendants in a suit in
enforce a contract of affreightment where both are charged
for its breach, such practice being within the spirit, though
of admiralty rule 59.

E—POWER OF DISTRICT COURT TO ESTABLISH.

court has power, under admiralty rule 46, to establish the
permitting process in rem and in personam to issue upon the
ther by rule or decision.

On exceptions to libel.

iller and Scott & Upson, for libelants.

is and Horace L. Cheyney, for respondents.

PERSON, District Judge. This libel, which charges the
contract of affreightment, was originally filed against
Planet Venus, and "John Doe and Richard Roe, do-
der the name of the Philadelphia Transatlantic Line,
aylor's Sons, managers, the charterers of said steam-
essel was attached by process in rem, and, upon giv-
was released in due course. No process in per-
ed, but not long afterwards the libelants asked permis-
so as to describe the other respondents as "Frederick
James S. Taylor, the charterers of said steamship,
," etc. Permission having been granted, process was
the persons named, and was duly served. The pres-
are filed both by the claimant of the steamship and
al respondents, and attack the jurisdiction of the court
that proceedings in rem and in personam upon a con-
tment cannot properly be joined.

or present purposes, that the attack is properly di-
the jurisdiction of the court is the matter in question,
n that the objections should not prevail. It is true
e in this district, which is supported by a decision of

Judge McKennan in *The Alida* (C. C.) 12 Fed. 343, has not heretofore permitted process in rem and in personam to issue upon the same libel, and I might perhaps be justified in simply following this precedent. If the point were doubtful, I think I should be likely to adhere to our own custom; but believing, as I do, that the contrary practice is clearly adapted to avoid circuity of action and to promote the administration of justice, I am disposed to follow the course that has been adopted in some other districts, securing also the incidental advantage of furthering uniformity of procedure in the courts of admiralty. I have the less hesitation in taking this step because of the considerations to which I shall now briefly refer. The decision in *The Alida* was pronounced in 1882, and was expressly based upon *Citizens' Bank v. Nantucket Steamboat Co.*, Fed. Cas. No. 2,730, decided in 1811, and upon *Dean v. Bates*, Fed. Cas. No. 3,704, decided in 1846. Apparently no other cases were called to the court's attention; for it is stated in the opinion that, "so far as the question has been judicially considered in this country, there is no substantial diversity of decision." This statement, I think, could hardly have been made, if the court had seen the careful and well-considered opinion of Judge Betts in *The Zenobia*, Fed. Cas. No. 18,208, which was decided in 1847, and the decision of Judge Blatchford in *Vaughan v. Six Hundred and Thirty Casks of Sherry Wine*, Fed. Cas. No. 16,900, which was rendered in 1874, and affirmed by Chief Justice Waite in 1878 (Fed. Cas. No. 12,918). Within a month or two after *The Alida* was decided, the opposite practice, upheld by *The Zenobia*, was again maintained by Judge Brown in the Southern district of New York (*The Monte A* [D. C.] 12 Fed. 331), in an opinion of which the reasoning is, I think, eminently satisfactory. A few years later, in 1886, the practice of joining the vessel and the owner or master in one libel was approved by Judge Deady in the district of Oregon (*The Director* [D. C.] 26 Fed. 708); and the ruling of Judge Brown was adhered to by him in *The J. F. Warner* (D. C. 1883) 22 Fed. 342, and *The Baracoa* (D. C. 1890) 44 Fed. 102. A similar practice appears to exist in Wisconsin. *The Keokuk*, 9 Wall. 517, 19 L. Ed. 744. It is also to be observed that in 1883, the year following the decision in *The Alida*, the supreme court promulgated the fifty-ninth rule in admiralty, permitting the two remedies to be joined in an action for collision; and the extension of this rule to cases within its spirit, although not within its letter, has been expressly approved by the supreme court in the very recent decision of *The Barnstable*, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954. It seems to me, therefore, that if the point decided in *The Alida* were now presented in this district for the first time, there could be little doubt, in the light of the subsequent action of the federal courts, that it would be decided in favor of the libel under consideration; and I feel free, therefore, to follow my own inclination, and to permit hereafter the two forms of remedy to be used together ordinarily in a proceeding brought to enforce a contract of affreightment. There may be circumstances under which a joinder should not be permitted, but exceptional cases may be left for consideration as they arise. The present controversy is one in which both the ship and the charterers are

ability on the same contract of affreightment, and I properly be called upon to answer in the same process should be contended hereafter that the liability ought should be borne by one rather than by the other, so can be determined, and the whole controversy suit.

also made by the respondent that the district courts to establish the practice of permitting process in rem to issue upon the same libel. I do not think the ob-

In my opinion, rule 46 gives the district courts establish such a practice, either by a formal rule, or ecting the method of future procedure.

to the libel are dismissed.

ROTT V. STANDARD SANITARY MFG. CO.

Court, W. D. Pennsylvania. February 7, 1902.)

No. 16.

VENTION—PLEADING—PLEA.

prior invention and use in a suit in equity for the in- patent, which, under Rev. St. § 4920, subd. 3, is provable ating in the answer, cannot be raised by plea.

or motion to strike off plea.

isty, for plaintiff.

and Lyon, McKee & Mitchell, for defendant.

Circuit Judge. Every defense which may be a full merits of a bill in equity is not, of course, to be con- d to be brought forward by way of plea. Story, the true end of a plea is to save the parties the ex- mination of the witnesses at large, and the defense is such as reduces the cause, or some part of it, Id. This is a suit in equity for the infringement the bill is in the usual form. The defendant has g up the prior invention and use by one Marschutz nted by the plaintiff. This is one of the defenses ivisions of section 4920, Rev. St., is provable in an der the general issue upon notice in writing, and y upon like notice in the answer. Now, in Carn- n (C. C.) 8 Fed. 807, Judge Blatchford held that the r patent or previous description in a printed publi- n subdivision 3 of section 4920 must, in a suit in o in an answer, and not by a technical plea. This ed upon a reasonable construction of section 4920. t the authority of the case has been shaken by later n, in Sharp v. Reissner (C. C.) 9 Fed. 445, it was

ingement suits, see note to Caldwell v. Powell, 19 O. C.

held by Judge Blatchford, and in *Korn v. Weibusch* (C. C.) 33 Fed. 50, it was held by Judge Coxe, that in a suit in equity the question of infringement cannot be determined upon a plea. In *Knox Rock-Blasting Co. v. Rairdon Stone Co.* (C. C.) 87 Fed. 969, Judge Severens declared that a plea to a bill in equity for infringement of a patent is inappropriate, unless in very special circumstances. In 3 Rob. Pat. § 1112, it is said that, "while such special matters as the departure of a reissued patent from its original may form the subject of a plea, defenses which attack the patentability of the invention, or the fact of infringement, or other principal averment of the bill, can be set up only in the answer." The text of this writer, I think, is sustained by the clear weight of authority. In the cases cited by the defendant the circumstances were special, or new matters were set up in defense. Thus, in *Edison Electric Light Co. v. United States Electric Lighting Co.* (C. C.) 35 Fed. 134, the plea alleged that the plaintiff's patent had expired before the suit was brought, by reason of the expiration of a previously granted foreign patent for the same invention. And in the case of *Westervelt v. Library Bureau*, 114 Fed. —, before Judge Colt, special reasons for filing the plea were shown. To sanction such pleas as the one before the court would lead to the trial of patent causes by piecemeal. Should issue be taken on this plea, and determined adversely to the defendant, no doubt the question of the alleged prior invention and use by Marschutz would be conclusively settled against the defendant; but, in its answer over, the defendant might set up all other defenses on the merits, including other anticipations. Such a practice would be intolerable.

Unless the defendant shall file within 10 days a stipulation agreeing that this plea shall stand for an answer, an order will be entered striking off the plea, with leave to the defendant to answer the bill within 30 days.

WOODS v. BAILEY.

(Circuit Court, M. D. Pennsylvania. February 12, 1902.)

1. SECURITY FOR COSTS—AFFIDAVIT OF POVERTY.

Plaintiff may file a proper affidavit of poverty, though a former affidavit of poverty, under Act July 20, 1892 (27 Stat. 252), has been adjudged insufficient, and an order to give security for costs has been made.

2. SAME—TRUTH OF AFFIDAVIT—HOW CONTESTED.

The filing of the affidavit of poverty, under Act July 20, 1892 (27 Stat. 252), and not the truth of it, constitutes the answer to defendant's demand for security for costs, and defendant can only contest this truth by a motion to dismiss under the fourth section.

T. M. B. Hicks, for plaintiff.

J. T. Fredericks, for defendant.

ARCHBALD, District Judge. By a previous order of this court, the plaintiff, as a nonresident of the district, was required to give security for costs in the sum of \$250. 111 Fed. 121. Before that

le, on a rule taken upon her to give such security, to avail herself of the act of July 20, 1892 (27 Stat. an affidavit of poverty, but it was adjudged insufficient order made. She now comes in with one which is m, and the question is whether she is entitled to have In my opinion, she is. While there is quite a little defendant's contention that her plea of poverty has been posed of, at the same time I cannot close my eyes to the former affidavit was thrown out on the ground that the assertion of poverty not being absolute, but relative supposed demand for bail in \$1,000, and that the effort to cure its defects. The assertion now is absolute the affidavit is received, by a mere slip in the form isly taken she may be deprived of a substantial right. the law should be so administered, and, considering within my discretion, I will allow the affidavit to come ure, it may still be regarded as in time, within the act; for the order for security is a demand to which takes answer by the affidavit now presented, and thus its terms. It was so held in *McDuffee v. Railroad* Fed. 865, where an affidavit was received after an city had been entered; and in *Whelan v. Railway Co.* 219, a second more specific affidavit was allowed to ncies of the case; while in *Reed v. Pennsylvania Co.*, he court, in denying an application because the affidavit, expressly provided that it should be without renewal upon one that was. These cases seem to in- ty of practice which I am not inclined to abridge.

urged by counsel that the defendant is entitled to ce to contradict the affidavit, and show that the plain- oor person she claims to be; but, upon a careful read- ute, I do not think, at the present stage of the case, . The affidavit, if sufficiently direct and positive, is, ance, to be taken as true, and the plea of poverty ac- his does not leave the opposite party without remedy. ce, by the second section of the statute, if the affi- ly false the affiant may be prosecuted for perjury; t place, by the fourth section, the court may dismiss be made to appear that the allegation of poverty is id court be satisfied that the alleged cause of action malicious." Under this section, it has, indeed, been the presentation of an affidavit the court may inquire and grant or refuse relief, according as it is found ise. This was the course pursued in *Boyle v. Rail-*) 63 Fed. 539, and in *Brinkley v. Railroad Co.* (C. C.) oth decided by Hammond, J.; and a similar view been taken in *Whelan v. Railway Co.* (C. C.) 86 Fed. was declared by Lacombe, J., that the act does not stricted right to prosecute as a poor person, a pre- gation being provided for by the fourth section. So, ailway Co. (C. C.) 104 Fed. 286, it was said by Trie-

ber, J., that "this [fourth section] clearly demonstrates that, before such leave will be granted, there must be some kind of showing made to the court that there is reasonable cause to believe that, if permitted to prosecute the suit in forma pauperis, the plaintiff is likely to recover something by his action." But, with due respect to the eminent judges who have so ruled, the true construction of the act, in my judgment, is that put upon it by Wheeler, J., in *McDuffee v. Railroad Co.* (C. C.) 82 Fed. 865, where it was held that a demand for security for costs is fully met by the filing of an affidavit, without more. "The statute does not * * * provide," it is there said, "that an affidavit shall not, if untrue, be an answer to a demand for security in an action pending, but only that the court may dismiss any such cause so brought under the act, if it be made to appear that the allegation of poverty is untrue. * * * The filing of an affidavit, and not the truth of it, is what the statute makes an answer to the demand." Following this view, I therefore hold that, on filing an affidavit in proper form, the party is entitled to proceed with the case in forma pauperis, leaving it to the opposite party to contest the truth of the affidavit on a motion to dismiss, if desired. This was the course pursued in *Wickelman v. A. B. Dick Co.*, 85 Fed. 851, 29 C. C. A. 436, and seems to me to be the one to be observed. It raises the issue in an orderly way, and after a full hearing, in which both parties have opportunity to produce the evidence pro and con, it enables the court to act directly and effectively upon the question. All that the statute, at the outstart, in terms, requires, is an affidavit, without particulars, that, because of poverty, the party is unable to pay the costs or give security for them, and not until this allegation has been called in question can he be expected or prepared to maintain its truth. Until this is done, by a motion to dismiss on a proper countershowing the affidavit of the applicant must stand. As strengthening this construction, it is to be noted that the only question before the court on such an application is whether or not it shall be granted; a refusal being the only possible adverse result. But in proceedings under the fourth section much more is contemplated. The power is there given to end the case by an order of dismissal, if either the allegation of poverty is found untrue, or the cause of action is deemed malicious or frivolous, and this double inquiry is entirely inappropriate and unprovided for in disposing of the preliminary question whether the plea of poverty shall prevail. A dismissal is the penalty attached to a false plea successfully made, and is inapplicable to an effort which has failed. It is a summary remedy, necessary, no doubt, to hold in check the temptation to resort to the statute, but because of its drastic character it is not to be allowed except in the way that is there pointed out. The applicant, having invoked the law, cannot complain if its provisions are turned against him, but he is entitled to have it done, not only in the way that affords him the fullest opportunity to be heard, but in the way that the law provides. Considering, therefore, that the remedy given by the fourth section is distinct and specific, it must be specifically and separately pursued. It is the method provided by the statute for testing the falsity of the

not to be drawn into the preliminary inquiry when presented, where the question of its formal sufficiency is involved.

Having now filed an affidavit of poverty which complies with the requirements of the statute, the order heretofore made, awarding costs, is set aside.

In re McCALLUM et al.

Court, E. D. Pennsylvania. January 25, 1902.)

No. 993.

CLAIMS AGAINST ESTATE—JURISDICTION OF DISTRICT COURT.
 § 23, cl. "b," providing that suits by the trustee in bankruptcy may be brought in the courts where the bankrupt whose estate is administered by such trustee might have brought them if such suits had not been instituted, unless by consent of the parties proceedings had not been instituted, unless by consent of the parties proposed defendant, being confined to suits by the trustee, and that jurisdiction upon the jurisdiction of the district court as to suits by the estate or trustee, conferred by section 2, cl. 7, giving power to determine controversies in relation to the bankrupt

INVOLVED.

Act, § 2, cl. 7, conferring power upon the district court, in cases of bankruptcy, to collect, reduce to money, and distribute the assets of the bankrupts, and to determine controversies in relation to such assets as therein otherwise provided,—there being no provision in the act regulating suits or claims against the estate, or against the trustee as its representative,—the jurisdiction of the district court in such suits and claims is unlimited, and is not dependent upon the result of the suit in controversy.

TRUSTEE'S HANDS—PROCEEDS OF GOODS SOLD ON CONSIGNMENT.

The bankrupt's estate has been converted into cash, and such proceeds of the trustee in bankruptcy, a claim by a creditor for the full amount of his debt on the ground that it is the value of goods which had been only consigned to the bankrupt, and the title remaining in the creditor, but which had been consigned by the trustee, is nothing more than a claim against the assets of the estate, which the court, as an incident to the bankruptcy, has the right to hear and determine.

COURT.

Being a claim to a superior right to a fund about to be distributed in which all the other creditors of the bankrupt were to be heard in defense of their rights, and an application for leave to sue the trustee in bankruptcy in the state court should be refused.

Application in the matter of McCallum & McCallum, for leave to sue the trustee in bankruptcy in the state court. Refused.

for creditor.

Edman and Wm. S. Price, for trustee.

PERSON, District Judge. The facts upon which this case is based are these: Before the petition in bankruptcy was

filed, the bankrupts had made an assignment for the benefit of creditors, under which a large part of their assets had been sold and converted into cash. The fund thus arising has been handed over to the trustee, and is now in his hands. The present petitioner's claim, which he asks to pursue in the state court, is based upon the averment that he delivered to the bankrupts certain oriental rugs, to be sold by them upon consignment; the title to the rugs to remain in the petitioner, and the bankrupts to be compensated by being paid a commission on the sales. These rugs, it is further averred, were all sold by the bankrupts or by the assignee; and the petitioner seeks to follow the proceeds, asserting a right to be paid in full out of the fund in the hands of the trustee. He has also proved his claim as an ordinary debt against the bankrupt estate, but has not accepted the dividend that was recently declared, asking for leave first to pursue his claim to be paid in full, and, failing success in this attempt, intending to resume his position as an unsecured creditor of the estate. He asks leave to sue the trustee in a state court, because he believes that the bankrupt act, as interpreted by the supreme court in *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, requires such a suit to be brought in the circuit court, if the other jurisdictional requisites exist, or in the state courts, if, as in the present case, the amount in controversy is less than \$2,000.

I am unable to take this view of the bankrupt act. The case of *Bardes v. Bank* interpreted section 23, cl. "b," which is concerned simply with suits brought by the trustee, and has no reference to suits brought against him. I find nothing either in the statute or in the opinion of the supreme court further to qualify section 2, cl. 7, of the act, which confers power on the district court, as a court of bankruptcy, to collect, reduce to money, and distribute the estates of bankrupts, and to determine controversies in relation thereto. The only restriction upon this grant of power, which congress had the undoubted right to make, is the restriction contained in the final words, "except as herein otherwise provided"; and, as I have already intimated, there is no provision elsewhere in the act regulating suits brought or claims made against the estate, or against the trustee as its representative. It seems to me that the present application is the ordinary case of a claim against a fund in the hands of a court, and such claims the court in possession of the fund has the right to hear and determine. It is an incident to the power to distribute, and, except where this power is expressly so limited by competent authority that a claim to a share of the fund must be sent to some other court for determination, the court that has possession of the fund is the proper tribunal to decide all controversies concerning its ownership.

I do not deny the jurisdiction of the state courts to determine controversies, in proper cases, between the trustee and adverse claimants; but this, I think, is not such a controversy. The claim here is essentially that the applicant be declared to have a superior right to a certain part of a fund about to be distributed. He is not asserting that he can recover any personal chattels from the trustee.

he may have had to the rugs themselves is gone, and the character or the other, has been transferred to the one who is an ordinary creditor, he must, of course, prove his claim in a bankrupt court. If he is claiming a superior right in the fund,—a right to take away a part of it to the exclusion of other creditors,—I think he ought to pursue the claim in the court where it will be heard in defense of their rights. In these circumstances, I am of opinion that the applicant should prefer such claim as he may be advised to make. It is for leave to sue the trustee in the state courts is

N. C. LAND & LUMBER CO. v. GARDNER-LACY LUMBER CO. et al.

Court, E. D. North Carolina. February 11, 1902.)

REMOVAL OF TIMBER—PRELIMINARY INJUNCTION.

Bill to remove cloud and enjoin trespass on land, on which a restraining order is issued, is against numerous defendants, many of interest, some of whom do not answer, it will be necessary to issue a subpoena, and the restraining order continued to the hearing, defendants not answering.

The complaint against numerous defendants seeks, in equity, to remove cloud, and enjoin trespasses on land, and a de-cession of part of the land traverses complainant's title, allegations of trespass, and sets up an apparently good title, issues of law, which must be tried in an action of ejectment will direct a temporary restraining order vacated, unless steps are taken within 10 days for the trial of defendants' possession.

Defendant in a suit in equity to establish title, remove cloud, trespasses on land, claims title, and avers that it has established faith, lumbering works on the land, at great expense, preparation for market quantities of timber, which will cause if not immediately prepared for commerce, the court will grant a temporary restraining order on such defendant giving bond that, if so required, it will account to complainant for timber on the land, and further direct such order vacated unless within 20 days formulate issues for the trial of the title to a jury.

Mark, for plaintiff.

My and George Rountree, for defendants.

District Judge. Plaintiff filed its bill in equity against defendants, and a restraining order was granted, the rule day in February, 1902. The bill alleges: That a corporation created and existing under the laws

That the Gardner-Lacy Company is a corporation existing under the laws of South Carolina, having assets in Brunswick county, N. C., and that the numerous defendants are citizens of North Carolina. That the

state of North Carolina in 1795 granted to Benjamin Rowell, Stephen Williams, and Wm. Collins certain lands in North Carolina, and complainant is the owner in fee, seised and in possession, of the land described in said grants. Muniments of title, surveys, and acts of the legislature are set out at length. That complainant has for 30 years had possession of said land, except some small tracts (which are not described), moving trespassers therefrom, paying taxes thereon, etc. That defendants have filed entries on parts of said land, trespassed thereon, cut timber (which is the chief value of the lands to plaintiff), and caused irreparable damage and depreciation of complainant's interests. That to establish complainant's rights would involve it in a multiplicity of suits, endless litigation, delay, and irreparable damage; and it seeks this remedy to establish its title, remove all clouds, and enjoin trespassers in one action. That while complainant is informed as to the location of its own lines and boundaries (which are not set out in the bill, but appear in the grants and plots attached), and the fact of defendants and others trespassing and committing acts of spoliation within its boundaries, it has been unable to ascertain the particular grants and deeds, if any, under which defendants pretend to justify and defend, and defendants, in equity and good conscience, should be required to disclose fully and completely the grants, entries, claims, or deeds under which they claim the right to trespass upon the said lands, cutting and removing timber therefrom; and defendants cannot show any superior title to complainant. That said lands are assessed for taxes in complainant's name at \$61,000. Then follow the prayers for relief. A temporary restraining order was granted, returnable on the rule day in February, 1902. The subpoena, bill, and restraining order were returned served on 58 of the defendants (naming them) when the questions involved were heard; counsel appearing on both sides.

Upon an examination of the record, it appears Mrs. N. J. Schulten, one of the defendants, filed an answer January 31st in which she denies the title of complainant to parts of the land referred to, sets out her muniments of title thereto, and raises issues of fact which constitute an apparently good defense at law. A court of equity cannot try these issues. This defendant also denies any trespass or cutting of timber,—in short, sets up defenses upon an apparently good legal title, which must be tried by a jury on the law side of the docket. To the rule to show cause she makes no specific answer, but her answer is considered in this connection, having been filed before the return day. On the return day the Gardner-Lacy Company answered with many affidavits, and demurred *ore tenus* to the bill. This defendant claims to be the owner in fee of certain tracts,—the Burnice Little tract (80 acres), the Elijah Little tract, the Nathan Little tract, the Formyduval tract, the Narlow and Williams tract, the Samuel Evans tract (100 acres), and the Noah Williamson tract, of 100 acres, of which it and those under whom it claims have for more than seven years been in open, notorious, continuous, and exclusive possession under color of title. It claims the timber interests on all these lands; has established a

mp, and constructed a tramway, with iron rails, engineering outfit; five or six miles long, and prepared timber ways described; some rafted, some cut down, and belted preparatory to being felled. On the same day (turn day) this defendant demurred to the bill, which be more properly considered on the hearing on the . Other defendants do not answer the rule, and the he present, be taken pro confesso as to them. At the questions will doubtless be presented which it would to consider now, and which the court has no intention to even consider at this time.

question for consideration at this time is, shall the rer be continued to the hearing? It is only when coms bill alleges a joint liability or community of interanswer of one defendant will inure to the benefit of nts. Bates, Fed. Eq. Proc. 330, and authorities cited. seems to be no community, but a great diversity, of he part of the defendants, and diverse defenses. Hence set up by Mrs. Schulken and the Gardner-Lacy Comaffect the other defendants, except in so far as other e connected with such defenses. As to other defendis taken pro confesso, and the injunction continued to

Schulken traverses the title of complainant, denies all trespass, alleges she is not cutting and has not cut sets up an apparent good title in herself. Issues are hich must be tried by a jury on the law side of the is in possession of a part of the land, claiming title her right to retain such possession must be tried in ssues formulated in the form of an action of ejectment. e done on the equity side of the docket. As against does not set up such equities as entitle complainant relief, unless such action of ejectment is commenced oon as her defense is disclosed; and, unless proper end are taken within 10 days, the restraining order d as to the defendant N. J. Schulken. This order is a examination of the record ex mero motu.

principal objects of the bill, as said in *Dick v. For-* S. 405-415, 15 Sup. Ct. 124, 39 L. Ed. 201, and *Hol-* en, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52, being ounds on and quiet title, it has served its purpose and its end as to that part of the land claimed by the Company, which discloses an apparently good title, ndaries of the land claimed by this defendant. Deoses its muniments of title; also that it has timbers tages of preparation for market, and great loss will the same is not prepared for commerce within a rea-

Timber belted preparatory to being felled or that round or in the water, if left standing, lying, or floatutilized when in proper condition, becomes worthless al purposes. To effect this end by injunction would

be inequitable, and serve the contrary of the primary object of a court of conscience and equity,—a loss to all parties concerned. This the court will not do. It is not equity. Defendant sets up an apparently good title. It has erected its works at considerable expense,—evidently in good faith, depending on its title. To tie up its enterprise by injunction after these disclosures would smack of oppression, not equity. Complainant has its rights. Defendant also has rights. The court will preserve both. The traversed allegations in the bill will be tried by a jury, being the usual questions in actions of ejectment,—is the complainant the owner and entitled to the possession of the land, the boundaries of which are now known? etc. In the meantime, if complainant shows its good faith by taking steps to test its claim, the interests of the parties as they appear will be protected and preserved. The test should be made in a reasonable time. Under the circumstances, the law's delay would be an injustice. A consideration of the questions of law and equity discussed on the hearing has been purposely avoided, lest their consideration at this time should, when the contentions, rights, and equities of the parties are more fully disclosed, embarrass the parties or the court by a premature consideration or discussion. The final hearing will probably be had within the next 60 days, when these questions can more intelligently be considered and determined.

It is therefore considered, ordered, and adjudged that as to the Gardner-Lacy Lumber Company the restraining order heretofore granted be, and the same is hereby, modified and dissolved, on the said Gardner-Lacy Company entering into bond, in the sum of \$10,000, conditioned that it shall, if so required by order of this court, account to complainant and pay for such timbers as it shall cut and use from the land claimed by, or of which it shall be adjudged by the court, the New Jersey & North Carolina Land & Lumber Company was and is the owner and entitled to the possession. Said restraining order is continued in full force and effect as to lands claimed by complainant, and not included within the boundaries of the land to which the Gardner-Lacy Company claims title. It is further ordered that, unless the New Jersey & North Carolina Land & Lumber Company shall within 20 days from the entering of this order formulate issues and take steps to have its title to said land claimed by the Gardner-Lacy Lumber Company tried by a jury, the said restraining order heretofore granted herein shall be, and the same is hereby, vacated and dissolved. And this cause is held for further order.

AMERICAN ALKALI CO. v. CAMPBELL.
(Circuit Court, E. D. Pennsylvania. February 6, 1902.)

No. 66.

1. CORPORATIONS—CALL ON STOCK—LIABILITY.

The registered owner of preferred stock of a corporation, on call made thereon during the continuance of such ownership, becomes charged with a definitive debt, and is liable thereon, though he has made no express promise to pay.

TRANSFER OF STOCK—LIABILITY FOR CALL.

The registered owner of corporation stock, after call made transferred his shares on the books of the corporation to a person before any installments of the call were payable, he was not relieved from his obligation to pay the call, which became due at the time of the call.

LIABILITY OF CORPORATION.

Transfer of a corporation to a transfer on its books of preferred stock, which a call has been made, does not relieve the registered owner of at the time of the call from the liability fixed by the call.

LIABILITY OF CORPORATION FOR NONPAYMENT OF CALL—CUMULATIVE REMEDY.

If a corporation is authorized by statute to forfeit shares for nonpayment of calls made thereon, it can still enforce payment by action against the registered owner of such shares at the time of the call; the remedy of forfeiture being merely cumulative.

LIABILITY OF CORPORATION FOR PAID-UP SHARES—REMEDY OF OBJECTING STOCKHOLDER.

The directors, authorized by the stockholders of a corporation, to issue paid certificates of preferred stock on which \$20 was payable for outstanding unpaid shares of preferred stock, and to place in the treasury of the company the remaining shares, the action of an objecting stockholder would be a suit to restrain consumption of such proceeding.

— EXTENSION OF TIME — EXCHANGE OF SHARES FOR PAID-UP STOCK—FORFEITURE OF FRANCHISE.

The directors of a corporation passed resolutions extending the time for payment of the first installment of a call on preferred shares, and for an exchange of stock, whereby two shares of full-paid and one share of preferred stock should be exchanged for five shares of unpaid stock on which \$20 would have been paid; thus leaving one-fifth of the preferred stock in the treasury, and two-fifths outstanding. Held, that the directors showed no effort to reduce the capital stock of the corporation by purchasing its stock or otherwise, so as to forfeit its franchise, and thus deprive it of the right to recover the debt incurred by the corporation by a call on the preferred stock.

LIABILITY OF CORPORATION FOR CALL—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

A corporation to recover an unpaid call on stock, an affidavit alleging fraud in making the call, and that in order to defraud the company an assessment was levied, though unnecessary to the purpose of the company, but not alleging that the assessment was levied by the directors' powers, or would be unnecessary if it were held that the company should continue to prosecute its business, is insufficient.

AFFIDAVIT OF DEFENSE—SUFFICIENCY.

Under the act of Congress, St. U. S. § 954, which requires United States courts to render judgment according to the right of the cause, without regard to technical objections in a declaration, except those which, in cases of demurrer, are specially set down, together with his demurrer, as grounds therefor, an affidavit of defense in an action by a corporation to recover an unpaid call on stock, stating that the statement of claim shows no ground of defense, and is insufficient to justify a verdict or judgment, is, in such case, most, to a general demurrer, and is insufficient to bar the action.

LIABILITY OF CORPORATION—SUFFICIENCY.

A statement of claim alleged that defendant was the registered owner of a certain amount of stock in plaintiff corporation, and that by virtue of the call, and demand thereon, which were set forth, defendant was liable to pay a specified amount. No agreement by defendant to pay the call in question was alleged, nor was the plaintiff's certificate of incorporation made part of the declaration. Defendant was not alleged to be the holder of the stock at the time when the call became payable. Held, that the declaration was sufficient.

10. SAME—DEFENSE—IRREGULARITY OF ORGANIZATION.

The owner of stock in an acting corporation cannot defend himself in an action to recover calls made on such stock by alleging irregularity of the corporation's organization.

11. SAME—DECLARATION—AMENDMENT.

Under Rev. St. U. S. § 954, which requires United States' courts to give judgment without regarding defects in a declaration, except those which, in cases of demurrer, the party demurring specially set down together with his demurrer, as the cause thereof, a statement of claim in an action by a corporation to recover unpaid calls on stock may be amended by an allegation that the balance remaining due on the stock after the first installment thereon had been paid has not since been paid.

12. SAME—AFFIDAVIT OF DEFENSE—AMENDMENT.

Where an amendment of a statement of claim has been allowed, a supplemental affidavit of defense, confined to the subject-matter of such amendment, will also be allowed.

Burr, Brown & Lloyd, for plaintiff.

F. B. Bracken, for defendant.

DALLAS, Circuit Judge. This is an action upon a call made by the board of directors of the plaintiff corporation on the holders of its preferred stock of record on September 16, 1901. It has been heard upon plaintiff's rule sec. reg. for judgment for want of a sufficient affidavit of defense. The plaintiff's statement of claim alleges that on September 16, 1901, the defendant was the holder of 5,100 shares of the said preferred stock, which were duly registered, and stood in his name upon the books of the company; and it avers that by reason thereof, and by force and virtue of the call, notice, and demand set forth, the defendant became, and then was, liable to pay the plaintiff the sum of \$12,750 on November 11, 1901; being \$2.50 per share due upon that date under the terms of said call as modified by resolution of September 25, 1901. The affidavit of defense first filed, which is somewhat voluminous, need not be here set forth at length, nor even summarized; for defendant's counsel has clearly defined the questions intended to be raised by it, and, as the counsel for plaintiff has conceded that those questions are adequately presented for decision, the attention of the court may well be confined to their consideration.

The defendant, as the registered owner of preferred stock of the corporation plaintiff when the call sued on was made, was liable thereon, though he had made no express promise to pay. *Webster v. Upton*, 91 U. S. 66, 23 L. Ed. 384. The duty which before call made and notified, the owner, by reason of that pre-existing duty, becomes charged with a definitive debt,—a sum fixed and certain, which he is absolutely bound to liquidate. The learned counsel of the defendant has urged upon my attention the case of *Braddock v. Railroad Co.*, 45 N. J. Law, 663, where it is said that "a call is nothing more than an official declaration that the sums subscribed are to be paid"; but by this, I think, is meant—what is obviously true—that a call cannot be creative of the pre-existing duty to which I have referred, and which in *Webster v. Upton*, supra, is defined as "the legal duty of paying all legitimate calls made during the

the ownership." It does not mean that one who is—not by subscription, but by assignment—becomes, is legal duty to pay all calls when and as made, and of the company from and at the time he acquires his though no call whatever be in fact made during the con-ownership. To my mind, such a proposition would manifestly unsound, and careful reading of the entire New Jersey court has satisfied me that it had no firming it. The general rule that the indebtedness established by a call is that of the persons who at that time were listed on the company's register as the owners of its shares is inapplicable to the present case, either by any reason of this particular call, or by reason of the fact that, after the call was made, the defendant's shares were transferred on to a purchaser to whom he had previously paid. The statement of claim alleges the call in fact to be its clear legal effect,—as being \$10 per share on the holders of the preferred stock of record on September 16, 1901"; and, the defendant was then of record as such holder, I see no doubt that he was bound by it. He was not, it is true, to pay, except in installments to mature at later dates, but as a debtor was then finally fixed. Was it shifted by the transfer which subsequently, but before any call was made, became payable, was made on the books of the company? I think not. Whatever right, if any, the transferee has against the transferee, the responsibility of the former is on itself as one arising out of a duty imposed by the company. Therefore, even if it be assumed that the company's transfer was given with intent to discharge him, and with full authority to do so on its behalf, yet it may well be that such assent could in any case have the effect of releasing the particular stockholder from the common obligation of the company to contribute to make good the subscribed capital, and of the general body of stockholders as well as of the creditors, if any. *Burke v. Smith*, 16 Wall. 394, 21 100. But there is nothing to warrant the supposition that, in the transfer in this instance, it was intended to discharge the defendant from his then positively incurred indebtedness. The fact of such intent is certainly not a necessary inference from the fact of the company, and it cannot be implied upon the fact, however plausible. In *Hood v. McNaughton*, 54 Atl. 497, "a distinction is drawn between one stock by transfer and the original subscriber. The fact that in the absence of any fraudulent purpose, discharge of liability for unpaid installments by due transfer of his shares to another cannot obtain immunity in that way." But the installments which are here referred to are not installments previously made, but the uncalled installments of the original subscription, which a stockholder is bound to pay under the legal duty of paying if called for "during

the continuance of his ownership." The correctness of this understanding is plainly shown by the employment of the same word ("installment") a few lines below in the opinion, where it is said that the subscription constitutes "a contract between the subscriber and the company, by which the subscriber engages to pay the remaining installment [i. e., the balance due on his subscription] on demand by the corporation." It is this duty of paying "the remaining installment" on demand which devolves upon a stockholder by transfer, and, as that duty attaches to any call made during the continuance of his ownership, his consequent liability becomes fixed when a call is made, and, when so fixed, cannot be discharged by any subsequent disposition which he may make of his shares, even if accompanied or followed by transfer. Whether the corporation's auxiliary right to forfeit and sell these shares was lost or waived by its acquiescence in the change made in their ownership is unimportant; for neither the obligation to pay, nor the personality of the obligor, would be affected or altered by the obligee's relinquishment of one of the means provided for securing the debt and facilitating its collection. The statutory provision for forfeiture affords a cumulative, not an exclusive, remedy. The law to this effect is well stated, and in accordance with at least the great weight of authority, in *Cook, Corp.* § 124, as follows:

"Frequently, when a corporation is authorized by statute to forfeit shares for nonpayment of the subscription, the question arises whether the statutory remedy of forfeiture is exclusive, thereby preventing a resort to the common-law remedy of an action of assumpsit on the contract. It is the well-established rule that it does not. A grant of the power to declare a forfeiture of the shares of a subscriber for nonpayment of calls does not, by implication, deprive the corporation of its option of remedies; and the corporation may, in its discretion, upon the failure of the subscriber to pay for his stock, either proceed against him by suit to collect the unpaid calls, or may forfeit his shares of stock. The corporation, by such a statute, is given its choice of remedies, and may pursue either. The remedy by forfeiture is additional. In legal language, the remedy by forfeiture is cumulative."

For the reasons which have been indicated, I hold that the defendant was liable upon the call in question (if valid), notwithstanding his sale of his stock and its transfer on the books of the company as alleged by him, and that such liability is enforceable by action, although the New Jersey statute authorized the sale, when ordered by the board of directors, of such number of the shares of a delinquent owner as will pay all assessments then due. But the validity of the call is denied upon two grounds, and these will now be separately considered.

1. It is contended that "by virtue of the resolutions of September 25th, passed by directors of plaintiff company, and approved by the stockholders October 30, 1901, as stated in the affidavit of defense, the terms of the call sued upon were radically changed, and the said resolutions are of such a character as to relieve the defendant from liability." No authority has been cited as sustaining this proposition, and the very ingenious argument which has been submitted in its support has not convinced me that it should be accepted.

upon which it is based are set out or mentioned of defense as follows:

the payment of the first installment, of \$2.50 per share, payable in 1901, be, and the same is hereby, extended to November 1, 1901, and it is the judgment of this board that the best interests of the stockholders will be served by the exchange of two shares of this company, full paid and nonassessable, for one share of preferred stock of this company, on which twenty dollars have been paid, after which exchange there will remain in the company three-fifths of the preferred capital stock, amounting to 72,000 shares, leaving outstanding forty-eight shares of the full-paid preferred stock, of the par value of \$50 per share. Resolved, that a special meeting of the American Alkali Company be called and held at the office of the company, 417-19 Market street, in the city and county of Camden, in the state of New Jersey, on Wednesday, October 30th, 1901, at 12 o'clock noon, for the purpose of authorizing the exchange of the full-paid preferred shares as set forth in the foregoing resolution, the election of directors, and for such other business as may come before the meeting. And at a special meeting of the stockholders of said company, held in pursuance of the last above recited resolutions at said office in the city of Camden, state of New Jersey, on October 30th, 1901, a resolution was adopted authorizing the exchange of full-paid shares as set forth in the resolution last above recited."

It is, as is contended for defendant, that the effect of the exchange, if acted upon, would be to reduce the capital of the company, it would not follow that the defendant's liability, which had been previously made would be therefor. The procedure proposed was not only recommended by a majority of the board of directors, but was expressly authorized by the stockholders themselves; and, if they were with-held from conferring such authority, the obvious remedy of a stockholder would be by suit in equity to restrain the carrying out of the scheme. Neither its proposal nor adoption by the corporation. If carried into effect, a forfeiture of the corporation's franchise to exist and to conduct its legitimate business would not result, and therefore its right to sue for the reduction of its capital, including those created by calls upon its shares, could not be lost. But I cannot perceive that these calls in fact contemplate or produce a reduction of the capital of the company. They merely authorized the directors to issue full-paid certificates to the extent which the payments would justify, and thereupon not to cancel, but to place in the hands of the company, the remaining shares. "Hence this is an effort to reduce the capital stock of the company by the exchange of its stock or otherwise. But if it had been intended to reduce the value of its own shares, there are numerous cases which show that a corporation may do so, and violate no duty to the stockholders, if prohibited by its charter." *Chetlain v. Insurance*

If submitted for defendant it is said that "it is not a mere mismanagement in the affairs of a company, but a fraud in its management, constitutes a defense to an action for recovery of stock; but in this case the allegations in the affidavit

go much further, and charge fraud in the making of the call itself." Substantially, then, what the defendant alleges is that a fraud was practiced upon him and other holders of the preferred stock by the directors of the company, in making this call, and that, in order to carry out a fraudulent scheme, the assessment was levied, although unnecessary for any purpose of the company. But it is not alleged that the assessment was in excess of the powers of the directors, nor that it would be unnecessary if it were intended that the company should continue to prosecute its business. Consequently the following observations of Mr. Justice Field in *Oglesby v. Attrill*, 105 U. S. 609, 26 L. Ed. 1186, are directly applicable, and seem to be conclusive against the sufficiency of this particular defense. He said:

"As to the wisdom of an assessment, or its necessity at the time, or the motives which prompt it, the courts will not inquire, if it be within the legitimate authority of the directors to levy it, and the objects for which the company was incorporated would justify the expenditure of the money to be raised. They will not examine into the affairs of a corporation to determine the expediency of its action, or the motives for it, when the action itself is lawful."

This authoritative statement of the law, although it does preclude stockholders from setting up a fraudulent motive in levying an assessment as a defense to an action at law brought for its recovery, does not leave them wholly without remedy; for they are, upon plain equitable principles, entitled to the assistance of a court of chancery "by decree compelling the directors to wind up the company's business and distribute the assets among those who are entitled to them, unless they can be lawfully used for other business purposes allowed by the charter." *Benedict v. Construction Co.*, 49 N. J. Eq. 23, 23 Atl. 485.

The affidavit of defense originally filed, after presenting the several defenses which have been considered as in bar of the cause of action as set forth in the declaration, contains this final paragraph:

"Defendant further avers that he is advised and believes that the facts alleged in plaintiff's statement of claim filed in this case do not show any cause of action against the defendant, and are not sufficient to justify the finding of a verdict or the entry of a judgment against the defendant for the amount of the claim in this suit, or any part thereof."

The utmost that can possibly be said for this averment is that it amounts to a general demurrer; but the courts of the United States are required, in all civil cases, to proceed and give judgment according to the right of the cause, without regarding any defect in a declaration, except those which in cases of demurrer the party demurring specially sets down, together with his demurrer, as the cause thereof. Rev. St. § 954. If, however, the court were at liberty and inclined to disregard this statutory mandate, it would not, I think, be justified in refusing the judgment now asked for by reason of any of the objections to the statement of claim which have been relied on in argument. It is by no means clear to me that it does not sufficiently allege that the balance remaining due upon the original subscription to the preferred stock after the first installment of \$10 thereon had been paid has not since been paid,

balance of caution, the plaintiff will be allowed to amend its statement of claim. Id. I am of opinion that it is not necessary that the amendment of claim should set out any provision of the statute of New Jersey further or otherwise than it appears that an agreement by the defendant to pay the call in full was not be either alleged or proved; that it is not essential to the plaintiff's right of action that it should appear that the plaintiff was a holder of stock at the time when the call became payable, and that it was not incumbent upon the plaintiff to produce its entire certificate of its incorporation a part of the

affidavit of the defendant includes no point especially founded upon the supplemental affidavit of defense. That affidavit, however, was carefully examined, and I understand its purpose to be to show that the organization of the plaintiff company was irregular and that its certificate of incorporation is defective. Whether these facts show this, I do not feel called upon to determine, but "it is settled by the decisions of the courts of the state and by the decisions of many of the state courts, that a corporation which contracts with an acting corporation cannot defend himself on such contract, in a suit by the corporation, on the ground of irregularity of its organization. * * * The same principle applies to the case of a subscription to the capital stock of a corporation which has attempted irregularly to create itself a corporation, and has acted as such." Chubb v. Upton, 95 N. D. L. Ed. 523.

The plaintiff is allowed to amend its statement of claim by inserting an allegation that the balance remaining due upon the shares of stock after the first installment of \$10 thereon has not since been paid, and leave is granted to the plaintiff to file within 15 days after notice of such amendment a supplemental affidavit of defense, which, however, must relate to the subject-matter of said amendment; and, if no amendment is made in pursuance of the leave hereby granted, the plaintiff's statement of claim shall stand for judgment for want of a sufficient affidavit of defense to be made absolute.

R. & BANKING CO. OF GEORGIA v. FARMERS' LOAN & TRUST CO. OF NEW YORK et al.

Supreme Court, D. South Carolina. February 1, 1902.)

COUNTS—MUTUAL CLAIMS.

The system of railroads, at the head of which was the C. Co., and which was the P. Co., the federal court for Georgia appointed H. as receiver of the P. Co., and the greater part of the P. road being in South Carolina, the federal court therefor, in ancillary proceedings, confirmed and reconfirmed the appointment of H. as receiver of the P. road. Thereafter the federal court for Georgia dismissed the bill so far as it related to the P. road, and discharged such road from the custody of the receiver; and the federal court for South Carolina thereupon, by order contemptuous, decreed that H. should account before the federal court for Georgia, and decreed of discharge. Thereafter A. was appointed receiver

for the P. road by the state court of South Carolina. Held that, as against claim of A. and his successor in interest for amount due the P. road by H. as such receiver, there could be set off claims against A., as receiver of the P. road, for supplies afterwards furnished him by H. and his successors, the receivers of the C. Co.

In Equity.

Smythe, Lee & Frost, for petitioners.

Lawton & Cunningham and Mitchell & Smith, for respondents.

SIMONTON, Circuit Judge. This case now comes up on a report of the special master upon the accounts of H. M. Comer, late the receiver of the Port Royal & Augusta Railway Company. Very much testimony has been taken. The report is very voluminous. The papers in the original report were in a confused condition,—a confusion removed in some measure by a second report, after recommitment of the original report. In order to reach a conclusion, a statement of facts in detail is needed.

The Central Railroad & Banking Company, a corporation of the state of Georgia, was in control of an extensive system of railroads within and outside of the state of Georgia. All of these roads were tributary to the center of the system, the Central Railroad & Banking Company, and were conducted in its interests. The accounts of the whole system—of each road in the system—were kept at Savannah in the office of the Central Railroad & Banking Company, and by its agents. Some of these tributary roads were owned by the Central Railroad & Banking Company, and others were under its control and domination by reason of its ownership of stock therein and of bonds having voting power. Among the roads of this latter class were the Port Royal & Western Carolina Railroad and the Port Royal & Augusta Railway, each of which had a terminus in the state of Georgia, the greater portion of each being in South Carolina. Both companies were incorporated in each of these states. On the 1st day of July, 1892, under proceedings in the circuit court of the United States for the Southern district of Georgia, in a cause entitled "The Central Railroad & Banking Company against the Farmers' Loan & Trust Company," the whole of the system of the complainant was placed in the hands of H. M. Comer, as receiver, with a view to preserve the integrity of the system. To these proceedings the two Port Royal corporations were made parties. As the greater part of these two railroads were within the district of South Carolina, ancillary proceedings were instituted in this court for the purpose of facilitating the control of the receiver appointed in the court in Georgia, and the appointment of H. M. Comer as receiver was recognized and confirmed in this court. The whole system had been conducted as a unit, and the administration of H. M. Comer was upon the same line and was governed by the same purpose. As was said by this court, when the order appointing Comer receiver was filed here, it put him in the place of and with the same powers that the Central Railroad & Banking Company had. On the ——— day of ———, 1893, the circuit court of the United States for the Southern district of Georgia dismissed so much of the original bill as related to the Port Royal & Western Carolina Railway and the Port Royal

ailway, and discharged and released from the custody of
r, receiver, these two corporations. So soon as this
d official information of this action on the part of the
inal jurisdiction, it adopted and confirmed its decree,
court had done, ordered Comer, receiver, to turn over
oyal & Augusta Railway Company all the property and
d company in his hands as receiver. In the meantime
edings were had in the court of common pleas for Aiken
e state of South Carolina, by King et al. against the
z Augusta Railway Company, wherein John H. Averill
d receiver. This cause was removed into this court,
rill was recognized as receiver. This, however, was
o the discharge of H. M. Comer, and after the order
action of the Georgia court. So Mr. Averill was not
of H. M. Comer in the sense of one substituted in his
occupied his place as receiver under wholly different
e was the appointee of a state court, and when the
moved into this court, coming over in the same plight as
e court, Mr. Averill's receivership came with it. Dun-
101 U. S. 810, 25 L. Ed. 875; *Hinckley v. Railroad Co.*,
25 L. Ed. 591. The order of this court confirming the
circuit court for the Southern district of Georgia, dis-
Comer from his receivership of the Port Royal &
way, instructed him when his accounts as such receiver
dered to the circuit court of the United States for the
rict of Georgia, and had been approved by said court,
certified copy thereof with the clerk of this court. The
ot show whether this was done. But in June, 1893, J.
ceiver, filed his petition in this court, stating that Mr.
ceiver, had not turned over any money or property to
ing that he be made to account. Whereupon an order
n July following, requiring Mr. Comer to account for
d doings as receiver of the Port Royal & Augusta Rail-
der of this court terminating the receivership of Mr.
e referred to, contemplated that he should account be-
it court of the United States for the Southern district
r his actings and doings as receiver of the Port Royal
railway, and that on such accounting a certified copy
l be filed in this court. This proceeded upon the theory
ial receivership was a part of the receivership of the
, and so its accounting should be had at the court of
diction. Inasmuch, however, as no evidence of such
contemplated in the order appeared, this order of July,
de. An account having been filed, and finally corrected
r, receiver, under that order, it was referred to D. B.
J., as special master, and his report thereon will be
reafter.

edings in the matter of the Central Railroad & Banking
the circuit court of the United States for the Southern
orgia, culminated in an order of foreclosure and sale of
ty and assets of every kind of that great system, and
omas became the purchasers. Ryan and Thomas there-

upon filed their petition in that court stating that the purchase was made by them pursuant to a plan formed between them and divers of the mortgagees, lessees, and other creditors of the Central Railroad & Banking Company looking to the formation of a new company; that they were also owners of a large number of securities formerly of the Railroad & Banking Company; that all the accounts of the receivership had been to a large extent wound up, though there were still in existence many claims whose collection would involve litigation and delay. They asked to be put in possession of all the assets of the receivership, they assuming all its outstanding obligations. On 5th February, 1896, the circuit court of the United States for the Southern district of Georgia granted the prayer of the petition, and directed the receivers to carry it out, subject to the outstanding obligations. The company referred to in this petition of Ryan and Thomas was formed under the name of the Central Railroad of Georgia. To it Ryan and Thomas conveyed all the railroad property and all the assets of the receivership, excluding therefrom any claim against the Port Royal & Western Carolina Railway and the Port Royal & Augusta Railway. Thus, the entire interest of the Central Railroad & Banking Company in these two South Carolina roads remained in Ryan and Thomas, subject, of course, to the condition of the order that they assume the obligations of the receivership as to them.

As has been seen, the Port Royal & Western Carolina Railroad was placed in the hands of Mr. Comer as receiver by the circuit court in Georgia. In May, 1893, an order was entered in this court appointing John B. Cleveland as receiver, not as successor to Comer, but as an original appointment; the court carefully drawing the distinction between Comer's position and his. Finally, under decrees for foreclosure, the property was sold November 20, 1895, to Thomas and Ryan as purchasers, who afterwards procured the incorporation of the Charleston & Western Carolina Railroad Company, and transferred to it the property purchased. After their purchase of the Port Royal & Western Carolina Railway, Ryan and Thomas presented their petition on 6th November, 1896, to the court, showing that they held certain preferential claims against the receivership of that road, assigned to them by the receivers of the Central Railroad & Banking Company, and offering to receive in full of their claim all the choses in action, etc., of the receivership, agreeing to pay all of its liabilities. This petition was granted, and the transfer made on this condition. On 2d February, 1899, mutual releases were executed between Thomas and Ryan and the Charleston & Western Carolina Railway of this claim, and of all others of every kind.

On 1st September, 1896, the mortgages upon the Port Royal & Augusta Railroad Company were foreclosed, and the property covered by them sold. At that sale Thomas and Ryan became the highest bidders, and they transferred their bid to the Charleston & Western Carolina Railway. The conveyance was made to this company by the master. Afterward, upon its petition, all the choses in action and property of that description held by the receivers were transferred to the Charleston & Western Carolina Railway Company, it assuming all the claims against and obligations of the re-

thus possessed of all the rights of Receiver Averill in action and accounts of the Port Royal & Augusta Charleston & Western Carolina Railway Company in this suit, and claim all the results of the accounting of the same.

As to a discussion of the account filed by him in this account, as finally presented, is as follows:

Receiver, to Port Royal and Augusta Railway Company, Dr.	
road from July 1, 1892, to April	
.....	\$236,968 97
due by agents and C. & S. R. R.,	
.....	1,920 61
.....	<u>\$235,048 80</u>
expenses, July 1, 1892, to April 25,	
.....	\$215,669 98
per statement attached.....	9,210 05
.....	<u>224,880 03</u>
.....	<u>\$ 10,168 83</u>
due receiver, as per statement at-	
.....	21,085 70
.....	<u>\$ 10,917 37</u>

\$235,048.56 and \$215,669.98 are not disputed. The \$9,210.05 and \$21,085.70 are in controversy.

Memorandum made by the master, at a reference held in November, 1893, in the presence of counsel, it is a question is made as to the actual amounts which have been paid up, subject, however, to their [right of counsel] right to make legal objections to the impropriety of the charges made or to the mode of prorating adopted by the Central and Banking Company." It is impossible to learn from the trend of the argument, it does not apply to \$9,210.05, and possibly, but not certainly, may apply to the same.

As for the item \$9,210.05 are as follows:

Port Royal & Augusta Railway, to H. M. Comer, Receiver, Dr.	
14,435.75 tons, secondhand 45 lb. iron, at \$21.00	
for fastenings, laid on main stem Port Royal and	
.....	\$30,150 76
1,065 tons, secondhand 54 lb. steel, laid between 52	
and "Y" at Yemassee, at \$25.00 per ton, including	
.....	2,791 25
1,065 tons, secondhand 54 lb. steel, laid in cotton yard,	
\$5.00 per ton, including fastenings.....	1,928 50
.....	<u>\$34,870 50</u>

Contra.

scrap rail, at \$18.23 7/10.....	\$25,228 73
tons frogs.....	431 72
.....	<u>25,660 45</u>
H. M. Comer, receiver.....	<u>\$ 9,210 05</u>

As for the other items will be discussed hereafter.

The master was instructed to report the testimony. All legal questions were thus reserved to be made before the court. When the report of the master came on to be heard in February, 1900, it was recommitted to him, with instructions to ascertain: (1) When the rails for which Mr. Comer seeks credit were furnished, during, before, or after his receivership. (2) Were they laid on the track and property of the Port Royal & Augusta Railway Company? (3) How were they obtained? Were they furnished by the Port Royal & Western Carolina Railway Company and by the Central Railroad & Banking Company of Georgia, and charged against the Port Royal & Augusta Railway Company as a debt of the latter company, as the account in the receiver's report would indicate? or were they procured by the receiver from these companies, and paid for out of net earnings of his receivership or otherwise? (4) What is meant by "net earnings" in the vouchers of the receiver? Does the term mean only the balance on this particular account? or is it the result of all the operation of the railway, after a deduction of all expenditures, for every purpose, from the gross amount earned?

1. The testimony submitted by the special master in response to these questions has been carefully examined. It is impossible to escape the conclusion that the rails for which Mr. Comer seeks credit were furnished during his receivership.

2. The items \$30,150.75 and \$2,791.25 are for rails laid on the main stem of the Port Royal & Augusta Railway. The item \$1,928.50 was for rails laid down in the yard at Augusta upon land the property of this railway company. The rails so laid down were used by the Central Railroad & Banking Company, and by the two Port Royal Railroads, all of these roads being then under the control and management of H. M. Comer, the receiver of the system to which all of the roads belonged, which control and management was under the domination of the system and for its interest.

3. The rails so laid down on the Port Royal & Augusta Railway were furnished by Comer, receiver of the Port Royal & Western Carolina Railway, to himself as receiver of the Port Royal & Augusta Railway, charged against the receivership of the latter road, and credited to the receivership of the former road; these renewals of rails being an incident in the management of the system under the control of Comer, the charges and the credits having been made on the books of the receivership of the Central Railroad & Banking Company. The receiver had authority to do this in the interests of the property in his charge. *Cowdrey v. Railroad Co.*, 1 Woods, 336, Fed. Cas. No. 3,293. Testimony has been introduced tending to show that the iron was charged at an unreasonable price. The account was filed in 1894. The testimony was taken as late as April 23, 1901. At this late day the principal party is dead, and the chief witnesses either dead or removed to parts unknown, and cannot be here and speak to or explain the transaction. So many years having passed when the matter could have been and was not brought up, the ends of justice will best be served in accepting the statement of the account.

for rails in the yard at Augusta should also be allowed. paid upon the property of the Port Royal & Augusta passed with this property to the purchaser. It is true that so laid was used by other roads in the same system. During the receivership of course was the result of the of the system, and in accordance with the purpose of ship, the preservation of the integrity of the system. During the receivership of Mr. Averill, if against his wishes, been prevented or paid for.

As having been allowed, there remains a balance of to be accounted for. He seeks to reduce this balance bills for items due by Averill, receiver, to the receiver-Central Railroad & Banking Company. The itemized evidence begins with bills sent on 12th June, 1893, following of subsequent dates, up to and including April, ceased to be receiver of the Port Royal & Augusta April 24, 1893, and all the items were for repairs, supplies furnished by or due to the receivership of the road & Banking Company.

Comer, the Charleston & Western Carolina Railway Company in the shoes of J. H. Averill, receiver, and is bound by the same which bound him. The case must be treated as if the receiver, was the party seeking relief. If, therefore, the receiver of the Port Royal & Augusta Railway, demand an account from Comer, appointed ancillary receiver of the railway, in proceedings connected with the system of the Central Railroad & Banking Company, and wholly distinct from the system in which he held his appointment, is met by a statement that between him as receiver and the receivers of the system-Central Railroad & Banking Company, could this be discharged such balance? It is important to understand the position of Comer, receiver. He was appointed upon the Central Railroad & Banking Company, receiver of the system conducted under that name, including its sub-controlled roads, among these the Port Royal & Augusta Railway. The bill was filed to preserve the integrity of the system in which the complainant was the center and exponent. He was appointed with this purpose, ancillary bills were filed in the receivership, and his appointment was recognized and confirmed by the order of this court. The order of this court was passed out of comity with the court of the United States for the Southern district of Georgia, in carrying out its purposes and accomplishing its ends. Comer was created as the representative of the system, and was clothed with the same powers as, the Central Railroad & Banking Company. So complete was this representation, that the sole purpose of the recognition of Mr. Comer as receiver of the system, that when the court of original jurisdiction in the receivership action, revoked so much of Mr. Comer's appointment to the Port Royal & Augusta Railway as a part of his receivership, that that railway from the system, and directed Comer to deliver the property to the company, this court, upon official

notice of that action, at once adopted and enforced it. This is the language of this court:

"It is ordered and adjudged that the prayer of said petitioner be granted so far as to discharge and release from the possession of this court and its receiver in the above-entitled cause the Port Royal & Augusta Railway, and all property and effects of the Port Royal & Augusta Railway Company; and it is further ordered and adjudged that H. M. Comer, Esq., receiver, do forthwith turn over to the Port Royal & Augusta Railway Company all the property and effects of said company in his custody as receiver, and that as receiver of the Port Royal & Augusta Railway Company, its property and assets, the said H. M. Comer be, and he is hereby, discharged."

More than this, in discharging him this court further ordered:

"That when the accounts of said Comer, as receiver, of his operation and management of the Port Royal & Augusta Railway Company, during the period he has held possession of the same, shall be rendered to the circuit court of the Southern district of Georgia, the court of primary jurisdiction, and shall have been approved, a certified copy thereof must be filed by him with the clerk of this court."

So that, while Comer was recognized and confirmed as receiver in this jurisdiction, it was because he was discharging his functions as receiver of the whole system of the Central Railroad & Banking Company and its associated and dependent roads to which he had been appointed by the court in Georgia. And this view is emphasized by the fact that he was instructed by this court to render his accounts as receiver of the Port Royal & Augusta Railway to the court of original jurisdiction, filing in this court a certified copy thereof after approval in that court. This is in accord with the practice of the federal courts in cases of ancillary receiverships. Beach, in his work on Federal Procedure, discussing the matter of ancillary receiverships (at section 617), says:

"In such cases an ancillary bill is filed in each of the courts of ancillary jurisdiction, and an order entered confirming the original appointment of the receiver, recognizing the court in which the first bill was filed as having primary jurisdiction over all the property and assets of the defendant railroad company, wherever situated."

In *Ames v. Railroad Co.* (C. C.) 60 Fed. 966:

"The receivers of a railroad system must report to and be governed by the circuit court sitting in the district of their original appointment in all matters relating to their general management of the trust, their general accounting, and the general operation of the road within the circuit."

The same principle was followed in *Clyde v. Railroad Co.* (C. C.) 56 Fed. 539; *Ex parte Powell*, Id. And it is stated to be the general law as to insolvent corporations in *Smith v. Taggart*, 30 C. C. A. 563, 87 Fed. 94. The conclusion drawn from all the cases is that it is the duty of an ancillary receiver, after paying the expenses of his receivership, to account with and remit to the receivers in the original jurisdiction all funds and assets in his hands. This being so, the balance in the hands of Comer, receiver of the Port Royal & Augusta Railway Company, was property of the receivership in the original jurisdiction, to be accounted for by it. It is true that the circuit court of the United States for the Southern district of Georgia reversed its action with regard to the Port Royal & Augusta Railway, and held that it was without jurisdiction. But Comer,

ver under the original order, was, at all events, reversed by the Georgia court could not be reversed by the contrary, it was entitled to all respect, and the affirmation of that order by this court clothed Comer with, and subjected him to all the duties, of ancillary

Merill became the receiver of the Port Royal & Augusta in the case of King et al. against that corporation, appointment of the state court, and so recognized after the cause into this court, he kept up for a time the same relations which had existed between his road and the Central Railroad & Banking Company, conducted by itself. He had his traffic arrangements with it, got supplies and repairs made in its shops, and so incurred the bill. So, when he seeks to obtain the balance he claims against the ancillary receivership of Comer,—a balance, as properly distributable in the court of original jurisdiction by this counterclaim or offset of the receivership. Admitting the balance, it claims that it has been incurred by subsequent transactions which occurred between the account and the period of the accounting. It is true that it is made out in the names of Comer and Hayes, receiver, but this does not affect it. A receivership is a continuing one, and is not to a corporation sole. The claim belongs to the receiver, not to the person of the receiver. *McNulta v. U. S.* 327, 12 Sup. Ct. 11, 35 L. Ed. 796; *Association v. U. S. C. A.* 609, 99 Fed. 494. In my opinion, the account to the general receivership of the Central Railroad & Banking Company system, is good as against this balance in the hands of the ancillary receiver.

Showing a number of tax receipts, showing payment of taxes on the Port Royal & Augusta Railway for the year 1892, were produced. They are all in the name of the Central Railroad & Banking Company of Georgia. These items of taxation are not in any account filed, nor is the court in possession of any information with regard to them. It would appear that they have already been credited in the receiver's accounts, by which it were, although the actual payments were, made. It is to say, the total amount of tax to be paid was for the months of the year, and each month was credited with its proportion of tax. At the end of the year the taxes were payable, the actual payment was made. In counsel desire, this can be made a matter of reference. It can be taken dismissing the intervention of the Charleston & Carolina Railway Company.

GERMAN STATE BANK v. MINNEAPOLIS, ST. P. & S. STE. M. RY. CO.

(Circuit Court, D. Minnesota, Fourth Division. September 18, 1901.)

1. RAILROADS—CARRIAGE OF MAIL—NEGLIGENCE—LOSS OF PACKAGE—LIABILITY.

A railroad carrying mail for the government owes no duty to the addressee of a package rendering the railroad liable for the loss of the same through its negligence.

2. SAME—DEGREE OF CARE.

Conceding that a railroad may be held liable by the addressee of a package for the loss of the same in the mail through the railroad's negligence, the degree of care required is only the reasonable care exacted of an ordinary bailee for hire.

3. SAME—COMPLAINT—ALLEGATION—SUFFICIENCY.

A complaint in an action against a railroad company alleged the mailing of a valuable package to complainant, and its carriage by the railroad company to its station, where it was alleged that the mail sack was delivered to defendant's station agent, whose duty it was to safely care for the mail sack during the night; that the agent left the station, and that a road master or foreman of the railroad entered the station, and with a false key opened the mail sack; and that such foreman had access to the office or room where the mail sack was deposited, and was permitted to go and come therefrom at will. *Held*, that the facts stated in the complaint failed to show a lack of ordinary care on the part of the railroad.

Action by the German State Bank against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Judgment sustaining demurrer to the complaint, with leave to plaintiff to amend.

Dale & Allen and Geo. W. Brown (Henry Conlin, of counsel), for plaintiff.

Alfred H. Bright, for defendant.

LOCHREN, District Judge. This case is presented by demurrer to the complaint, which alleges, in substance, that on November 10, 1900, the Metropolitan Bank deposited in the United States mail at Minneapolis, in a prepaid and duly registered letter or package, addressed to the plaintiff at Harvey, N. D., the sum of \$3,000 in currency, which therefore became the property of the plaintiff, who was then insured against the risks of the transportation of such money by the Bankers' Mutual Casualty Company of Des Moines, Iowa, under a policy of insurance, a copy of which is attached to the complaint. The mail sack containing said package was carried in a mail car in defendant's railroad from Minneapolis to Harvey under the exclusive control of postal clerks, who delivered said mail sack, duly locked, and containing said package, to defendant's night station agent at said Harvey, who was not an employé of the post-office department, and whose duty, on behalf of defendant, it was to safely care for and guard said mail sack and its contents during the night, and safely deliver the same to the postmaster at the Harvey post office, which was within 80 rods of the railway station. The night station agent deposited the mail sack in a room in the depot, and absented himself therefrom for a time, during which one Soule, a road master or foreman of defendant, entered the room, and with a key which he had caused to be made unlocked the mail sack, and took

and stole the money. The Bankers' Casualty Company to its contract of insurance, has paid said sum of plaintiff, who brings this suit for the benefit of the

government has from the first assumed the absolute control and performance of the postal service of the express provision of the constitution authorizing to establish post offices and post roads. The function so governmental, as it is calculated to produce revenue, the policy of the government may dictate; and it is minister to the general welfare by furnishing to all between all parts of the country, and reaching to other of communication as rapid and safe as can be effected by the safeguards provided by law. The government what matter shall be mailable, and the rates of the manner of payment of the same. These matters of law, and are not left open for negotiation or contract has any place in the scheme. The government has no competitor in the exercise of this function, but penalizes the sending or carrying of sealed letters in its mails. It permits, but does not compel, the packages which may contain articles of value in its mails; and avails himself of this permission the package enters entitled to the same care as any letter and no greater. For registration applies equally to letters and other only aids in tracing their course and carriage. The government receives, handles, assort, and carries the mails, same as addressed. The postal officials, of whatever kind, of whatever kind, are the servants of the government hands which it employs in the performance of its duties. The exceptions presently to be mentioned, I think asserted that these servants are not in privity with, by to, any one except the government, to whom their duty to be assured by provisions of the postal laws, penal. The exceptions are the cases where the duty of such a postmaster, clerk, or distributing carrier, requires to do an act personal to a known or designated individual receiving from him a letter or package to be placed in the mail, in which case he would owe him the duty of using ordinary care in the mail, or in the proper receptacle for mail. A servant should receive through the mail a letter or package it became his duty to deliver to the person addressed, and that person the duty of using ordinary care in making delivery of the same. A railway company carrying mail should not assume as to them any of the duties or responsibilities of a common carrier. No one but the government can regulate such service, and the duties and responsibilities of a carrier of mails are measured by the terms of the constitutional provisions of the postal laws and regulations. The government has the care, custody, or control of the railway company's mail, but under exclusive control of the railway postal

clerks, in separate cars or compartments, fitted especially for that service. As to the safety of the persons of such clerks the railway company assumes the same duty which rests upon it respecting other persons lawfully being carried on its trains. But as to the mail itself it has no duty except what it owes the government, its employer. It has no notice or means of knowledge of the contents of mail sacks, nor as to who has sent or who is entitled to receive the letters or packages. It never was employed by such persons, has no privity with them, and owes to them, severally and personally, no duty whatever. Were it otherwise, then when, as often happens, cars are wrecked and burned, and the mail destroyed, as the result of negligence for which the railway company is in law responsible, so that recoveries against it are had for personal injuries, and for all destruction of luggage and merchandise, the courts would be burdened with actions to recover for the loss of valuable packages claimed to have been in the mail; affording such opportunity for fictitious claims as might speedily compel railways to refuse such hazardous employment. The fact that no such litigation has ever arisen is decisive against the claim that a railway company owes any duty to the sender or addressee or owner of the contents of any letter or package contained in the mails which can be made the basis of an action at law. As above stated, the law requires that all letters sent from place to place be sent by the mail. But there is no such requirement in respect to valuable packages, which may lawfully be sent through express companies, or by other responsible carriers. The postal service has become so efficient, speedy, and safe that, in view of its cheapness, many persons send valuable packages by post, taking the risk themselves, rather than pay more to responsible carriers, who make charges with some reference to the value of the article and consequent amount of the risk assumed.

2. But if it were conceded that under some circumstances an action of this kind can be maintained by the owner of a package lost from the mail against a railway carrier of the mail, no liability can arise under the facts stated in this complaint. If any privity can be imagined as existing between the railway carrier between distant places and the owner of a package in the closed mail sack, and that the railway company owes such package owner a duty to exercise care in the carriage of that especial package, it would not be that degree of care and of responsibility which rests upon a common carrier, but at most the reasonable care which an ordinary bailee for hire must exercise in respect to the article which is the subject of the bailment. There is in such case no responsibility if the article is stolen, even by a servant of the bailee, if the bailee has taken and caused to be taken reasonable care under the circumstances. Under the allegations of the complaint, and upon the theory of the concession suggested, the bailment would not cease until the mail sack containing the package was delivered at the post office at Harvey, which was within 80 rods of defendant's depot. It is alleged that the mail sack was delivered to defendant's night station agent, whose duty it was "to safely care for and guard said mail sack and its contents during the night." It must be in-

is that the mail sack reached that depot too late in received at the post office before the following morning must be stored in the depot, as in a warehouse, for there is no allegation that it was not put in a safe depot, guarded by such sufficient locks as would be such case. The only attempted allegation of negligence the night station agent, after receiving the mail sack, leave said depot, and did absent himself therefrom time to this plaintiff unknown, and thereby defendant's duty to keep and care for said mail sack and its contents cannot hold that defendant's duty in respect to the circumstances required that the station agent keep the mail sack the balance of the night, and keep awake, allegation just quoted fails to charge any negligence. The allegations are to the effect that one Soule, a roadman of the defendant at Harvey, entered the depot, the key opened the mail sack, and stole the package the employment of Soule by the defendant, and the defendant had "access to the office or room where said mail sack was deposited, and was permitted to go and come therefrom do not sustain any inference of lack of reasonableness are stated tending to show that defendant had any knowledge of Soule as other than honest and trustworthy; and the character of his employment indicates that he was not. The allegation that he had access to the room, and was allowed to go and come therefrom at will," with defendant's knowledge, is too vague and indefinite, and requires too heavy an imagination, to lead me to regard it as a statement of fact, with defendant's knowledge and consent, such action in the nighttime, or at any time other than when he was on duty of his employment might properly direct him there. The first of the second ground of demurrer only specifies one separate reason for sustaining the demurrer on the first ground. If the demurrer is sustained, with leave to the plaintiff to amend the complaint on or before the November rule day.

PRESIDENT, ETC., OF FARMERS' BANK OF DELAWARE
et al.

Circuit Court, E. D. Virginia. February 13, 1902.)

CAUSES—NATURE OF CONTROVERSY.

by a trustee in bankruptcy to recover the amount of an allowance is not one arising solely by virtue of a state statute, which a court of equity would not otherwise have jurisdiction. It is properly maintainable in equity in a state or federal court, and, where the diverse citizenship properly appearing, and the amount in controversy exceeds the jurisdiction of the state court, it may be removed into the federal court.¹

jurisdiction as a ground of federal jurisdiction, see notes to Shipp v. C. O. A. 249; Mason v. Dullaghan, 27 C. C. A. 298; United Land & Emigration Co. v. Gallagher, 32 C. C. A. 479.

2. SAME—DIVERSE CITIZENSHIP—NOMINAL PARTIES.

Defendant's counsel, in whose hands it is sought to attach money belonging to defendant, are not such necessary parties to an action by a trustee in bankruptcy to recover an alleged preference received by defendant as would prevent defendant from removing the cause to a federal court, where it is a citizen of a different state from plaintiff, notwithstanding that counsel are citizens of the same state.

McLemore & Corbitt, for complainant.

Heath & Heath, for defendants.

WADDILL, District Judge. The defendant, the Farmers' Bank of Delaware, in the West Norfolk Lumber Company involuntary bankruptcy proceedings, was by decree of the United States district court for the Eastern district of Virginia (112 Fed. 759) awarded certain moneys held by said court not to be a part of the bankrupt's estate, and as against which, in said court, the bankrupt's trustee could not assert any claim against the bank, by reason of an alleged preference said to have been received by the bank in its dealings with the bankrupt company. The bankrupt's trustee, the complainant, thereupon applied to the bankrupt court for leave to sue in some court of competent jurisdiction to recover the amount of the preference, and, upon leave being given, instituted this suit in equity in the court of law and chancery for the city of Norfolk to attach the money decreed by the court of bankruptcy to the defendant bank, in the hands of its attorneys, and also caused a copy of the attachment to be served upon the City National Bank of Norfolk, the registry of the United States district court, before the check issued by said court in favor of the defendant bank, and delivered to its attorneys, had been paid. The Bank of Delaware thereupon filed its petition for removal of said cause into this court, accompanied by proper bond, and the same was accordingly removed, and is now before this court upon a motion made by the complainant to remand to the state court.

The motion to remand herein is overruled, as it appears: First. That the requisite diversity of citizenship exists to entitle the removal. Second. That the amount involved is sufficient. Third. That the suit itself is not one arising solely by virtue of the statutes of Virginia, and of which a court of equity would not otherwise have jurisdiction. It is one properly maintainable in equity, in a state or federal court, and, the diverse citizenship properly appearing, and the amount being sufficient, it can be removed from the state into the federal court. Fourth. The defendants James E. Heath and James E. Heath, Jr., partners practicing law as Heath & Heath, the counsel for the Farmers' Bank of the State of Delaware, in whose hands it is sought to attach the money belonging to the bank, are not such necessary parties as would disentitle the bank to have the cause removed into the federal court because of the failure of the record to show that every party to one side of the litigation was a citizen of a different state from every party on the other side of the suit.

THE JOHN H. STARIN.

ct Court, D. Connecticut. January 14, 1902.)

No. 1,308.

AMER AND ANCHORED VESSEL—EXCESSIVE SPEED IN HARBOR

John H. Starin, while passing down New Haven harbor at night, near the center of the channel, which was wide, and at a speed of 12 knots, came into collision with schooner Gurney and sunk her. *Held*, that the steamer for violation of the rule requiring her to keep to the right channel, and because she was going at a dangerous speed, the known fact that it was the custom of vessels to anchor of the harbor, and that a number of vessels were then anchored, and further because, under the evidence, if she had kept out she should have seen the schooner for a mile or more.

UTORY FAULT—PRESUMPTIONS.

rule that, where the fault of one vessel for a collision is established, she must establish the contributory fault of the other, the evidence equally clear, and that every presumption will be in favor of the latter, where there was evidence showing that a steamer, passing an anchored schooner half an hour or less before she was sunk and sunk by a passing steamer, which was clearly in the harbor, it will be presumed that such light was burning at the time of

Suit for collision.

Park, for libelants.

Wotton, Ward Church, and Harrison Hewitt, for claim-

D, District Judge. At about a quarter before 11 on October 18, 1900, the side wheel passenger steamboat, 200 feet long, while proceeding down New Haven harbor to New York, struck the schooner Allan Gurney, on the starboard side of her bow, and caused her to sink. The channel is about 800 feet wide at this point. The Starin was running a little west of south, and going at full speed, about 12 knots, over the bottom, near the middle of the channel, in the usual anchorage ground for vessels in New Haven harbor, and was headed about northwest. That the Starin was negligent, clear from the testimony of her own witnesses. They testified that a dark cloud temporarily obscured the sky at about the time of the collision; that it was more difficult to see lights on vessels going out of the harbor than when coming in. They testified that they have for 20 years anchored anywhere in New Haven harbor, and that they had already passed a number of vessels in the harbor; and that when they first sighted the Starin, at a distance of 800 feet away, it was impossible to avoid a collision. The Starin, without excuse, violated the statutory rule that steamships must keep on the right-hand side of the channel. She was in a crowded harbor at a confessedly dangerous speed under the existing conditions,—a speed inconsistent with the safety

of other vessels. *The City of Paris*, 9 Wall. 638, 19 L. Ed. 751; *The Syracuse*, 9 Wall. 676, 19 L. Ed. 783. Furthermore, the testimony of the disinterested witnesses and of the witnesses for libellant is to the effect that it was a clear night, so that vessels could be seen for a mile or more, regardless of lights, and that the schooner had one or both of her sails up, reefed. The *Starin*, having elected to take the center of the channel, failed to use vigilance as to lookout or speed, or both, sufficient to guard against collision. The conclusion reached is that the *Starin* was at fault. The *Starin* not only denies that it was in fault, but it contends that the schooner *Gurney* was in fault, because, first, although thus anchored near the center of the channel in the known path of New York steamboats, she had no lookout on deck. It does not appear that such a watch is required when there is a sufficient light, or that the presence of such a lookout could have prevented the collision.

It is further claimed that, although the schooner had a lantern in her fore rigging, it was not burning at the time of the collision. The *Starin's* witnesses swear that no light was visible. The schooner's witnesses swear that the light was burning prior to, and at the time of, the collision. Their testimony as to the light at the moment of collision is somewhat indefinite, owing to the fact that the mate went down with the schooner, and the captain was obliged to jump overboard. In addition to the evidence of interested parties as to lights, there is the evidence of three apparently disinterested witnesses. Knight, pilot of a steam tug, was anchored about a quarter of a mile from the schooner *Gurney* on the night in question. He testifies that he saw the light on the *Gurney* when she was a mile and a half away, and again when he passed her. It is not clear whether he saw the light later than 30 minutes before the collision. Springer, the watchman on board the Connecticut Naval Brigade transport, testifies that he was anchored about three-quarters of a mile from the *Gurney*; that she had a bright light; that he went off duty a little after 12 o'clock; that about an hour before this he "noticed a change in the light of one of the schooners [the *Gurney*]. It seemed lower towards the water." He noticed this change about an hour after he first saw the *Gurney's* light. It is agreed that, after the *Gurney* sank, a light was thus located in her fore rigging. Blake, a watchman of oyster beds, swears that he was going up and down the harbor that night, and that he saw the *Gurney's* light burning some 15 or 20 minutes before he saw her going down. It is thus sufficiently established that a proper anchor light was burning on the *Gurney* some 20 or 30 minutes prior to the collision. There is no satisfactory evidence that it continued to burn up to the time of the collision. To rebut the presumption of such continuance, claimants have shown that the regular cook, whose business it was to keep the lantern cleaned and filled, had left two or three days before, and that there is no evidence that the lantern had been filled since; the only evidence on this point being that of the mate of the *Gurney*, who testified that he hung the lantern in the rigging that night, and when asked, "Where did you get it from to hang it there?" said, "The cook lights and cleans

be entered in favor of libelants.

Court, W. D. New York. February 3, 1902.)

ANKRUPTCY—PRELIMINARY OBJECTION TO JURISDICTION—

Y—BURDEN OF PROOF.

UNPAID CREDITOR—RIGHT TO PETITION.

TAKING OBJECTION.

7. The following is the opinion of the special master: The undersigned, as special master, by an order of the district court, dated November 16, 1901, with leave to the alleged bankrupts "to present such preliminary objections to the sufficiency of the petition to the regularity of these proceedings, and to the jurisdiction of the court," has heard the testimony of the witnesses

diction, as though the same were personally presented" to the court. There seems to be little, if any, dispute on the facts, which may be stated as follows: On November 7, 1901, Emmett W. McConnell filed a petition in involuntary bankruptcy against Samuel Schenkeln and Martin A. Coney, alleging, among other things, that the latter were "copartners and persons united in interest in the management and care of an institution known and described as the 'Infant Incubators' at the Pan-American Exposition, Buffalo, N. Y., and that your petitioner is a creditor of the said Schenkeln & Coney, and your petitioner has an approvable claim against them, amounting, in the aggregate, in excess of securities held by him, to the sum of five hundred dollars." The petition also alleges that under the agreement between the petitioner and the alleged bankrupts, whereby, for certain considerations, he was to receive twenty-five per cent. of the gross receipts of the concession known as the "Infant Incubators," there "became and was due and owing your petitioner * * * the sum of thirty-one thousand two hundred and fifty dollars, no part of which has been paid, except the sum of fourteen thousand dollars, leaving a balance yet due and owing your petitioner of seventeen thousand two hundred and fifty dollars, with interest from November 1, 1901." The petition also alleges that the petitioner had previously begun an action in the supreme court of the state of New York on such indebtedness, and in such action obtained an attachment against "the property, building, paraphernalia, and appliances used by said Schenkeln & Coney in the display at the Pan-American Exposition aforesaid," and that under such attachment the sheriff of Erie county has attached and taken possession of the same, and between fifty and sixty dollars in cash found on the premises, and about forty dollars on deposit in a local bank. The petition also shows that in such action an order of arrest was granted, and the debtors taken into the custody of the sheriff of Erie county, who at that time still had custody of them, but from whose custody, it appeared on the argument, they have since been released. The petition alleges as the act of bankruptcy committed by the alleged bankrupts that they have, "for the purpose of hindering, delaying, and preventing the collection of your petitioner's claim, and the claims of their other creditors, if any, and to defraud, wrong, and cheat and swindle your petitioner and their other creditors, if any, * * * concealed, assigned, transferred, and disposed of all moneys collected in said infant incubators by the exhibition thereof, and not remaining in their hands, in the sum of twenty-nine thousand dollars." On this petition, and on the affidavits of the petitioner, Emmett W. McConnell, and his attorney, Percival M. White, filed at the same time, the district court, on the 7th day of November, 1901, issued a warrant, directed to the marshal of the district, whereby he was required to bring the alleged bankrupts "before the court forthwith for examination, and thereafter and thereupon to hold such bankrupts * * * as this court may direct"; such warrant reciting the commission of an act of bankruptcy, and that the alleged bankrupts "are about to sell, assign, transfer, their property for the purpose of hindering and defrauding their creditors, and that they, and each of them, are about to leave this district * * * to avoid examination, and that their departure, or the departure of either of them, will defeat these proceedings in bankruptcy." The marshal thereupon took the alleged bankrupts into custody, and brought them into court for examination, whereupon the order of reference previously mentioned was made. Other facts will appear from the discussion of the questions raised by the respective parties.

The alleged bankrupts have appeared by counsel, and raised three preliminary objections to this examination, all of them going to the jurisdiction. For the purpose of this examination, they seem to have waived any technical objections to the papers themselves,—as, for instance, the use of the word "approvable," instead of "provable," in the petition,—so that the questions to be determined are three: (1) Whether the petitioning creditor and the alleged bankrupts were partners. (2) Whether, because of the unsurrendered attachment, the petitioner has a petitioning creditor's debt at all. (3) Whether the petition itself does not show the alleged bankrupts to be solvent.

ed by the respective attorneys that, if the agreement between Schenkein and Coney amounts to a partnership, under *Johnson and In re Palmer*, 3 Deac. & C. 244, *Ex parte Briggs*, 3 Deac. & C. 367, and *Ex parte Gray*, 4 Deac. & C. 779, there has not a petitioning creditor's debt, and this plea to will be fatal, not merely to this branch of the proceeding, but to the whole. It seems strange that this question has never been decided in the United States; *Robinson v. Hanway*, Fed. Cas. No. 11,953, is cited by analogy. There can, however, be no doubt that the law is the same in the English cases cited express the law. Was, then, the agreement between McConnell and Schenkein and Coney a partnership, the original agreement, bearing date April 10, 1900, between the three individuals, has been made a part of the papers in this case, and a construction of it is necessary to determine the rights of the parties. Without quoting from such agreement in full, it is sufficient to summarize as follows: The counsel for the petitioners claims that this agreement does not constitute the partnership for the following reasons: The words "partner" and "partnership" do not occur therein; Schenkein and Coney are together parties to the agreement, and McConnell alone party of the second part. McConnell contributed not more than \$15,000 to Schenkein,—he being the official manager, and not to the two. McConnell is given title to the plant and such loan. Schenkein and Coney, and not McConnell, have the right to receive after such loan is paid. Nothing on the face of the agreement shows the rate of division, either as to profits or losses, between Schenkein and Coney. Nothing on the face of the agreement amounts to show that there are losses. Nothing on the face of the agreement amounts to show that there are share net profits. Nothing on the face of the agreement amounts to show that McConnell's part to devote his time or services to the partnership. The face of the agreement indicates that there was any consideration for the agreement, save the advance of money. Creditors other than the petitioners are not affected; he being, as is alleged, the only creditor. The alleged bankrupts claim that this agreement covers a period of years, and prevents all three parties from engaging in any other business during that period; it appearing to have been the original purpose of the same exhibit not merely in Buffalo, but at the then offices at Toledo, Ohio, and St. Louis, Mo.; that the petitioning creditors have a proprietary interest in certain of the avails of the business, which is as follows: "It is understood and agreed by the parties that should the parties of the first part, or either of them, prepare perfumes, powders, or other preparations, or should any of the parties prepare any lotion, food, or other preparation, to be used in the treatment of infants, and shall have the same protected by trade-marks, or patents, the party of the second part shall have an equal interest in said trade-marks, copyrights, or patents;" that if none of the three could be disposed of without the consent of the other two; that in one of the recitals of the agreement it is stated that the parties desire to take an interest in said concession of infant industry; that McConnell has the right to appoint a representative or manager; that the gross receipts were to be divided daily in the presence of the petitioners; in brief, the agreement would seem to indicate that the petitioners, who had associated with him the alleged bankrupts, had advanced money; that McConnell was willing to furnish the petitioners the plant, provided he had title to the same until he could receive an advancement, he to take one-half of the gross receipts until the advancement was accomplished, and then to receive one-fourth of the gross receipts thereafter, the title to the plant to vest instantly in Schenkein and Coney; that McConnell to have no interest in the business save his share in the one-fourth proprietary interest in the lotions, foods, and other preparations which should be used in the plant, and then the petitioners had been protected by trade-marks, copyrights, or patents; that to say that my first impression of this arrangement, upon the petition and affidavits, was that it was a part-

nership. The submission of the original agreement, however, has led to the opposite conclusion. The law of the state of New York, which is, of course, controlling on this proposition,—this being a New York contract, and carried out in that state,—while not entirely clear, seems to be summed up in the following, from *Richardson v. Hughitt*, 76 N. Y. 55, 32 Am. Rep. 267: "The general rule, no doubt, is that, to constitute a partnership, there must be a community of interest *inter sese*, and that the parties shall share the profits and loss. 3 Kent. Comm. 23; *Pattison v. Blanchard*, 5 N. Y. 186. This, however, is not without exception, and, where there is an agreement for sharing in the profits of a business, in some cases it is sufficient to establish a partnership as to third persons. See *Manufacturing Co. v. Sears*, 45 N. Y. 797, 6 Am. Rep. 177. And here comes in another exception to the rule last stated, which is that where the person has no interest in the capital or business, and is to be remunerated for his services by a compensation from the profits, or measured by the profits, or what is to depend, as in case of seamen or other voyages, upon the result, it has no application. Where, then, one is only interested in the profits of a business as a means of compensation for services rendered, he is not a partner. *Leggett v. Hyde*, 58 N. Y. 272, 280, 17 Am. Rep. 244; *Smith v. Bodine*, 74 N. Y. 30; *Vanderburgh v. Hull*, 20 Wend. 70; *Burckle v. Eckart*, 1 Denio, 337, on appeal 8 N. Y. 132; *Fitch v. Hall*, 25 Barb. 13; *Lamb v. Grover*, 47 Barb. 317; 1 *Smith, Lead. Cas.* (5th Am. Ed.) 292. These cases fully sustain the doctrine laid down, that, where the profits are a measure of compensation, no partnership is created." Compare, also, *Curry v. Fowler*, 87 N. Y. 33, 41 Am. Rep. 343; *Cassidy v. Hall*, 97 N. Y. 159. The rule laid down in *Richardson v. Hughitt*, *supra*, has been distinguished by the same court in such cases as *Hackett v. Stanley*, 115 N. Y. 625, 22 N. E. 745; *Magovern v. Robertson*, 116 N. Y. 61, 22 N. E. 398, 5 L. R. A. 589; *Bank v. Gallaudet*, 122 N. Y. 656, 25 N. E. 909,—cited by the counsel for the alleged bankrupts. But a careful reading of these cases will discover points which make them clearly distinguishable from the case at bar. In *Hackett v. Stanley* the agreement was "to divide equally the net profits of the business," and recited that the arrangement was not merely in consideration of the loan, but "in further consideration of services of the said party of the second part in securing sales in said business, and for any further moneys he may, at his own option, advance for use in said business." In *Magovern v. Robertson* the parties seeking to avoid partnership liability were by the agreement given one-third of the net profits "in consideration of their indorsement and their general interest in the business." In *Bank v. Gallaudet* the parties were to share equally in the profits after the partner who made the advances had been repaid. In other words, there was a sharing in the net profits. In all of these cases, too, the question arose between outside creditors and the alleged partners,—a very different proposition, on the equities, at least, from that at bar, where the question is between three persons who were parties to a written agreement fixing their rights. It is undoubtedly true, as urged by the counsel for the alleged bankrupts, that the giving of a proprietary interest in the lotions, etc., to *McConnell*, is strong evidence of a partnership. *Magovern v. Robertson*, *supra*. But I cannot agree with him that this element of the agreement alone should negative the numerous elements the other way,—certainly not on a preliminary objection of this kind; for I take it that this point will be brought to the attention of the court when the merits of this controversy are to be determined; that is, after the alleged bankrupts shall have filed their answer to this petition. The objection to the jurisdiction on the ground that *McConnell* is a partner of the alleged bankrupts, and therefore has not a petitioning creditor's debt is overruled.

2. But has this creditor, who comes into court alleging his attachment, and not offering to surrender it, a petitioning creditor's debt? Manifestly if an attachment is a preference, he has not such a debt. In *re Rogers Milling Co.* (D. C.) 102 Fed. 687; In *re Gillette*, 5 Am. Bankr. R. 119, 104 Fed. 769. And Judge Seaman, in *re Burlington Maltling Co.*, 6 Am. Bankr. R. 369, 109 Fed. 777, has held (the facts being strikingly similar to those here) that an attachment is a preference. That case, however, rests on the

alency between the two terms,—a doctrine with which, in respect, I cannot agree. The learned judge overlooks the *re v. Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 908, 46 L. Ed. 1, which it is as sounding brass,—namely, its ruling that it is a "preference." Thus: "Subdivisions 'a' and 'b' are preference given by the debtor to his creditor. Subdivision 'a' shall constitute it, and subdivision 'b' states a consequence to be that the transfer may be avoided by the trustee or its value recovered, provided, however, that the transfer is made within four months before the filing of the petition for adjudication, and the creditor had reason to believe that the transfer was intended. So far, so clear." Now, an attachment is not a "transfer." It cannot, therefore, be a "preference" nor be surrendered under section 57g. Unless there is no it, it may coexist with a petitioning creditor's debt. On the broader ground of the policy of the law, the question is not that, were it urged on the merits, and not preliminarily, to which this petitioning creditor has some right, it might be the other way. An attaching creditor, under the law, seems to have been admitted or excluded from the bankruptcy somewhat at will. Thus such creditors could intervene and be heard. In *re Bergeron*, Fed. Cas. No. 1,342; In *re Menzies*, No. 9,420; In *re Hatje*, Fed. Cas. No. 6,215. Yet such creditors cannot be counted when the question was whether an involuntary bankruptcy represented the required proportions in number and amount. Fed. Cas. No. 12,556, reversing same case below, Fed. Cas. No. 12,556. The reason for the distinction seems to be that in the former case the attachments would be avoided by the bankruptcy; in the latter, if counted, might put the nonattaching creditors at the disadvantage. Under the law of 1867, no secured creditor could be avoided. In *re Frost*, Fed. Cas. No. 5,134; In *re Green Pond*, Fed. Cas. No. 5,786. Contra, In *re Stansell*, Fed. Cas. No. 13,293; In *re Rado*, Fed. Cas. No. 11,522; In *re Currier*, Fed. Cas. No. 11,522. The doctrine forced Judge Dyer, of Wisconsin, to hold in *Re Menzies*, No. 1,921, that an attaching creditor is not a secured creditor, therefore, a petitioning creditor's debt. It is not necessary to determine whether, under the present law, an attaching creditor is a "secured creditor." If unsecured, he surely has no claim, secured, under the present law (§ 59b), this objection to the demurrer, his allegation, which is, in substance, that the security is worth at least \$500 less than his claim, is not only a case directly in point under the law of 1867 is In *re Menzies*, No. 6,215, decided by Judge Dillon after his decision in *supra*. He takes broad ground, seeming to admit that an attaching creditor is a secured creditor, and, while decreeing that a creditor who is fully secured cannot, while holding on to his attachment, sustain a petition to force his debtor into bankruptcy, adds: "If, under the law, a creditor is not fully secured, it is, I think, quite probable that, if his debt over the value of the security, he is to be regarded as a secured creditor." Thus clearly implying that the case is authority for the proposition that an attaching creditor's lien equals the debt. This broad view has now been affirmed by our statute (Bankr. Act. §§ 59b, 57e). In a close question as to whether to follow it, than would be the opposite course. I am of the great force of Judge Seaman's remarks in *Re Burlington*, *supra*, holding that an attaching creditor has elected his remedy, and has been held that a lien creditor waives his lien by the filing of a petition. In *re Bloss*, Fed. Cas. No. 1,562. Under the law, a creditor would undoubtedly be admitted to prove his claim against the debtor, that his attachment lien be considered null and void. It is not his lien in so many words, but his petition is the first

of a series of acts which make that surrender inevitable. There may be some cases—and this is apparently one—where the attachment did not reach the property at which it was aimed. If this creditor has a debt in \$17,250, as he alleges, the security is palpably insufficient. The attachment and the petition were but a few days apart. The claims of other creditors are not involved, for there are no other creditors. It would be unjust, at least at this stage of these proceedings, to hold no jurisdiction on these grounds. This objection is, therefore, for the purposes of this examination, overruled.

3. Nor is it important whether this petition show insolvency. The act of bankruptcy alleged is the first. Section 3a (1). The quantum of this estate is kept under cover. *Citizens' Bank of Salem v. W. C. De Pauw Co.*, 5 Am. Bankr. R. 345, 45 C. C. A. 130, 105 Fed. 926. There is a concealment here, which, if the facts alleged in the petition and affidavits are true, is with intent, at least, to hinder and delay this creditor. By section 3c the burden of pleading and proving solvency is on the alleged bankrupts. Compare *West Co. v. Lea*, 174 U. S. 590, 597, 19 Sup. Ct. 836, 43 L. Ed. 1098. They cannot be allowed at this time to object to jurisdiction on this ground.

The preliminary objections are therefore overruled, and the examination will proceed at 11:30 a. m. on January 13, 1902, unless on or before January 10, 1902, the alleged bankrupts shall file a petition for review, which will in that event be granted.

William H. Hotchkiss, Special Master.

Percival M. White (Philip V. Fennelly, of counsel), for petitioning creditor.

Irving L. Fisk (Louis L. Babcock, of counsel), for alleged bankrupts.

HAZEL, District Judge. On November 7, 1901, a petition was filed by a creditor to adjudge Samuel Schenkein and Martin A. Coney, copartners, bankrupts. At the same time an application was made by the petitioner for a warrant to the marshal, directing him to bring the alleged bankrupts forthwith before the court for examination, as provided for by section 9b of the bankruptcy act. In obedience to the warrant the alleged bankrupts were brought into court by the marshal, and, by counsel, objected to the jurisdiction of the court on the grounds (1) that petitioner and the alleged bankrupts were partners; (2) that petitioner had obtained a preference in the state court in the nature of an attachment upon property of the alleged bankrupts, and, therefore, the attachment not being surrendered, the petitioning creditor has no provable debt; (3) that the petition to have debtors adjudged bankrupts does not disclose insolvency. The future appearance for examination of the alleged bankrupts whenever required having been satisfactorily arranged by counsel for petitioner and for debtors, an order of reference was made to Referee Hotchkiss, as special master, to decide and determine the objections to the jurisdiction of the court, and to continue the examination of the bankrupts if such objections were found untenable. The alleged bankrupts are therefore in the custody of the court pursuant to the warrant of arrest. The special master, after due deliberation, overruled all the objections urged to the jurisdiction. His reasons therefor are submitted in an opinion, wherein he exhaustively reviews the authorities under the bankruptcy act of 1867, bearing on the proposition presented, and disagrees with the holding of *In re Burlington Malting Co.*, 6 Am. Bankr. R. 369, 109 Fed. 777, under the present act. The opinion accompanies the allowance of a peti-

of his ruling upon the three preliminary objections presented. I concur with the special master in his decisions stated in his opinion, upon the first and third of them. The special master found that the agreement between the petitioner herein and the partnership proposed was not a copartnership; that, while there was evidence of partnership based on agreements between the parties, such evidence, standing alone, was not sufficient to negative conclusion on a preliminary objection to the jurisdiction. The dispute between the parties was very properly held to be a substantive matter, the merits of the controversy, and therefore not determinative. The special master, however, found that, inasmuch as the petitioners charged was removal and concealment, pleading and proving solvency is on the bankrupts. The court also approved.

To approve the finding and conclusion on the second objection for review. I am of opinion that a creditor who obtains an attachment has, in substance and effect, a lien upon the property attached thereby, until such attachment is vacated or becomes void by the adjudication. To this extent, and up to this extent, an attaching creditor must be deemed to have a preference. He should give him a greater percentage of his debt than a creditor not similarly secured or protected in his claim. A petitioner who has applied for, and obtained from the court, a provisional remedy, which, if allowed to prevail, would result in indebtedness, or a part of it, to the exclusion of other creditors, when such lien is created upon property of the alleged bankrupts to the detriment and hindrance of general creditors. The claim of such a creditor through legal proceedings is permitted to become a lien upon the property attached. He holds an attachment on the property of the bankrupts in one hand, and comes into this forum in another hand, seeking another provisional remedy, while maintaining his attachment as an anchor to windward in case of an adverse decision. Such a remedy availed of inures to the petitioner's sole benefit. It is true that a lien on property attached in a state court should not be construed as a transfer of property, within the meaning of section 60 of the act, whereby a preferential transfer is prohibited. *Pirie v. Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 46 L. ed. 1007. Section 67, however, specifically provides that a lien obtained upon mesne process, begun within four months of the filing of the petition, shall be dissolved by the adjudication whenever the said lien was obtained and permitted while the debtor was insolvent and that its existence and enforcement will be terminated. This section, construed with the other provisions of the bankrupt act bearing on the rights of an attaching creditor, and the soundness of his claim without formal release of any kind, is strongly persuasive of the soundness of Judge Johnston's opinion in *Re Burlington Malting Co.*, supra, where the court held that a lien similar to that presented here. It was there held that a preference, within the meaning of the bankrupt act, was a lien sought and permitted in fraud of the pro-

visions of section 67c. The claim thus secured to the creditor by attachment was held not to be provable unless the preference created thereby was surrendered, as required by section 57g. The spirit of the Pirie Case would seem to strengthen the position of Judge Seaman, rather than that of the referee, when all the applicable sections of the law are considered together. The opinion of Judge Seaman further points out that the failure by congress to recognize an attachment lien as belonging to that class of securities made valid and unaffected by an adjudication in bankruptcy gives force to his interpretation and conclusions. I concur in this view. The lien of an attachment, undoubtedly, by operation of law, creates a preference which enables the attaching creditor to obtain a superior right to the property levied upon. The referee views the proposition somewhat doubtfully. After stating that an attachment is neither a "judgment" nor a "transfer," and cannot, therefore, be a "preference," and that "it may coexist with a petitioning creditor's debt," he says:

"Looked at from the broader ground of the policy of the law, the question is close,—so close that, were it urged on the merits, and not preliminarily to prevent an examination to which this petitioning creditor has some right, the decision here might be the other way."

I am unable to take this view of the contention. The objection to the jurisdiction was made in due time to prevent an examination of the debtors, to which the petitioning creditor, under certain conditions, is entitled. By section 9, under which the petitioning creditor proceeds, it is provided that a bankrupt, under certain circumstances, shall be exempt from arrest upon civil process. Under certain circumstances, the judge may order the marshal to keep the bankrupt in custody not exceeding 10 days, but not imprison him, until he shall be examined and released, or give bail for his appearance for examination from time to time, not exceeding, in all, 10 days. On an application of this character, it must clearly appear upon satisfactory proof, by the affidavits of at least two persons, that the bankrupt is about to leave the district for the purpose of avoiding examination. Under section 2, subd. 15, it was held that the court may issue an order in the nature of a writ of ne exeat. In *re Lipke* (D. C.) 98 Fed. 970. The drastic remedy provided by section 9 is one directed against the liberty of a citizen, and therefore should be strictly construed and carefully applied. Manifestly, the rights of the petitioning creditor and the rights of the alleged bankrupts under this particular section must be determined at the very threshold of the proceeding. The language of Judge Seaman in the Burlington Malting Co. Case, *supra*, in reference to the dual position of a petitioner in involuntary bankruptcy, who also pursues a remedy to maintain an invalid lien against the same person in another forum, aptly applies. He says:

"Instead of the single proceeding on the part and for the benefit of the general creditors intended by this act, to save the assets of an insolvent debtor from spoliation by preferences, and secure equality in their distribution, this petitioner appears, with a claim disputed and fairly disputable, seeking, on the one hand, to obtain a preference by enforcing it through an attachment against the property, and, on the other, invoking the inconsistent remedies of bankruptcy."

In no sense can it be urged as a justification for the continuance of the attachment that the bankrupt act does not afford complete machinery for the conservation of the bankrupt's estate. Simultaneously with the filing of the petition, the property of the alleged bankrupts might have been taken into the custody of this court. The petitioner did not adopt this course. He rests on his attachment, and must therefore be denied the equitable relief he now seeks of this court.

The ruling of the referee on the second question submitted for review is reversed, and the order of arrest is vacated.

CARY MFG. CO. v. STANDARD METAL STRAP CO.

(Circuit Court, S. D. New York. January 13, 1902.)

1. PATENTS—INFRINGEMENT—BOX-STRAP REEL—ANTICIPATION.

Cary patent, No. 403,247, dated May 14, 1889, for a reel for box straps, held, in view of a partial anticipation by Fleisher's reissued patent, No. 9,019, dated January 6, 1890, not to be infringed by defendant's reel.

2. SAME—SAME—INNOCENT PURPOSE—EFFECT.

While one selling a patented device for a use which would be an infringement might be liable as a participator, he would not be liable for an improper use made by the purchaser afterwards, and not contemplated in making the sale.

In Equity.

A. G. N. Vermilya, for plaintiff.

W. P. Preble, Jr., for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 403,247, dated May 14, 1889, and granted to Spencer C. Cary for a reel for box straps, consisting of a spool to coil the strap on, and arms from the ends of the spool, with holes through them there for a pin or nail for an axle, and at the outer ends for a pin or nail to hang it on for a support. The specification says:

"By this means the framed reel is held firmly in position on the support, and the spool and coll are free to revolve on the shaft, c, of the former in unreeling the strap. Furthermore, the fastening nails, together with the hollow shaft, c, may be made to serve to draw or hold the sides, d, d¹, of the frame closely to the edges of the strap coll, so as to hold the strap from uncoiling without the exertion of force by the operator on the free end of the coll."

The claim in question is for:

"(2) A reel for metal box straps, consisting of a spool, C, adapted to have the metal strap coiled upon it, an axle, c, upon said spool is journaled, and a frame, D, composed of parallel arms, d and d¹, in which said axle is mounted, and which extend diametrically across said spool, and reach in opposite directions beyond the rim thereof, as described, and are united at their outer ends, and therein have the respective corresponding openings, d² and d³, adapted to receive fastening pins, substantially as and for the purpose set forth."

The patent is more fully set forth in *Manufacturing Co. v. De Haven* (C. C.) 88 Fed. 698, at page 701, where the conclusion was

reached on what was then before the court that the second claim was valid because of the braking of the coil in unwinding by driving the nails into the support, and thereby binding the coil. Judge Lacombe there said: "The patent is an extremely narrow one. It would not be infringed by defendant's device if the latter had its arms rigid against compression, so that they could not act as a brake." Here the defendant has shown, among others, Fleisher's reissued patent, No. 9,019, dated January 6, 1880, for a similar reel for coils of braid, in which an elastic band over the outer ends of the arms in notches for drawing them together is specified. This narrows the patent still further. In the defendant's reel the arms are slotted, and the coil rests upon its lower edge for braking, and the arms would not brake unless the user should drive the outer nail or pin deep enough to bind the coil between the arms there; the moving center not permitting the pin, or whatever is used for an axle, to be driven into the support for that purpose. So there does not now appear to be sufficient scope left of the plaintiff's patent to cover the defendant's reel as it is furnished to users. The outer holes are for hanging it up, and not for braking in unwinding; and there are no central pins or nails to be driven into the support for binding the arms together upon the coil to brake it in unwinding. The defendant, by selling for an intended use that would be an infringement, might be liable as a participator, but not for a use by a purchaser afterwards not contemplated in making the sale. The driving of the outer nail or pin further to accomplish what was otherwise well provided for would not seem to be so within the purpose of the defendant as seller as to warrant a decree against such sales.

Bill dismissed.

ROLFE ELECTRIC CO. et al. v. STERLING ELECTRIC CO. et al.

(Circuit Court, S. D. New York. January 14, 1902.)

PATENT—INFRINGEMENT.

The Barrett patent, No. 445,217, for a thermal cut-out, *held not infringed.*

In Equity.

Seward Davis, A. Miller Belfield, and Charles A. Brown, for plaintiffs.

Charles C. Bulkley, for defendants.

WHEELER, District Judge. This suit is brought for alleged infringement of patent No. 445,217, dated January 27, 1891, and granted to Albert Barrett, for a thermal cut-out, and of another patent withdrawn from this case. In the specification of the remaining patent, the inventor says:

"The invention comprises an attenuated and relatively fragile portion of the circuit; a strong spring, or an equivalent device, capable, under certain conditions, of exerting a strong and sudden force upon the said fragile portion, and of breaking the same, and thus causing a wide gap in the continuity of said circuit; a normal support for the said spring, whereby the

said fragile section is ordinarily freed from the tension thereof; and means, comprising a ball or mass of matter, solid and hard ordinarily, but capable of fusing, softening, or fracture under a moderate degree of heat when closely applied, which I term a 'heat-responsive mass,' and a heat-concentrating coil of the said attenuated conductor closely associated therewith (being, in fact, embedded therein), for enabling the said spring to come promptly and forcibly into action, and to break or tear away the said fragile conducting section to open the circuit. The heat of the circuit, being concentrated by the embedded convolutions, softens, breaks, or fuses the wax, and the spring which exerts a constant pull on the loop held thereby acts promptly to pull out the end loop to break the fine wire, and consequently the circuit, and thus to remove the danger. The spring itself, released by the softening of the wax, flies back with great force to the position indicated in Fig. 4. In fact, so promptly does it fly back that the wire is not merely broken, but usually is also torn completely away from its fastenings, leaving a gap in the circuit as wide as the distance between the binding screws. I have made these appliances sufficiently sensitive to break the circuit under a current developed on short circuit by a single Leclanché cell, and with greater currents they act so promptly that the wax ball seems rather to explode than to soften."

The claims particularly relied upon now are:

"(1) A thermal protector for an electric circuit, and apparatus included therein, comprising a ball or mass of material solid and hard at a normal temperature, but capable of fusing or softening when heated; a loop or hook having one end embedded in the said mass; a fixed ring or bracket for the said mass and its dependent hook; an attenuated and relatively fragile section of circuit conductor extending between terminals, and having a portion of its length coiled within the substance of said heat-responsive mass, and adapted to serve as a heat concentrator therefor; and a power device, such as a spring or weight, normally engaged and supported by the said loop, and held in tension thereby, and adapted to break the attenuated conductor when freed by the development of heat in the embedded coil section of said conductor,—substantially as described.

"(2) In a thermal protector for electric circuits, an attenuated and relatively fragile section of circuit conductor, a portion of which is coiled round the shank of a loop support, and embedded within a mass or ball of material adapted to become plastic when warmed, combined with a rigid support for said mass, and a spring engaged by said loop, and normally held in tension thereby, but adapted to overcome the same and to tear the said loop and the coils secured thereto from the heat-responsive mass on the passage of an unduly strong current through the said coils."

The defendants' cut-out consists of a stem and core, connected by solder in a coil of wire, between two posts, one of which is a spring pulling upon the solder, away from the other, all in the circuit. When an excessive current heats the wire and softens the solder, it yields to the spring, which pulls the stem away from the core and breaks the circuit. The use of a coil in or about softenable material holding a spring to release the spring and break the circuit by the heat of an excessive current was well known in various arrangements before this invention. Barrett was not an inventor of a cut-out composed of such devices, but of his arrangement of such devices in a cut-out. *Railway Co. v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053. The defendants use the same or similar devices, but in different form, arrangement, and mode of operation. The part of the specification quoted and these claims show distinctly that the invention patented is the arrangement of the parts so that the excessive current will heat the coil, and soften the material holding it, and release the

spring, which will rupture the coil and break the circuit. In the defendants' arrangement the excessive current heats the coil and weakens the solder so it will yield to the spring, which pulls it apart and breaks the circuit. The parts of the arrangements are different, and they do not do the same thing in the same way. That arrangements of the same or like devices shown in prior patents would not be commercially operative does not vary this conclusion. This patentee improved their defects in his way, but that did not prevent others from improving the same or other defects in their way, so long as they do not take his. The alleged infringement is not found, and accordingly the plaintiffs do not appear to be entitled to any relief.

Bill dismissed.

KEASBY & MATTISON CO. v. PHILIP OARY MFG. CO.

(Circuit Court, S. D. New York. December 27, 1901.)

BILL—CAUSES OF ACTION—JURISDICTION—IMPROPER JOINDER—DEMURRER.

A demurrer to a bill which includes a cause of action for unfair competition, of which the court is without jurisdiction for want of the necessary diversity of citizenship, with a cause of action on a patent, of which the court has jurisdiction, will be sustained, unless within 10 days plaintiff dismisses the former.

In Equity,

See 110 Fed. 748.

Allen D. Kenyon, for demurrer.

Edward K. Jones, opposed.

WHEELER, District Judge. The bill of complaint includes a cause of action for unfair competition in trade, of which this court is without jurisdiction for want of the necessary diversity of citizenship, with a cause of action on a patent, of which the court has jurisdiction. The demurrer must therefore be sustained for this multifariousness. The plaintiff may, however, discontinue the former within 10 days, and, if this is done, the demurrer may be overruled, the defendant to answer over by February rule day.

HIGGINS OIL & FUEL CO. et al. v. SNOW et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,114.

1. FEDERAL COURTS—FOLLOWING DECISIONS OF STATE COURTS—LIMITATION AND LACHES.

A federal court, although sitting in equity, may follow the rule of decision of the state courts upon the questions of limitation and laches.¹

2. EQUITY—LACHES—SUIT BASED ON LEGAL TITLE.

Under the rule of decision in Texas, where the title of a complainant to lands, upon which he bases his right to relief in equity, is a legal one, capable of being established at law, the doctrine of laches and stale claim does not apply, but his rights are barred only by adverse possession; and on general principles equity will follow the law on such question, where the jurisdiction is concurrent.

3. JUDGMENTS—PERSONS CONCLUDED—PARTY BY REPRESENTATION.

A widow entitled under the laws of Texas to a life estate in one-third of real estate owned by her husband, which consisted of an undivided interest inherited from his father, is not bound by a compromise judgment entered in an action brought by her children and the other heirs of their grandfather against an adverse claimant, to which action she was not a party. The fact that her co-tenants might have recovered her interest in their own names did not render her a party by representation.

4. ESTOPPEL—LIFE TENANT—ACCEPTANCE OF PROCEEDS OF SALE BY REMAINDERMEN.

The acceptance by a married woman, as a gift from her children by a former marriage, of a part of the money received by them in payment for their interest in lands inherited from their father, in which she had a life estate under the laws of Texas, did not estop her from asserting her rights as life tenant as against the purchaser, where her children did not undertake to convey anything more than their own interest.

5. DOWER—ESTATE OF SURVIVING WIFE UNDER TEXAS STATUTE—MINERAL RIGHTS.

The land and marital laws of Texas are derived largely from the civil law, and the life estate given thereby to a surviving wife in the lands of her deceased husband is broader than the common-law dower; such life estate being one which under the civil law could not have been impeached for waste, and which would have carried with it the right to open and work every kind of mines on the property.

6. SAME.

The statute of Texas governing "descent and distribution," after providing for the distribution of the personal estate of an intestate who leaves a surviving husband or wife and children, further provides (Rev. St. art. 1689) that "the surviving husband or wife shall also be entitled to an estate for life in one-third of the land of the intestate, with remainder to the child or children of the intestate or their descendants." *Held*, that the word "land" is employed in such statute in its most comprehensive sense, and that a surviving husband or wife takes a one-third interest for life in the land itself, as such, including not only the surface, but also all minerals therein, and is entitled to a proportionate share of the income or profit derived from the extraction of such minerals during his or her lifetime, whether operations were commenced prior to the death of the decedent, or subsequently by the remaindermen or owners of the other undivided interests.²

¹ State laws as rules of decision in federal courts, see notes to *Griffin v. Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

² Dower in mines, see note to *Black v. Mining Co.*, 3 C. C. A. 316.

7. RECEIVERS—GROUNDS FOR APPOINTMENT—IMPOUNDING INTEREST IN OIL PRODUCTION.

Complainant's husband died intestate, leaving her and two children surviving, and being the owner at the time of his death of an undivided one-sixth interest in certain lands in Texas, in one-third of which, under the laws of the state, complainant took a life estate. No division of the lands affecting complainant's interest was ever made. Subsequently defendants acquired the interests of all of the other tenants in common of the property, including the interest of complainant's children as remainder-men, and drilled numerous oil wells thereon which produced large quantities of oil. *Held*, that complainant was entitled either to one-eighteenth of the net proceeds of the oil produced, or to the income which such share would produce during her lifetime, and that, while she was not entitled to the appointment of a general receiver to take control and management of the property, she was entitled to the appointment of a special receiver to collect and hold such share of the proceeds pending the determination of her rights therein; the defendants being numerous, and for the most part corporations formed for the sole purpose of producing and selling oil.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

The opinion of the circuit court, filed December 6, 1901, is in full as follows:

BRYANT, District Judge. This is an application for the appointment of a receiver. The complainant, Annie E. Snow, a citizen of the state of California, joined pro forma by her husband, G. H. Snow, has filed a bill in equity against the defendants, Higgins Oil & Fuel Company and over 200 others, corporations and natural persons, citizens of the state of Texas, or of states other than California, alleging that she is the owner of a life estate in one-eighteenth, undivided, of the John A. Veatch survey of land in Jefferson county, Tex., less certain subdivisions that are excepted, embracing the greater portion of the Beaumont oil field, and including at the date of the filing of the bill 66 flowing wells, all in the possession of the defendants, who are engaged in marketing the oil. She seeks an accounting in regard to the oil taken and marketed, claiming an eighteenth thereof, and to recover the amount ascertained to be due. The bill also contains the prayer for the appointment of a receiver to take charge of the wells, so that they may be operated pending the litigation without risk or detriment to any party, or, in the alternative, that a receiver be appointed to collect one-eighteenth of the revenues from said wells, and to hold or invest the same pending the litigation, with such powers and duties as the exigencies of the case may warrant. Those of the defendants who have appeared in response to the rule to show cause why a receiver should not be appointed have filed demurrers and answers, and make substantially the following contentions: (1) That the complainant has been guilty of laches in not sooner asserting her claim, and should, therefore, be denied equitable relief; (2) that as to 500 acres of the land she is concluded by a judgment rendered in 1887 in a suit brought by her children and others, in which the 500 acres was awarded to one Charles L. Cleveland, a defendant in the suit; (3) that she received and used money from the estate of her first husband, Andrew A.

Veatch, through whom she inherited the life estate here involved, equivalent to her interest in this land, and also received and used a portion of the proceeds of a sale made by her children of their interest, and is therefore estopped from asserting any claim here; (4) that as a life tenant the complainant is entitled to no interest in the oil produced, her estate being limited to the surface; and (5) that in no event should a receiver be appointed. The complainant filed a general replication.

It was established on the hearing that the land in question, about 3,400 acres, was granted by the Mexican government to John A. Veatch, February 6, 1835, and was owned by him at his death, April 24, 1870. He died intestate, and this land was inherited by his six children, one of whom was Andrew A. Veatch. The complainant was married to said Andrew A., January 20, 1869, and lived with him as his wife until his death, intestate, March 11, 1871, when, under the law of descent and distribution in force in Texas, an estate for life in one-third of his one-sixth interest vested in her, with remainder to their children, who were two in number. Afterwards on March 25, 1875, the complainant was married to her present husband, G. H. Snow, and they have ever since lived together as husband and wife. Prior to the year 1882 this land, which is practically all level prairie, lay out, wild and unoccupied. It was about that time inclosed in a pasture with other land by parties who paid the taxes for the use of the land until about the year 1896, when the fences were taken down and it became again uninclosed, with the exception of a few small tracts, of a few acres each, that were put into cultivation subsequent to 1896. Thus it was, nearly all lying out and unfenced, and used as commons by the public, when petroleum oil was discovered in January of the present year. The first well was on the Pelham Humphreys survey, a short distance from the line of the Veatch. Since then many wells have been sunk on the Veatch, and others are being drilled; but the present oil territory thereon does not exceed 200 acres. That portion, however, is thick with derricks, and has upon it tanks, pipe lines, and railroad tracks, and the surface soil is impregnated with petroleum, so that agriculture, or any use, except for the production of oil, is prevented. The greater portion of the remainder of the survey is shown to be capable of cultivation and adapted to rice culture or pasturage. Affidavits were read showing that for these purposes it has a value of from \$15 to \$35 per acre; but it is under a lease for oil mining. The wells have been drilled, and the tanks and pipe lines constructed, by the defendants, at great expense, as shown by their answers. With the exception of the complainant's interest, they own the land held by them, respectively, deriving title by mesne conveyances from the heirs of John A. Veatch for all except the 500 acres known as the "Charles L. Cleveland Tract," and they hold that under like conveyances from Cleveland. The latter acquired title to this as against all the children and grandchildren of John A. Veatch by a compromise judgment of the district court of Jefferson county, rendered June 7, 1887, in a suit brought by them. The complainant's two children were parties plaintiff, represented by their uncle, Samuel H. Veatch, as next friend;

but she was not a party. Afterwards these children executed powers of attorney to their uncle, and he conveyed their interests thereunder, accounting to them for \$300 as proceeds of the sale. This was in 1891, and it seems that they gave their mother a part of the money, and it was used in support of the family. After the Cleveland judgment some of the land was platted as a town, with lots, blocks, streets, and alleys, and some lots were sold; but no evidence was offered showing that the complainant knew of this,—that is, had actual knowledge. It also appears that she never exercised any acts of ownership over the land, or asserted any claim to it, until after the oil discovery. On May 25, 1901, however, she made a written demand on each of the defendants, the Higgins Oil & Fuel Company, the J. M. Guffey Petroleum Company, the Heywood Oil Company, the Lone Star & Crescent Oil Company, and the National Oil & Pipe Line Company, to be let into joint possession, and for an accounting as to the oil taken by them, which was refused. Of these defendants only one, the J. M. Guffey Petroleum Company, states in its answer the amount or value of oil marketed. All the defendants who have answered and are operating wells show their solvency and ability to respond to any judgment that may be obtained against them in the case. In fact, the complainant does not deny their present solvency, but makes a sworn averment as follows:

"Your orator further shows that the property of said corporate defendants operating and that will operate wells on said land consists mainly, and in some instances solely, of the interest owned by them in said land and in said wells; that the land is of but little value, except for the oil, and if said defendants are allowed to exhaust said oil, and pay the revenue to their stockholders, many of whom reside and have their property beyond the limits of the state of Texas, as your orator fears they will do, there would be no available and adequate fund and property out of which your orator could be compensated; that said defendants operating said wells are antagonistic and hostile to your orator, and therefore cannot be relied upon to render an impartial and just account of their operations; also that the oil is taken from the wells by means exclusively within the control of the defendants, and that the complainant has no way of ascertaining and proving by disinterested testimony the amount of oil taken and marketed from time to time."

The first question presented has been frequently decided by the supreme court of Texas, where it is held that, if the complainant's title is a legal one, as in the present case, capable of being established at law, the doctrine of laches and stale claim does not apply. It is simply a question of adverse possession. *San Patricio Corp. v. Mathis*, 58 Tex. 242; *Moss v. Berry*, 53 Tex. 632; *Williams v. Conger*, 49 Tex. 602; *House v. Brent*, 69 Tex. 30, 7 S. W. 65; *Lumber Co. v. Pinckard* (Tex. Civ. App.) 23 S. W. 723; *Land Co. v. Hyland* (Tex. Civ. App.) 28 S. W. 206. And, though sitting in equity, this court may follow the rule of decision in the state court on the question of limitation and laches. *Balkam v. Iron Co.*, 154 U. S. 177, 14 Sup. Ct. 1010, 38 L. Ed. 953; *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. 137, 22 L. Ed. 331. Again, since the complainant could go into a court of law and establish her title, and then come to this court for the desired equitable relief, there is no reason why she should be denied it in the first instance. In cases, thus, of

concurrent jurisdiction, equity follows the law, and a court of equity will consider itself bound by the same rules that would apply in a court of law. *Godden v. Kimmell*, 99 U. S. 201, 25 L. Ed. 431; *Metropolitan Nat. Bank v. St. Louis Dispatch Co.*, 149 U. S. 448, 13 Sup. Ct. 944, 37 L. Ed. 799; *Reugan v. Sabin*, 3 C. C. A. 578, 53 Fed. 420; 11 Am. & Eng. Enc. Law, 476.

The contention that the complainant was bound by the judgment rendered in the suit against Cleveland, when she was not a party to it, cannot be sustained. The fact that her co-tenants might have recovered for her in their names does not alter the matter. *Stovall v. Carmichael*, 52 Tex. 383; *Walker v. Read*, 59 Tex. 187; *Bass v. Sevier*, 58 Tex. 567; *Jeffus v. Allen*, 56 Tex. 195; 1 Black, Judgm. 554. Nor can it be said that she was a party by representation. *Williamson v. Jones* (W. Va.) 19 S. E. 444, 25 L. R. A. 222; 15 Enc. Pl. & Prac. 627.

Coming to the next point, the proof offered on the hearing fails of showing that the complainant received from the estate of Andrew A. Veatch in California any more than she was entitled to as her part thereof, so that it becomes unnecessary to say what would have been the effect if she had appropriated more than her share. But it is urged that she estopped herself from asserting her life estate when she accepted as a gift, and used a part of the money realized by her children from the sale of their interests. There is no element of estoppel in it. They had not attempted to sell her interest, or the land itself; but if they had, and she had used the money, she would not have been estopped, because she was a married woman. *Johnson v. Bryan*, 62 Tex. 623; *Owens v. Land Co.* (Tex. Civ. App.) 32 S. W. 189, 1057.

A difficult question arises in regard to the rights of a life tenant, as respects petroleum oil obtained from the land. There seems to be no decision in Texas on the point, and but very few by the federal courts; in fact, none directly in point. The statute under which the complainant acquired her life estate appears under the head, "Descent and Distribution," and reads as follows:

"When any person having title to any estate of inheritance, real, personal or mixed, shall die intestate as to such estate, and shall leave a surviving husband or wife, the estate of such intestate shall descend and pass as follows: (1) If the deceased have a child or children or their descendants, the surviving husband or wife shall take one-third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants." Rev. St. Tex. art. 1689.

It is noticeable that all property is classified, and its mode of descent regulated under two heads: First, "personal property," and, second, "land." The latter term is therefore employed in its most comprehensive sense, and is nomen generalissimum. A life estate is given the survivor in one-third of the land of a deceased husband or wife, in this sense necessarily, because all property of inheritance that is not land is classified as personal property, and if the mineral rights that belonged to Andrew A. Veatch by virtue of his fee simple

ownership of one-sixth of this land did not pass, one-third to his widow for life, as land, it passed as personal property, one-third to her absolutely. The life estate is given, not in the surface of the land, but in the land as land, and it is elementary that the land itself in legal contemplation extends from the sky to the depths. Coke says:

"The term 'land' includes, not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings; and it has an indefinite extent upwards as well as downwards, so as to include everything terrestrial under or over it." Co. Litt. 4a.

Blackstone says:

"Land comprehends all things of a permanent and substantial nature, being a word of very extensive signification; also, if a man grants all his lands, he grants all his mines of metals and his fossils, his woods, his waters, and his houses, as well as his fields and meadows." 2 Bl. Comm. 16-18.

Washburn says:

"Land is always regarded as real property, and ordinarily whatever is erected or growing upon it, as well as whatever is contained within it or beneath its surface, such as minerals and the like, upon the principle that '*cujus est solum, ejus est usque ad cælum*' in one direction, and '*usque ad orcum*' in the other." 1 Washb. Real Prop. 3.

The American and English Encyclopedia of Law (old edition) defines it as follows:

"Land is the surface of the earth, whatever is attached to it by nature or by the hand of man, and all that is contained within or below it." Vol. 19, p. 1032.

In *Koen v. Bartlett*, 23 S. E. 665, 31 L. R. A. 130, 56 Am. St. Rep. 887, the court discussed this question of whether a life estate in land is a mere interest in the surface, and said:

"It must be conceded that the life tenant is vested with the ownership thereof as land, as being seised of the immediate freehold of possession, which possession extends from top to bottom, to the subsurface as much as the surface, in other words, to the land as a whole, or the tenant for life has a freehold, as well as a tenant in fee, and that the owners of the inheritance have no more right to approach by a tunnel, and break and enter his superficial close, than they have to break and enter his close on the surface."

Lenfers v. Henke (Ill.) 24 Am. Rep. 263, is to the same effect, and in that case the court said:

"Land comprehends all things of a substantial nature, which includes all ground, soil, or earth whatever, and hath in its legal signification an indefinite extent upwards as well as downwards. Minerals are a part of the land itself, and, if not susceptible of division, the wife is entitled to be endowed of the profits and rents."

According to all the cases and text-books a life estate in land invariably extends to all minerals beneath the surface; but, the right being merely to use and enjoy, and not to dispose of, the land, the difficulty arises in determining what is proper use and enjoyment, and when a life tenant may and when he may not sever and dispose of minerals without being guilty of waste. It is obvious that a life tenant, if allowed to mine, might get a much larger proportion of the benefit of the estate than he would ordinarily receive. On the other

hand, if not allowed to mine, he might get much less. The courts have undertaken to draw the line, and it may be stated as a general rule, at common law, that, while a life tenant may continue to work mines that were open when the tenancy commenced, and this even to exhaustion, and may construct new approaches, he cannot open new mines, for to do so would be to commit waste. The rule allowing life tenants to mine, when the operations are commenced before the tenancy is created, is based on the theory that in such cases mining is a mere mode of use and enjoyment, and to extract minerals is but to take the accruing profits of the land. *Raynolds v. Hanna* (C. C.) 55 Fed. 801; *Koen v. Bartlett*, 23 S. E. 664, 31 L. R. A. 130, 56 Am. St. Rep. 884; *Seager v. McCabe*, 52 N. W. 299, 16 L. R. A. 247; *Wentz's Appeal*, 106 Pa. 301. The matter resolves itself, then, into a question of when and under what circumstances mining may be adopted as a mode of using the land. The authorities all agree that there is no restriction when the land has once been used for mining purposes before the life tenant comes in; and they now go a step further, and hold that mining will be allowed if the owner of the preceding estate has fixed on it the character of mining land by lease or the like, though no mines were opened. *Priddy v. Griffith* (Ill.) 37 N. E. 999, 41 Am. St. Rep. 397; *Koen v. Bartlett*, supra; *Seager v. McCabe*, supra.

In the case at bar, the remainder-men, being also the owners of seventeen-eightieths absolutely, have taken possession of the entire property to the exclusion of the life tenant, and have converted it into an oil field. The latter has committed no waste, and the point to be decided is, not whether she might drill for oil herself, but whether she may elect to acquiesce in the changing in the mode of use. The estates were joint when the change was made, and no partition was demanded. Consequently, any advantage that ensues must inure to the benefit of all the co-tenants in proportion to their interests. *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263, is an applicable authority, in principle at least. The case involved two questions: (1) Whether a widow is entitled to dower in mines not open when her right of dower attached, but opened by the reversioner before assignment; and (2) whether a certain verbal agreement was valid as an assignment of dower. Both were decided in the affirmative. After announcing that the first question presented was one of first impression, the court proceeds with a review of the authorities. Speaking of the rule that a life tenant or dowress may not open new mines, the court observes:

"In many of the later cases, as well as the earlier cases, no reason whatever is assigned for the adoption of the rule; but, where any is assigned, it is, the dowress cannot open new mines when discovered, because she would be committing waste, which she is not permitted to do. On principle, why may she not be endowed of mines opened by the heir or owner of the fee, after the dower attaches and before there has been any assignment? By all the decisions, it is not waste for her to work mines opened, although the same had been abandoned before the death of the husband. She may construct new approaches, and not be guilty of waste. The reason for the rule adopted that bars dower in all mines not opened during the lifetime of the husband failing, the rule ought not to be extended to cases not strictly within its meaning."

And finally:

"The heir, by opening the mines, has destroyed all other profits of the land. There is no mode of enjoying mines, excepting by working them. If this cannot be done, they are profitless to the dowress. As we have seen, it is not waste in her to work mines opened by her husband, and, by a parity of reasoning, we reach the conclusion it is not waste for her to work mines opened by the heirs before assignment of dower."

Priddy v. Griffith (Ill.) 37 N. E. 999, 41 Am. St. Rep. 397 was decided by the same court, and language to the same effect used.

There is a slight difference between the facts of *Lenfers v. Henke* and the case at bar. In that case the widow's interest was consummate dower, while here it is a vested life estate in an undivided interest. But it is not perceived how this could affect the principle involved. The reasoning of that case is applicable here, and seems unanswerable, and it is certainly in keeping with the tendency of modern decisions. Still, it recognizes the rule that a life tenant may not open new mines, and it is not in conflict with any of the cases cited by counsel for defendants, unless it be *Coates v. Cheever*, 1 Cow. 460. It seems to have been there held by one of the courts of New York in 1823 that the widow was not dowable of mines opened by the heir after the husband's death. The land there had been devoted to mining purposes, however, by the husband, in his lifetime, and the decision for that reason was clearly wrong. *Billings v. Taylor* (Mass.) 20 Am. Dec. 533; *Gaines v. Mining Co.*, 33 N. J. Eq. 603; *Priddy v. Griffith*, supra; *Koen v. Bartlett*, supra.

There is another well-established principle that supports the holding of *Lenfers v. Henke*, and it is this: As against the heir and his vendees, the widow is entitled to dower in her deceased husband's land according to value and condition at the time dower is assigned. A full discussion of this occurs in *Allen v. McCoy*, 8 Ham. 418. See, also, 1 Washburn, 238-240; 2 Scribner, 595; 5 Am. & Eng. Enc. Law (old) 929. The same rule applies in partition between cotenants, except that actual improvements are allowed to the one making them, but enhancements from independent causes, such as growth in the population of a town or discovery of mineral deposits, may be shared by all.

Thus far the question has been treated without distinction between conventional life estates and common-law dower on the one hand, and life estates inherited by the law of heirship and succession on the other. In *Seager v. McCabe*, supra, the supreme court of Michigan, construing a dower statute of that state, reviewed the decisions at considerable length, made the distinction, and announced the following conclusion:

"The rules applicable to a country where landed estates are large and diversified, where the laws of inheritance are exclusive, where the theory of dower is subsistence merely, and where there is a strong disposition to free estates from even that charge, do not obtain in a commonwealth like ours, where estates are small, and the policy of our laws is to distribute them with each generation, where dower is one of the positive institutions of the state, founded in policy, and the provision of the widow is a part of the law of distribution, and the aim of the statute is, not subsistence only, but provision commensurate with the estate. In the present case the grant is by

operation of the statute, giving the use of all the lands of which the husband was seised. The grant must be held to include the use of these lands, irrespective of whether mines are opened upon them before or after the husband's death."

The statute there construed was not as broad as the one of Texas, and was directed at the subject of dower. The Texas statute makes no mention of dower, but defines that which under the civil law would have been a usufruct,—an estate not impeachable for waste. This is specially significant, when it is remembered that the Texas system of land titles and laws of marital rights is devised largely from the civil law. *Carroll v. Carroll*, 20 Tex. 743. Under the civil law the usufructuary had a right to seek for and open every kind of mines, stone and lime quarries, chalk pits, and gravel banks. 1 Dom. Civ. Law, 843; 2 Dom. Civ. Law, 945-968; *Neel v. Neel*, 19 Pa. 323.

Another noticeable feature of the statute is that it gives the surviving husband the same estate in the land of the wife upon her death that it gives her in his land at his demise. This is a complete answer to the argument that the rule shall depend upon whether mines are open or not at the time of the husband's death, because he, by reason of his position as the head of the family, is deemed to fix for the use of his property commensurate with the necessities of his family. I think the complainant is entitled to one-eighteenth of the oil produced, after deducting all expenses of producing and marketing. If she is not entitled to the net one-eighteenth absolutely, then she is entitled to have such net yield impounded and put at interest, the interest to be paid to her during her life, while the corpus of the fund is preserved for the remainder-men. *Blakley v. Marshall* (Pa.) 34 Atl. 564; *Wilson v. Hughes* (W. Va.) 28 S. E. 781, 39 L. R. A. 292; *Bryan, Petroleum*, 41; *Macswinney, Mines*, 65. In neither event, however, should a court of equity take from the defendants the control and management of the common property. But a special receiver, more in the nature of an auditor, will be appointed for the purpose of taking and keeping accurate accounts of all oil marketed by the defendants, together with prices obtained and expenses incurred, and to collect, receive, and hold, subject to the orders of the court, one-eighteenth of the net amount of all oil so marketed. *Ulman v. Clark* (C. C.) 75 Fed. 868, *Williamson v. Jones*, 19 S. E. 436, 25 L. R. A. 222.

From the evidence introduced it seems at least probable that the lines of the Veatch and Humphreys surveys coincide, and that the Ingalls and Douthett surveys are invalid. This, however, would still leave the location of the line in dispute. The line fixed by the judgment in the case of *Pasture Co. v. Cleveland* (Tex. Civ. App.) 26 S. W. 93, appears to have been acted upon as an agreed line for some years, and for the purposes of the present order it will be considered as the true line.

F. C. Proctor, Geo. C. Greer, Foster Rose, Gustave Lemle, D. Edw. Greer, A. T. Watts, and Wm. P. Ellison, for appellants.

Amos L. Beaty and R. R. Hazlewood, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. As, by the record, the appellee, Mrs. Snow, is seised of an estate for life in one undivided one-eighteenth part of the lands described in the decree appealed from, and to that extent is a tenant in common with the owners of the fee, we all agree that she is interested in and entitled to an accounting for all oil developed and produced on and from the said lands to the prejudice of her estate, and to that end a receiver was properly appointed pending the litigation necessary to finally determine the full rights of the appellee. On this appeal no other questions need be passed upon.

The decree of the circuit court is affirmed, with costs.

UNITED STATES v. TOWNSEND et al.

(Circuit Court of Appeals, Second Circuit. January 4, 1902.)

No. 78.

TARIFF ACTS—CONSTRUCTION—"PROFESSIONAL PRODUCTION OF A SCULPTOR."

In construing tariff statutes congress must be assumed to use words and phrases in the sense in which they have been applied by the treasury department and executive and administrative officers under earlier statutes, and, so construed, the phrase "professional production of a sculptor," as used in Tariff Act 1897, par. 454, providing that "the term 'statuary' * * * shall be understood to include only such statuary * * * as is the professional production of a statuary or sculptor," must be considered as synonymous with "productions of a professional sculptor."¹

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court reversing a decision of the board of general appraisers, which affirmed the assessment for duty of certain marble statuary.

See 108 Fed. 801.

Henry C. Plast, for appellant.

Howard T. Walden, for appellees.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

PER CURIAM. The articles in question are marble and alabaster busts, single figures, groups, and bas reliefs, which are designed for use chiefly for memorial or cemetery and church purposes, and include such subjects as Faith, Hope, Memory, Sorrow, the Resurrection, etc. They were assessed for duty, under paragraph 115 of the tariff act of 1897, as "manufactures of marble," at 50 per centum ad valorem. The importers contended that they should be assessed under paragraph 454, which reads as follows:

"454. Paintings in oil or water colors, pastels, pen and ink drawings, and statuary, not specially provided for in this act, twenty per centum ad valorem; but the term 'statuary' as used in this act shall be understood to

¹ Interpretation of commercial and trade terms in tariff laws, see note to Dennison Mfg. Co. v. U. S., 18 C. C. A. 545.

include only such statuary as is cut, carved or otherwise wrought by hand, from a solid block or mass of marble, stone or alabaster, or from metal, and as is the professional production of a statuary or sculptor only."

There was a great deal of evidence presented to the circuit court which was not before the board of general appraisers, and which materially differentiated the case from the one it passed upon. The judge who heard the cause below discussed the questions presented in a careful opinion, in the reasoning and conclusions of which we fully concur. The appellant calls attention to the fact that in paraphrasing paragraph 454 that opinion states the concluding clause as requiring the statuary to be the "production of a professional sculptor," when the phrase used in the act is "the professional production of a sculptor." The change of phraseology is immaterial. It is a familiar rule of construction of tariff statutes that congress must be assumed to use words and phrases in the sense in which they have been applied by the treasury department and executive and administrative officers of the government under earlier statutes which contained the same words and phrases. *Robertson v. Downing*, 127 U. S. 612, 8 Sup. Ct. 1328, 32 L. Ed. 269. The phrase "professional production of a sculptor" is found in successive tariff acts for some years past. Under date of February 6, 1880 (Treasury Synopsis, 4416), the secretary of the treasury, in a letter to the secretary of state, says:

"The terms 'professional productions of a sculptor' and 'productions of a professional sculptor' are considered as having the same signification, and the articles must be a production of a professional sculptor or statuary in the true definition of that term, in order to be admissible at a duty of," etc.

And the instructions as to consular certificates evidently regard the one phrase as a synonym of the other. It must be assumed that congress used the phrase it chose with a like understanding of its meaning.

The decision of the circuit court is affirmed.

In re HENSCHEL et al. (two cases).

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

Nos. 74, 80.

1. BANKRUPTCY—CHOOSING TRUSTEES.

Under Bankr. Act 1898, § 56a, requiring matters submitted to the creditors to be passed on "by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present," claims allowed are not to be counted in choosing a trustee, where the creditor is not present, and the power of attorney of his proxy is insufficient.

2. SAME—PROXIES—CERTIFICATE OF NOTARY.

A notary's certificate of acknowledgment to power of attorney to proxy of bankrupt's creditor is sufficient though having no venue, as it complies with the form prescribed pursuant to Bankr. Act 1898, § 30, vesting the supreme court with power to prescribe rules and forms.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

William M. K. Olcott, for petitioners.

E. J. Myers, for respondent.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

WALLACE, Circuit Judge. This is a petition of review of an order of a court of bankruptcy confirming the appointment of a trustee. 109 Fed. 861. At a meeting of the creditors of the bankrupt to choose a trustee of his estate 10 creditors, whose claims aggregated \$8,173, voted for Mr. Whitney, and 4 creditors, whose claims aggregated \$2,048, voted for Mr. Hough. The court confirmed the choice of Mr. Hough as trustee, he having been appointed such by the referee in bankruptcy upon the theory that the creditors had made no choice. This ruling proceeded upon the consideration that there were 24 creditors present at the meeting, and consequently the votes cast for Mr. Whitney were not those of a majority. In this number of 24 were 10 who were not allowed to vote. Proxies for these votes had been executed to certain attorneys, and these attorneys offered to vote for Mr. Whitney, but the votes were excluded by the referee upon the ground that the proxies were not valid. The district court, in confirming the choice of Mr. Hough, besides deciding that a majority of the votes present had not been cast for Mr. Whitney, also decided that Mr. Hough was the choice of the creditors, because 8 of the votes cast for Mr. Whitney were cast by proxies who voted on defective powers of attorney. We are of the opinion that creditors whose claims have been allowed are not present at a meeting within the meaning of section 56a of the bankrupt act, when they are not permitted to participate in its proceedings. The language of the clause is as follows:

"Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided."

The meaning of the clause is to vest the power of creditors in those who are present, and not allow the proceedings to be delayed by the absence of those creditors who do not take sufficient interest to participate; but it is not its meaning to treat those as present who are excluded from voting by the referee. The court below construed it as meaning that the proceedings are to be controlled by the majority in number and amount of the "claims" present at the meeting, and was of the opinion that the claims sought to be represented by the excluded proxies were present at the meeting. We do not understand how claims are present at a meeting when the creditors themselves are absent, and those who seek to represent the claims are not allowed to represent them. Such claims are present only in the sense that every claim that has been proved is present. The proof of claim has been filed with the register, and may be on his desk during the meeting, but it is not present for any vital purpose. The proxy who is excluded from participation in the meeting is for all practical purposes precluded from representing the claim, and is absent from the meeting in legal contempla-

tion. We agree with the circuit court of appeals for the Sixth circuit that of the creditors giving proxies those only are to be counted whose powers of attorney were regarded as authorizing the attorney to appear and participate in the meeting. In *re McGill*, 45 C. C. A. 218, 106 Fed. 57.

The defects in the eight powers of attorney to the proxies voting for Mr. Whitney consisted in the absence of a venue to the notary's certificate of acknowledgment. The acknowledgment conformed literally to the form prescribed by the supreme court. Form No. 21 (18 Sup. Ct. xxviii.). In *People v. Snyder*, 41 N. Y. 397, a justice of the supreme court of the United States, in taking the acknowledgment to a deed, omitted the venue, and the question whether it was a valid acknowledgment was presented for decision. The court, in holding the acknowledgment to be sufficient, said:

"This officer was entitled to take the acknowledgment, and it must be presumed that he did it within the limits of his jurisdiction, even though that is not stated to have been the case in the certificate which he made, for the legal presumption is in favor of the validity of the acts of public officers where nothing appears warranting a different conclusion."

In *Carpenter v. Dexter*, 8 Wall. 513, 19 L. Ed. 426, the venue to the certificate of a notary was simply, "State of New York," and it was objected that the certificate had no assignable locality, and was therefore fatally defective; but the court in considering the objection used this language:

"The commissioner of deeds in New York had authority to act only in his city, and it will be presumed, although the state is named, that the officer exercised his office within the territorial limits for which he was appointed."

The proposition that, when the official character of the person taking the acknowledgment appears in the certificate, his authority and jurisdiction are to be presumed, is generally recognized by the authorities. There are, however, respectable authorities to the effect that the certificate is defective when it contains no venue, and the place where it was taken cannot be ascertained by a reference to the instrument to which it is attached. Bankr. Act, § 30, vests with the supreme court the power to prescribe rules and forms to be observed in proceedings under it. As the certificates in question comply accurately with the form which has been prescribed pursuant to this statutory authority, it must be deemed sufficient.

We conclude that the district court erred in approving the action of the referee. The cause is remitted to the district court with instructions accordingly.

SUN PRINTING & PUBLISHING ASS'N V. EDWARDS.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 71.

1. PAROL EVIDENCE TO VARY WRITTEN CONTRACT—ADMISSIBILITY.

Where letters between plaintiff and defendant show a contract by which plaintiff was employed as superintendent of defendant's printing and mechanical departments for a certain term at a certain salary, with power to employ and discharge all help, parol evidence is not

admissible, in an action against defendant for the wrongful discharge of plaintiff, to show conversations and negotiations between the parties prior to the exchange of letters, for the purpose of showing that the contract actually made by the parties required plaintiff to bring with him into defendant's service a force of competent compositors and stereotypers, etc., as such oral agreement, relating to the same subject-matter, is not a collateral agreement which may be established by such evidence.

2. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—IMPLIED CONDITIONS.

The contract implies an undertaking on the part of plaintiff that he is competent to discharge his duties as superintendent of defendant's printing establishment, and that he will discharge such duties faithfully.

3. SAME—EVIDENCE—ADMISSIBILITY.

Where plaintiff introduces evidence of the conversations and negotiations between the parties before the exchange of letters constituting the contract, evidence of such conversations and negotiations is admissible on behalf of the defendant.

In Error to the Circuit Court of the United States for the Southern District of New York.

Franklin Bartlett, for plaintiff in error.

Thos. F. Bayard, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment entered for the plaintiff upon the verdict of a jury.

The action was for breach of contract. The plaintiff alleged in his complaint that a written contract had been made with him by the defendant, evidenced by a letter written by him to the defendant, and the defendant's letter in reply, by which he was to be employed by the defendant for the term of two years, and that he was discharged by the defendant, without cause, shortly after he entered upon the performance of his duties. The letter written by the plaintiff was as follows:

"I understand that I am to be employed by your corporation for the term of at least two years at an annual salary of \$5,200, payable in equal weekly payments of \$100 each. I am to have entire control of all the printing and mechanical departments and appliances of your corporation, and am to employ and discharge, at my discretion, all the employees of said departments. The office of 'superintendent of printing' is to be created, and by that designation I shall expect to be known. I submit this statement in full to you, in order that, if you see fit to take me on, there may be no misunderstanding as to the terms agreed upon, by either side."

The defendant's letter in reply was an unconditional assent to the contents of the plaintiff's letter.

The defendant's answer, among other defenses, besides alleging that the plaintiff was discharged for justifiable cause, alleged that the letters did not contain the whole agreement between the parties, and set up, in substance, that the plaintiff, on his part, undertook to bring with him into the employ of the defendant a force of 200 experienced and qualified compositors and stereotypers, and to supervise and manage the composing and stereotyping departments of the defendant in a manner to relieve the defendant of all trouble

in printing its newspapers, and that he failed to fulfill these promises. The principal assignments of error are addressed to the rulings of the court at the trial in excluding evidence.

The trial judge excluded evidence offered by the defendant of the conversation and negotiations between the parties preliminary to the exchange of the letters. So far as this evidence was offered by the defendant for the purpose of establishing the agreement set up in its answer, we think that it was not competent.

When a contract is consummated by writing, the presumption of law is that the written instrument contains the whole of it. The agreement is to be ascertained exclusively by its terms, and oral representations or stipulations preceding or accompanying its execution, differing from or not contained in the instrument, cannot be proved. But when the writing is of a nature to import that it was not intended to embody the entire contract between the parties, oral evidence to prove the whole terms is admissible. An example of such a writing is a memorandum of purchase or sale. *Allen v. Pink*, 4 Mees. & W. 140; *Potter v. Hopkins*, 25 Wend. 417; *Filkins v. Whyland*, 24 N. Y. 338. So, also, a parol collateral agreement made prior to or contemporaneous with the written agreement, which does not qualify the terms of the instrument, and is not inconsistent with them, may be given in evidence. But in applying this rule the question what collateral agreements do qualify the written contract, and what do not, is one upon which there is much divergence in the adjudications. Thus, in *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512, there was an agreement in writing by which the plaintiff agreed to furnish, and the defendant to purchase, certain machines upon terms and at times specified; and the defendant was permitted to prove a parol agreement at the same time by which the plaintiff guaranteed that the machines should be so made that they would do the defendant's work satisfactorily, and, if not, that the plaintiff would take them back. On the other hand, in *Seitz v. Machine Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837, there was a written contract whereby the plaintiff agreed to supply the defendant with a specified machine, and put it in operation under the superintendence of a competent man, and the defendant agreed to pay therefor a specified sum at specified times; and the court held the defendant could not be permitted to prove an oral agreement, entered into at the same time, that the machine purchased should have a certain capacity, and be capable of doing certain work. In referring to the rule that the existence of a separate oral agreement as to any matter to which the written agreement is silent, and which is not inconsistent with its terms, may be proved by parol, the court, in its opinion, used this language:

"But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it."

This court must be controlled by the principle of that decision. See, also, *Bast v. Bank*, 101 U. S. 93, 25 L. Ed. 794; *Godkin v. Monahan*, 27 C. C. A. 410, 83 Fed. 116, 53 U. S. App. 604.

The implied conditions of a contract are as much a part of its terms as the written parts, and the rule which forbids the proof of a collateral parol agreement which is inconsistent with the written terms equally forbids the proof of one which is inconsistent with its implied conditions. As the trial judge correctly stated in his instructions to the jury, in this case the agreement between the parties implied an undertaking on the part of the plaintiff to be competent to discharge the duties of a superintendent of the defendant's printing establishment, and to discharge them faithfully; and this was the extent of his undertaking. By the contract, he was to have entire control of the printing department, and proof that he agreed to employ a force of a specified number of men, if it would not have established an undertaking inconsistent with that provision of the contract, certainly would have established one that did not relate to a distinct subject, but was so closely related as to form a part of it. Proof that he agreed to discharge his duties as superintendent in such manner as to accomplish a particular result would establish an undertaking inconsistent with the implied terms of the agreement. As, of the undertakings sought to be proved, one related to the same subject as the written contract, and the other would have qualified its purport, they were not available to the defendant.

Although, in excluding the evidence for the purpose of establishing the alleged collateral agreement the ruling of the trial judge was correct, we think the preliminary conversations between the plaintiff and the managing agents of the defendant were admissible on other grounds. The plaintiff had given testimony in respect to these conversations, and had detailed what was said; and when the defendant offered to prove its version of them, and the objection was made that the evidence would contradict the terms of the written contract, the defendant insisted upon its right to prove them because the plaintiff had been allowed to do so. Prior conversations and negotiations are often competent when the subject-matter of a contract requires the aid of extrinsic evidence to ascertain its meaning. It was important in this case to know what kind of a printing establishment was contemplated by the contract, as the question of the plaintiff's competency, and the right of the defendant to discharge him for inefficiency, would measurably depend upon the character of the establishment he was to supervise and manage. Was the defendant's printing department to be maintained on the scale, and its business conducted generally, in the future as in the past, or did the parties contemplate a new departure, and the maintenance of a larger or smaller concern? The contract is silent on these matters, and it may well be that the evidence excluded was competent for the purpose of making that determinate which was left vague and uncertain. But whether the evidence was competent in this view or not, it was admissible because the plaintiff, having opened the door and availed himself of its benefit, was foreclosed from precluding the defendant from its benefit. The testimony given by the plaintiff was of a character likely to influence the jury, and we cannot doubt it was prejudicial to the defendant.

The judgment is reverse.

METROPOLITAN ST. RY. CO. V. HUDSON.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 22.

1. STREET RAILWAY—INJURY TO PASSENGER—INSTRUCTIONS.

Where, in an action for injuries to a passenger on a street car, the issues are whether plaintiff was injured by the careless starting of the car after it had stopped or by her own negligence in attempting to board it before it had stopped, it is error to instruct that if the car, even if not quite at a standstill, was moving with such extreme slowness that a person might fairly undertake to board it, and while plaintiff was about boarding it the conductor suddenly started it, so that it moved forward with a jerk, defendant's negligence would be established.

2. SAME—APPEAL—ASSIGNMENT OF ERROR.

An assignment of error complaining of an erroneous instruction is without merit where the court, on plaintiff's exception, qualified the instruction, and plaintiff took no further exception.

3. SAME—MEASURE OF DAMAGES—INSTRUCTIONS.

In an action for injuries, an instruction not to award plaintiff any damages for hysteria not directly caused by the accident is properly refused, as it restricts the recovery to damages directly caused by the accident, while those indirectly resulting from it may also have been recoverable.

In Error to the Circuit Court of the United States for the Southern District of New York.

Theo. H. Lord, for plaintiff in error.

J. Aspinwall Hodge, for defendant in error.

Before WALLACE, Circuit Judge, and TOWNSEND, District Judge.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff in an action for negligence rendered upon the verdict of a jury. The only assignments of error which have been argued relate to an instruction given by the trial judge to the jury in respect to the negligence of the defendant, and his refusal to give one in respect to the question of damages requested by the defendant.

The issues upon the trial, aside from those relating to the damages, were whether the plaintiff was injured by the careless starting of the defendant's car after it had stopped to receive passengers, or whether she was injured by her own negligence in attempting to board it before it had come to a stop. The trial judge instructed the jury that "if the car, even if not quite at a standstill, was still moving with such extreme slowness that a person might fairly undertake to board it, and while plaintiff was about boarding it the conductor suddenly started it, so that it moved forward with a jerk," negligence on the part of the defendant would be established.

This instruction was apparently given under the impression of the trial judge that the plaintiff may have received her injury while attempting to board the car after it had come to a stop and before it had got under much speed. The evidence did not authorize such a theory, and, if it had, we think the instruction would not have been

correct without further qualification. Unless a car has reached one of its regular stopping places, or its speed has been slowed to permit an intending passenger to board it, or some invitation, express or implied, to board it has been given by those in charge, the conductor is under no obligation to anticipate that any person will attempt to board; and if, in ignorance of such an attempt, he causes the motorman suddenly to put on speed, he does not violate any duty towards an intending passenger. Conductors of street cars are at liberty to regulate the movements of their cars as they see fit so long as they do not violate their duties to others. If, however, while a car is proceeding slowly, the conductor is made aware that an intending passenger is attempting to board it, although it may not be his duty to stop the car, common prudence certainly forbids that he start it suddenly forward. No man is at liberty to do an act unnecessarily which he knows or ought to know is likely to imperil the person of another.

Notwithstanding the instruction was incorrect, in view of the issues which were presented by the evidence, we think the assignment of error based upon it is not well taken. The attention of the trial judge was not called to the erroneous theory of the facts suggested by the instruction, and when the plaintiff excepted to the instruction the trial judge qualified it, and the plaintiff took no further exception. Obviously, the plaintiff acquiesced in the instruction as qualified.

The other assignment of error is based upon the refusal of the trial judge to instruct the jury not to award the plaintiff "any damages for hysteria not directly caused by the accident." He did not instruct them specifically whether the hysteria was or was not an element of damages, but he defined adequately the general rule of compensation in actions for personal injury, and no exception was taken to that portion of the charge. The instruction was one of a character which the judge at a trial is at liberty to give or withhold at his discretion. It is open, however, to the criticism that it sought to restrict the recovery to damages directly caused by the accident, while those indirectly resulting from it may also have been recoverable. The author of the initial cause is responsible for the indirect damages which are its natural consequences. The suggestion that the instructions given did not confine the consideration of the jury to the damages arising solely from the accident is hypercritical. The only controversy as regarded damages was in respect to the extent of the injuries caused by the defendant's acts, and to urge that the jury might have given damages for hysteria not thus caused is an academic proposition, and does not appeal to common sense.

We conclude that the exceptions by the defendant were not well taken, and the judgment should be affirmed.

McKNIGHT v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 10, 1902.)

1. CRIMINAL LAW—WRIT OF ERROR—STAY OF PROCEEDINGS—BAIL.

Under Rev. St. § 1007, providing that a writ of error, when granted within 60 days after the rendition of the judgment complained of, or afterwards, with the permission of a judge of the appellate court, shall operate as a supersedeas, and under rule 38 of the circuit court of appeals (31 O. C. A. civil, 90 Fed. civil.) such writ, in the case of a conviction of a crime not capital, stays execution, but such stay of proceedings does not involve the question as to whether, pending the writ of error, defendant shall be detained or go at large on bail.

2. SAME—POWER OF COURT.

Under the act to establish the circuit court of appeals (26 Stat. 829), section 11, providing that all provisions of law in force regulating appeals or writs of error, including provisions for bonds or other securities, shall regulate such proceedings in that court, and rule 38 of such court, the court has the power, and it is generally its duty, to admit to bail, after conviction of a crime not capital, pending a writ of error.

3. SAME—APPLICATION FOR ADMISSION TO BAIL.

Where defendant was convicted of embezzling funds of a national bank, and the trial court refused to admit him to bail pending a writ of error, in the absence of some great urgency, a further application for admission to bail should be made to the appellate court.

4. SAME—TIME.

Where one convicted of crime is admitted to bail pending a writ of error, the bail should be allowed for a time only sufficient to insure the filing of the transcript in the court of appeals within a reasonable time, reserving the question of further bail until the lapse of the time thus fixed.

5. SAME—THIRD CONVICTION.

The fact that defendant has been tried and convicted three times on the same indictment for embezzling funds of a national bank is not sufficient ground for denying bail pending a third writ of error.

On Application for Bail Pending Writ of Error.

See 111 Fed. 735.

W. C. P. Breckinridge, A. E. Richards, and A. G. Ronald, for plaintiff in error.

R. D. Hill, U. S. Atty., for the United States.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge. The plaintiff in error has been convicted under an indictment charging embezzlement of funds of a national bank. After writ of error allowed and citation served, he applied to the court below for bail, pending his writ of error, but bail was refused him. Application was then made for bail to one of the members of this court, who, preferring that the application should be made to this court, suggested to the trial judge the propriety of admitting the petitioner to bail until such time as this court might have opportunity to hear and determine an application from the plaintiff in error. Upon this suggestion the trial judge acted, and the plaintiff in error has been admitted to bail until February 12th next. He has now filed a petition praying to be allowed to stand upon bail pending his writ of error. Under the rules of this court, and in due course of procedure, the petitioner's bail must expire long before a hearing

upon his writ of error. In such circumstances it becomes necessary to determine whether he shall, pending his writ of error, be allowed to give bail for his appearance in the district court after the determination of his case in this court. The writ of error, when filed within 60 days of the judgment complained of, operates as a supersedeas or stay of proceedings; and a writ of error from this court to the circuit or district court, in the case of the conviction of a crime not capital, is a matter of right without giving any security. Section 1007, Rev. St.; *In re Claasen*, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409; *Hudson v. Parker*, 156 U. S. 277, 283, 15 Sup. Ct. 450, 39 L. Ed. 424; rule 38 of this court (31 C. C. A. cviii., 90 Fed. cviii.).

If the writ of error is not allowed until after the lapse of 60 days, it will equally operate as a supersedeas, provided the judge signing the citation shall so direct. But the stay of proceedings simply prevents the execution of the judgment of the trial court, and by no means involves the question as to whether pending the writ of error he shall be detained or go at large upon bail. Neither the power nor the general duty to admit to bail after conviction, and pending a writ of error, can be regarded as open, in view of the thirty-sixth rule of the supreme court, and the conclusions announced by that court in *Hudson v. Parker*, where Mr. Justice Gray, after a consideration of the statutory provisions in respect of bail, said:

"But, however it may be in a capital case, it is quite clear, in view of all the legislation on the subject of bail, that congress must have intended that under the act of 1891 (26 Stat. 827), in cases of crimes not capital, and therefore bailable of right before conviction, bail might be taken, upon writ of error, by order of the proper court, justice, or judge. And we are of opinion that any justice of this court, having power, by the acts of congress, to allow the writ of error, to issue the citation, to take the security required by law, and to grant a supersedeas, has the authority, as incidental to the exercise of this power, to order the plaintiff in error to be admitted to bail, independently of any rule of court upon the subject, and that this authority is recognized in the first paragraph of rule 36."

Rule 38 of this court is, in substance, rule 36 (31 C. C. A. cvii., 90 Fed. cvii.) of the supreme court. That this court has the power, by virtue of its jurisdiction over the proceedings in error, to admit to bail in criminal cases pending upon writ of error, is indisputable. The eleventh section of the act to establish circuit courts of appeals (26 Stat. 829) provides that:

"All provisions of law now in force regulating the methods and systems of review, through appeals or writs of error, shall regulate the method and system of appeals and writs of error, provided for in this act, in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit court of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

It follows from this broad power that this court, or its judges, may exercise, in aid of its appellate jurisdiction in criminal cases, the same powers in regard to the allowing of writs of error, or admission to bail pending a writ of error, which were formerly exercised in appellate criminal proceedings by the supreme court or its justices,

by virtue of the provisions of statutory law in force, or by implication from the grant of jurisdiction over proceedings in error. Rule 36, said the supreme court in *Hudson v. Parker*, "was so framed as to give effect to the appellate jurisdiction conferred by the act of 1891 in the manner most consistent with the provisions of the various acts of congress concerning the same matter." The same rule has been adopted by this court to give effect to the jurisdiction conferred upon it by the act of 1891, and by the act of January 20, 1897 (29 Stat. 492), withdrawing from the supreme court jurisdiction of criminal cases not capital, and conferring the same on this court. There seems to have been no disagreement in the supreme court in respect of the power of the supreme court to admit to bail in criminal cases pending on writ of error; for Mr. Justice Brewer, in his dissenting opinion, expressed his agreement with the assertion that the court "has power to admit to bail in criminal cases pending in error," though he deduced the power "to let to bail solely from the grant of jurisdiction over the proceedings in error," and differed with the majority in respect to the power of a single justice, not assigned to the circuit to which the writ of error issued. From whatever source the power comes it is clear that this court, as an appellate court, has the power to admit to bail pending a writ of error. The granting of the writ of error in itself stays the execution of the sentence of the trial court. Detention pending the writ is only for the purpose of securing the attendance of the convicted person after the determination of his proceedings in error. If this can or will be done by requiring bail, there is no excuse for refusing or denying such relief. This seems to be the view taken of the thing and policy of the statute of the United States; for in *Hudson v. Parker*, cited above, the court said:

"The statutes of the United States have been framed upon this theory: that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

The fact that bail has been refused by the trial judge, though not conclusive, is a fact which would make it more seemly, in the absence of some great urgency, that further application should be made to the appellate court, which, by virtue of its appellate jurisdiction, may properly be called upon to make all proper orders for the custody of the defendant pending the hearing of his writ of error. We quite agree with the counsel for the government, that all presumption of innocence is gone after conviction, and that proceedings resorted to for the mere purpose of delay should be discouraged. We do not, however, deem it wise, or in harmony with the humane principles of our law, that proceedings to review alleged error committed upon the trial of a defendant should be so far discouraged as to altogether deny the right to bail in that class of cases deemed bailable before conviction. That it should be made the interest of defendants, after conviction, to speed the hearing in the appellate court, we quite agree, and all unnecessary delays, due to the conduct of the defendant seeking a review, may well be discouraged by allowing bail for a time only sufficient to insure the filing of the transcript in the court

of appeals, reserving the question of further bail until lapse of the time thus fixed, when a new bond may be taken by the trial court on application to it, or by direction of the appellate court, for such time as the latter may prescribe. The district court denied bail upon the ground that this was the third trial and third conviction upon the same indictment. We cannot regard this fact a sufficient ground for denying bail during the pending of a third writ of error.

The application of the petitioner will be allowed on condition that he enter into bond in the same amount of the bond upon which he is now at large, conditioned to make his appearance in the district court for the Western district of Kentucky, at Louisville, on the first Wednesday in May, 1902, and from day to day thereafter until discharged from his obligation by a new bond or other order of that court. The bond to be executed may be approved by the court below or by any judge of that court.

CUDDY et al. v. CLEMENT et al.

PRINCE et al. v. OGDENSBURG TRANSIT CO.

(Circuit Court of Appeals, First Circuit. January 16, 1902.)

No. 393.

1. MARITIME LIENS—SUPPLIES—CONTRACT WITH OWNER.

The rule applied that by the maritime law no lien is presumed to arise for supplies or labor furnished a vessel on a contract made by the owner, and proof is required that the minds of the parties to the contract met on a common understanding that such a lien should be created. The *Iris*, 100 Fed. 104, 40 C. C. A. 301, considered.¹

2. SAME—IMPLIED LIEN.

The rule that an owner of a vessel, who is not also the master, may create an implied lien on her for supplies, is a modern one, confined to the United States, and not a part of the maritime law, and the distinctions and limitations of such rule have never been clearly and fully declared; but the true rule undoubtedly is, with reference to implied liens created by the owner, as well as to express liens created by him in the form of bottomry or *respondentia*, that there must be a maritime necessity, and this implies both a need of repairs or supplies, and a reasonable impracticability of obtaining the same on the credit of the owner.

3. SAME.

A contract between a corporation owning and operating a large fleet of steamers on the Great Lakes, and having its principal place of business in the state of New York, and a firm of coal dealers having yards at Cleveland, Ohio, and Sandwich, Canada, by which the latter agreed to furnish such coal as the company's vessels might need at such ports during the navigation season, construed, and *held*, in the light of the circumstances, and of similar transactions between the parties in previous years, not to give the dealers liens on the vessels for coal supplied them thereunder.

4. SAME—STATE STATUTES—LIMITATION TO DOMESTIC VESSELS.

Rev. St. Ohio, § 5880, creating liens on steamboats for supplies, labor, etc., furnished under contract with the master or owner, must be restricted in its operation to domestic vessels.²

Webb, District Judge, dissenting.

¹ Maritime liens for supplies and services, see note to *The George Dumois*, 15 C. C. A. 679.

² Maritime liens created by state laws, see note to *The Electron*, 21 C. C. A. 21.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 107 Fed. 978.

Harvey D. Goulder (Goulder, Holding & Masten and Carver & Blodgett, on the brief), for appellants.

Louis Hasbrouck, for appellees.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PUTNAM, Circuit Judge. The petitioners in this case, now the appellants, were coal suppliers, doing business under the name of Cuddy-Mullen Coal Company. The rule of law which governs the parties was laid down by our opinion rendered on February 2, 1900, in *The Iris*, 40 C. C. A. 301, 100 Fed. 104, 106, 110. The *Iris* was reaffirmed by us in 41 C. C. A. 679, 101 Fed. 1006, and it came before the supreme court on a petition for certiorari, which was denied, under the title of *Woodworth v. Nute*, 179 U. S. 682, 21 Sup. Ct. 915, 45 L. Ed. 194. The portions of the opinion in *The Iris*, 40 C. C. A. 301, 100 Fed. 104, to which we refer, are as follows:

"By the maritime law, no lien for supplies or labor furnished a vessel is presumed to arise on a contract made by the owner, and proof is required that the minds of the parties to the contract met on a common understanding that such a lien should be created. Neither is it sufficient that the party who furnished the labor or supplies gave credit, so far as his own intentions were concerned, to the vessel, or would not have furnished them except on the belief that he was acquiring a lien for them. In this respect the status is different from what it is with reference to liens for labor and supplies furnished a vessel on the order of her master. * * * That understanding may, of course, be inferred from facts as well as from express language, as is ordinarily true with reference to all alleged contracts where it must be shown that the minds met."

In the case at bar, the vessels on which the petitioners claim liens were foreign to the ports where the supplies were delivered them, while in *The Iris* the vessel in question was domestic. Therefore many of the observations in *The Iris* are not applicable here.

The facts which relate to this appeal are sufficiently stated in the opinion of the learned judge who disposed of the case below, with few exceptions. The supplies, which were coal, were furnished in conformity with a contract, as follows:

"Memorandum of contract made and entered into this second day of May, 1898, by and between the Cuddy-Mullen Coal Company of Cleveland, O., and the Ogdensburg Transit Company of Ogdensburg, N. Y.:

"In consideration of the said Ogdensburg Transit Company hereby agreeing to take from the said Cuddy-Mullen Coal Company what coal the fleet of steamers operated by them may require at the points herein named, during the season of navigation of 1898, the Cuddy-Mullen Coal Company hereby agrees to furnish at its dock in Cleveland, at the following prices per ton: Youghlougheny R. M. coal, such as the steamers were supplied with last season, at the price of \$1.70 per ton f. o. b. vessel and trimmed, or steam lump, same quality of coal, 10c. additional per ton, namely: To the steamers Governor Smith, F. B. Prince, W. J. Averill, J. B. Langdon, E. R. James, A. McVittis, W. L. Frost, W. A. Haskell. These prices are to continue in operation throughout the season of navigation of 1898.

"Whatever coal any of said steamers may require in Detroit river is to be furnished by the said Cuddy-Mullen Coal Company at its docks at

Amherstburg or Sandwich, at the price of \$2.20 per ton aboard and trimmed for steam lump Youghlougheny.

"It is also understood and agreed that if the price of coal goes down, and other boats under similar conditions are furnished coal at Cleveland at lower prices than \$1.70 per ton for run of mine, and \$1.80 per ton for lump, then, and in that case, the Ogdensburg Transit Company is to have the benefit of such reduced price during the time it prevails.

"This contract is to be subject, however, and contingent upon strikes, accidents, delays of carriers, and other delays unavoidable or beyond the control of either of the parties hereto.

"Ogdensburg Transit Company.

"By F. W. Baldwin, Manager.

"Cuddy-Mullen Coal Co.,

"By L. Cuddy."

"The additional clause, written in ink, is agreed to by the signers.

"F. W. Baldwin, Manager.

"Cuddy-Mullen Coal Company.

"By L. Cuddy."

The case came into the circuit court by reason of the fact that a receivership had been constituted of the assets of the Ogdensburg Transit Company, and the Cuddy-Mullen Coal Company intervened by summary petition, claiming admiralty liens. We do not pass on any question as to the jurisdiction of the circuit court. *Moran v. Sturges*, 154 U. S. 256, 276, 277, 14 Sup. Ct. 1019, 38 L. Ed. 981. It appears by the record, and also by the opinion of the learned judge who sat in the circuit court, that the coal was furnished at the ports named in the contract, to the various steamers as ordered by their masters, and as required from time to time during the season, and that for the number of tons received on each occasion each master gave a receipt to the Cuddy-Mullen Coal Company.

The receipt was attached to a voucher, forwarded by the Cuddy-Mullen Coal Company to the Ogdensburg Transit Company. All the receipts and vouchers were alike in form, the Cuddy-Mullen Coal Company using therefor printed forms, furnished by the Ogdensburg Transit Company, at the request of the latter. The vouchers contained a proper form for receipts showing payment. At the close of the season,—that is to say, on December 19, 1898,—these receipts were filled out and signed by the Cuddy-Mullen Coal Company, who on that day took therefor a note of the Ogdensburg Transit Company covering all the vouchers. This note contained the following, which was cited by the circuit court, but not especially noticed by it, and which, perhaps, was not brought pointedly to its attention; that is to say, it concluded with the words, "which, when paid, shall be in full for fuel supplied to the O. T. Co. steamers, season of 1898." It is stated that this note was on a form used by the Cuddy-Mullen Coal Company in its business in cases where a lien was claimed for coal furnished. It does not appear, however, that the Ogdensburg Transit Company knew, or had any intimation of this fact, or that the clause was ever brought specifically to its attention. Moreover, the day the note was given the vouchers were receipted by the Cuddy-Mullen Coal Company "in full," without any reservation like that contained in the note. This latter fact would not change the legal effect of this part of the transaction if its legal effect were directly involved, because,

for that purpose, the receipt and note would be taken as one instrument; but it minimizes the force of this clause in the note for the only purpose for which it could be used. Of course, if liens were not given when the coal was furnished, they could not be created by any understanding which first had its origin at the time the note was given; so that the most that can be implied from this clause would be to the effect that thereby the Ogdensburg Transit Company recognized liens as already existing. It comes in, therefore, if for any purpose, as an admission, the importance and weight of which are to be tested by the other circumstances of the case.

One other fact not specifically set out in the opinion of the circuit court, and to which its attention was not directly called, was the precise terms of the contract in the particulars to which we will hereafter refer.

With regard to the coal furnished at Cleveland, the petitioners also rely on section 5880 of the Revised Statutes of Ohio, as follows:

"Any steamboat, or other water-craft navigating the waters within or bordering upon this state, shall be liable, and such liability shall be a lien thereon, for all debts contracted, on account thereof, by the master, owner, steward, consignee, or other agent, for materials, supplies, or labor in the building, repairing, furnishing, or equipping of the same, or for insurance, or due for wharfage, and also for damages arising out of any contract for the transportation of goods or persons, or for injury done to persons or property by such craft, or for any damage or injury done by the captain, mate, or any other officer thereof, or by any person under the order or sanction of either of them, to any person who is a passenger or hand on such steamboat or other water-craft, at the time of the infliction of such damage or injury."

We do not find that this statute was particularly commented on by the learned judge who sat in the circuit court. The counsel have brought it to our attention, and, although it is not clear that it is covered by the assignment of errors, yet it involves too important propositions to be overlooked. What effect shall be given to it will be considered hereafter.

Aside from the questions which may be involved in the application of the Ohio statute, no liens arose unless a mutual understanding that there should be liens can, as said in *The Iris*, be properly implied from the giving and receiving of the vouchers referred to, supported by the peculiar expression in the note of the Ogdensburg Transit Company which we have cited, so far as that expression can be regarded as an admission affecting the result. Before weighing the effect of these two elements, it is necessary to clear the case of some confusion appearing at some of its stages. The position of the petitioners is not an unmixed one with reference to the distinctions between supplies ordered by a master and those ordered by an owner. It proceeds on the hypothesis that this is the ordinary case where supplies are ordered by a master in a foreign port, so that the favorable rules as to presumptions apply which were stated in *The Emily Souder*, 17 Wall. 666, 671, 21 L. Ed. 683, and which have often been elsewhere expressed. The propositions of the petitioners in this connection twist the case from

its natural relations to ordinary business transactions, and are properly disposed of in the opinion of the learned judge who sat in the circuit court, wherein he said:

"When the master, in any instance, notified the petitioners of the amount of coal he desired, it was presumably a notification under the contract, and the coal was presumably furnished under the contract. The situation is the same as if the manager of the defendant company had been present when the vessels arrived, and had personally notified the petitioners that he wished them to furnish under the contract the respective amounts of coal which were supplied."

Looking at all the circumstances of the case fairly, and according to the rules which we must assume govern, in their ordinary transactions, two business concerns like those involved here, and avoiding the distortion of facts for the purpose of creating a lien in behalf of the petitioners, it is too plain to require any elaboration that this extract from the opinion of the learned circuit judge states precisely the relations of the masters of the various steamers to the transactions in question; but the petitioners seek to meet this by affirming that the contract which we extract is so defective in its terms that it is a mere memorandum. They refer to the fact that it makes no provision for credit, and they claim that it only specifies what amount of coal is to be taken. Therefore they maintain that the contract amounted only to directions to the masters of the steamers with reference to the dealers or yards from whom they were to obtain their fuel. But it is formal in all respects. To be sure, it did not bind the Ogdensburg Transit Company to purchase any specific amount of coal, or, indeed, any coal at all, because it did not bind it to send the steamers named to the ports named. Its terms were clearly obligatory on the Cuddy-Mullen Coal Company to supply what coal might be required; and the fact that the Ogdensburg Transit Company was not bound to send steamers to the ports named did not change the nature of the instrument as obligatory and perfect within the terms of the law as well as from a commercial point of view. In this respect the contract was fully as specific as that under consideration by this court in *Church v. Proctor* (decided on February 2, 1895) 13 C. C. A. 426, 66 Fed. 240, where Judge Aldrich, speaking in behalf of the court, explained, at page 242, 66 Fed., and page 428, 13 C. C. A., that the contract was complete on its face, in the sense that it was as complete as contracts regulating undertakings of the character concerned could well be made. Maritime liens for repairs and supplies are in the nature of safeguards against the emergencies in which sea-going vessels may be placed at foreign ports, and the danger of such emergencies arising in this case was, at least, guarded against by the contract in the record before us.

Of course, it is not maintained that the mere fact that the contract failed to state whether the coal was to be paid for in strict cash affects its binding force in the eyes of the law; but this, apparently, is relied on as bearing on the proposition that, as personal credit was not stipulated for, it must be presumed that the coal was delivered in agreed reliance on a lien. Looking at the rela-

tions of these parties under similar contracts for several years, the question whether the sales were to be for cash is to be determined, not so much by any formal terms as by the prior course of dealings and the usages on the Lakes, and by a knowledge whether the Ogdensburg Transit Company was entitled to credit. So far as concerns the latter element, there are no proofs or suggestions in the record, one way or the other, except the transaction between these parties in the particular to which we will hereafter refer, and except that this corporation was the owner of a large fleet of steamers, navigating the Lakes, and was actively operating them, without any evidence, direct or indirect, that, when the contract was made, it was under any considerable indebtedness. Therefore the ordinary presumption of fact applies which applies to all persons and corporations owning and actively operating large properties, without any suggestion of not meeting obligations in the ordinary course.

But the record shows plainly that credit was intended. To the petition are attached various schedules, stating the amount of coal and the prices thereof. The claim set out in the petition is for these specific amounts, with interest from December 19, 1898, which day we can take judicial notice was about the close of the season of Lake navigation. It is the same on which the note referred to was given. The note itself was made on six months' time, and included the interest for that period, and none of the schedules attached to the petition, and no allegations of the petition, claim any interest except from December 19th. The several vouchers which have been referred to were receipted in full on December 19th, without any addition of interest. Therefore the record shows that, by the understanding between the parties, the prices were made as of a date which represented the close of the season, and that no interest was to be paid for the intervening period. This demonstrates, not only that the Ogdensburg Transit Company was entitled to credit, but that it actually did receive credit, and that it was agreed that it should have it.

Important facts are found in the very frame of the written contract between the parties. Its caption formally describes it as one between the petitioners and the Ogdensburg Transit Company. It commences with these words, "In consideration of the said Ogdensburg Transit Company hereby agreeing to take," etc.; and to the same effect are the closing words that, under certain circumstances, "the Ogdensburg Transit Company" is to have the benefit of certain reduced prices. It is true that these expressions are in no sense peculiar; but they are appropriate to ordinary contracts between two parties for merchandise, when they rely on each other and on nothing else. Nowhere does the Ogdensburg Transit Company assume to act in behalf of its steamers, or as representing them; but throughout the contract is positively expressed as one between the parties who executed it, and as individual to them and them alone. It contains at all points such features, and none others, as properly belong to a contract between two parties dealing on their own personal credit for a series of transactions.

On the other hand, the vouchers, so much relied on by the petitioners, did not assume, in any particular, to represent correctly the relations of the parties. In any event, the Ogdensburg Transit Company was liable personally for the fuel; yet it is omitted from the vouchers, which name, in each case, the vessel only. Therefore, as the vouchers were not exact in this substantial particular, there would seem to be no presumption that they intended to correctly represent the transactions. It is to be remembered that they were given at the request of the Ogdensburg Transit Company, and are exactly such, and only such, as a careful corporation, operating a line of vessels, would desire in order that it might receive the approval of the masters, and be able to keep the usual accounts with each steamer. In view of the ordinary course of transactions of careful merchants and operators, desiring proper accounts with their various properties, they are as consistent with one theory as with the other.

Some effective observations in this direction will be found in *The Patapsco*, 13 Wall. 329, 20 L. Ed. 696. That, also, was a case of coal furnished various steamers operated by the Commercial Steamboat Company. The coal was purchased by the agent of the corporation; but under the circumstances of the case, which, as appears in *The Valencia*, 165 U. S. 264, 269, 17 Sup. Ct. 323, 41 L. Ed. 710, was regarded as a very close one, it was held that the coal dealer had liens on the various steamers involved. On looking at the corresponding facts of the two cases, the reason why liens should be sustained in *The Patapsco* and denied here becomes apparent. As we have said, in each case the coal was ordered by the owner, but in *The Patapsco* there was no contract for a season, nor any other contract of a formal nature. The coal was delivered to each steamer on arrival, after requisition by the engineer on the owner's agent. The agent testified (page 331, 13 Wall., and page 697, 20 L. Ed.) that the owner was not known in the transaction. It appeared that, during the whole time the coal was being furnished, the owner was in an embarrassed condition, and that, almost simultaneously with the supplying of the first lot, all of its steamers were heavily mortgaged. At page 333, 13 Wall., and at page 697, 20 L. Ed., Mr. Justice Davis, in behalf of the court, observes:

"There is no reason to suppose that the master had funds or the owners of the line credit." "On the contrary, it is in proof that the company which owned the line of steamships was, at the date of these transactions, hopelessly insolvent, and was borrowing large sums of money on a mortgage of its steamers, away from home, and in the very city where the libellant resided."

Then the opinion follows up these facts, and says that, under the circumstances, it would be a "violent presumption" to suppose that the libellant relied on the credit of the corporation. It remarks, at page 334, 13 Wall., and at page 698, 20 L. Ed.:

"It is very clear that there was no credit to the company at the time of sale, because the coal was sold for cash, at the lowest market price."

In all the particulars which we have named, the case at bar is the reverse of *The Patapsco*. Under the circumstances, the court

there held, as we have already said, that the coal dealer had liens on the steamers, although it was met with the fact that the entries on his journal charged the coal to the Commercial Steamboat Company, and in no instance to the steamers. Nevertheless, it says at page 335, 13 Wall., and at page 698, 20 L. Ed.:

"There is nothing besides this journal entry to indicate that the coal was furnished on the personal credit of the company, and, as the other facts in the case are in favor of a charge direct to the steamship, we do not think the legal inference of credit to the ship is removed."

In the case at bar the effect intended to be given to the method of making the accounts is the reverse of that in *The Patapsco*, but the observation cited applies here. In each case the accounts and vouchers, as kept and rendered, fail to agree with the actual credit given, and also in each case they are insufficient to overcome the weight of the more important and persuasive facts. Having thus determined that, in the present case, there is not enough in the vouchers and receipts to weigh against the effect of the formal contract between the parties, it is clear that there is nothing in the peculiar expression which we have cited from the note, minimized, as it is, by the other facts to which we have referred, to influence our judgment on the question of fact involved.

The circumstances of *The Havana*, decided by the district court for the Eastern district of Pennsylvania (87 Fed. 487), and affirmed by the court of appeals for the Third circuit (35 C. C. A. 148, 92 Fed. 1007), are strikingly like those at bar, and the result was the same as that reached in the circuit court. Referring to the fact that the libelants relied on the manner of charging supplies on their books, the district court observed that they were made in the method common to all cases where the owners are looked to for payment, the vessel being named simply to identify the work. It appears at page 489 that the bills were made against the vessel and her owners. The court added that "they would be naturally so made, whether a lien existed or not." The court of appeals, observing, in substance, that where repairs are ordered by an owner, even in a foreign port, no lien is presumed, and that in the case before it there was nothing to show an understanding or assent by the owner that the *Havana* should be subject to a lien, affirmed the decree of the district court dismissing the libel. In view of the conclusions in *The Patapsco* and *The Havana*, and considering the effect which we must give to the various facts appearing in the case at bar to which we have referred, when grouped, we are of the opinion that the decree of the circuit court should be affirmed.

One other topic, however, deserves comment. The petition alleges that the coal could not have been procured except on the credit of the vessels. The answer denies this allegation, and we have already seen that there is no proof in the record in support of it. On the other hand, the frame of the contract between the parties, together with the evident understanding, as shown by the facts to which we have referred, that credit was to be given until the end of the season, lead to the conclusion that the *Ogdensburg Transit Company* had credit, as we have already said. The rule

that an owner of a vessel, who is not also the master, may create an implied lien on her for supplies, is a modern one, confined to the United States, and not a part of the maritime law. This is historically well known, and it is also stated by so eminent an authority as Fland. Mar. Law, § 241. Mr. Flanders understood this proposition to be supported by the opinion of Mr. Justice Johnson in *The St. Jago de Cuba*, 9 Wheat. 409, 416, 6 L. Ed. 122. The fact that the owner may hypothecate a vessel by an implied lien, without bottomry, must be regarded as established in the United States by *The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651; *The Guy*, 9 Wall. 758, 19 L. Ed. 710; and *The Kalorama*, 10 Wall. 204, 214, 19 L. Ed. 941. The rule has been recognized in other cases, but it originated with those to which we have referred. It happens that, as the rule was developed, no proper distinctions or limitations have been given concerning it, except those explained by the extracts we have made from *The Iris*, and there shown to have been fully sustained by the supreme court.

In the case of supplies and repairs ordered by a master in a foreign port, their necessity being shown, everything else is presumed *prima facie* in favor of a lien, and the burden is thrown on whomsoever disputes its validity; but, with reference to supplies ordered by the owner, it is difficult to say what the presumptions are. At one stage of the maritime law, it seems to have been understood that the owner might bottomry a vessel under circumstances which would make the bottomry valid although there were no maritime necessity therefor. Fland. Mar. Law, § 251. If such were the law, it might follow that, by a clear understanding, the owner might in like manner impress the vessel with an implied lien, although there were no maritime necessity therefor. On that hypothesis, there could be no inquiry, when repairs or supplies are ordered by the owner, whether a credit to the vessel was requisite. The true rule, however, undoubtedly is, with reference to implied liens created by the owner, as well as to express liens created by him, in the form of bottomry or *respondentia*, that there must be a maritime necessity. This implies both a need of repairs or supplies, and a reasonable impracticability of obtaining the same on the credit of the owner. The law is thus stated in the last edition of Abbott's *Law of Merchant Shipping* (London, 1892) 165. In *The Kalorama*, at page 214, 10 Wall., and at page 944, 19 L. Ed., this is also implied by the observation that, "undoubtedly, the presence of the owner defeats the implied authority of the master; but the presence of the owner would not destroy such credit as is necessary to furnish food to the mariners, and save the vessel and cargo from the perils of the seas." We think, therefore, that there can be no question that both the petitioner and the respondent correctly understood the law when they alleged on the one part, and denied on the other, that the coal could not have been obtained except on the credit of the vessels. This would leave only the question whether the same presumption as to the need of credit, the claimant having shown the necessity of the repairs or supplies, arises when obtained on the order of the owner as when obtained on the order

of the master; but, as we have already stated, we are not disturbed by this, because the case shows that the Ogdensburg Transit Company had sufficient credit.

This leaves nothing remaining to be considered except the Ohio statute. In *The Iris*, we were careful to limit the case to the application of a state statute to a domestic vessel. Nowhere has it ever been said that a state statute is valid to alter the conditions as to maritime liens, with reference to supplies and repairs furnished vessels in foreign ports, as to which a complete set of rules has been framed by the federal courts. Whether or not an attempt of that nature would amount to a regulation of commerce, and therefore be unconstitutional, was expressly left open in *The Kate*, 164 U. S. 458, 471, 17 Sup. Ct. 135, 41 L. Ed. 512. A rule of construction, however, was given in *The Kate* which is sufficient to lead us to a conclusion with reference to the statute now in question, to the effect that we ought to restrict it to domestic vessels, as to which no other remedy exists than that given by it. It was observed that this statute originated when it was questionable whether the federal courts would exercise admiralty jurisdiction over the Lakes. If it had been finally determined that they would not, the statute might, perhaps, have had a broader range; but, as the law has been developed, we see no justification therefor. However, we can easily dispose of the case, so far as this statute is concerned, without absolutely determining its construction; because, as we said in *The Iris*, 40 C. C. A. 301, 100 Fed. 104, 110, even when the statute *prima facie* gives a lien, "the circumstances may be such, for example, when the supplies are furnished on a general account, as to show that the parties intended that credit should be given solely to the purchaser." Such is the condition of this case. With reference to this statute, our conclusions are practically the same as those of the circuit court of appeals for the Second circuit, in *The Electron*, 21 C. C. A. 12, 74 Fed. 689, 693, so far as that court had under consideration the application to foreign vessels of a state statute, attempting to give liens for repairs or supplies.

The decree of the circuit court is affirmed, and the costs of the appeal are awarded to the appellees.

WEBB, District Judge. I am unable to concur with the majority of the court in the disposition of this cause. In my opinion, the exceptions to the master's report should have been overruled, the report confirmed, and a decree upholding the liens entered in favor of the petitioners.

TELLER V. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1901.)

1. INJUNCTION—GROUNDS.

A court of equity is not justified in issuing a preliminary injunction or restraining order by the mere fact that it will do no harm, but there must be some affirmative ground shown calling for the exercise of the jurisdiction.

2. JUDGMENTS—SUIT TO SET OFF CROSS JUDGMENTS—RESTRAINING TRANSFER.

A judgment against the United States can neither be enforced by process nor transferred so as to prevent the government from setting off against it any cross demand against the judgment plaintiff, especially in view of the provision of Act March 3, 1875 (18 Stat. 481), expressly requiring such set-off. Hence there is no necessity nor ground for the issuance of a preliminary injunction or restraining order by a court of equity, in a suit by the United States to set off cross judgments, to prevent the transfer of his judgment by the defendant.

Appeal from the Circuit Court of the United States for the District of Colorado.

On December 2, 1899, John C. Teller, the appellant, recovered a judgment against the United States of America, the appellee, in the circuit court of the United States for the district of Wyoming, in the sum of \$18,843.16. On January 24, 1901, the United States recovered a judgment against Teller in the circuit court of the United States for the district of Colorado in the sum of \$27,963.96. Afterwards, on the same day, January 24, 1901, the United States exhibited its bill of complaint against Teller in the circuit court of the United States for the district of Colorado, alleging therein the foregoing facts, and also that Teller was insolvent, and prayed for a temporary restraining order enjoining Teller from assigning his judgment, and for a final decree offsetting the judgment in favor of the United States against Teller's judgment so far as necessary to satisfy the same. Upon the filing of this bill, and on due notice of the motion therefor, the circuit court, on January 28, 1901, made an interlocutory order, based solely on the averments of the bill, restraining Teller from transferring, assigning, or in any manner disposing of his judgment until the further order of the court. From this interlocutory order an appeal was prosecuted to this court pursuant to the provisions of Act March 2, 1891 (26 Stat. 825). See 111 Fed. 119.

Willard Teller (Mr. Clayton C. Dorsey, on the brief), for appellant.

Robert A. Howard and John K. Richards, for the United States.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

The only assignment of error deemed necessary to consider in disposing of this appeal is that the complaint fails to disclose that the United States could have suffered any injury if Teller had assigned or transferred his judgment. The subject of set-off, or applying a creditor's cross demands or counterclaims to the satisfaction of existing demands in favor of the debtor, is undoubtedly of equitable cognizance. *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565. But, as said by Mr. Justice Jackson, in delivering the opinion of the court in that case, such cross demands "may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice." There must be in cases of this kind, as in all others seeking equitable relief in the nature of a restraining order, a reasonable ground to believe that some threatened or probable injury will result before a court of equity will subject a defendant to the annoyance, cost, and expense incident to a restraining order. It is not sufficient that such an order will do no harm. It should at least be made to appear

that it would do some good. Applying the foregoing principles of equity to the case before us, we observe: First, that it was not in Teller's power to enforce his judgment against the United States by levy of execution as in cases between natural persons, the only possible resort for securing its payment being an act of congress making an appropriation therefor; and, second, that any transfer or assignment of his judgment would confer no greater rights upon a transferee or assignee than Teller himself had, and that all equities, whether of set-off, counterclaim, or otherwise, against him, would be enforceable against any such transferee or assignee. The foregoing propositions are not only obvious, but were conceded by counsel of the United States, at the argument of this case, to be correct. Not only so, but the act of March 3, 1875 (18 Stat. 481), affords an ample safeguard against any possible injury in such cases. It is as follows:

"When any final judgment recovered against the United States or other claim duly allowed by legal authority shall be presented to the secretary of the treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, * * * it shall be the duty of the secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States."

Any person to whom Teller might have sold his judgment would have taken it with knowledge of the provisions of the foregoing act, and subject thereto. Teller, no doubt, fully recognizing the restraints against him, never has taken any steps to enforce his judgment or to sell or dispose of the same, and never has threatened to do so. This appears by necessary inference from the fact that no averment to the contrary is made in the bill of complaint.

From the foregoing it clearly appears that no wrongful act has been threatened by Teller, and that, in the nature of the case, no wrong or injury in the matter complained of can, with or without a restraining order, be inflicted by him upon the United States. The restraining order was therefore a vain thing, and the court below was not, in our opinion, warranted in the exercise of a sound discretion in awarding the same. The order appealed from is therefore reversed, and the cause remanded to the trial court, with directions to deny the motion for a preliminary injunction.

UNITED STATES v. LEE YEN TAI.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 38.

2. CIRCUIT COURTS OF APPEAL—JURISDICTION—RIGHT TO CERTIFY QUESTION TO SUPREME COURT—CONSTRUCTION OF TREATY.

The circuit court of appeals, having no jurisdiction of any case in which the validity or construction of treaties is called in question, is authorized by Act March 3, 1891, § 6, to certify to the supreme court any question of law concerning which it desires the instruction of that court for its proper decision. An appeal to the former court presented the question whether the Chinese treaty of 1894 repealed the existing statutes authorizing the deportation of Chinese, but also included other questions, which were within the jurisdiction of the court. *Held*, that

the court of appeals could reserve its decision on the latter questions, and certify the former to the supreme court, or might reverse or affirm the decision without passing on the former question, but was not authorized, by reason of there being other questions involved in the case, to pass on the former question.

2. APPEAL—ASSIGNMENT OF ERROR—SUFFICIENCY.

Assignments of error, on an appeal to the circuit court of appeals from an order in habeas corpus proceedings discharging a prisoner, that the trial court erred in discharging the prisoner, and in not ordering him back into custody, and in not dissolving the writ, are insufficient in not setting out particularly the error intended to be urged, as required by rule of the court.

3. HABEAS CORPUS—APPEAL—PRESENTATION OF QUESTIONS BELOW.

Where objections to the form of a petition for a writ of habeas corpus are not urged in the district court, they will not be considered on appeal.

Appeal from the District Court of the United States for the Southern District of New York.

A. U. Parsons, for the United States.

Max J. Kohler, for appellee.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

WALLACE, Circuit Judge. This is an appeal from an order in habeas corpus made by the United States district court for the Southern district of New York discharging Lee Yen Tai from the custody of the marshal for the Northern district of New York. 108 Fed. 950.

The writ issued upon the petition of Lee Wah, a brother of Lee Yen Tai, setting forth, in substance, that Lee Yen Tai, being lawfully entitled to be and remain in the United States pursuant to the constitution and the laws thereof and the treaty with China promulgated in 1894, was imprisoned and held in restraint by the marshal by color of a warrant for his deportation issued by a United States commissioner for the Northern district of New York without jurisdiction. The return of the marshal set forth the warrant. The warrant recited, in substance, that the petitioner was arrested and brought before the commissioner on the charge of being a Chinese laborer seeking to enter the United States without producing the certificate prescribed by law, and not entitled to be or remain within the United States, and thereafter, upon a hearing and trial, was found guilty of the charge; whereupon the commissioner adjudged that he be immediately removed to the empire of China by the United States marshal for said district.

Upon the hearing in the district court no evidence was introduced, and the case was decided upon the facts set forth in the petition and the return. As no opinion was written by the district judge, it may be inferred that the decision proceeded upon the ground that the treaty of 1894 between the United States and China operated as a repeal of the pre-existing statutes providing for the deportation of Chinese citizens unlawfully within the United States.

The assignments of error assume that the decision proceeded upon this ground, and challenge the construction placed by the court upon the treaty. If the appeal presented no other question than the cor-

rectness of this ruling, this court would be without jurisdiction to entertain it. The circuit court of appeals has no jurisdiction in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty is drawn in question. In such cases an appeal or writ of error lies directly to the supreme court, and the circuit court of appeals can only exercise appellate jurisdiction in cases other than those. Authority, however, is given the circuit court of appeals in every "subject within its appellate jurisdiction" to certify to the supreme court any question of law concerning which it desires the instruction of that court "for its proper decision." Act March 3, 1891, § 6. The supreme court in several cases has held that, although a case which has been brought to the circuit court of appeals by an appeal or writ of error may involve a question which that court has no jurisdiction to entertain, it may nevertheless, if the case also involves other questions, determine those questions, and certify to the supreme court the question which it may not entertain. *U. S. v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; *Carter v. Roberts*, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. Ed. 861. In the latter case the court used this language:

"When cases arise which are controlled by the construction or application of the constitution of the United States a direct appeal lies to this court, and, if such cases are carried to the circuit court of appeals, those courts may decline to take jurisdiction, or, where such construction or application are involved with other questions, may certify the constitutional question, and afterwards proceed to judgment, or may decide the whole case in the first instance."

This language is relied upon by counsel for the appellant as meaning that the circuit court of appeals may in deciding the whole case decide the constitutional question, or, as in this case, a question involving the construction of a treaty. We do not regard it as intended to bear that meaning, and, as we read the language, it means simply that the circuit court of appeals may decide the whole case by affirming or reversing the decision under review without passing upon the constitutional or treaty question, or, if it sees fit, may reserve judgment and certify that question.

Passing to the questions which this court has power to determine, they may be summarily disposed of. The only assignments of error other than those respecting the construction of the treaty are that the court erred in discharging the defendant, that it erred in not ordering him back into the custody of the marshal, and that it erred in not dismissing the writ. The assignments do not comply with the rule, as they do not set out particularly the error intended to be urged. The court is at liberty, however, to notice a "plain error not assigned." The more important of the errors which have been urged allege defects of form in the petition which might have been cured by an amendment if they had been taken in the court below. They do not appear to have been taken there, and cannot be raised for the first time upon appeal.

There certainly is no "plain error" in the case to justify a consideration of questions not presented by the assignments. Except for the importance of the decision of the court below in its bearing upon other cases which may arise under the Chinese exclusion laws,

we should consider it to be our duty to affirm the order of the court below, without certifying any question for instructions to the supreme court; but it is so desirable in the public interests that the error of construction, if there was one, be corrected promptly, that we have concluded to reserve judgment, and certify the question for instructions.

MACMAHAN PHARMACAL CO. v. DENVER CHEMICAL MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. December 16, 1901.)

No. 1,572.

1. TRADE-MARKS—COMMON-LAW RIGHT—HOW ACQUIRED.

The common-law right to the exclusive use of a word, symbol, or device as a trade-mark is not given merely by its adoption as such, but it must also have been used for such a length of time, and under such circumstances, as to identify the goods in connection with which it is used to the trade as those of a particular manufacturer or dealer as distinguished from those of other manufacturers or dealers.

2. SAME—NECESSITY OF PUBLIC USE.

A pharmacist in New York City for 20 years made and sold a liquid preparation for use by dentists under the name of "Macmahan's Concentrated (or saturated) Tincture, Aconite, with Iodine." After that time he was succeeded by a corporation which continued to make and sell the preparation, adding to the above designation on the labels the word "Antiphlogistine." On cards and circulars it was described by the name "Macmahan's Antiphlogistine," but such cards or circulars were not shown to have been distributed to any extent, and the preparation was not advertised in any other manner. In 10 years the company made but 362 sales, to 98 different customers, almost exclusively dentists, who purchased for their own use. The article was not known in the market generally, nor even to pharmacists in the city. *Held*, that such company did not have an exclusive right to the use of the word "Antiphlogistine" as a trade-mark, and especially as against another company which had adopted it, without knowledge of such use as a trade-mark, to designate a plastic preparation not adapted to the use of dentists, but intended for external application, and which, during a number of years, it had advertised extensively, and in which it had built up an extensive trade.

3. SAME—TRANSFERABILITY—DISASSOCIATION FROM ARTICLE.

A trade-mark is not by itself such property as can be transferred, and the right to use it cannot be assigned except as incidental to the transfer of the business or property in connection with which it has been used. A transfer of the right to use it in connection with a different article, or one of a different manufacture, would result in deceiving the public as to the article or its origin, which it is the sole legitimate purpose of a trade-mark to prevent, and a transferee will not be protected in such use by a court of equity.

Appeal from the Circuit Court of the United States for the District of Colorado.

In the year 1867 one Thomas J. Macmahan, a druggist of New York City, prepared a liquid mixture of tinctures of aconite and iodine for the use of dentists, and labeled it thus:

"POISON.
Sat. Tinct. Aconite Root,
with Iodine.
Prepared Expressly for Dentists' Use by
T. J. Macmahan.
138 Sixth Av., bet. 10th & 11th Sts.,
New York."

Macmahan's general drug business consisted of the manufacture and sale of dental preparations, like tooth powder and mouth wash. He carried on that part of the business, consisting of putting up and selling the above-mentioned mixture, in a very small way under the name "saturated" or "concentrated tincture of aconite and iodine," until the year 1890, when he sold and transferred his entire business to the appellant, the Macmahan Pharmacal Company, a corporation then organized in New York by him to take over and conduct the same. He at once became, and has ever since continued to be, the vice president, treasurer, and general manager of the corporation. Between December 27, 1889, and October 8, 1900, when a new set of books was opened by the corporation, his private sales book shows that eight sales of the mixture in question were made by him and noted on his sales book as "Antiphlogistine," which word he claims to have adopted some time in 1889 as his trade-mark. The corporation soon made a change in the label for the mixture, and thereafter employed the following:

"POISON.
MACMAHAN'S
Concentrated Tinct. Aconite,
WITH IODINE.
ANTIPHLOGISTINE.
Prepared Expressly for Dentist's Use by
MACMAHAN PHARMACAL CO.,
No. 172 Sixth Ave., New York."

This mixture was put up in one-ounce bottles, on which was pasted the label. The business done by the corporation between 1890, when first organized, and April, 1900, when Macmahan's testimony was taken, in selling the mixture was as follows: Total number of sales, 362; gross amount of sales, \$514.18; total number of customers, 98. The sales were made almost exclusively to dentists and dental supply houses in New York City. In a very few instances they were made on the prescription of general practitioners for other purposes. No advertisement of the mixture in question appears ever to have been made in newspapers or journals of the day by the Macmahan Company. The record shows that it had a business card as follows:

The Macmahan Pharmacal Co.,

Manufacturing Chemists,

SOLE PROPRIETORS OF
MACMAHAN'S
HANDICAP TOOTH POWDER.
MACMAHAN'S
BAU FAVORITE, A LIQUID DENTIFRICE.
MACMAHAN'S
ANTIPHLOGISTINE.

142 Sixth Avenue,

New York.

—and also that it prepared at different times between 1890 and 1900 two circulars which were employed by it as the interior wrapper of the bottles. These circulars gave the origin and history of the mixture and some of the uses to which it might be put, and each had a heading, in large letters, thus: "Macmahan's Antiphlogistine." There is some proof also to the effect that the company had letterheads, billheads, and envelopes substantially like the business card, but when they were first employed, or how long, or how extensively, they were used, does not appear. Accordingly, it is safe to say that the only substantial evidence of knowledge on the part of the public of the use of the word "Antiphlogistine" by the Macmahan Company is such as has been conveyed to it by the label last referred to, pasted on the bottle itself, and on its outside wrapper, and such as may have been discovered from an inspection of the circular constituting the

inside wrapper of the bottle, in connection with the fact that 98 different persons, during the 10 years following the incorporation of the company, purchased some quantity of the mixture, presumably wrapped in the circular. The evidence in relation to the card, letterheads, billheads, and envelopes is so unsatisfactory, as to the time when they were used, that they are of no substantial value as evidence of knowledge on the part of the public of their contents. On the other hand, the evidence of two experienced pharmacists of New York, who were produced by the Macmahan Company as witnesses in its behalf, tends to show that its mixture was not known among the pharmacists of New York by the name of "Antiphlogistine," or by any other name, and that the preparation known there by that name was one made by the Denver Chemical Manufacturing Company, the appellee. This last-named company was organized as a corporation in 1893, and immediately engaged in business at the city of Denver, Colo. It appears from the record that between the years 1890 and 1893 one Dr. Sheets, a physician of Denver, compounded a certain medicinal preparation, consisting of a soft, plastic, antiseptic dressing, intended for external use only. Without any knowledge that the word "Antiphlogistine" had ever been employed by Macmahan, or any other person, as a trade-mark for the sale of liquid dentifrice, or any other article of merchandise, Sheets adopted the word as his trade-mark, and forthwith used it in connection with the sale of his preparation. The Denver company was incorporated for the purpose of acquiring the right to manufacture and sell the preparation of Dr. Sheets, as he had done. It afterwards acquired the same, and has since then carried on the business of manufacturing and selling that preparation solely. From the beginning, the Denver company advertised it extensively and at great expense, throughout the United States, Canada, and England, as "Antiphlogistine." The sales rapidly increased from year to year from 1894, when it sold 3,521 pounds, until 1900, when it sold 138,950 pounds. In April, 1895, the defendant company took the requisite steps, pursuant to the requirement of the act of March 3, 1881 (21 Stat. 502), to secure, and did secure, registration of its trade-mark. In October, 1896, this company for the first time received information by letter from the Macmahan Company that it claimed the exclusive right to the use of the word "Antiphlogistine" as its trade-mark. Dr. John Campbell was at that time one of the largest stockholders, a director, and for nearly five years had been president, of the Denver Company. In 1896 he was in New York engaged in prosecuting its business there. The communication from the Macmahan Company was referred to him for inquiry. He made an investigation, and reported to his company that Macmahan's preparation was a liquid, and not at all like the plastic compound of his company, that it was used exclusively by dentists, and known to but very few, and that there was no conflict between the two preparations. Nothing further was heard from the Macmahan Company until October, 1897, when Macmahan again wrote, notifying the Denver Company of his claim. Some correspondence ensued between counsel of the parties, but it ended in February, 1898. Soon after that, some disagreement arose between Dr. Campbell and the officers of his company, which resulted in his severing his connection with the company, resigning as an officer and selling out his stock. In April, 1899, Dr. Campbell entered into a written contract with the Macmahan Company, reciting that that company had been "engaged in making and selling a medicinal preparation intended for external application in liquid form" under the name "Antiphlogistine," and that Dr. Campbell had "devised, and is about to manufacture and sell, a medicinal preparation, not in liquid form, for external use, which he desires to make and sell under the said name 'Antiphlogistine,'" and concluding with an agreement conferring upon Campbell the right to use the word "Antiphlogistine" to designate his preparation, with a covenant on the part of the Macmahan Company not to sue Campbell for such use, but obligating Campbell to pay 5 per cent. of his gross sales to the Macmahan Company as a license fee for the privilege of using the word. This agreement also contained a provision as follows: "Fifth. Upon being requested so to do, and upon being duly indemnified for all expenses, costs, and charges which it may incur, the party of the first part [the Macmahan Company], its successors or assigns, shall bring such suits,

actions at law, or take such other proceedings as the party of the second part [Campbell] or his assigns shall desire, to prevent the use of said word 'Antiphlogistine' by any other person or persons, in or about the sale of any medicinal preparation." Shortly afterwards Campbell requested the Macmahan Company to institute this suit, and it was accordingly done, in the name of the Macmahan Company as complainant, but at the expense and for the benefit of Dr. Campbell, pursuant to the aforesaid agreement. The general object and purpose of the suit was to enjoin the Denver Company, defendant below, from using the word "Antiphlogistine" in connection with the sale of its compound, on the ground that the Macmahan Company had the exclusive right thereto as a trade-mark. In due course of time it was brought on for a hearing on the facts, as hereinbefore substantially narrated, and resulted in a decree dismissing the bill. The substantial error assigned is that the circuit court erred in refusing to enjoin the defendant as prayed, for the reason, as is claimed, that the complainant had acquired the exclusive use of the word "Antiphlogistine" as a trade-mark for its mixture.

Lysander Hill, for appellant.

Edmund Wetmore (William G. Edwards, on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

This is an action to restrain the alleged infringement of a specific trade-mark. No claim is made that defendant's goods are so put upon the market as to induce or tend to induce purchasers to buy them as and for the goods of complainant. In fact the packages containing them are so dissimilar in character, size, dressing, and display from the complainant's packages that it is impossible that any person could be deceived with respect to them, or that defendant could palm off its goods as and for those of complainant; and no claim is made that defendant adopted the word "Antiphlogistine" as its trade-mark with any knowledge that complainant or its predecessor had ever either adopted or used the same for any purpose whatsoever. No question, therefore, of fraudulent purpose or intent on the part of the defendant to circumvent the complainant or deceive the public is raised by this record.

Defendant concedes that it has made use of the word as its trade-mark continuously and extensively from and after 1893 to the present time, and claims that it has a legal right to continue so doing. It contends that complainant never acquired the exclusive right to the use of the word at all, and if it did that it was limited to use upon that particular class of merchandise known as "liquid dentifrice," with which alone it was associated.

The right to a trade-mark at common law, independent of the registration statute, is not created by invention or priority of adoption alone. A word, symbol, or device, to be a valid trade-mark constituting a right of property, must have been used by the owner in connection with the sale of his goods for such length of time, and under such circumstances, as indicates to the trade that the goods in connection with which it appears are his goods, as distinguished from those of other manufacturers or dealers. The mere adoption of such word, symbol, or device, unaccompanied by such

a use, is not sufficient to create an exclusive right thereto. Mr. Justice Clifford in the leading case of *McLein v. Fleming*, 96 U. S. 245, 251, 24 L. Ed. 828, 831, expresses the rule thus:

"Where, therefore, a party has been in the habit of stamping his goods with a particular mark or brand, so that the purchasers of his goods, bearing that mark or brand, know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp."

In the *Trade-Mark Cases*, 100 U. S. 82, 94, 25 L. Ed. 550, 552, Mr. Justice Miller, speaking for the court, says:

"The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use, rather than a sudden invention. * * * At common law the exclusive right to it grows out of its use, and not its mere adoption."

In the case of *Levy v. Waitt* (decided by the circuit court of appeals for the First circuit) 10 C. C. A. 227, 61 Fed. 1008, 1011, 25 L. R. A. 190, in a case somewhat analogous to that now before us, it is said:

"It seems to have been assumed in the discussions of this case that the common-law right to a trade-mark comes more from selection or discovery than from actual occupation of the market. * * * But this is not the law. The right to a trade-mark at common law must not be confused, as it too frequently is, with the *prima facie* right existing under registration statutes. It arises to such a limited extent from the mere matter of selection or discovery of the name or symbol used that this may be of trivial consequence."

The court then adopts the language employed by Vice Chancellor Sir W. Page Wood in *Collins Co. v. Brown*, 3 Kay & J. 423, as a good compendium of the common law of trade-mark, as follows:

"The simple question in these cases is, has the plaintiff, by the appropriation of a particular mark, fixed in the market where his goods are sold a conviction that the goods so marked were manufactured by him?"

In the case of *McAndrew v. Bassett*, 4 De Gex, J. & S. 380, 386, Lord Westbury states that property in words stamped upon a vendible article exists when "the article goes into the market so stamped, and there obtains acceptance and reputation, whereby the stamp gets currency as an indication of superior quality, or some other circumstance which renders the article so stamped acceptable to the public." To the same effect are the following cases: *George v. Smith* (C. C.) 52 Fed. 830; *Tetlow v. Tappan* (C. C.) 85 Fed. 774; *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 70 Conn. 516, 533, 40 Atl. 534.

According to the rule hereinbefore announced, the present case must be decided by answering the following question: Did the complainant make such use of the word "Antiphlogistine" in connection with its medicinal preparation as to cause it to be known and recognized in the market by that word? For a period of over 20 years, beginning in 1867, the preparation in question had been sold and known (if at all) by the name "Saturated" or "Concentrated Tincture of Aconite and Iodine, Prepared * * * by T. J. Macmahan." Afterwards, at about the time of the formation of the complainant corporation in 1890, the word "Antiphlogistine" first appeared on the label, but it then, and continuously thereafter,

appeared immediately and prominently associated with the name of the discoverer of the preparation, the person who had been handling it and selling it for a period of 20 years theretofore. In that label the attractive and suggestive feature is the old word "Macmahan's." There was apparently a purpose manifested by the new corporation to continue the name by which the preparation had been so long known, and, accordingly, the label reads "Macmahan's Concentrated Tincture of Aconite, with Iodine. Antiphlogistine." Obviously the word "Macmahan's" was intended to be a catchword descriptive of the preparation; otherwise there would have been no necessity for using it at all. It was not thereby intended to indicate that the preparation was manufactured by the Macmahan Pharmacal Company, because that fact is explicitly stated at the bottom of the label. The only two circulars shown by the proof ever to have been published by complainant bear a striking heavy-leaded caption, not "Antiphlogistine," but "Macmahan's Antiphlogistine." The business card, billheads, letterheads, and envelopes also show that complainant was not content to describe its preparation as "Antiphlogistine" alone, but each and all of them have the forerunner "Macmahan's." For the reasons appearing in the statement of the case to the effect that there is no evidence as to when, or how long, or how extensively the business cards, billheads, letterheads, and envelopes were used, they afford no substantial evidence of the existence of the trade-mark prior to its adoption by the defendant, but they nevertheless evince a consistent attitude on the part of complainant to make the word "Macmahan's" a part of its trade-mark. From the foregoing, we can readily understand that the decoy prescriptions shown to have been sent to old-established pharmacists in New York, calling for "Antiphlogistine" alone, shortly before the evidence was taken in this case, were not filled by using "Macmahan's Antiphlogistine." The pharmacists did not recognize the word "Antiphlogistine" as complainant's brand. Not only so, but the limited sales of the preparation by any name indicate an unfamiliarity with it certainly as "Antiphlogistine." Ninety-eight different persons only inquired for it during the decade following the supposed adoption of the trade-mark in question, and the aggregate amount paid by them for all the purchases made amounted to the sum of \$514.18 only. There is no evidence in the record showing that complainant's preparation was kept in drug stores generally for sale. On the contrary, the only fair inference from all the evidence is that it was manufactured in very small quantities, kept for sale exclusively by complainant, advertised little if any, sold infrequently and in small quantities, and most generally to dentists located in near proximity to complainant's drug store, unknown to the trade generally by any name, and when known in the region where sold it was not known as "Antiphlogistine" but "Macmahan's Antiphlogistine." Such being the evidence, we are of opinion that complainant's mixture had obtained no such acceptance or reputation in the trade under the name "Antiphlogistine" as to confer upon complainant a right of property in that word alone. The test laid down by the supreme court, in cases *supra*, is not met. The use was not sufficient to ripen into a right of

property. The mark "Antiphlogistine" on any package would not have been recognized by the trade as evidence of its origin, or as an indication of complainant's ownership. It follows that defendant's large and prosperous business, innocently and at great expense organized and developed by the use of this same word under the circumstances shown by the proof, cannot be destroyed on complainant's claim of a superior right thereto.

The question was much argued by counsel whether the liquid dentifrice of complainant prepared and offered for sale in small bottles is of the same class of merchandise as the plastic compound of defendant, prepared and offered for sale in tin cans. It is true both of them are intended, in a general sense, to reduce inflammation, but complainant's is practically a dental remedy, employed almost exclusively in connection with the teeth, while the defendant's is a general remedy, inapplicable to the use of dentists, but intended for and solely applicable to external use as a substitute for ordinary poultices, blisters, and counterirritants. It is conceded that if these were different classes of merchandise, within the accepted meaning of those words, in their relation to trade-mark, then each party might adopt and use the same trade-mark, as there would be no danger of confusion resulting therefrom. We, however, do not deem it necessary for the disposition of this case to pass upon the main question so argued. We feel, however, constrained to say this much, that, in our opinion, the complainant, by undertaking to sell the right to use the word in question to Dr. Campbell for his use in handling plastic compounds, evinced an intention to abandon its claim to the trade-mark, except in connection with its liquid preparation, and cannot claim in a court of equity that it does not belong to a separate class of plastic compounds, or that it will be damaged by defendant's use of the same word in connection with its plastic compound. In fact the complainant is making no such claim. This suit is prosecuted by Dr. Campbell, not for complainant's benefit, but for his own. He was a prominent executive officer, and largely interested in defendant corporation, had participated in the early and continued struggles of the company to secure a trade for its compound, had necessarily known and approved of the large outlays of money for advertising it as "Antiphlogistine," and had on behalf of his company investigated complainant's claim, and pronounced it invalid. For reasons unexplained, he afterwards sold his stock, resigned his position as an officer of the defendant company, made the contract referred to with complainant, and caused this suit to be instituted. The main purpose of the contract was to transfer from complainant company to Dr. Campbell the right to use the word "Antiphlogistine" as a trade-mark for his preparation, which, by agreement, was not to be in "liquid form." There was no transfer to him of complainant's business, or any part of it, and no license to operate at complainant's place of business. The sole purpose was to separate what complainant called its trade-mark, reserving to itself the right to use it on its preparation in liquid form, and transferring it to Dr. Campbell for his use on preparation not in liquid form. This contract betrays a false conception of the character of trade-mark property. A trade-mark cannot be assigned,

or its use licensed, except as incidental to a transfer of the business or property in connection with which it has been used. An assignment or license without such a transfer is totally inconsistent with the theory upon which the value of a trade-mark depends and its appropriation by an individual is permitted. The essential value of a trade-mark is that it identifies to the trade the merchandise upon which it appears as of a certain origin, or as the property of a certain person. When its use has been extensive enough to accomplish that purpose, and not till then, it becomes property, and when it so becomes property it is valuable for two purposes: (1) As an attractive sign manual of the owner, facilitating his business by its use; (2) as a guaranty against deception of the public. By familiarity with the trade-mark attached to the owner's merchandise, purchasers are enabled to buy what they desire, and are thereby protected against imposition and fraud. Disassociated from merchandise to which it properly appertains, it lacks the essential characteristics which alone give it value, and becomes a false and deceitful designation. It is not by itself such property as may be transferred. *Browne, Trade-Marks* (2d Ed.) § 363; *Heinisch's Sons Co. v. Baker* (C. C.) 86 Fed. 765; *Kidd v. Johnson*, 100 U. S. 617, 620, 25 L. Ed. 769. To sustain complainant's contention in this case would, in effect, permit Dr. Campbell to commence a new business in 1899, with which he had theretofore in no manner been associated, and, on complainant's theory of its own exclusive right thereto, to falsely certify to the public that the merchandise manufactured and sold by him was in fact manufactured and sold by complainant. Not only this, but it would enable Dr. Campbell to antagonize the defendant's right to use the trade-mark which he himself had for six years recognized as valid and had encouraged the defendant to expend large sums of money in perfecting and establishing a business under its supposed protection. The language employed by the supreme court of the United States in *Medicine Co. v. Wood*, 108 U. S. 218, 223, 227, 2 Sup. Ct. 436, 439, 442, 27 L. Ed. 706, 708, 709, is so apposite to the situation disclosed by this record that we cannot refrain from quoting it.

"If one affixes to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess, in the estimation of purchasers. * * * Those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience. If they claim relief against the frauds of others, they must themselves be free from the imputation. If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that, by the fraudulent rivalry of others, their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character."

The foregoing quotations are alone applicable on the fundamental theory of the complainant in this case, namely, that it had made such use of the word "Antiphlogistine" as its trade-mark that the public recognized it, when found on any packages either of liquid or plastic medicinal preparations, as convincing evidence that they were put up

by complainant company. On that theory, Dr. Campbell's use of the mark on his preparations would be such a flagrant imposition upon the public that no court of equity would permit, much less facilitate, it.

We are of opinion, for the reasons hereinbefore stated, that complainant never acquired any right of property in the word "Anti-phlogistine" as a trade-mark, and, if it had, that the business arrangement made with Dr. Campbell forfeited all right to the equitable relief prayed for in this action.

Other interesting questions arising in this case were argued at the bar, but in the view we have taken of the propositions already discussed it becomes unnecessary to express our views concerning them.

The decree of the circuit court dismissing the bill was undoubtedly correct, and is accordingly affirmed.

ROTHCHILD v. MEMPHIS & C. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 10, 1902.)

No. 966.

1. RAILROAD—CORPORATIONS—STOCKHOLDERS—TENANTS IN COMMON—TRUST RELATION—JUDICIAL SALE—PURCHASE OF PROPERTY.

Where a stockholder of a railroad corporation, though owning a majority of the stock, does not actually control the affairs of the company for his own benefit and to the prejudice of the minority stockholders, he does not occupy a trust relation towards them, and, as they are not tenants in common, he may purchase the property of the corporation at a judicial sale for his own benefit, if there be no actual fraud.

2. SAME—ACTION TO AVOID SALE—LACHES.

Where the minority stockholders of a railroad made no objection to a judicial sale of the property to the majority stockholder and no effort to protect themselves for 17 months, and until the purchaser had expended large sums in the payment of debts and improvement of the property, an action to avoid the sale was then too late.

3. SAME—PURCHASE BY ANOTHER ROAD—POWER TO HOLD—RIGHT TO QUESTION.

Where at a judicial sale of a Tennessee railroad it was purchased by a railroad company incorporated in Virginia, which had filed its charter in Tennessee, and was authorized to make the purchase under Acts Tenn. 1881, c. 9, § 2, providing that a railroad may acquire another road by purchase, after the sale is confirmed and title vested in the purchaser, the state alone can question the purchaser's power to hold such title.

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

A bill was filed in the circuit court for the Western district of Tennessee by the complainant, who is a stockholder in the Memphis & Charleston Railroad Company, on behalf of himself and all other stockholders desiring to become parties complainant, against the Memphis & Charleston Railroad Company and the Southern Railway Company. The purpose of the bill is to have the title of the Southern Railway Company to the property and franchises of the Memphis & Charleston Railroad Company, purchased at a foreclosure sale, declared to be held in trust for the benefit of the shareholders of the Memphis & Charleston Railroad Company. The bill states: That in January, 1892, nearly if not all of the lines of the Southern Railway Company in the state of Tennessee were owned and operated by

the East Tennessee, Virginia & Georgia Railway Company. That said last-named corporation owned as its main line a railway extending from Chattanooga, Tenn., via Morristown, to Paint Rock, N. C., where it connected with the lines of railroad forming the Richmond & Danville Railroad system, and such main line furnished said Memphis & Charleston Railroad at Chattanooga its main connection and outlet for the business of the Mississippi valley and beyond, which it received at Memphis. In addition thereto, prior to said 1st of January, 1892, said East Tennessee, Virginia & Georgia Railway Company had acquired and owned 106,264 shares of the capital stock of the Memphis & Charleston Railroad Company, the same being a majority of all its shares. By means of such ownership said East Tennessee, Virginia & Georgia Railway Company controlled said Memphis & Charleston Railroad Company. It elected its board of directors, a majority of whom were officers and directors of said Tennessee company. Its operating and traffic departments were under the control of the same persons, who were in control of the operating and traffic departments of the East Tennessee, Virginia & Georgia Railway Company, and it was entirely subordinated to said East Tennessee, Virginia & Georgia Railway Company, and under its control as a part of its system. That said East Tennessee, Virginia & Georgia Railway Company, through the ownership of large blocks of its stock, was closely allied with the Richmond & West Point Terminal Railway & Warehouse Company, having a majority of its directors in said last-mentioned company. And it alleges: That said last-mentioned company owned all of the capital stock except 22 shares of the Richmond & Danville Railroad Company, and that during the month of July, 1892, said Richmond & West Point Terminal Railway & Warehouse Company, said Richmond & Danville Railroad Company, said East Tennessee, Virginia & Georgia Railway Company, and the Memphis & Charleston Railroad Company were put into the hands of receivers in the several United States circuit courts having jurisdiction. That at the time the various bills were filed the complainant in the suit against the Memphis & Charleston Railroad Company was the chairman of the board of directors of the East Tennessee, Virginia & Georgia Railway Company, and filed the bill as a creditor in behalf of himself and all other creditors and stockholders. That the receivers took possession without resistance to their appointments, and that subsequently, on the 25th of November, 1893, the Central Trust Company of New York filed its bill against the Memphis & Charleston Railroad Company in the same court in which the receivers were appointed to foreclose a mortgage securing an issue of \$1,000,000 of bonds, claiming default in the payment of interest. On the 25th of August, 1895, the Farmers' Loan & Trust Company likewise filed in said court its bill to foreclose a mortgage executed by the Memphis & Charleston Railroad Company to secure an issue of \$2,264,000 of bonds. That, in order to reorganize and bring all of the railroad companies hereinbefore mentioned under the ownership and control of one corporation, a committee was appointed, who had incorporated, under the laws of Virginia, the Southern Railway Company, with authority to receive, hold, and operate the properties intended to be acquired. Under the sale of the property of the East Tennessee, Virginia & Georgia Railway Company the Southern Railway Company, with their other assets, acquired the 106,264 shares of the stock of the Memphis & Charleston Railroad Company, above mentioned. This sale was duly confirmed on the 14th of July, 1894, and the bill alleges that the Southern Railway Company has ever since owned said stock, and thereby controls the corporate action of the Memphis & Charleston Railroad Company, occupying a trust relation to the minority stockholders, and could take no action in regard to the Memphis & Charleston Railroad Company or its property, except as trustee for the equal benefit of itself and all its fellow stockholders therein; that the Southern Railway Company, being in the position of a tenant in common with the other stockholders, set about acquiring the property of the Memphis & Charleston Railroad Company for its own use, to wipe out the interest of the minority stockholders therein; and that, if the Southern Railway Company had used its power as a majority stockholder for the purpose of having the Memphis & Charleston Railroad Company refund its debt at a lower rate of interest, and operate

its property to the best advantage, said railroad company could have saved to the stockholders a large part of the face value of their stock. But the bill alleges that, instead of so doing, the Southern Railway Company entered into an agreement, for its own benefit, with the holders of the securities of the Memphis & Charleston Railroad Company to have the property sold and bought in by the Southern Railway Company; that to carry out this plan the Southern Railway Company, instead of operating its lines in a way calculated to promote the business of said Memphis & Charleston Railroad Company, which was dependent thereon, and although such manner of operation would have been to the interest of the business of the Southern Railway Company as a common carrier, it so operated its other lines as to decrease the earnings of the Memphis & Charleston Railroad Company, and cut it off from business, and seriously embarrass the operations of its receivers, which conduct was for the sole purpose of decreasing the value of the Memphis & Charleston Railroad so that it could be obtained at the lowest possible price; that while the Memphis & Charleston Railroad was in the hands of receivers, although its earnings were sufficient to have paid and kept down the interest on the mortgage bonds and prevented the maturity thereof, said earnings were used by the receivers at the instance of the parties controlling the East Tennessee, Virginia & Georgia Railway Company, and afterwards the Southern Railway Company, to thoroughly repair and put in use said Memphis & Charleston Railroad, and the charges were, in the main, reported as operating expenses, so as not only to greatly enhance the intrinsic value of the property, but at the same time to create the impression that its earning capacity had greatly diminished, and also to suffer its bonded debt to become entirely in default; that a decree of foreclosure in the suit wherein the Central Trust Company of New York was complainant was entered, under which the property of the Memphis & Charleston Railroad Company was sold on the 26th of February, 1898, and the property was purchased by the Southern Railway Company for \$2,500,000, the upset price named in the decree, and, said sale being confirmed by the court, the Southern Railway Company became the owner of the said Memphis & Charleston Railroad and all its property and franchises. The bill sets out that the Southern Railway Company, being incorporated under the laws of the state of Virginia, has no power to operate the Memphis & Charleston Railroad, nor to own its stock; that the Memphis & Charleston Railroad does not connect with any line of railroad owned by the Southern Railway Company, and that its ownership, operation, or lease, or the ownership of a majority of its capital stock, would be without the authority of the laws of the states in which its railroad lies, and from which the franchises to operate the same are derived, and that the sale is therefore illegal and void; that the said Southern Railway Company holds the property so purchased by it as a trustee for itself and for all other stockholders of the Memphis & Charleston Railroad Company, subject alone to the payment of such sums of money as said Southern Railway Company has lawfully expended in the purchase of the same, and in payment of pre-existing debts.

The answer of the defendant Southern Railway Company denied every material allegation of the bill through which it was sought to charge it with conspiracy, fraud, or misconduct, actual or constructive, and alleged that neither the complainant nor any of his associate stockholders were willing or ever offered to pay or bear any of the obligations of the Memphis & Charleston Railroad Company; that that railroad company, from the 15th day of July, 1892, until the sale mentioned in the bill of complaint, was in the hands of receivers of the federal court, and that at the sale, it having complied with the laws of Tennessee in that behalf, the Southern Railway Company was enabled to and did purchase the property of the Memphis & Charleston Railroad Company without regard to its ownership of 106,264 shares of its capital stock, which at that time was without real or potential value; that while the Memphis & Charleston Railroad Company was in the hands of receivers neither the defendant nor any party controlling it made any suggestion to the receivers in regard to the application of the earnings of the said railroad, nor did they change any relations which had previously existed between the East Tennessee, Virginia &

Georgia Railway Company and the Memphis & Charleston Railroad Company, nor did they discriminate against the Memphis & Charleston Railroad Company, but dealt with the receivers as it did with every other connection of the defendant; that the receivers made yearly reports to the court, and the management of the property was controlled by the court without any interference or suggestion from the defendant or any person controlling it; that since the sale the defendant has been in possession of and engaged in the operation of the Memphis & Charleston Railroad Company, and has expended large amounts of money in the maintenance of the road; that all of the proceedings leading up to its purchase and ownership of the Memphis & Charleston Railroad were consummated publicly and in the due and orderly course of business, with the knowledge of the complainant and other stockholders of the Memphis & Charleston Railroad Company, none of whom offered to intervene or participate in or bear any part of the expenses of such purchase, or in any other way unite with the defendant in the acquisition of said railroad property.

After proofs were taken and a hearing had, a decree was entered in the circuit court dismissing the bill, from which decree the complainant appealed to this court.

Tully R. Cornick and W. B. Henderson, for appellant.

Frank P. Poston, for appellee.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

WANTY, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The proofs in this case fail to show any actual fraud on the part of the Southern Railway Company before or at the sale, or any actual control by it of the Memphis & Charleston Railroad. The road was in the hands of receivers appointed by the court from July 14, 1892, until the sale was made on the 26th of February, 1898. The defendant Southern Railway Company was not organized until 1894, and there is nothing in the proofs from which any manipulation of the affairs of the Memphis & Charleston Railroad by the Southern Railway Company since its organization, or by its stockholders before its organization, can be inferred. The relief, in the absence of this proof, must be founded on the allegations in the bill "that the relations of said Southern Railway Company and of your orator and the other stockholders of said Memphis & Charleston Railroad Company at the time when said sale took place (the said Memphis & Charleston Railroad Company having abdicated its functions of controlling said property, and it and its board of directors being entirely under the control of the Southern Railway Company) were the same as those of tenants in common, and the said Southern Railway Company could not acquire any right, title, or interest in the said property, except for the equal and common benefit of itself and the other stockholders of said Memphis & Charleston Railroad Company; and that the Southern Railway Company, a foreign corporation, did not have the right in law to become the purchaser of the Memphis & Charleston Railroad Company's property."

1. Stockholders are not tenants in common of the property of the corporation, and a stockholder, as such, even though he owns a majority of the stock, does not occupy a trust relation toward the other stockholders, and he may deal with them or with the corporation in good faith. In order to establish a trust relation, the ma-

jority stockholder must actually control the affairs of the company for his own benefit and to the prejudice of the minority stockholders. If he is not in control of the property, and does not mismanage it to the prejudice of the minority stockholders, he may purchase, if there is no actual fraud, the property of the corporation at a judicial sale for his own benefit, and he is not accountable to any other stockholder for the property so purchased. In *Mickles v. Bank*, 11 Paige, 127, 128, 42 Am. Dec. 103, Chancellor Walworth uses this language, which seems apt when applied to the facts here, and has long been indorsed by courts and text writers:

"The principal object of the bill appears to be to set aside the sales of the property of the corporation upon the ground that the sales were invalid. In this the complainant must necessarily fail upon the allegations of the bill, even if the corporation is made a party; for the sales were valid, and gave a good title to the purchaser. And one stockholder of a corporation has a perfect right to become a purchaser, for his own benefit, at a sheriff's sale of the corporate property upon an execution against the corporation; nor is he accountable to any other stockholder for such property if there is no fraud in the sale, even where the property is bought in by him much below its value. The remedy of the other stockholders is to attend the sale upon the executions, and bid up the property to its cash value, and thus prevent the same from being sacrificed. The stockholders of a corporation are neither tenants in common of the corporate property nor copartners, either before or after the dissolution of the corporation."

There is nothing in the proof in this case from which it can be found that the Southern Railway Company ever operated or controlled the property of the Memphis & Charleston Railroad Company, so that no mismanagement of its corporate affairs for the purpose of obtaining advantage at the expense of the minority stockholders can be attributed to it. The sale of the property was not brought about through its manipulation, and it is not shown that the property did not bring a fair price. If the minority stockholders desired to become purchasers, they could have devised a plan of reorganization, and bid in the property if it did not bring what they thought was its full value at the sale. *Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328. This the complainant did not do, but waited until after the sale had been made and confirmed, and the purchaser had been in possession of and operating the property from February 26, 1898, until August 7, 1899, when he filed this bill, the allegations of which would, if action had been promptly taken, have brought the defendant Southern Railway Company within the principles laid down in the cases holding the majority stockholder a trustee in the purchase of the corporate property for the benefit of all of the stockholders of the corporation. But the proofs lack the essential elements of control and mismanagement, without which the relief could not be given, even if the bill had been seasonably filed. The allegations of control, mismanagement, and fraud are emphasized throughout the bill of complaint, but seem to be wholly lacking in the proof, the complainant apparently relying on the position that, when it is shown that a person holding a majority of the stock of a corporation purchases all of its property, there is a presumption of fraud which makes him a trustee for all of the stockholders, and proof of fraud becomes unnecessary. No case in the large number cited by counsel for the complainant justifies this posi-

tion. In each one there had been actual fraud in the control and mismanagement of the property for the purpose of bringing about its acquisition by the majority stockholder. It is true that every transaction of a majority stockholder with the corporation will be viewed by the courts with jealousy, and set aside on slight grounds; but it is not void, and, if the relations of the majority stockholder are fair and open, there is no rule which forbids his dealing with the corporation, and no presumption that such dealing is fraudulent. The actual control of the property, which is the basis in all of the cases of the trust relation, not existing, and the sale not having been brought about by the fraudulent action of the defendant, it did not, by its purchase, become a trustee for the complainant and other stockholders of the Memphis & Charleston Railroad Company. *Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *McKittrick v. Railroad Co.*, 152 U. S. 473, 14 Sup. Ct. 661, 38 L. Ed. 518; *Rogers v. Railway Co.*, 33 C. C. A. 517, 91 Fed. 313; *Gillett v. Bowen (C. C.)* 23 Fed. 625; *Lucas v. Friant*, 111 Mich. 426, 69 N. W. 735; *Bank v. Walker*, 66 N. Y. 424; *Spurlock v. Railway Co.*, 90 Mo. 200, 2 S. W. 219; *Price v. Holcomb*, 89 Iowa, 123, 56 N. W. 407; *Thomp. Corp.* §§ 1071, 1076, 1079; *Cook, Corp.* §§ 6, 653.

There is nothing in the case of *Farmers' Loan & Trust Co. v. New York & N. R. Co.*, 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689, which is relied upon by this complainant, at variance with these views. In that case the New York Central & Hudson River Railroad Company purchased a majority of the stock and bonds of the New York & Northern Railway Company, and while its officers were in control of the New York & Northern Railway Company they declined to accept traffic from other roads that would have produced a fund with which to pay the interest on the bonds; the income of the road which should have been employed to pay the interest was diverted to other and improper purposes, which action occasioned the inability of the company to meet its obligations, the default in which resulted in the foreclosure suit. After making an elaborate review of the authorities, Judge Martin, for the court, states the rule as follows:

"The principle of these authorities renders it quite obvious that a corporation purchasing a majority of the stock of another competing one cannot obtain control of its affairs, divert the income of its business, refuse business which would enable the defaulting company to pay its interest, and then institute an action in equity to enforce its obligations, for the avowed purpose of obtaining entire control of its property to the injury of the minority stockholders."

The elements of control and mismanagement there existed, and were the basis upon which the judgment rested, and will be found in the cases reviewed by Judge Martin, and in the cases urged by counsel for complainant here. Their absence in this case is fatal to the appellant's contention.

2. The minority stockholders, as the proof shows, with the full knowledge of all of the proceedings culminating in the sale, made no objection, but permitted the property to be sold to the Southern Railway Company for a large sum, and that company to expend a

large amount of money in its improvement, without making any effort to impeach the sale until the filing of this bill. There is no excuse given for this delay, and the complainant would have thereby lost any right to the relief sought, if he ever had any. *Oil Co. v. Marbury*, 91 U. S. 591, 592, 23 L. Ed. 328; *Simmons v. Railroad Co.*, 159 U. S. 278, 16 Sup. Ct. 1, 40 L. Ed. 150; *Miles v. Vivian*, 25 C. C. A. 208, 79 Fed. 848-853; *Harwood v. Railroad Co.*, 17 Wall. 81, 21 L. Ed. 558. In the case of *Oil Co. v. Marbury*, above cited, Justice Miller says:

"The doctrine is well settled that the option to avoid such a sale must be exercised within a reasonable time. This has never been held to be any determined number of days or years as applied to every case, like the statute of limitations; but must be decided in each case upon all the elements of it which affect that question."

3. The Southern Railway Company has filed its charter in the state of Tennessee, as provided by the laws of that state, and is thereby authorized to make the purchase of another railroad sold under judicial proceedings, as provided by its statutes. Acts Tenn. 1881, c. 9, § 2; *Rogers v. Railway Co.*, 33 C. C. A. 517, 91 Fed. 299. The transaction has been executed, and the title has passed, and the state would be the proper party to now question the transaction, if it were illegal. In *Rogers v. Railway Co.*, 33 C. C. A. 534, 91 Fed. 316, 317, this court, speaking through Judge Lurton, says:

"We do not think that this complainant, in his character as a stockholder of the Nashville, Chattanooga & St. Louis Railway Company, is in a position to make this question. The railroads in question were sold at a judicial sale. The purchaser at that sale has conveyed them by deed to the Louisville & Nashville Railroad Company. The transaction is an executed one, and the title has actually vested in the purchaser. * * * If the contract was in fieri, it might be open to a stockholder of the Louisville & Nashville Railroad Company as such, and upon a bill properly framed to restrain his company's officers from completing such an illegal transaction. But that is not this case. This is an executed transaction. The title has vested. It may be a defeasible title, but it has passed out of Phillips by his deed, and is vested in his conveyee. Until the state shall institute proceedings for the forfeiture of the charter, or for the purpose of defeating the title, it is a sound legal title, and will support this lease, unless it be subject to other objections."

The decree dismissing the bill was correct, and it is affirmed.

W. J. LEMP BREWING CO. v. ORT.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1902.

No. 1,078.

EVIDENCE—SUBJECTS OF EXPERT TESTIMONY—MATTERS OF COMMON KNOWLEDGE.
The question what would have been the result, under circumstances shown, if the driver of a wagon had made a sharp turn for the purpose of avoiding a collision with a buggy, is not one for expert testimony, but the matter is one of common knowledge.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

John Lovejoy, M. L. Malevinski, and Alex. Sampson, for plaintiff in error.

Jas. B. Stubbs, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The refusal to permit the witness Nichols to testify as an expert in regard to what would have happened in case he, as driver of the beer wagon, had made a sharp turn to the right, whereby the fore wheels of his wagon would have missed the plaintiff's buggy, was not reversible error, because the matter was one of common knowledge; and, further, because the witness Nichols was thereafter examined and cross-examined fully with regard to all actual details of the collision.

There was no error in overruling the objection to the introduction in evidence on the trial of the stenographer's report of the testimony of Demetri Petropol, Amelia Petropol, and H. C. Nichols, taken on a former trial, because the stenographer's report was fully and sufficiently verified.

The refusal of the trial judge to give the special instructions requested before the court's charge was given did not constitute reversible error, because all the propositions and definitions involved were embraced in the charge as given, to which charge there was no objection except as to the rule of damages.

An examination of the pleadings in connection with the proceedings as set forth in the bill of exceptions will show that the rule of damages given in the general charge, and to which exception was taken, was correct generally and in detail, and, in our opinion, was proper to guide the jury in assessing damages, and in no wise tended to mislead them into giving double damages.

Finding no reversible error in the record, the judgment of the circuit court is affirmed.

CARLING v. SEYMOUR LUMBER CO. et al.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1902.)

No. 1,110.

1. GEORGIA INSOLVENCY ACT—SUSPENSION BY BANKRUPTCY ACT.

The Georgia insolvency laws (Code Ga. 1895, c. 4, §§ 2716-2722), providing for the distribution of the assets of insolvents, and authorizing the chancellor to recommend to the creditors of the defendant that they release him from further liability, being in effect a state bankruptcy act, its operation was suspended by the passage of the bankruptcy act of 1898, and proceedings under the former act are void.

2. SAME—MORTGAGE—FORECLOSURE—PETITION—SUFFICIENCY—STATE RECEIVER—TRUSTEE IN BANKRUPTCY—RIGHT TO POSSESSION OF PROPERTY.

A petition in equity filed in the Georgia superior court, which, under Code Ga. § 2770, has jurisdiction of mortgage foreclosure suits, alleged that the plaintiff was a mortgage creditor of defendant, and contained all allegations necessary to authorize a foreclosure, alleged that defendant was insolvent, and asked the foreclosure of the mortgage, and the appointment of a receiver for the debtor's property; but other allegations and prayers for relief showed that the plaintiff had the insolvency law in view in framing his petition. *Held*, that the proceedings would be sustained as a mortgage foreclosure suit within the jurisdiction of the superior court, even though the bill was imperfect, and required amendment; and that the proceedings were not void as taken under the Georgia insolvency law (Code Ga. 1895, c. 4, §§ 2716-2722),

which was suspended by the passage of the bankruptcy act; and therefore that the possession of the mortgaged property by a receiver appointed by the state court would not be disturbed in bankruptcy proceedings against the debtor.

3. SAME.

A trustee in bankruptcy, of a bankrupt whose property has been seized under a mortgage and is in possession of a receiver appointed in the mortgage foreclosure suit by a state court of competent jurisdiction, is entitled to the possession of the property not covered by the mortgage, and to the excess of the proceeds of a sale of the mortgaged property over the mortgage debt and costs of foreclosure.

4. SAME—COMITY.

Where a trustee in bankruptcy is entitled to assets of the bankrupt which are in possession of a receiver appointed by a state court of competent jurisdiction, comity requires, as a general rule, that the trustee should first make application to the state court instead of the bankruptcy court for an order for the possession of such assets.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of Georgia.

For decision of district court reversed by this opinion, see 112 Fed. 323.

This is a petition in equity to this court, under the jurisdiction conferred on it by clause "b" of section 24 of the bankruptcy act of July 1, 1898 (30 Stat. 553), to superintend and revise in matter of law certain proceedings in bankruptcy of the district court of the United States of the Southern district of Georgia. A full statement of the facts will be necessary to make clear the questions that are raised by the petition.

Proceedings in the State Court.

On the 1st day of October, 1900, the Exchange Bank of Macon, Ga., a corporation, filed in the superior court of Bibb county, Ga., a petition in equity against the Macon Sash, Door & Lumber Company, also a Georgia corporation, doing business in Bibb county. It is alleged in the petition that the defendant corporation was indebted to the petitioner in the sum of \$13,350, evidenced by 18 promissory notes, each indorsed by W. J. Beeland and T. C. Hendricks. These notes were secured by a mortgage executed by the defendant company to the petitioner. This mortgage is on personal property and real estate described in the petition. It is alleged that the object of the mortgage was to create in favor of the petitioner a lien, not only on the entire contents of the defendant's storehouse and the entire plant and materials situated upon the described real estate, but also upon all additions that may be made thereto, until the said notes have been fully paid. The defendant, at the petitioner's request, on July 21, 1897, made to petitioner a second mortgage for the purpose of securing the same debt, shown by renewal notes. The second mortgage embraced other and additional property to that described in the first mortgage. Copies of the two mortgages were made exhibits to the petition. It is alleged that the defendant and the indorsers on the defendant's notes are insolvent, and that the property described in the mortgages is deteriorating in value, and that the defendant owes other debts, evidenced by notes and open accounts, amounting to \$11,500.10, and that judgments amounting in the aggregate to about \$700 have been rendered against the defendant, which the defendant is unable to pay. It is also alleged that petitioner has demanded of the defendant payment of its indebtedness which had matured, and that defendant had failed to pay the same; that petitioner has no adequate or complete remedy against the defendant except in a court of equity, and that the interposition of a court of equity is demanded, both in the interest of all the defendant's creditors as well as of the defendant itself; that, in order to avoid a multiplicity of suits at law and the needless sacrifice of defendant's property, it is necessary that a court of equity, through its receiver, should administer and wind up the affairs of the said company.

converting its property and assets into cash. There is a prayer for process, and the following special prayers: "Wherefore it prays: (1) That the said defendant company be restrained and enjoined from selling, incumbering, or in any wise disposing of any of said property upon which plaintiff has its mortgage lien, and which is hereinbefore fully set forth and described. (2) That a permanent receiver be appointed by this court to take possession of the entire property and assets of every description, to administer the same under the direction and orders of this court, and to convert the same into cash at some early date for prompt distribution among defendant's various creditors, according to their respective priorities. (3) That all the other creditors of the said defendant company be allowed to become parties to this proceeding, which plaintiff prays may be taken as a creditors' bill, for the purpose of protecting the rights of all parties at interest. (4) Plaintiff prays that it may have a judgment and decree against defendant for the amount of its debt, and foreclosing its said two mortgages, and that the same may be decreed to be the highest and best lien upon the fund realized from the sale of the mortgaged property." This petition was signed by counsel, and duly verified. On October 2, 1900, the judge of the superior court of Bibb county, at chambers, made an order for the defendant to show cause on October 11th why the prayers of the petition should not be granted, and in the meantime restraining the defendant from incumbering or selling or in any way disposing of the property owned by it, and appointing Dupont Guerry temporary receiver of the defendant's property to take possession of and to hold the same subject to the further order of the court. Certain orders of continuance were then made on different dates. On the 27th of November, 1900, the defendant, the Macon Sash, Door & Lumber Company, filed an answer to the petition. The mortgage debt was admitted, the averment of insolvency was denied, and it was admitted that the machinery had deteriorated in value. It was claimed in this answer that its assets were largely in excess of its liabilities. On November 30, 1900, the superior court entered a formal decree appointing Thomas J. Carling permanent receiver to take possession, subject to the orders and directions of the court, of all the property, both real and personal, and choses in action, of every character, belonging to the defendant company. Carling was required to give and did give bond as such receiver in the sum of \$10,000. There were many orders made in reference to the receivership, which it is unnecessary to state. It appears from the record that the receiver came into the possession, under these orders, of all the property embraced in the two mortgages, and of choses in action and other property not covered by the mortgages.

Proceedings in the United States District Court.

On the 17th day of November, 1900, the Seymour Lumber Company and two other creditors of the Macon Sash, Door & Lumber Company filed a petition in the district court to have the latter company adjudged to be a bankrupt. On December 3, 1900, the lumber company filed an answer to the petition in bankruptcy, resisting the same, denying that it had committed an act of bankruptcy, denying that it was insolvent, and demanding a trial by jury. On motion of the Seymour Lumber Company and the other creditors, petitioners in said bankruptcy proceedings, on May 21, 1901, the district court made an order restraining the Exchange Bank of Macon, Ga., and others who had become parties to the said suit in the superior court of Bibb county, Ga., from further prosecuting that suit until the 1st day of July, 1901, and until the further order of the court. On November 25, 1901, the Macon Sash, Door & Lumber Company, having withdrawn its answer and demand for jury trial, was by said district court adjudged a bankrupt. On the same day, November 25, 1901, the district court made an order directing the marshal to take possession of the property of the bankrupt, and ordered Thomas J. Carling, the receiver theretofore appointed by the superior court of Bibb county, Ga., to surrender the same to the marshal. That part of the order relating to Carling is as follows: "That the said T. J. Carling be, and he is hereby, ordered and directed to deliver to said marshal all of the property, money, deeds, books, and papers of the said Macon Sash, Door & Lumber Company in his possession, custody, or control." The marshal

demanded of Carling that he surrender the property to him, and, Carling having failed to do so, the district court, on the petition and motion of the Seymour Lumber Company and others, the original petitioning creditors in the cause in bankruptcy, on November 20, 1901, made the following order: "Upon considering the foregoing petition, it is ordered by the court that the said T. J. Carling be and appear before the undersigned, judge of the United States district court for the Western division of the Southern district of Georgia, at the United States court house in Macon, Georgia, at 10 o'clock a. m., on the 2d day of December, 1901, then and there to show cause, if any he can, why he has refused to surrender the property, money, deeds, books of account, and papers of the said bankrupt, the Macon Sash, Door & Lumber Company, in his possession, custody, or control, described and mentioned in the order and warrant of seizure issued out of the said United States district court on the 25th day of November, 1901, and, in case he should fail to show such cause as aforesaid, why an attachment should not be issued against him for his disobedience to the orders of the court. Let the said T. J. Carling be served with a copy of the foregoing petition and this order forthwith."

Thomas J. Carling filed a written answer to this rule to show cause, in which he stated that he made the answer under the direction of the superior court of Bibb county, state of Georgia; that he held the property demanded of him by the marshal, not in his own right or personally, but as the receiver appointed by said state court in the case of the Exchange Bank of Macon against the Macon Sash, Door & Lumber Company. In this answer he stated that Dupont Guerry had been appointed the temporary receiver on October 2, 1900, and that subsequently, on November 30, 1900, he had been appointed permanent receiver by said state court; that the property had been continuously in the possession of the state court from October 2, 1900, when Dupont Guerry was appointed temporary receiver, up to the present time; that he employed counsel by leave of said court that appointed him, and had incurred expenses, and had not been paid anything for his services; and that he was under bond in the sum of \$10,000 for the faithful performance of his duties as receiver. He attached to his answer a copy of the proceedings in the state court showing the petition, answer, and orders. Carling claimed in this answer that, the superior court having first taken jurisdiction of the property and having taken possession of it through its temporary and permanent receiver, the possession and control of the property ought not to be interfered with by the district court, and that in all of these proceedings he had acted in good faith, and without the purpose and intention to treat with disrespect any of the orders of the district court, and that he had not treated any of the orders of the court with disrespect; that in good faith he was advised and believed that as an officer of the superior court of Bibb county charged with the administration of the property, and under a bond for the faithful performance of his duties as receiver, he could not surrender the property except upon the order of the judge of the superior court, under which court he held his appointment. He attached to the answer copy of an order of the state court directing him not to surrender the property, but to show the fact and date of his appointment as receiver to the district court.

After hearing argument, the district court held that Carling's answer was insufficient, and on the 6th day of December, 1901, made the following order: "A rule having been issued out of this court requiring T. J. Carling, one of the defendants in the above-stated cause, to show cause before this court why he refused to surrender the property, money, deeds, books of account, and papers of the said bankrupt, Macon Sash, Door & Lumber Company, in his custody, possession, and control, described and mentioned in the order and warrant of seizure out of this court on the 25th day of November, 1901, with which order and warrant of seizure he had been duly served, and, in case he should fail to show such cause, why an attachment should not be issued against him for his disobedience to the order of this court; and the said T. J. Carling, for showing cause as required by said rule, having filed his answer and response therein, and the court having heard and considered the evidence in said matter submitted and the argument of counsel: It is now ordered, adjudged, and decreed by the court that the response

and showing made by the said T. J. Carling is insufficient; that the said T. J. Carling be, and he is hereby, peremptorily ordered, directed, and required to surrender and deliver to John M. Barnes, marshal of the United States for the Southern district of Georgia, all the said property, money, deeds, books of account, and papers of the said bankrupt, Macon Sash, Door & Lumber Company, in his possession, custody, and control, described and mentioned in the order and warrant of seizure issued out of this court in the above-stated cause, on the 25th day of November, 1901, by 10 o'clock a. m. on the 7th day of December, 1901, and, in case he should not so surrender and deliver the same, he shall be attached as for contempt of court."

Carling having failed to obey this order, the district court on December 7, 1901, made the following additional order: "It having been adjudged and decreed by the court in the above-stated cause, on the 6th day of December, 1901, after due notice and hearing, that T. J. Carling, one of the parties in said cause, was in contempt of this court in resisting and refusing to obey an order and warrant of seizure issued out of this court in said cause on the 25th day of November, 1901, requiring the marshal of said district to seize and take possession of, and the said T. J. Carling to deliver to said marshal, the property, money, deeds, books of account, and papers of the said bankrupt, Macon Sash, Door & Lumber Company, in his possession, custody, and control, and described and mentioned in said order and warrant of seizure, with which said order and warrant of seizure the said T. J. Carling has been duly served; and the said T. J. Carling having appeared in open court this day, and admitted that he had purged himself of said contempt so adjudged and decreed against him, by surrendering and delivering to said marshal said property, money, deeds, books of account and papers by 10 o'clock this day: It is now adjudged and decreed by the court that the said T. J. Carling is still in contempt of this court in refusing to surrender and deliver said property, money, deeds, books of account, and papers by 10 o'clock this day, as ordered and directed to do by this court on the 6th day of December, 1901. It is now ordered that the marshal of said district be, and he is hereby, directed and required, immediately after the expiration of 10 days from this date, unless the judgments, orders, and decrees adjudging and decreeing said T. J. Carling to be in contempt as aforesaid shall be sooner superseded according to law, to attach and seize the body and person of said T. J. Carling, and confine him in the common jail of Chatham county, Georgia, in said district, and there him safely keep until he shall have purged himself of the said contempt adjudged and decreed against him, by surrendering and delivering to the said marshal all of the property, money, deeds, books of account, and papers of the said bankrupt, Macon Sash, Door & Lumber Company, in his possession, custody, and control, described and mentioned in the order and warrant of seizure issued out of this court on the 25th day of November, 1901, or until the further order of this court."

The purpose of the petition for revision and review filed in this court is to revise, as matter of law, the foregoing proceedings in the court of bankruptcy; and it is alleged here that the court erred in making the foregoing orders of December 6 and December 7, 1901.

Washington Dessau and N. E. Harris, for petitioner.

John R. L. Smith and J. T. Hill, for respondents.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court. Under the Georgia system the superior courts have exclusive jurisdiction in cases affecting the title to lands and in equity cases. The superior court of Bibb county, Ga., is a court of general jurisdiction, and has the powers and jurisdiction of a court of chancery. Code Ga. 1895, § 5842. It has, by express statute, jurisdiction of suits to foreclose mortgages (Id. 2770); and to appoint receivers (Id. 4904). The judges of the superior courts

are, in equity cases, chancellors. While bills in equity are "abolished" (Id. 4931), they survive in the "petition," which is addressed to the court, and sets forth the cause of action, legal or equitable, or both, and claims legal or equitable relief, or both. Id. 4937.

Chapter 4 of the fourth title of the Georgia Code is entitled "Insolvent Traders." It embraces sections 2716 to 2722, inclusive, which are copied in the margin.¹ These sections, in brief, provide that when any corporation not municipal, or any trader being insolvent, fails to pay debts at maturity, creditors representing one-third or more of the unsecured debts of the insolvent may invoke by petition the power of a court of equity to collect the debts and distribute the assets of such insolvent. The chancellor is authorized, in cases where the insolvent has fairly surrendered his property for distribution, "to recommend to the creditors of the defendant that they may release him from further liability." This insolvent traders' act is held by the supreme court of Georgia to be a kind of state bankrupt law. Describing the procedure, the court said: "It is putting a trader in bankruptcy, and relieving him from past debts, as far as state legislation can do so." *Comer v. Coates*, 69 Ga. 491-495. In a later case this language is repeated and approved, and the court added: "The act does in many respects resemble the bankrupt acts of congress." *Ryan v. Kingsbery*, 88 Ga. 361-389, 14 S. E. 596, 605. The constitution limits the power of a state to legislate on this subject, for it is not permitted to so legislate as to impair the obligation of contracts. U. S. Const. art. 1, § 10. This act is clearly a state insolvency law, within the power of the state to enact when the congress has not exercised its power to pass a uniform bankrupt law. The administration of the estates of insolvents by the state courts under this statute would be inconsistent with the exclusive jurisdiction of the courts of bankruptcy under the bankrupt law. The passage of the bankrupt law by congress, therefore, suspended the operation of this state statute. *Sturges v. Crowninshield*, 4 Wheat. 122-196, 4 L. Ed. 529; *Tua v. Carriere*, 117 U. S. 201-210, 6 Sup. Ct. 565, 29 L. Ed. 855; *Butler v. Goreley*, 146 U. S. 303-314, 13 Sup. Ct. 84, 36 L. Ed. 981.

The main question of contention between the parties to this suit is whether or not the state court had jurisdiction of the suit in which it appointed the temporary and the permanent receiver. The solution of this question will answer others raised in the record.

It is contended by the creditors of the Macon Sash, Door & Lumber Company, who procured the adjudication in bankruptcy, that the state court had no jurisdiction of the case made by the petition in equity, and that, therefore, the appointment of the receiver is void. The argument is that the proceeding in the state court is based on the general insolvency laws, and that its purpose is to wind up and distribute the estate of an insolvent debtor. And it is asserted that the congress is vested by the constitution with power to establish uniform laws on the subject of bankruptcy for the purpose of administering and distributing the estates of insolvent persons (Const. art. 1, § 8); and

¹ See note at end of case.

that congress having exercised this power, and committed the administration of the bankrupt's estate exclusively to the courts of bankruptcy, proceedings in state courts in insolvency are void. If the state court's jurisdiction depended alone on the insolvent traders' law (Code Ga. 1895, §§ 2716-2722), its order appointing Carling receiver would be void. This is true because the passage of the bankrupt law by the congress rendered conflicting state insolvent or bankrupt laws void. *Tua v. Carriere*, 117 U. S. 201, 210, 6 Sup. Ct. 565, 29 L. Ed. 855; *Butler v. Goreley*, 146 U. S. 303, 314, 13 Sup. Ct. 84, 36 L. Ed. 981.

But was the jurisdiction of the state court dependent on the validity of these Georgia statutes relating to insolvency? We have seen that it had jurisdiction to foreclose mortgages and to appoint receivers. The only pecuniary claim asserted by the petitioner in the state court was secured by two mortgages. The petition contains a prayer to foreclose these mortgages. The notes secured by the mortgages have two indorsers. The insolvent traders' act, before it was superseded, must have been put in operation at the suit of "unsecured" creditors. Code Ga. 1895, § 2716; *Cracker Co. v. Brooke*, 91 Ga. 243, 18 S. E. 136. The appointment of a receiver is a jurisdiction often exercised by equity courts in foreclosure suits. The insolvent traders' law provides for a proceeding against insolvents only, and the petition alleges that the defendant therein is insolvent; but that allegation is proper, if not necessary, to obtain a receiver in a foreclosure suit. So of all the averments as to the business embarrassments of the defendant in the petition. They are usual in bills seeking the appointment of a receiver. It is true that the petition contains other averments that are unnecessary and unusual in a foreclosure suit, such as demand and refusal to pay, that the petition is for the benefit of the petitioner and other creditors, etc. These and other averments show that the pleader had in view the insolvent traders' law. But the bill contains all the allegations necessary to a valid decree appointing a receiver and foreclosing the two mortgages. The fact that it contains other and unnecessary averments, even if made to conform to a statute no longer operative, does not deprive the petition of equity, and defeat the jurisdiction as to the matters well pleaded. Conceding that the petition was imperfect and required amendments, it would not follow that the state court was without jurisdiction. The purpose of the petition was, among other things, the foreclosure of the mortgages and the possession of the property by a receiver to be appointed by the court; and when the court adjudged the petition sufficient, and made the appointment, that appointment cannot be questioned by another court, or the possession of the receiver appointed disturbed. *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660, at page 178, 157 U. S., page 574, 15 Sup. Ct., and page 660, 39 L. Ed.

A demurrer or plea to the entire petition for want of jurisdiction would not have been sustained, although part of its statement and prayer were based on matters as to which relief could not be granted. The Georgia statute in question being void, only that part of the petition dependent on it would have been subject to demurrer. *Beach, Mod. Eq. Prac.* 241. A demurrer or plea to the whole petition for want of jurisdiction would have been overruled. We think, therefore,

conceding the "traders' insolvent" law to be superseded and made void by the bankrupt law, that the state court had jurisdiction of the suit as one to foreclose a mortgage, and to appoint a receiver of the property covered by the mortgages.

The bankrupt act was unquestionably designed by the congress to secure the possession of the property of the bankrupt for administration under the proceedings in bankruptcy. The district court has authority, under paragraph 3 of section 2, to appoint receivers, or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition, and until it is dismissed or the trustee appointed. Other provisions are in the act for the recovery of the bankrupt's property by the trustee when appointed. By authority so conferred, the district court, in a proper case, may direct the marshal, under summary process, to seize the property of the bankrupt in the hands of third persons claiming to own it (*Sharpe v. Doyle*, 102 U. S. 686, 26 L. Ed. 277; *Feibelman v. Packard*, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984); may compel the return of property of the bankrupt illegally taken out of the possession of the referee in bankruptcy (*White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183); and may take property from the possession of the purchaser from the assignee of the bankrupt under a general assignment (*Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814). But it has not been held that property of the bankrupt in the hands of a receiver of a state court having jurisdiction can be so taken out of his possession. It is indicated in *Moran v. Sturges*, 154 U. S. 256, 283, 14 Sup. Ct. 1019, 38 L. Ed. 981, that the federal courts, in the exercise of their exclusive jurisdiction to enforce maritime liens, will not interfere with the actual possession of a state court. It was there said: "When its [the state court's] jurisdiction has determined, the admiralty courts may proceed." However this may be in cases of the exclusive jurisdiction of the federal courts, it is clear, on precedent and principle, that the federal courts will not interfere with the actual possession of a state court, through its receiver, of mortgaged property, in a case where the state court has jurisdiction to foreclose the mortgage. The case of *Davis v. Railroad Co.*, 1 Woods, 661, Fed. Cas. No. 3,648, decided on circuit by Mr. Justice Bradley, is directly in point, so far as it applies to the property covered by the mortgages sought to be foreclosed in the state court. It was there held that a receiver in possession of mortgaged property under order of a state court of chancery, in proceedings for foreclosure begun prior to the commencement of proceedings in bankruptcy, cannot be dispossessed by order of the district court in the bankruptcy proceedings; "that a proceeding to enforce a mortgage or other specific lien involves the right of property, and possession in pursuance thereof, legally or judicially taken, before proceedings in bankruptcy, cannot be interrupted by those proceedings." This proposition is sustained by *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403; for it is there decided that the foreclosure suit may proceed notwithstanding the proceedings in bankruptcy, and that the purchaser at the foreclosure sale will obtain a good title.

The orders made by the bankruptcy court which are under review were made on the theory that the proceeding in the state court was based alone on the insolvent traders' act, and that the appointment of the receiver was void. These orders, in effect, require the receiver of the state court to surrender to the marshal all of the property held by him as receiver. Part of this property, but not all of it, is covered by the mortgages sought to be foreclosed in the state court. No separate questions are raised as to the property not mortgaged. The orders made by the bankruptcy court which are submitted for review and revision relate to all the property held by the receiver.

A receiver or trustee, when appointed in the bankruptcy proceedings, while not entitled to the mortgaged property, will be entitled to any excess arising from the foreclosure sale, when made by order of the state court after the payment of the mortgages and costs of foreclosure. He will also be entitled, when appointed, to the possession of the choses in action and the other property in the hands of the state court's receiver which is not covered by the mortgages. The bankrupt law is equally binding on the state and the federal court, and we cannot doubt that the former will, on proper application, give full effect to it. Where assets are in the hands of the receiver of one court which legally and equitably belong to the trustee or receiver appointed by another court, comity requires, as a general rule, that application should be made for a proper order to the former court whose officer has possession of the property. This rule is reciprocal between the federal and state courts, each respecting the possession of the other. *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470; *In re Tyler*, 149 U. S. 164.

The jurisdiction and authority of the bankruptcy court for the enforcement of the bankrupt law is paramount. State insolvency laws are superseded by the bankrupt act. While it is a general rule that a federal court may not enjoin proceedings in a state court, an exception is made in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. Rev. St. U. S. § 720. When the state court is in possession, through its receiver, of assets that it is without jurisdiction or authority to hold against a receiver or trustee appointed in bankruptcy proceedings, instead of making a peremptory order on the receiver of the state court to surrender the funds, an injunction, if necessary, might be granted by the bankruptcy court to prevent the unlawful distribution of the assets, until application could be made to the state court for an order to its receiver to surrender the assets to the proper custodian. The laws of the United States being equally binding on all the courts, we cannot assume that the state court would refuse to administer them. We are not now called on to decide what course should be taken in the event of a disregard of the bankrupt law by the state court. That such application should be made in the first instance to the state court is sustained, not only by the analogous cases relating to comity, but by adjudications directly in point on this question of practice under the bankrupt law. *Mauran v. Carpet-Lining Co.* (R. I.) 50 Atl. 331; *In re Lesser* (D. C.) 100 Fed. 433, 439; *In re Kersten* (D. C.) 110 Fed. 929, 931; *In re Lengert Wagon Co.* (D. C.) 110 Fed. 927; *Ex parte Waddell*, Fed. Cas. No.

17,027; *In re Seebold*, 45 C. C. A. 117, 105 Fed. 910; *Scheuer v. Stationery Co.* (C. C. A.) 112 Fed. 407.

The judgments of the court of bankruptcy rendered December 6, 1901, and December 7, 1901, are reversed.

NOTE.

Georgia Code 1895—Insolvent Traders.

"Section 2716 (3149a). Receiver for Insolvent Trader. In case any corporation not municipal, of any trader, or firm of traders, shall fail to pay, at maturity, any one or more matured debts, payment of which has been properly demanded of such debtor, and by him refused, and shall be insolvent, it shall be in the power of a court of equity, under a creditor's petition, to which one or more creditors, representing one-third in amount of the unsecured debt of such insolvent corporation, trader, or firm of traders, whose debts are matured and unpaid, shall be necessary parties, to proceed to collect the assets, real and personal, including choses in action and money, and appropriate the same to the creditors of such trader, firm of traders, or corporation.

"Sec. 2717 (3149b). Chancellor's Power in Such Cases. The chancellor, under such proceedings as are usual in equity, may grant injunctions, and appoint receivers for the collection and preservation of the assets in the cases provided by this chapter, and may at any time appoint an auditor and take all proper steps to bring the matter to a final hearing.

"Sec. 2718 (3149c). Who May Be Parties. Any creditor may become a party to said petition, under an order of the court, at any time before the final distribution of the assets, he becoming chargeable with his proportion of the expenses of the previous proceedings.

"Sec. 2719 (3149d). No Preferences; Assets, How Distributed. Upon the appointment of a receiver, no creditor shall acquire any preference, by any judgment or lien, on any suit or attachment, under proceedings commenced after the filing of the petition, and all assignments and mortgages to pay or secure existing debts made after the filing of said petition shall be vacated, and the assets be divided pro rata among the creditors, preserving all existing liens.

"Sec. 2720 (3149e). Allowance for Defendant's Support. It shall be in the power of the judge to make a suitable allowance for the defendant for a support during the pendency of the proceedings, having in so doing respect to the condition of the defendant and the circumstances of the failure.

"Sec. 2721 (3149f). Who is a Trader. Any person or firm shall be considered a trader who is engaged, as a business, in buying and selling real or personal estate of any kind, or who is a banker or broker or commission merchant, or manufacturer manufacturing articles to the extent of five thousand dollars per annum.

"Sec. 2722 (3149g). Chancellor may Recommend Debtor's Release. It shall be in the power of the chancellor, in his final judgment in the cases provided for, to express his opinion, if the facts authorize it, that, from the facts as they have transpired during the progress of the cause, the defendant has honestly and fairly delivered up his assets for distribution under the law, and to recommend to the creditors of the defendant that they release him from further liability."

PITCAIRN v. PHILIP HISS CO.

(Circuit Court of Appeals, Third Circuit. February 5, 1902.)

No. 43.

1. APPEAL—ADMISSIONS—EVIDENCE.

Plaintiff's request to charge that the jury should not disallow all his bill because there are defects in the woodwork, but should deduct from that bill on this account what it would cost, under the evidence, to put the woodwork in as good condition as it should have been under the

contract, having been affirmed, is sufficient basis for the statement of the court in its charge that plaintiff admits there are defects in the woodwork, and has given evidence that they could be remedied at a cost of not over \$500, so as to make it an admission.

2. SAME.

A party, by adopting and making part of its brief on appeal the statement of the court, in its opinion refusing new trial, wherein it was alleged that the evidence showed the woodwork could be put in condition for \$500, admits there was evidence of defects.

3. ENTIRE CONTRACT.

A contract to decorate walls of room, do the woodwork therein, and furnish it for \$5,200 is an entire contract.

4. CONTRACTS—SUBSTANTIAL PERFORMANCES—QUESTION FOR JURY.

Whether there has been a substantial performance of a contract to decorate walls of a room, do the woodwork therein, and furnish it for \$5,200, so as to allow recovery thereon, is a question for the jury; there being evidence of defects in the woodwork which it would take \$500 to remedy.

5. SAME—INSTRUCTION.

Instruction to jury, in action on entire contract for decorating room, doing woodwork, and furnishing it, that the defective woodwork would not preclude a recovery, if the contract was "otherwise" substantially performed, takes from the jury the question of substantial performance of the entire contract.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Wm. W. Smith, for plaintiff in error.

Wm. M. Hall, Jr., for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and KIRKPATRICK, District Judge

GRAY, Circuit Judge. In this case the defendant in error, which was the plaintiff below, sued for a balance claimed to be due under five written contracts for decorating, furnishing, and refitting the dwelling house of plaintiff in error, who was the defendant below, and also for the value of some extra work and articles not included in the written contracts. These contracts were in the form of letters written by plaintiff below, promising to do certain work and furnish certain articles at a price stated therein, to each of which there is a written acceptance by the defendant below. Three of the letters are dated January 28, 1899, another dated July 14, 1899, and another without date, but accepted September 14, 1899. The offer in each of the letters covered different rooms in the house, or different articles of furniture, and in some cases the offer in each letter was divided into separate groups, stating an amount for which the material and work in each group would be furnished. In the contract with which we are here concerned, the letter accepted September 14, 1899, after making separate estimates for the office, library, billiard room, and son's room, contained the following:

"Daughter's Room. Walls and ceiling redecorated, woodwork and mantel (shutters not included) of maple (bird's-eye panels), curtains and furniture covers of damask selected, new rug, 2 bureaus, 1 bed (5' 6") and bedding, 1 easy chair, 1 rocker, 2 small chairs, 1 work table (3x2) of bird's-eye maple, cost to be \$5,200."

The learned trial judge properly instructed the jury that the five written contracts on their face were distinct, and were to be treated as

severable; "that is to say, although there might be a breach of performance in one of these contracts, yet, if the other contracts were substantially performed, the plaintiff would be entitled to recover the price or prices stipulated in the contracts thus substantially performed." He also correctly charged the jury that as these written contracts are divided into separate groups of articles or work, in each of which there is a fixed price of its own, these subdivisions in respect to performance or nonperformance are also to be treated as severable and distinct.

All the foregoing appears by the pleadings, and the bill of exceptions brings before us, as part of the record, the charge of the court, with the exceptions made to particular portions thereof. The assignments of error founded thereon are as follows:

"First. The court below erred in instructing the jury as follows, viz.: 'In respect to the defective woodwork, such defect would not preclude a recovery upon the contract which included that work, if the contract was otherwise substantially performed; but the defendant would be entitled to a deduction for the cost of repairing such defect, and the plaintiff would only be entitled to recover the contract price, less this deduction.'

"Second. The court below erred in this: that almost at the end of the charge to the jury the court, after having previously answered all the points submitted by defendant, and after having previously delivered to the jury the portion of the charge above set forth, affirmed plaintiff's fourth point, which point and the court's answer thereto are as follows: 'Fourth. That the jury should not disallow all of plaintiff's bill because there are certain defects in woodwork, but should deduct from that bill on this account what it will fairly cost, under the evidence, to put the woodwork in as good condition as it should have been under the contract.' 'This point is affirmed.'

"Third. The court below erred in its charge to the jury in this: that the court, having previously affirmed defendant's fourth point, which point and the answer thereto are as follows: 'No one is obliged to accept defective and improper work, and, if new work is so constructed as to be so defective and improper as not in substantial performance of the contract therefore, the purchaser has a right to refuse to accept the same, and the contractor cannot, after such rejection, patch up or repair such defective and inferior work, and then compel the purchaser to accept the same; neither can he recover the contract price therefor, less the amount necessary to put such defective and improper work in proper condition.' 'This point is affirmed,'—yet subsequently in the charge the court affirmed plaintiff's fourth point as stated above, which point and the answer thereto are as follows: 'Fourth. That the jury should not disallow all of plaintiff's bill because there are certain defects in woodwork, but should deduct from that bill on this account what it will fairly cost, under the evidence, to put the woodwork in as good condition as it should have been under the contract.' 'This point is affirmed,'—plaintiff's fourth point and the answer thereto being inconsistent with and contradictory to defendant's fourth point and the answer of the court thereto, as above set forth."

The bill of exceptions contains no transcript of the testimony as a whole, or any portion of it, or any statement of what the testimony tends to prove, pertinent to the portions of the court's charge excepted to. The assignments of error follow the exceptions, and the sole question raised thereby is as to the correctness with which the court instructed the jury in the particulars mentioned.

The plaintiff in error has stated in his brief that "on trial of the case plaintiff [below] admitted that the woodwork in the daughter's room was defective, and called witnesses, who testified that it would cost \$500 to repair this defect," and in lieu of any testimony or evidence in the record to that effect, he relies, in the first place, upon the statement by the court in its charge, as follows:

"The plaintiff admits that in the daughter's room there are defects in the woodwork, and has given evidence tending to show that those defects could be remedied at a cost of not over \$500, and also that the admitted defects in the newel posts could be remedied at a cost of not over \$25."

To this the plaintiff in error appends the statement that:

"These facts are correctly stated by the court, and are part of the conceded facts in this case."

A binding admission may be made by parties, not only on the record, but by their statements to the court. Such an admission as would support the statement of the learned judge, just quoted, was made by the plaintiff below, defendant in error here. One of the requests submitted by the plaintiff below to the court, for a charge to the jury, was the fourth, which, with the answer of the court, is the subject of one of the assignments of error, above quoted. The defendant in error, however, strenuously contends that, in the absence of any evidence brought up by the bill of exceptions bearing on the point in controversy, there is nothing before this court on which it can review the ruling of the trial court in that respect; but the affirmance of this point must be taken as an admission of the fact of defects in the woodwork, and the cost of repair, under the evidence, and not a mere hypothetical statement of the same. As a statement from the plaintiff below, it is a sufficient basis, not only for the ruling upon the point presented therein, but for the statement of the court in its general charge, in regard to the admission as to defective woodwork.

Again, the plaintiff below adopts, and makes part of its brief before this court, the statement of the court below, as to this admitted defect, in its opinion refusing the motion for a new trial, referring to the page of the record where it is found. It is as follows:

"The plaintiff actually did this specified woodwork. After the completion of the work, however, the wood therein shrunk and warped some, and the joints opened. What caused this was the subject of dispute. The plaintiff alleged, and at the trial gave evidence tending to show, that the mischief was occasioned by the damp condition in which the house was kept. The defendant alleged, and at the trial gave evidence tending to show, that the plaintiff had used in this work insufficiently seasoned wood, and that that was the cause of the trouble. But, whatever the cause, the uncontradicted evidence in the case showed that the woodwork could be put in perfect condition at a cost not exceeding \$500. It was testified that this could be done at a much less expense, but no witness named a higher sum than \$500 as the very outside cost of complete repairment."

We do not have to "look, therefore, to the charge of the judge for the state of the evidence in which that very charge is to be held right or wrong." The admissions made by the plaintiff below in court, appearing in the record and above referred to, present to this court a state of facts which form a sufficient basis on which to review the ruling of the court excepted to. In this, the case at bar is distinguishable from that of *Worthington v. Mason*, 101 U. S. 149, 25 L. Ed. 848, and from the other cases cited in the brief of defendant in error. We have, therefore, distinctly presented the question whether, in this state of the evidence, the instructions which were given by the court were correct, and to the consideration of that question (the important one in the case) we now turn.

The defendant below contended to the court and jury, as appears

by the record, that, by reason of a defective construction of the woodwork in the daughter's room, there could be no recovery of the amount agreed to be paid to the plaintiff, under the contract for its furnishing and decoration; that the contract was an entire one, and, with this admittedly defective construction, there was not a substantial performance of the same. The plaintiff below, on the other hand, contended that the defect in the woodwork resulted from no fault on its part, but that, if it did, it was of such a character as would be easily remedied at an expense of not more than \$500, and that it should be allowed to recover the difference between that amount and the contract price. In this state of the controversy, the court charged the jury on this point, as follows:

"In respect to the defective woodwork, such defect would not preclude a recovery upon the contract which included that work, if the contract was otherwise substantially performed; but the defendant would be entitled to a deduction for the cost of repairing such defect, and the plaintiff would only be entitled to recover the contract price, less this deduction."

The court also affirmed plaintiff's fourth point, which, as already quoted, is as follows:

"Fourth. That the jury should not disallow all of plaintiff's bill, because there are certain defects in woodwork, but should deduct from that bill, on this account, what it will fairly cost, under the evidence, to put the woodwork in as good condition as it should have been under the contract."

We think the learned judge in the court below erred in these instructions to the jury. The contract in question is an entire contract. \$5,200 was the price to be paid for its performance. The contract itself did not attempt to apportion this sum among various items, and there was, therefore, no basis for such apportionment, if otherwise it could have been appropriately made. The contract being entire, the price to be paid is single, and the consideration is solely for the performance of the whole work contracted to be performed. Whether this entire contract had been substantially performed was a question of fact for the jury. They might well be told that, in determining this question, they need not take into the account any slight or unimportant defect, or one that could be easily remedied by a deduction from the agreed price, as such do not necessarily make it impossible to truthfully declare that an entire contract has been substantially performed; but whether such alleged defects are substantial or unimportant is a question of fact for the jury. Substantial performance of the entire contract is sufficient, and the jury may properly so find. This, however, is not the proposition of the charge as excepted to. The instruction of the court below takes away from the jury the question of fact as to whether there had been a substantial performance of the entire contract, and the subordinate and related one, whether the defect in the woodwork was so slight and trivial as to be immaterial in the consideration of the question of substantial performance, or so serious as to negative a substantial performance of, and thus preclude a recovery upon, the entire contract. The language of the court is:

"In respect to the defective woodwork, such defect would not preclude a recovery upon the contract which included that work, if the contract was otherwise substantially performed."

The question here submitted to the jury was not as to a substantial performance of the entire contract, but whether, with the defective woodwork excluded from consideration, the contract was otherwise substantially performed. By this instruction the court took away from the jury the question of fact, whether there had been a substantial performance of the entire contract, and decided itself that certain deficiencies were not material. The question as to defective woodwork, as we have said, should have been submitted to the jury, to be determined as a part of the general question of substantial performance of the entire contract. This erroneous view of the function of the jury is repeated and emphasized in the affirmance of the plaintiff's fourth request to charge. Such an instruction to a jury could not fail to be prejudicial to the defendant, by depriving him of the right, that was his, to have the jury consider the whole question of substantial performance, including the determination of the fact whether any alleged deficiency was important and material or not. We do not think that the error here pointed out was rendered innocuous by the other portions of the charge, in which the learned judge correctly stated to the jury the law in regard to substantial performance.

It should not be passed without notice that the learned trial judge affirmed defendant's fourth point, as follows:

"No one is obliged to accept defective and improper work, and if new work is so constructed as to be so defective and improper, as not in substantial performance of the contract therefor, the purchaser has a right to refuse to accept the same, and the contractor cannot, after such rejection, patch up or repair such defective and inferior work, and then compel the purchaser to accept the same; neither can he recover the contract price therefor, less the amount necessary to put such defective and improper work in proper condition."

This is a very clear statement of what we think the doctrine applicable to the case in hand to be, and strengthens our confidence in the correctness of the view that we have taken, and, but for the opinion of the court on the motion for a new trial, it would suggest that possibly the view we have criticised was inadvertently taken by the learned judge who charged the jury. However this may be, we are of opinion that error in so vital a point as the one to which we have called attention cannot be passed over as unimportant, by reason of the correct and cogent statements of the law in other portions of the charge. We have carefully examined the authorities and cases cited in behalf of the defendant in error, but can find in none of them sanction for the proposition that, where the question in controversy is whether there has been a substantial performance of a contract, the court can take from the consideration of the jury, by deciding for itself, the question whether an alleged defect is material or immaterial to such substantial performance, or that the question in such case to be submitted to the jury is whether the contract in suit has been otherwise substantially performed, after the question of performance as to a certain portion thereof has been excluded from their consideration.

For the reasons stated, we are compelled to the conclusion that the judgment below should be reversed, and the case remanded, with directions for a new trial.

In re LEVIN.

(District Court, S. D. New York. April 2, 1901.)

BANKRUPTCY—FAILURE TO ACCOUNT FOR ASSETS—CONTEMPT.

A bankrupt will be adjudged in contempt for failing to comply with an order directing him to turn over assets, where he claims that robbers broke into his store and stole between \$7,000 and \$8,000 of his stock of goods, worth \$10,000, and that after continuing business with the balance for about four months he deserted the store and left its contents to the mercy of any one choosing to take them; he having at the time of robbery told the police and his creditors that practically nothing was taken.

In Bankruptcy. The following is the opinion of Referee Seaman Miller:

This is a motion on behalf of the trustee to compel the bankrupt to pay over certain money and merchandise which the bankrupt failed to specify in his schedules as belonging to him. The bankrupt herein has been engaged as a cloak merchant in this city for the last six years. A portion of that time he was in partnership with his brother, but since 1897 he was in such business on his own account; having started with about ten thousand dollars capital. A few months prior to being adjudicated a bankrupt, he occupied the fifth loft at No. 97 Wooster street, which was reached by an elevator and a stairway. In that loft the bankrupt admits that he had on the 5th day of September, 1899, in the neighborhood of ten thousand dollars' worth of stock. The bankrupt now claims that on the following day his store was entered and all his merchandise was stolen, except between two and three thousand dollars' worth of stock; but his statement to the police at the time was that practically nothing had been taken, and his boast to his creditors was that he was in great luck,—that, while his store had been broken open, he had come opportunely upon the scene before anything had been taken. The conclusion is irresistible that the alleged robbery never occurred, and that the stock which the bankrupt now claims was stolen is still under his control, or the avails thereof are still in his possession. With the balance of stock on hand the bankrupt continued to do business until the 29th day of December, 1899, when, according to his own story, he literally deserted the store, and left the contents thereof to the mercy of any persons who chose to take them. There are other grounds upon which this motion is based, but the evidence is not clear as to them. As the liabilities set forth in the schedules herein amount to but \$6,833.90, an order may be entered compelling the bankrupt to pay over to the trustee herein the sum of \$7,000.

Hays & Hershfield and I. Gainsburg, for trustee.
Manheim & Manheim, for bankrupt.

THOMAS, District Judge. The bankrupt has failed to comply with the order of the court directing him to surrender assets of the value of \$7,000, and for that reason is in contempt of court. The trustee will prepare order accordingly.

In re H. J. ARRINGTON CO.

(District Court, E. D. Virginia. February 13, 1902.)

1. BANKRUPTCY—COMPOSITION—BEST INTERESTS OF CREDITORS—NATURE OF ASSETS—AMOUNT OFFERED—ACCEPTANCE.

Under Bankr. Act, § 12, subd. "d," providing that the judge shall confirm a composition, if satisfied that it is for the best interests of the creditors, and that the bankrupt has not been guilty of any acts or failure to perform any of the duties which would be a bar to his discharge,

and the offer and its acceptance are in good faith, and have not been made or procured except as in the statute provided, or by any means, promises, or acts therein forbidden, where a bankrupt's assets consisted of a stock of goods and accounts due in a country mercantile business, the estimated value of contracts for cutting and shipping cord wood, and real estate situated in the country, in the absence of any acts on the part of the bankrupt which would debar him of his discharge a composition of 25 per cent. on the dollar offered to the unsecured creditors, and accepted in good faith by 86 out of 89 of them, representing \$11,170, as against only 1 opposing it, representing only \$400, should, upon the recommendation of the referee, showing that there was no probability of the estate paying over 10 per cent. more than offered, be confirmed, as being for the best interests of the creditors.

§ SAME—OBJECTIONS—CORPORATIONS—DIVIDENDS—SUBSEQUENT CREDITORS—EVIDENCE.

An application for confirmation of a composition offered by a bankrupt corporation was opposed by one creditor upon the ground that the corporation, previous to the passage of the bankrupt act, had paid dividends which diminished its capital, and that the recipients of such dividends should, therefore, be compelled to pay them back. The evidence showed that, at the time of the payment of the dividends complained of, the corporation was very prosperous, and was able to pay such dividends without impairing its capital; that the dividends were declared in good faith by the board of directors; and that the objector's debt was contracted long thereafter. *Held*, that no case having been made which would justify the annulling of the action of the corporation in paying the dividends complained of, upon proper proceedings for that purpose, the objection to the confirmation could not be sustained.

Application in involuntary bankruptcy proceedings against the H. J. Arrington Company to confirm a composition offered by the bankrupt. To the report of the referee recommending the confirmation of the composition, the Greenville Bank excepts. Composition confirmed.

Wolcott, Wolcott & Gage, for bankrupt Leo.
D. Yarrell, for exceptant.

WADDILL, District Judge. This case is now before the court upon application to confirm a composition of 25 per cent. offered by the bankrupt company to its unsecured creditors. Upon due notice being given of the application to confirm the proposed composition, one creditor (the Greenville Bank of Emporia, Va.) appeared and opposed the same. The matter was referred to D. Lawrence Groner, Esq., referee in bankruptcy, who, after taking considerable evidence, reported, recommending the confirmation of the same; and, upon further exception, another reference was had, and a second report made, recommending the acceptance and confirmation of the composition, to which, likewise, the Greenville Bank excepted.

The duty of the court in determining whether a composition should be approved or rejected is one of more than ordinary delicacy and difficulty, in this: that the court is called upon to determine what is best for the rights of parties on a subject about which they naturally feel equally as competent to deal as the court. The statute (Bankr. Act, § 12, subdiv. "d") provides:

"The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty

of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden."

Under the evidence in this case, as viewed by the court, it will only be necessary to determine as to the first requirement of the statute; that is, whether the acceptance of the proposed composition will be for the best interests of the creditors. In passing upon this question under the bankrupt act of 1867, Judge Lowell, in *Re Morris*, 11 N. B. R. 443, Fed. Cas. No. 7,303, well said:

"A burden is cast upon the court that is not easily sustained,—of instructing parties concerning their own interests. In the absence of fraud and concealment, the question for the court seems to be not whether the debtor might have offered more, but whether the estate would pay more in bankruptcy."

And in a later case (*In re Whipple*, Fed. Cas. No. 17,513) the same learned judge, in discussing the propriety of a court's rejecting a composition, if opposed by a small minority of the creditors, because it appeared that a settlement in bankruptcy would be more for their interest, announced the rule to be that the judge must make his comparison, not with what the debtor might possibly have done, but, rather, with what the assignee in bankruptcy could do. In commenting on this rule, Mr. Justice Brown, of the supreme court, then United States district judge for the Eastern district of Michigan, in *Re Weber Furniture Co.*, Fed. Cas. No. 17,330, said:

"I am entirely content with this view of the law, and, indeed, I hardly see how any other construction can be placed upon the words 'being satisfied that the same is for the best interests of all concerned.'"

In this same case, in which the composition was rejected by the district court, and subsequently approved by the circuit court, Mr. Justice Brown, in discussing the subject of the court's approving the action of the creditors where taken after full consideration, further said:

"But where a composition deed has been signed by a large majority of the creditors upon a full consideration of the condition of the debtor, I should be very reluctant to overrule their judgment simply because I thought the estate would yield a larger dividend in bankruptcy. Much would depend upon the character of the property and the state of the markets. In the case above cited Judge Lowell intimated 'that a difference of five per cent. upon the amount of the debts and the probable amount of the assets would not be sufficient to induce me to reject the resolution.' I would go even further than that, and say that where the property consisted of real estate or of goods, the value of which depended upon the caprices of fashion, or other like contingencies, I would not overrule the discretion of the creditors, fairly exercised, if the difference were ten or even fifteen per cent."

In the circuit court, on appeal, in the same case (Fed. Cas. No. 17,331), the English and American cases upon the subject were fully reviewed, and the opinion there expressed, as deduced from them, that the decision of the majority of the creditors was conclusive as to the amount of compromise, when such judgment on their part was exercised in good faith, and there was nothing to indicate fraud, accident, or mistake.

The question of the approval or rejection of compositions under the present bankrupt law has been under review by the courts several times,—noticeably by the circuit court of appeals for the Fifth circuit, in *Bank v. Doolittle*, 5 Am. Bankr. R. 736, 46 C. C. A. 258, 107 Fed. 236, and in the circuit court of appeals for the Sixth circuit in *Adler v. Jones*, 6 Am. Bankr. R. 245, 48 C. C. A. 761, 109 Fed. 967. In the last-named case, Judge Day, speaking of whether the composition should be accepted or not, said (page 248, 6 Am. Bankr. R., page 763, 48 C. C. A., and page 969, 109 Fed.):

"It comes, then, to this: If the court is satisfied upon the hearing that the composition offered would be very considerably less than they might reasonably expect to realize in the administration of the assets in due course, then the composition is not for the best interest of the creditors. In determining this question the court will doubtless be influenced by the consideration that a man can ordinarily do better with his own property, and realize more therefrom, than can be obtained in course of judicial proceedings, with compulsory sales and expenses of administration."

Reference may be also had to Coll. Bankr. (3d Ed.) 148; Loveland, Bankr. 556.

In the case under consideration, of the bankrupt's unsecured creditors, eighty-six out of a number of eighty-nine, and representing an indebtedness of \$11,170.88, have accepted, and ask for confirmation of, the composition; and only one creditor, with a debt of \$400, opposes it. The referee, who heard and saw the witnesses, and devoted considerable time to the case, twice reports in favor of the acceptance of the composition of 25 cents on the dollar of the indebtedness, offered by the bankrupt to the unsecured creditors. He also reports that it is probable that an amount something larger—sufficient, possibly, to pay as much as 30 or 35 per cent. of said debts—may be realized from the assets of the bankrupt estate, though this he considers problematical only. Under these circumstances, the court should be very slow to reject the composition, and to place its judgment against that of the creditors themselves, acting with practical unanimity, and particularly in dealing with assets of the character involved here, made up of accounts due in a country mercantile business, a stock of goods, wares, and merchandise in such store, the estimated value of contracts for cutting and shipping cord wood, and real estate situated in the country. Nothing could well be more doubtful than a correct estimate of just what would be realized from this class of property when subjected to the crucial test of realizing upon it by legal proceedings. The bankrupt has not been guilty of any improper conduct in connection with the composition, nor committed any of the acts or failed to perform any of the duties which would debar him of his discharge; and the offer appears to have been made and accepted in good faith, and not had or procured by any of the means, propositions, or acts forbidden by the statute.

Counsel for the exceptant raises the further question that the bankrupt corporation in the year 1897, prior to the passage of the bankrupt law, declared certain dividends, and paid the same to three of its stockholders, contrary to law, and, in effect, took that much money from its capital, as contradistinguished from its profits, and for that reason insists that these persons, then holding stock in the company,

should, by proper suit instituted for the purpose, be required to pay back the amount thus received by them out of the assets of the company; and he also raises various technical questions affecting the payments as made. This exception presents at least the prospect of lengthy litigation, if not an increase of assets; and, as viewed by the court, the exceptant has failed to make out such a case as would justify the annulling of the particular transactions referred to upon proper proceedings had for that purpose. The place of business of the corporation was in the country, and its transactions were doubtless not conducted with the formality, regularity, and ceremony that would have been adopted by larger concerns in populous cities; but the transaction complained of, so far as the evidence shows, seems to have been conducted in substantial compliance with the law. At the time of the payment of the dividends referred to, the corporation was very prosperous, had on hand a large surplus, and was able to pay the dividends declared without impairing its capital; and with the action of the board of directors, taken in good faith at the time, complaint should not now be had, and that by creditors whose debts have long since been contracted. They have certainly no moral, if a legal, claim against the persons referred to. *Mor. Priv. Corp.* §§ 446, 467.

It follows from what has been said that, in the opinion of the court, it will be for the best interest of the creditors to accept the offer of composition, and an order will be accordingly entered confirming the same.

WELLER et al. v. PENNSYLVANIA R. CO. SAME v. NEW YORK CENT. & H. R. R. CO. SAME v. BALTIMORE & O. R. CO. SAME v. NEW YORK, O. & ST. L. R. CO. SAME v. ERIE RY. CO. SAME v. LAKE SHORE & M. S. RY. CO. SAME v. CHICAGO G. W. RY. CO. SAME v. ILLINOIS CENT. R. CO. SAME v. PITTSBURG, FT. W. & C. RY. CO. SAME v. MICHIGAN CENT. R. CO. SAME v. WABASH R. CO. SAME v. MISSOURI, K. & T. RY. SYSTEM. SAME v. CLEVELAND, C., C. & ST. L. RY. CO.

(Circuit Court, D. Colorado. February 5, 1902.)

Nos. 4,198, 4,204, 4,214, 4,215, 4,217-4,224, 4,425.

1. CORPORATION—DOMICILE—INFRINGEMENT OF PATENT—CIRCUIT COURT—JURISDICTION.

A corporation not incorporated in Colorado is not an "inhabitant" of the district of Colorado, within Act Cong. March 3, 1897, declaring that in suits for the infringement of patents the circuit courts of the United States shall have jurisdiction in the district in which the defendant is an inhabitant, etc.

2. SAME—SERVICE—APPLICABILITY OF STATE STATUTE.

The act of the state of Colorado relative to service of process is not applicable to a suit against a corporation brought in a federal court in the district of Colorado, where the corporation is not an inhabitant of such district; and in such case service must be had according to the acts of congress.

3. SAME—COMPLAINT—AVERMENT OF CORPORATE DOMICILE.

Act Cong. March 3, 1897, provides that in suits for infringement of patents the circuit courts shall have jurisdiction in the district where

defendant is an inhabitant, or where the infringement is committed and defendant had an established place of business, and that in the latter case service may be made on the agent conducting the business. *Held*, that in a suit against a corporation, in order to authorize service on an agent, the complaint must show the place of incorporation, so as to show that defendant is not an inhabitant of the district.

4. SAME.

An averment that defendant is incorporated in a certain other state named is sufficient to show that it is not an inhabitant of Colorado.

5. SAME—WHAT CONSTITUTES ESTABLISHED PLACE OF BUSINESS.

A railroad company which maintains an office in the district of Colorado, but whose agent there has authority to solicit business only, and who makes no contracts for the carriage of freight or passengers, has no "regular and established place of business" in the district, within Act Cong. March 3, 1897, declaring that in suits for infringements of patents the circuit courts shall have jurisdiction in any district where the infringement is committed and defendant has a "regular and established place of business."¹

Dyrenforth, Dyrenforth & Lee, S. D. Walling, and J. R. Burton, for plaintiffs.

Rogers, Cuthbert & Ellis, Robert J. Fisher, Wolcott & Vaile, and George S. Payson, for defendants.

HALLETT, District Judge (orally). Several suits are pending in the circuit court, in which Simon P. Weller and others are complainants and different railroad companies are defendants. They are suits for infringement of a patent, and motions have been filed to quash the marshal's return upon the summons issued in the several cases. These motions were discussed before the court a few days back, and they are now to be decided.

Some of the motions were made and are put upon the ground that the service was not according to the statute of this state relating to service upon corporations, and others were upon the ground that persons upon whom the service was made were not representatives of the corporations defendant in the suits. In all of the cases the service is subject to the act of congress of March 3, 1897, defining the jurisdiction of the circuit courts of the United States in cases brought for the infringement of letters patent. This act declares that in suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction in law or in equity in the district in which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. In the cases referred to, the defendants were not inhabitants of this district, not being incorporated in Colorado. In the case entitled "Galveston, Houston & San Antonio Railway Co. v. Gonzales," 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, the supreme court decided that a corporation is an inhabitant of that district only in which it is incorporated; so that these corporations are none of them "inhabitants" of this district in the

¹ Foreign corporations "doing business" in state, see note to *Wagner v. J. & G. Meakin*, 83 C. C. A. 585.

sense in which that word is used in the act of congress. The act provides in its last clause that, if such suit is brought in a district in which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought. In the case in which the defendant is not an inhabitant of the district, the jurisdiction of the court depends, under the first clause of the act, upon the question whether there have been acts of infringement within the district, and also whether the defendant has a regular and established place of business within the district.

In the cases first to be mentioned the motion to quash the marshal's return upon the process is upon the ground that the service has not been made according to the act of the state of Colorado in relation to such process, that the marshal has not shown by his return that the principal officers of the defendant were not found within the district, and that the service was not upon such agent as is mentioned in the act of the state as competent to receive service. The act of the state, it may be remarked in the first place, is not applicable in any of the cases, because in none of the cases is the corporation defendant an inhabitant of the district of Colorado. Therefore service must be according to the terms of the last clause of the act of congress; so that counsel is in error in supposing that he may, by his motion, raise a question as to the service of process according to the law of the state. But I consider, with reference to such cases, that it is not improper to decide and determine whether the service is according to the terms of the act of congress. And, first, upon that point it is to be observed that in some of the cases the place in which the defendant was incorporated is not alleged in the complaint. It is averred in the complaint that the defendant has a regular and established place of business within the state, which conforms to the last clause of the act of congress; but the place in which the defendant is incorporated—the state in which it is incorporated—is not alleged in the complaint. Therefore there is nothing in those cases to show that the defendant is not an inhabitant of the state of Colorado, and the service is defective for that reason. In others of the cases it is averred that the defendant was incorporated in a certain other state named,—that is, a state which is not the state of Colorado,—and this is sufficient to show under the act of congress that the defendant is not an inhabitant of the state of Colorado. In those cases it is also averred that the service was upon a person who is engaged in conducting the business of the defendant in the district of Colorado, and, it being averred in the complaint that the defendant has a regular and established place of business in the state of Colorado, and then in the return it being certified that the process was served upon an agent in charge of that business, the return is sufficient. These remarks explain the ground upon which the return of the marshal must be quashed in No. 4,215, against the New York, Chicago & St. Louis Railroad Company; No. 4,218, against the Lake Shore & Michigan

Southern Railway Company; No. 4,219, against the Chicago Great Western Railway Company; and No. 4,224, against the Missouri, Kansas & Texas Railway System. In all of these cases there is no averment of the state or district in which the defendant is incorporated. In No. 4,217, against the Erie Railway Company; No. 4,220, against the Illinois Central Railroad Company; and No. 4,222, against the Michigan Central Railroad Company,—the state in which the defendant is incorporated is averred in the complaint, and therefore it is shown that the defendants in those cases are not inhabitants of the state of Colorado.

We will now refer to several cases in which the form of the return of the marshal is not objected to, but the motion to quash is based upon the ground that the defendant corporation has no regular and established place of business in the state of Colorado, and is not doing business in this state, and therefore the return should be quashed. In No. 4,193, against the Pennsylvania Railroad Company; No. 4,214, against the Baltimore & Ohio Railroad Company; No. 4,221, against the Pittsburgh, Ft. Wayne & Chicago Railway Company; No. 4,223, against the Wabash Railroad Company; and No. 4,204, against the New York Central & Hudson River Railroad Company,—it is shown that the various companies have offices in the city of Denver, in which there is an agent of the company, and that this agent has authority to solicit business only. He is an agent of the company in the sense that it is his duty to advertise the company and solicit business amongst the people who may apply to him. Some of the offices are somewhat elaborate and others are very limited indeed. The agent does not make any contracts for carrying freight, nor does he sell tickets to passengers who may desire to go over the road which he represents. Upon this a question arises whether such an office is a regular and established place of business within the meaning of the act of congress. I am of the opinion that it is not of that character. It seems to me that in an act applying to all who may be doing any kind of business whatsoever,—that is, applicable to all kinds of business,—what is meant by a regular and established place of business is one in which some substantial part of the business of the company or corporation shall be carried on; and this, in the case of any kind of business, would seem to me to be, in a general way, the sale of the commodities which the defendant may offer to the public. In the case of a manufacturer it would be the sale of the product of his works. In the case of a railroad company I suppose it would be the sale of something which the defendant does for the public. Its business is to carry freight and passengers, and the making of contracts for that purpose would be the transaction of some substantial part of its business. But the men in charge of these offices are not authorized to make such contracts. According to statements in affidavits which have been filed, they have authority only to solicit business. They are what is called in mercantile business "drummers," who are trying to work up business for their employers; and in that view it seems to me that they do not transact any substantial part of the business of the parties whom they represent. This subject has arisen in many of the states under acts

which authorize service upon defendants who may be found within the state, and has been variously decided. Some of the courts have held under the act of congress of 1887 that service upon just such agents as are described in these proceedings is sufficient to give the court jurisdiction, and others have held that the service was not sufficient to give the court jurisdiction. In regard to such decisions in a general way it is to be observed that the act of congress passed March 3, 1897, is somewhat later in date than the act of 1887, and it is indicative of the mind of congress that rulings of courts under the act of 1887 were not entirely satisfactory, and that the rule adopted in respect to suits brought under that act, which were in the main damage suits,—especially those against railroad companies,—the service held good in those cases should not prevail in patent suits. This act, applicable to patent suits only, seems to give a more restricted meaning to the question of service than had been adopted under the act of 1887 in respect to other suits. As illustrating that, it may be observed that the damage suits were often brought upon causes of action which arose wholly without the jurisdiction in which the suit was brought. That is the character of a case upon which complainants in this suit rely very strongly,—a suit against the Denver & Rio Grande Railway Company, which is a corporation of this state. *Railroad Co. v. Roller*, 41 C. C. A. 22, 100 Fed. 738, 49 L. R. A. 77. In that case the liability of the defendant arose in the state of Colorado, and suit was maintained in the district of California upon service upon an agent in the state of California having the character of the agents in these records. In the act of March 3, 1897, it is provided that the cause of action must arise in the district; that is to say, by the express terms of the act there must be acts of infringement in the district. The right to sue upon a patent, therefore, must arise in the district. And, in addition to that, the defendant in the suit must have a regular and established place of business,—probably with reference to the acts of infringement, which are also mentioned in the act. I think, therefore, it is reasonable to, assume that the provision of the act of congress in respect to doing business within the district, which is necessary to give jurisdiction to the court, is something more than was held to be sufficient in some instances under the act of 1887.

If I am mistaken in that, there are decisions made under the act of 1887 which appear to me to be satisfactory, and they are to the effect that under that act an agent to solicit business within the district is not a representative of the corporation in the sense that he may receive service of process in the district. The cases are *N. K. Fairbanks & Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 4 C. C. A. 403, 54 Fed. 421, 38 L. R. A. 271, which was followed in *Wall v. Railway Co.*, 37 C. C. A. 129, 95 Fed. 399. These are decisions of the circuit court of appeals of the Seventh circuit. There is a circuit court decision to the same effect of earlier date. *Maxwell v. Railway Co.* (C. C.) 34 Fed. 286. In these cases, and in all, I think, that I have examined, the question considered was as to the character of the agent and the scope of his authority. Under the act of congress the question is whether the defendant has a

regular and established place of business, without reference to the character of the agent who may be in charge. The question of the business done in the place, which may be regular and established, of course is somewhat dependent upon the scope of authority of the man in charge of it, but it is not wholly so. A solicitor of business may not have any office at all. He may not need an office. Ordinarily, drummers of mercantile houses do not have offices, and they are solicitors of business. Probably in the case of railroad companies the maintenance of an office is more a matter of advertising than anything else. The company desires to be known to the public as one which is engaged in eastern states in the transportation business. Therefore it sets up offices in various cities and towns of the country. But this is not significant of its intention to do business in a regular and established place in all of the cities and towns in which it may set up such offices.

The case of the Pittsburg, Ft. Wayne & Chicago Railway Company (No. 4,221) is distinguishable from the others last mentioned, in that it is shown in that case that the defendant named therein leased its lines to the Pennsylvania Company many years ago, and therefore is not doing business actively as a railway corporation anywhere. Probably in that case there would be no ground for pretending or claiming that it has any regular and established place of business here or anywhere else.

The case of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (No. 4,425) is distinguishable from some of the others in that the return of the marshal does not show that the person upon whom service was made was in charge of the business in Denver, whatever it may be, which was done by that company. But it is also shown in that case that the company has an agency for soliciting business and an office. In this case the return is deficient in not showing that the agent was in charge of the company's business, and it will be quashed.

In the cases mentioned (Nos. 4,193, 4,204, 4,214, 4,221, and 4,223) the motion to quash is sustained.

On Motion to Dismiss.

These causes were heard upon motion to quash a return of the summons, and the return was quashed. Whether rightly heard upon such motion or not, and whether the question ought to have been raised in some other way, is not now a question for consideration. It was competent for the court to have dismissed the suit at the time of quashing the summons, but it was thought better to hold over the case with a view to give the plaintiffs an opportunity to suggest some other method of service than that which had been adopted in the case when it was first filed. No suggestion of that kind has been made, and it is fair to presume that the plaintiffs are not prepared to make any other service than that which was made in the first instance. If that be true, the suits must be dismissed, and the order will be made.

The suits will be dismissed, at plaintiffs' costs, for failure to serve process. Sixty days will be allowed for a bill of exceptions to be

filed. This order in respect to the bill of exceptions applies to what took place upon the motion to quash the return as well as to this motion.

DUNOAN v. MAINE CENT. R. CO.

(Circuit Court, D. Maine. February 7, 1902.)

No. 154.

CARRIERS—INJURY TO PERSON RIDING ON PASS—ASSUMPTION OF RISK.

One riding on a pass, given without consideration, and after assent to conditions that he should assume all risk of accident and that the carrier should not be liable, cannot recover of it for injuries from negligence of its servants; and it is immaterial that the giving of the pass was a breach of the federal statutes in reference to interstate traffic.¹

George E. Bird, William M. Bradley, and Philip Mansfield, for plaintiff.

N. & H. B. Cleaves and Stephen C. Perry, for defendant.

PUTNAM, Circuit Judge. This case comes before us on the general issue, accompanied with a brief statement of special matter of defense, as provided in the practice acts of Maine, followed by a demurrer by the plaintiff to the special matter.

The plaintiff was injured in a collision occasioned by the fault of the defendant's servants, and without corporate fault on the part of the defendant itself. At the time of the collision the plaintiff was journeying on the defendant's train on a free pass given him by the defendant at his own solicitation and request, without compensation, and accepted and used by the plaintiff as a pure gratuity, and on the conditions appearing thereon. The conditions, according to the force of the pleadings, were so far assented to and accepted by the plaintiff when he received the pass, and before he commenced his journey, that he thereby assumed all risk of accidents, and that he expressly agreed with the defendant that it should not be liable under any circumstances, whether by negligence of its servants or otherwise, for any injury while using the pass. In view of the pleadings, we have no occasion to recite the formal terms of the pass, or to consider the questions whether or not, or to what extent, an individual receiving a ticket from a common carrier is bound by any special notice appearing on it,—a class of questions very lately under consideration in *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039, and in *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. —.

The plaintiff maintains that the giving of the pass was a breach of the federal statutes in reference to interstate traffic. It may well be questioned whether there is enough in the record to bring the case within those statutes, but, independently of this, there are several answers to the proposition: Of course, if the foundation of the right against a common carrier were contract, it would be apparent that, under familiar maxims of the law, no action would lie, because,

¹ Rights of person traveling on pass, see note to *Chamberlain v. Pierson*, 81 C. C. A. 164.

even though the plaintiff is not subject to any penalty imposed by the interstate commerce statutes, he would be in *pari delicto*. Indeed, he would be the party especially enjoying the benefit of the combination in violation of law. It is not, however, necessary to go into the question whether the fact that an action against a common carrier who has actually received into his custody a passenger or merchandise lies in contract, as well as in tort, establishes that the substantial relation is contractual, or whether the right against a carrier is fundamentally based on the "custom of the realm," as commonly said, precisely as a right against a public officer or a quasi public officer is so based, so that, in the absence of a bill of lading or its equivalent, the *assumpsit* arises only because it is implied from the acceptance of the custody of the passenger or the goods. It is the undoubted law that the maxims with reference to persons in *pari delicto* are not limited to causes *ex contractu*, and that no suit can be maintained whenever it springs from an illegal transaction to which the plaintiff was a party, and which transaction is necessarily a portion of his case. *Pol. Cont.* (6th Ed.) 363. In the present suit the plaintiff could not show that he was legally on the defendant's train, without exhibiting his pass in his pleadings or in his proofs. No exoneration or contribution between joint tortfeasors, or between persons who have agreed together in violation of law, can arise out of the joint tort or the subject-matter of the agreement. But the case takes on even a more concrete aspect. Rejecting the pass as void, the plaintiff puts himself in the position of one who was on the train of the defendant without its permission, and without intention of paying the fare which would entitle him to be regarded as a passenger. The consequence, therefore, of the plaintiff putting himself in that position, is to leave him as an unauthorized intruder, and to place him outside of those rules of law which give protection against the mere negligence of the servants of a common carrier.

Coming now to the real question in the case, there is need of discussion of only few authorities. Those to which we will refer merely restate and apply well-settled rules. At the home of the common law, the situs of the birth and development of the rules relating to common carriers, no accepted text writer and no authoritative judicial decision gives the slightest support to the plaintiff's position. The preponderance of local judicial decisions in the United States is against him. If this case were of such a class that we were permitted to follow them implicitly, *Rogers v. Steamboat Co.*, 86 Me. 261, would dispose of this part of it to our own entire satisfaction. The supreme court, which must be the final arbiter for us on questions of the class involved here, has held that the acceptance by a carrier of the custody of a person to be transported affords a sufficient consideration, in law, to raise an obligation of reasonable care, in the absence of any stipulation to the contrary. It has also held that there may be other considerations than the usual passage money, which will leave resting on a common carrier all the duties imposed by the common law, and prohibit it from denying that it is acting in its capacity according to the "custom of the

realm," and therefore from asserting any defense inconsistent with such custom. But the precise issue before us has never been decided by that court, as was said by the circuit court of appeals for this circuit in *Whitney v. Railroad Co.*, 43 C. C. A. 19, 102 Fed. 850, 854, 50 L. R. A. 615. *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, decided nothing more than we have said; and in *Railway Co. v. Voight*, 176 U. S. 498, 505, 20 Sup. Ct. 385, 44 L. Ed. 560, it was stated to relate to "a passenger for hire." Inasmuch as the only federal case cited by the plaintiff (*Farmers' Loan & Trust Co. v. Baltimore & O. S. W. R. Co.* [C. C.] 102 Fed. 17, decided by the district judge for the district of Indiana) was based on a misapprehension in this respect of the various decisions of the supreme court, we must abide by what was said in *Whitney v. Railroad Co.*; and also we must add that not only is there no decision of the supreme court, but no federal authority which we should regard as determining the precise question before us. We might add that the entire line of reasoning in *Railway Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535, rests on the hypothesis that the conditions of a pass like those of this at bar are valid, except against one from whom the carrier has received some consideration or benefit in exchange; but the precise point was not before the court, and therefore it was not passed on by it. In *Railroad Co. v. Derby*, 14 How. 468, 483-485, 14 L. Ed. 502, it appears that Derby, the plaintiff below, was a stockholder of the corporation, riding on one of its trains by invitation of its president, and paying no fare, but under no stipulation like that in the case at bar. He was injured by the carelessness of the agents of the corporation in operating another train, and in bringing it into collision with that on which Derby was riding. Mr. Justice Grier delivered the opinion in behalf of the court, and, first of all, observed that, inasmuch as Derby was lawfully on a train of the corporation, he was in the position of one who is lawfully on a street, and carelessly driven against by another's servant. This was sufficient to dispose of the case. But Mr. Justice Grier went on, and stated some other considerations which are undoubtedly law. All we need refer to is to the rule stated by him, that "the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." This is undoubtedly true where the service has been in fact entered on, and where, as applied to the transportation of an individual, his person has been in fact intrusted to the custody of the carrier. Mr. Justice Grier then proceeded to some further considerations, which show that reasonable care in the use of the powerful and dangerous agency of steam involves the greatest diligence. This, however, we are not concerned with; but what precedes this explains why it is that, in the absence of any stipulation one way or the other, the receiving of the person of an individual into one's custody raises a sufficient consideration to impose on the latter the duty of reasonable care, regardless of the question whether the individual is *quâ* passenger, or whether relations thus established are those out of which the "custom of the realm" evolves peculiar obligations for one who undertakes a public service. It follows, therefore, that

neither the observations made by Mr. Justice Grier, nor the fact that the intrusting of one's person to the custody of another affords a sufficient consideration for an obligation to use reasonable care, determine the nature of the relation existing between the holder of a free pass with conditions and a common carrier issuing it.

The solution of what is thus left undetermined will be found in certain well-known principles more than once stated by the supreme court. In *Liverpool & G. W. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 441, 9 Sup. Ct. 469, 472, 32 L. Ed. 788, 792, Mr. Justice Gray, speaking in behalf of the court, said:

"The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgie or stand out, and seek redress in the courts. He prefers, rather, to accept any bill of lading, or to sign any paper, that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business."

In *Railroad Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, already referred to, Mr. Justice Shiras, at page 506, 176 U. S., page 387, 20 Sup. Ct., and page 565, 44 L. Ed., states the principles which justify the courts in holding that, as between common carriers and their customers, there are certain rules of public policy which require apparent interference with freedom of contract. He first refers to the importance which the law justly attaches to human life and personal safety; and he says that the second fundamental proposition relied on to nullify contracts to relieve common carriers from liability caused by negligence, is based on the position of advantage possessed by them over those who are compelled to deal with them. He thus refers to what underlies what we have cited from Mr. Justice Gray. The first topic to which he refers (that is, the importance which the law attaches to human life and personal safety) he evidently does not regard as essential to the issue, because, in the very case before him, he, and the court in whose behalf he was speaking, rejected all such considerations. At page 507, 176 U. S., page 388, 20 Sup. Ct., and page 565, 44 L. Ed., he sums up that exemptions claimed by carriers must be reasonable and just; "otherwise they will be regarded as extorted from the customers by duress of circumstances, and therefore not binding." What the opinion meant, in what follows, by the word "passengers," appears at page 513, 176 U. S., page 390, 20 Sup. Ct., and page 568, 44 L. Ed., where it says that the relation between express messengers and common carriers under the contract then under discussion, which was the usual contract, "is widely different from that of ordinary passengers."

Now, it is plain that the plaintiff was not, within the language of Mr. Justice Gray, a customer who had no real freedom of choice. It is also plain that, in the matter of the pass in question, he and the defendant stood on a footing of entire equality, and that neither had occasion to deal with the other except at his or its absolute option. It is also, in the same way, clear, to apply the language of Mr. Justice Shiras, that in the transaction before us the defendant had "no position of advantage" over "one who was compelled to deal" with it, and that the plaintiff is in no sense one who came within that class

described by him as yielding exemptions extorted from customers by duress of circumstances. Mr. Justice Shiras, at page 505, 176 U. S., page 387, 20 Sup. Ct., page 565, 44 L. Ed., further observes:

"It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare."

This opinion, at page 513, 176 U. S., page 390, 20 Sup. Ct., page 568, 44 L. Ed., observes that the relation of the express messenger to the transportation corporation resembles that of an employé of the latter, rather than that of a passenger; but from what immediately follows on the same page, and from what elsewhere appears, it is plain that the decision is not left to rest on that proposition. Its pith is well illustrated at page 518, 176 U. S., page 392, 20 Sup. Ct., page 569, 44 L. Ed., where it says that there is an obvious distinction between the cases of postal clerks, referred to, and the express messenger then before the court, in that the latter agreed to a contract exempting the railroad corporation from liability, while such was not the fact with the postal clerks. The opinion adds:

"To make the cases analogous, it should be made to appear that the government, in contracting with the railroad company to carry the mails, stipulated that the railroad company should be exempted from liability to the postal clerk, and that the latter, in consideration of securing his position, had concurred in releasing the railroad company."

To paraphrase this quotation, and to apply the underlying principle thereof to *Railroad Co. v. Derby*, 14 How. 468, 14 L. Ed. 502, and other decisions of that character, it should be made to appear that Derby stipulated that the defendant corporation should be exempted from liability. To apply further the rules thus enunciated in the opinions rendered in behalf of the supreme court, which are undoubtedly correct expressions of the law, we must hold that the right of private contract cannot be contravened by us unless the conditions in question can be regarded as extorted from the plaintiff by duress of circumstances. What is more directly in point, in order to bring the plaintiff within the protection of the "custom of the realm," it must appear that when he entered the defendant's train he stood on his rights under that custom, and was prepared to perform his duty imposed by it, including, with the rest, to make payment of his fare, or to yield to the corporation some consideration or some benefit which in law would be the equivalent thereof. To sum up, he is not entitled to hold the defendant as a common carrier unless he placed himself in the position of one who at the common law was entitled to the rights of a passenger, and became so entitled because of the obligation of the defendant to perform the duties resting on it by virtue of the public nature of its employment. He did not put himself in this position, and therefore there is no principle of public policy, and no authoritative rule laid down by text writers or courts, which prohibited him and the defendant from making a valid contract in the terms set out in the pleadings.

There is one other topic which has been referred to in the decisions

of the supreme court, which should not be left unspoken about. We refer to the fact that incidentally, both in *Railroad Co. v. Derby* and in *Railroad Co. v. Voight*, the opinions rendered in behalf of the court refer to the fact that the importance which the law attaches to human life forbids that relaxation of care in the transportation of passengers which might be supposed to be induced by special stipulations relieving common carriers. We have also referred to the fact that these observations were incidental, and were not in either case essential to the conclusions reached. They were mere explanations of the degree of diligence necessary to amount to reasonable care in the use of the dangerous and powerful element of steam. Nevertheless it has been frequently urged in support of the positions taken by the plaintiff that public policy forbids contracts of the kind under discussion under any circumstances, because they tend to the endangering of human life and personal safety. Such considerations, however, come into cases of this class only incidentally, because it is not apparent that, in granting passes with conditions stipulating against the results of mere negligence, there is any intention on the part of the carrier to increase the hazards to human life or personal safety. If they have such a tendency, it is only because all such stipulations between any persons—carriers or others—would have a like tendency; so that any rule of public policy which could be constructed on any such basis would be altogether too far-reaching, in that they would affect all the contractual relations of life. Inasmuch, herefore, as it is no part of the purpose of transactions like that at bar to create a public mischief, their limitation must be left to the criminal law and the legislature. Moreover, if propositions of this character could operate in behalf of the plaintiff, they would also have reached *Railroad Co. v. Voight*, and necessarily have compelled a different conclusion in that case, because they are in all respects as applicable there as here. *Railroad Co. v. Voight* directly involved this proposition, and therefore it is in point with reference thereto, although, for the other matters touched on by it, we have cited it because it conveniently expresses well-settled rules of law, and not as authoritative on the issues which we have to decide.

We will add that we do not find it necessary to refer to the other decisions of the supreme court in which practically the same result was reached as in *Railroad Co. v. Derby*.

It is to be observed that in the case at bar, as we have already said, the negligence out of which the injury to the plaintiff arose was not, as a matter of fact, that of the defendant corporation itself, but of its servants. We are not prepared to say that our conclusions would have been other than they are in either aspect, and it may be that our line of reasoning is sufficiently broad to cover both: Nevertheless we deem it proper to thus call attention to the particular circumstances of the case before us, reserving for further consideration in the future, if it ever becomes necessary, the question whether there could be any substantial difference in the result if the negligence had not been merely that of employés.

In *Whitney v. Railroad Co.*, 43 C. C. A. 19, 102 Fed. 850, 50 L. R. A. 615, already referred to, the court observed at the conclusion of

the opinion that, so far as concerns any moral obligations growing out of stipulations of the character of those at bar, the defendant, under the circumstances of that case, must appeal elsewhere than to courts of law; but the result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted.

The plaintiff's demurrer is overruled, and the special matter of defense demurred to is adjudged sufficient in law.

THE JUNEAU.

(District Court, D. Washington, N. D. January 17, 1902.)

SEAMEN—RIGHT TO WAGES—SET-OFF OF DAMAGES CAUSED BY NEGLIGENCE OF DUTY.

The master, mate, engineer, and fireman in sole charge of a tug, who, through gross and culpable neglect of their duty, permitted her to become grounded, by which she sustained damage, are liable to the owner for such damage, which may be set off against their claim for wages.

In Admiralty. Suit by seamen to recover wages.

William Martin, for libelants.

Peters & Powell, for claimant.

HANFORD, District Judge. This is a suit by the libelants to recover wages for services on the steam tug Juneau, in the capacities of master, mate, engineer, and fireman. It is not disputed that the libelants worked on the steamer during the time alleged, and that they have not been paid their wages; the claimant, however, defends on the ground that by gross negligence on the part of the libelants the steamer was damaged to an amount exceeding the wages earned. It is proved by the admissions of the libelants and other evidence that on a dark, stormy night, they took the vessel into Port Susan and anchored, and then devoted their attention to a game of cards, to such an extent that they allowed steam to go down, and the vessel to drag her anchor until she grounded. The tide was ebbing at the time, and, before they could raise steam sufficient to get off the beach, the vessel was hard aground, and listed over so that the flood tide overflowed and filled her, and she remained submerged for several days, until another tug could be sent to her assistance. After the Juneau was floated and pumped out, having no fresh water aboard to fill her boiler, salt water was used, with damaging effect. The evidence proves that, by reason of the bad treatment of the steamer in the particulars mentioned, her owner incurred an expense of \$89 in getting her off the beach, and \$15 for towing her into Seattle, and that these expenses, together with the damage to her machinery, furniture, and paint, exceed the total amount of wages due to all of the libelants. The evidence does not make it clear whether all of the libelants did or did not participate in the game of cards, but it is certain that they were all negligent; for, according to their own statements, no person on

the boat knew that she was dragging her anchor until she was on the beach, and then, by not having steam up, they were unable to pull off before the tide receded, leaving her hard aground; and no excuse whatever is offered for this negligence, except the pretense that the night was so dark they were unable to see that the vessel was dragging. In admiralty, justice is administered according to the principles of equity; and it is contrary to equity for the captain and crew intrusted with the care of a vessel, who by their culpable neglect of duty have suffered the vessel to be seriously damaged, so that by their employment the owner has been damaged, and not benefited, to have a lien upon the vessel for wages. Seamen may be subjected to deductions from their wages for neglect of their duty, and they are liable for losses of property occasioned by their negligence. *Desty, Shipp. & Adm.* §§ 178-181; *Brown v. The Neptune*, Fed. Cas. No. 2,022; *Spurr v. Pearson*, Fed. Cas. No. 13,268; *Wilson v. Belvidere*, Fed. Cas. No. 17,790; *Knap v. The Eliza and Sarah*, Fed. Cas. No. 7,873.

Case dismissed, with costs.

PEOPLE OF STATE OF NEW YORK V. BENNETT.

(Circuit Court, S. D. New York. January 14, 1902.)

1. REMOVAL OF CAUSES—CRIMINAL PROSECUTIONS—DENIAL OF EQUAL CIVIL RIGHTS.

Rev. St. § 1977, which declares that all persons shall have the same right to the equal benefit of all laws for the security of persons and property as is enjoyed by white persons, and shall be subject to like punishment, etc., has no bearing on a prosecution under Pen. Code N. Y. § 351, which provides for the punishment of persons who keep or occupy rooms for recording or registering wagers or selling pools, or who receive, record, or register the money of others bet or wagered, etc., the state statutes not subjecting white persons to one kind of punishment and other persons to another; and therefore the prosecution is not removable into a federal court, within Rev. St. § 641, authorizing the removal of criminal prosecutions against any person who is denied or cannot enforce in the state tribunal any right secured to him by any law providing for the equal civil rights of citizens of the United States.

2. SAME—DENYING EQUAL PROTECTION OF LAWS.

Laws N. Y. 1895, c. 570, which provides that any one who records a wager by some memorandum in his own possession, and does not transfer any memorandum thereof, shall not be punishable criminally if he makes that record on certain race courses authorized by the act, but shall be punished criminally if he makes it elsewhere, is not repugnant to the fourteenth amendment of the federal constitution, providing that no state shall deny to any person within its jurisdiction the equal protection of the laws, no class being discriminated against in the statute, but every one recording a wager on any other place than the race course being punishable; and therefore a prosecution for a violation of the statute is not removable into a federal court, within Rev. St. § 641.

Motion to Remand to State Court.

Charles E. Lebarbier and Joseph S. Auerback, for the motion,
John R. Dos Passos, opposed.

LACOMBE, Circuit Judge. This is a criminal prosecution of one Charles Bennett, who was indicted on four counts: (1) Keeping and occupying a room for the purpose of therein recording and registering bets and wagers and of selling pools upon the result of horse races; (2) keeping, exhibiting, and employing devices and apparatus for the purpose of recording bets and wagers and of selling pools upon the result of horse races; (3) recording and registering bets and wagers upon the result of horse races; (4) receiving, registering, and recording money bet and wagered upon the result of horse races,—all the above offenses being committed, as alleged, in a building in the city of New York, and not upon any race course such as is provided for in chapter 570 of the Laws of 1895. These acts are declared to be felonies, and punishable by imprisonment in the state prison, by section 351 of the Penal Code of New York. That section, it may be noted, defines the last above enumerated offense as receiving, registering, and recording any money bet or wagered, or offered for the purpose of being bet or wagered, “by or for any other person.” Apparently the section does not prohibit an individual from merely betting or wagering his own money, so long as he does not complicate that transaction with recording, registering, keeping a room, using devices and apparatus, etc., and does not engage in pool-selling or bookmaking. “Bookmaking” imports some method of recording bets; “pool-selling” imports a transaction where the money of some person other than the seller of the pool is to be received by him. The indictment does not specifically aver that Bennett received, registered, and recorded money bet or wagered “for any other person,” but the papers show that that is what he did in fact do. The act of 1895, *supra*, provides that any person who, upon certain race courses authorized by the act, shall make or record any bet or wager on the result of a horse race taking place thereon shall be liable in a civil action to recover the amount of such wager, and shall not be liable criminally, provided he does not exchange, deliver, or transfer any record, registry, memorandum, token, paper, or document of any kind as evidence of such bet or wager, and does not subscribe by name, initial, or otherwise any record, registry, or memorandum in the possession of another person, of a bet or wager, intended to be retained by such other person, or any other person, as evidence of such bet or wager. The result of an analysis of these acts—and they are the only ones to which the court’s attention is directed by this motion—seems to indicate: First. That certain acts, viz., keeping a room, or occupying a stand, etc., with books, apparatus, etc., for recording or registering bets or wagers; receiving, registering and recording the money of others bet or wagered; becoming the custodian, etc., for hire, of money wagered; pool-selling, etc.,—are prohibited, and punishable criminally wherever committed. Second. That a person who bets his own money on the result of a horse race is not punishable criminally, wherever he bets it. Third. That an individual who records a wager (his own or that of some one else) by some memorandum in his own possession, and does not transfer any memorandum or token thereof, shall not be punish-

able criminally if he makes that record on the race course, but may be punished criminally if he makes it elsewhere. Incidentally it may be noted that, according to the evidence, Bennett took another person's money, offered for the purpose of being bet or wagered on a horse race,—an act which would have been punishable criminally if committed on a race course. The cause may be disposed of, however, as if his acts were only those charged in the count, which is silent as to the fact that he registered and recorded money bet and wagered by another person. This cause was removed to this court under section 641, Rev. St. U. S., which provides for such removal when any criminal prosecution is commenced in any state court "against any person who is denied or cannot enforce in the judicial tribunals of the state * * * any right secured to him by any law providing for the equal civil rights of citizens of the United States." To warrant removal, it must be shown affirmatively that the defendant is denied or cannot enforce some right secured to him by some law of the United States providing for the equal civil rights of its citizens.

Defendant refers to section 1977, Rev. St. U. S. That provides that "all persons * * * shall have the same right * * * to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like punishment, pains, penalties, * * * and no other." This section has no bearing on the case at bar. The state statutes do not subject "white persons" who make, register, and record bets and wagers and commit the other acts above enumerated to one kind of punishment and penalty and other persons to some other kind.

Defendant also refers to the fourteenth amendment to the constitution of the United States. *Neal v. Delaware*, 103 U. S. 392, 26 L. Ed. 567, is authority for holding that the words "any law providing for the equal civil rights of citizens of the United States," in section 641, are broad enough to cover this amendment. The amendment provides that "no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Defendant contends that the statutes of the state deny the equal protection of the laws, because they punish individuals criminally for acts committed in one place, and not for the same acts committed elsewhere. In the multitudinous authorities construing the amendment, most of which are cited in the briefs, no case is found which sustains this proposition, or which holds that the state may not differentiate crimes and punishments as it pleases, so long as such differentiation is not an effort, more or less disguised, to discriminate against a class of persons by reason of their race, or color, or some other individual distinction. There is nothing of that sort here. No class is discriminated against. Every one, whoever he may be, who records a bet or wager in any other place than the race course, is subjected to the same punishment. No one who

merely records such bet when he is on a race course is subject to any punishment. It seems preposterous to hold that the fourteenth amendment precludes a state from making the commission of some particular act a crime if committed in the streets of a crowded city, or in a church, or a public building, or on navigable waters, or on the seashore, or at night, and no offense if committed on the highway in some sparsely settled rural district, or in the open country, or on nonnavigable waters, or in the mountains, or by daylight. The amendment provides that:

"In the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. * * * But legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923.

In Moore v. Missouri, 159 U. S. 678, 16 Sup. Ct. 181, 40 L. Ed. 301, the court says:

"The fourteenth amendment means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989. The general doctrine is that that amendment in respect to the administration of criminal justice requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses; but * * * the state may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offenses than for a first offense against the law, and that a different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated. Pace v. Alabama, 106 U. S. 583, 1 Sup. Ct. 637, 27 L. Ed. 207."

In the case last cited the statutes of Alabama made the living in adultery or fornication an offense, prescribing a certain penalty, and further provided that, if one of the couple were white and the other of the African race, the penalty should be greater. The United States supreme court sustained the statute. The cases cited on the brief of counsel for defendant, in which it was held that the state statute or ordinance was obnoxious to the amendment are these: Yick Wo v. Hopkins, 118 U. S. 367, 6 Sup. Ct. 1072, 30 L. Ed. 220. The board of supervisors of San Francisco passed an ordinance providing, in substance, that it should be unlawful to conduct the laundry business in frame buildings within the city limits unless a permit therefor was first obtained from the board of supervisors. It appeared that there were some 320 laundries in the city. 310 of them were in frame buildings, and of these about 240 were owned and operated by Chinese. It further appeared that upon application the required permit was given by the supervisors to all persons but the Chinese, but was refused to all the latter. The supreme court held that this constituted a species of class legislation, which was prohibited by the constitution. It said:

"In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms offered, of unequal and unjust discrimination in their administration; for the cases present the ordinances in actual operation, and the facts shown establish an administra-

tion directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. * * * The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution."

To the same effect is the decision in *Ho Ah Kow v. Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546, where an ordinance directed that the hair of persons confined in jail should be cut, the object sought being to inflict an additional punishment upon the Chinese prisoners.

In *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664, it was held that, where state statutes secure to every white man the right of trial by a jury selected from and without discrimination against his race, and at the same time requires such discrimination against the colored man because of his race, they are obnoxious to the fourteenth amendment.

In *Railroad Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, the statute provided that individuals who had claims against railroad companies might, upon recovery, in addition to damages, interest, and costs, include an attorney's fee in the judgment entered. Of this the court says:

"It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors, and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants, under like conditions, and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff. If it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong. They do not recover any if right, while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute."

In *Cotting v. Godard* (Nov. 25, 1901) 22 Sup. Ct. 30, 46 L. Ed. —, the statute which was held invalid provided that any stock-yards corporation doing more than a certain amount of business (which statute applied to only one corporation) should not be permitted to charge more than a certain tariff of fees and charges, and that any violation should be punished by fine and imprisonment.

In the *Stockton Laundry Case* (C. C.) 26 Fed. 611, the ordinance made it an offense for any person to carry on a laundry where clothes were washed for pay within the habitable portion of the city. The court held that this violated that clause of the fourteenth amendment which says: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The legislation condemned in *Re Parrott* (C. C.) 1 Fed. 481, prohibited any corporation from employing any Chinese or Mongolian in any capacity whatsoever.

In *Gibson v. Mississippi*, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075, the question discussed was legislation which should deny to citizens of the African race, because of their color, the right or privilege accorded to white citizens of participating as jurors in the administration of justice.

In none of these cases is there found authority for the proposition that the state may not, without violating the fourteenth amendment, prescribe a penalty for the commission of acts in certain specified localities, when the same acts, if committed in some other locality, are not prohibited, when it is not apparent that the legislation is directed against any class of persons whose classification is predicated upon anything else than the commission of the acts condemned. On the contrary, legislation of this character has been sustained in the federal courts. In *U. S. v. Ronan* (C. C.) 33 Fed. 117, it appeared that the statutes of Georgia provided that no license to retail spirituous liquors should be granted except in incorporated cities or towns, unless with the written consent of 10 of the nearest residents. It was held that the exception in favor of such towns and cities was not unconstitutional as denying to saloon keepers in the counties the equal protection of the laws secured to citizens by the fourteenth amendment. In *Re Ah Kit* (C. C.) 45 Fed. 793, a city ordinance making it a punishable offense to visit any gambling place located within certain specified limits (which designate what is known as the "Chinese Quarter"), and which ordinance applied to all alike, white men as well as Chinese, irrespective of race or color, was held not to be within the language of the fourteenth amendment.

For these reasons defendant has not made out a case which would warrant removal under section 641, and the motion to remand is granted.

MORGAN v. GARFIELD & PROCTOR COAL CO.

(District Court, D. Massachusetts. February 5, 1902.)

No. 1,181.

1. SHIPPING—DEMURRAGE.

Ordinarily demurrage is the agreed additional payment by the charterer for the allowed detention of the vessel beyond the period specified in the charter party.¹

¹ Definition and general principles of demurrage, see notes to *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.

2. SAME—CHARTER PARTY—CANCELLATION—DEMURRAGE—LIABILITY OF CHARTERER.

A charter party stipulated that the vessel should have 10 days in which to load, with a specified demurrage thereafter; it being agreed that the charterer should not be liable for demurrage if he was prevented from loading by strikes, unless loading had begun, and that in case of a strike the owner might cancel the charter. The vessel remained 18 days without loading, when its captain informed the charterer that a strike was imminent, and that the vessel was lying at the charterer's expense, and asked what concessions the charterer would make. The next day the captain wired the charterer for instructions and propositions, and the latter canceled the charter. *Held*, that the cancellation of the charter relieved the charterer from all liability for demurrage.

In Admiralty.

Carver & Blodgett, for libellant.

Hutchins & Wheeler, for respondents.

LOWELL, District Judge. The respondents chartered the schooner *Eagle Wing* for a voyage from Baltimore to some Northern port. The material parts of the charter party are as follows:

"Ten days to load, Sundays and holidays excepted, on the terms following: Demurrage five cents per ton thereafter." "It is agreed that said vessel has her turn in loading with other sailing vessels, vessels to load for the government having priority; and parties of the second part are not to be held accountable for demurrage if they are prevented from loading either by strikes at the mines or on the railroad, or any cause beyond their control. In case of strike, party of the first part has privilege of canceling charter party, but, if vessel has commenced to load, then shippers are to be held for demurrage."

The schooner proceeded to Baltimore; arrived and reported March 22d. She lay there without loading until April 10th. On April 10th her captain wrote to the respondent as follows:

"The prevailing opinion at this time is that a strike is imminent by tomorrow, and, should same occur, you will be notified by the Consolidation Coal Co. that they will be unable to load our cargo of coal on your account. As you are aware, the condition of the charter party of *Schr. Eagle Wing*, that in event of strike the vessel would have privilege of canceling charter. The prevailing opinion of shippers here is that strike will not last long. Would your firm be willing to retain the *Eagle Wing* to wait for cargo, even though strike should be declared? What concessions, if any, have you to make relative to the matter in question? As you are aware, the *Eagle Wing* is now lying here at your expense, and will be until loaded or strike prevents loading. I assure you that I have no desire to cancel our charter with you, but merely use these means of notifying you of condition of affairs now prevailing at this port. Kindly advise at earliest moment of your intentions.

Yours, truly."

On the following morning he sent the following telegram: "Wire your instructions for *Eagle Wing*. Waiting your proposition. Prompt answer required." To this telegram the respondents replied as follows: "Cancel charter on account of strike."

A strike began April 10th or 11th. The master sues for demurrage up to April 10th, and it is admitted that, after the 10 lay days had passed, 8 days more had elapsed prior to the cancellation of the charter as above stated. The libellant contends that the cancellation of the charter left the liability for this demurrage still subsisting. The respondent contends that the cancellation of the charter, either by the

libellant under the right given to him by the charter, or by the consent of both parties, has put an end to all liability for demurrage under the charter. Nothing appears in the correspondence between the parties to interpret the clauses of the charter party above quoted, or to take the case out of the general rule.

The question concerns the nature of the liability for demurrage stipulated for in a charter party. Does the liability ordinarily arise only after performance of the contract by the vessel? In other words, when the lay days have expired without loading by the charterer, can the owner treat the contract as rescinded, or is the vessel bound to await longer the convenience of the charterer? Is stipulated demurrage ordinarily compensation for waiting while the vessel is bound to wait by the terms of the contract, or is it compensation for damage sustained by a breach of the contract by the charterer? Is it payment for carrying out the contract, or damages for its breach? Extreme and exceptional cases may be put, but these do not concern the case at bar. That under ordinary circumstances the first alternative correctly states the law, is plain. "The word 'demurrage,' no doubt, properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in, or to be collected from, the instrument." *Lockhart v. Falk*, 44 Law J. Exch. 105. See *Cropton v. Pickernell*, 16 Mees. & W. 829; *Mathewson v. Ray*, Id. 329; *Gage v. Morse*, 12 Allen, 410, 90 Am. Dec. 155; *The J. E. Owen* (D. C.) 54 Fed. 185, 186. A vessel chartered under a stipulated rate of demurrage, which should sail away after the lay days had run out, would thereby break its contract of charter party. If this be true, it follows that the contract is equally broken if the vessel sails away after one or two or three days' demurrage. No compensation for demurrage could be recovered in the case supposed. Extreme cases may be put, as has been said already, where the result would be otherwise, but the ordinary rule is as above stated. In order to collect demurrage, the contract must ordinarily be carried out, and the cargo must be taken on board. The difference between stipulated demurrage and damages awarded for detention beyond the terms of the contract appears from a consideration of cases like *The J. E. Owen* (D. C.) 54 Fed. 185, and *Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co.*, 23 C. C. A. 564, 77 Fed. 919, 35 L. R. A. 623. Where no demurrage is stipulated, the contract is deemed a contract to load within a reasonable time under all the circumstances, and the burden is upon the owner, who seeks to recover for excessive detention, to show that the charterer was not diligent. No such burden rests upon the owner who seeks to recover stipulated demurrage. The charterer's diligence or negligence is immaterial. The general principle is further illustrated by *Lilly v. Stevenson*, 22 Sess. Cas. Scot. (4th Series) 278. There, after certain lay days, demurrage was to be paid at a certain rate, unless the detention arose from a strike. No limit of time was specified. The strike did not begin until the vessel was on demurrage. The vessel waited until the strike was over, then loaded, and sought to recover demurrage for all delay occurring after the expiration of the last lay day. This would have

been the true principle of computation if the charterer had been bound to load within the fixed days, and if demurrage were treated as liquidated damages for breach of contract. Having broken the contract before the strike began, the charterer could not set up in mitigation of damages that a strike had happened subsequently. The lord ordinary (Lord Wellwood) appears to have agreed with the owner, but his decision was reversed by the court of session. In delivering the opinion of that court, Lord Trayner said:

"The pursuers argued that the exemption from liability to which I have referred did not apply when no use had been made of the lay days, and that, if the defenders had used their lay days, the cargo would have been loaded before the strike began. But I cannot accede to that view. Days stipulated for by the merchant on demurrage are just lay days, but lay days that have to be paid for. If a charter party provides that the charterer shall have ten days to load cargo, and ten days further on demurrage at a certain rate per day, the shipper has twenty days to load, although he pays something extra for the last ten. Loading within twenty days is fulfillment of the obligation to load. Here the lay days proper were limited to sixty hours, but any time beyond that which was occupied in loading the cargo was to be paid for at the rate of 12s. 6d. per hour. The pursuer said that this would amount to a lease of his vessel for any length of time the defenders were pleased, provided they paid the stipulated rate. Even if it had been so, I rather think it would have been a good enough bargain for the ship. But it is not so. Where the days on demurrage are not limited by contract, they will be limited by law to what is reasonable in the circumstances, as circumstances may happen to exist or emerge. But there is no such limitation of the application of the demurrage clause in the charter party before us as that which the pursuer maintains there is, nor can any such limitation be fairly implied. The defenders were entitled to keep the vessel on demurrage, but were to pay no demurrage if the detention was caused by a strike." Page 286, 22 Sess. Cas. Scot.

See *Connor v. Smythe*, 5 Taunt. 654; *Francesco v. Massey*, 42 Law J. Exch. 75, 78.

If this be true, the application of the principle to the case at bar is simple. At the time of the cancellation of the charter no liability had accrued, enforceable by the libellant. Nothing was due under the contract. True, the contract had been performed in part. It would have been performed in part had it been canceled before the lay days ran out, yet no recovery could then have been had. Neither in that case nor in this does any benefit accrue to the respondent for which he is liable on a quantum meruit. See *O'Brien v. 1,614 Bags of Guano* (D. C.) 48 Fed. 726. The whole charter is canceled, and the inchoate liabilities arising thereunder are released.

Libel dismissed, with costs.

GILBERT v. SOUTH CAROLINA INTERSTATE & WEST INDIAN EXPOSITION CO.

(Circuit Court, D. South Carolina. February 21, 1901.)

1. SUMMONS—SUFFICIENCY—DATE.

In an action on an account beginning August, 1901, and continuing until January, 1902, a summons bearing date "the 8th day of February, nineteen hundred and —, and the one hundred and twenty-sixth year of the independence of the United States," is not insufficient as requir-

ing defendant to answer on a day anterior to the cause of action stated, it being clear that a word has been omitted, and the year of independence showing that the year intended is 1902.

2. SAME—AMENDMENT.

Such summons, even if insufficient, having the complaint attached to it, would be amendable, within Rev. St. § 948, authorizing amendments in process returnable to circuit or district courts where no prejudice or injury will result.

Ficken, Hughes & Ficken, for the motion.
J. P. K. Bryan, opposed.

SIMONTON, Circuit Judge. This is a motion to set aside a summons. The summons is properly tested with the seal of the court, and is in the name of the chief justice. But it bears date "the 8th day of February, nineteen hundred and ———, and the one hundred and twenty-sixth year of the independence of the United States of America." The complaint attached to the summons is on an account beginning August, 1901, and continuing, with its items, until January, 1902. The defendant's motion is based on the proposition that the summons requires the defendant to appear and answer on a day anterior to the cause of action stated in the complaint.

The statutes of the United States are most liberal in allowing amendments of process returnable to the circuit and district courts (Rev. St. § 948); and, even in writs of error, Rev. St. § 1005, provided that the amendment does not injure or surprise the party against whom it is made; and this following the general maxim, "Ut res magis valeat quam pereat." If an amendment were necessary to validate this summons, it would be allowed; for we have the complaint attached to the writ, and the papers in the complaint, by which we could amend. *Chamberlain v. Bittersohn* (C. C.) 48 Fed. 42. But an amendment is not necessary. This is the 126th year of American independence, a statement as certain as A. D. 1902. The defendant could see from the summons that a word was omitted, for the words are "nineteen hundred and ———." The words "one hundred and twenty-sixth year of American independence" at once show without possibility of error what word is omitted; for this year of American independence is the year 1902.

The motion is refused.

UNITED STATES v. SLAZENGER et al.

(Circuit Court, S. D. New York. May 19, 1900.)

No. 3,027.

CUSTOMS DUTIES—TENNIS BALLS.

Tariff Act 1897, par. 391 (30 Stat. 187), providing that all manufactures of which wool is a component material shall be classified and assessed as manufactures of wool, does not apply to merchandise of which silk is not a component material; and tennis balls of wool and rubber (rubber being the component material of chief value) are not dutiable under the provision for "all manufactures of every description made wholly or in part of wool, not specially provided for" in paragraph 386 of that act, but as manufactures of India rubber, or of which India rubber is

the component material of chief value, not specially provided for under paragraph 449 of said act.

Appeal by the United States from a decision of the board of United States general appraisers which sustained the protest of the importers as to the merchandise in question.

D. Frank Lloyd, Asst. U. S. Atty.
W. Wickham Smith, for appellees.

TOWNSEND, District Judge (orally). The articles in question are tennis balls, made of India rubber and covered with wool; the India rubber being the component material of chief value. They were assessed for duty under the provisions of paragraphs 366 and 391 of the act of 1897 (30 Stat. 184, 187), as manufactures of which wool is a component material, at 44 cents per pound, and 55 per cent. ad valorem. The question herein has been disposed of in the appeal of these importers (*Slazenger v. U. S.* [C. C.] 91 Fed. 517), except in so far as it may be affected by the following proviso in paragraph 391 (30 Stat. 187) of the silk schedule: "Provided, that all manufactures, of which wool is a component material, shall be classified and assessed for duty as manufactures of wool." Counsel for the United States contends that congress intended this proviso to apply to any manufacture of which wool is a component material. Counsel for the importers contends that this proviso is limited to the manufactures of silk, in said paragraph 391 of the silk schedule. It is clear that the construction contended for by the importers is correct. It appears by references to various other provisos in said act that, if congress had intended that this proviso should apply to paragraphs other than that in which it is inserted, they would have inserted language indicating such intention.

The decision of the board of general appraisers is affirmed.

HUNTER et al. v. THE TELLUS (two cases). CALIFORNIA & ORIENTAL S. S. CO. v. SAME. TELLUS S. S. CO. v. THE BELGIAN KING. R. DUNSMUIR SONS' CO. v. SAME.

(District Court, N. D. California. January 16, 1902.) . . .

Nos. 12,161, 12,224, 12,228, 12,196, and 12,195.

COLLISION—STEAMSHIPS IN FOG—FAILURE TO STOP AND REVERSE.

Evidence considered in a cause for collision between the steamships *Tellus* and *Belgian King* in the Pacific Ocean, at night, in a dense fog, and the *Belgian King* held to have been solely in fault for failing to stop and reverse on becoming aware that she was in close proximity to another vessel, as the *Tellus* was shown to have done.

In Admiralty. Cross actions for collision.

Milton Andros, for G. B. Hunter and others, owners of the *Belgian King*.

Page, McCutchen, Harding & Knight, for *Tellus S. S. Co.*

DE HAVEN, District Judge. The collision between the steamship *Belgian King* and the steamship *Tellus*, which is the subject of the litigation involved in these cases, took place in a dense fog, at about a quarter to 11 o'clock on the night of July 17, 1900, at a point on the Pacific Ocean between Point Reyes and Point Arena, on the coast of California. As is usual in this class of cases, each ship contends that the collision was caused solely by the fault of the other. It is not deemed necessary to enter into any lengthy discussion of the evidence. It will be sufficient to say that it has been fully considered, and my conclusion is that the collision must be attributed to the fault of the *Belgian King* in not stopping when she became aware that she was in close proximity to the steamer which proved to be the *Tellus*. If it should be conceded that the *Tellus* committed an error, just before the collision, in porting her helm, and, after this was done, giving the signal of one blast from her whistle, such error did not, in my opinion, contribute to the collision. The nature of the wound received by the *Tellus* shows conclusively that she was not under headway when the collision took place, and that she was run into by the *Belgian King*. If the latter had stopped her engines and reversed, as she ought to have done, when she became aware that the other vessel was near to her, and hidden in the fog; the collision would not have occurred. The *Belgian King* was doubtless moving at a very low rate of speed, but she did not discharge her whole duty in slowing down under the circumstances. She should have stopped when she became aware of the presence of the other vessel, until she ascertained its position, and then it would have been easy for her to have avoided the collision.

The libels of *Hunter et al. v. Tellus* (No. 12,161), *Hunter et al. v. Tellus* (No. 12,224), and *California & Oriental S. S. Co. v. Tellus* (No. 12,228), will be dismissed, and there will be a decree for the libelants in the cases of *Tellus S. S. Co. v. Steamship Belgian King* (No. 12,196), and *R. Dunsmuir Sons' Co. v. Belgian King* (No. 12,195), for damages and costs. The decree will further direct a reference to United States Commissioner Morse, to ascertain and report the amount of such damages.

INTERNATIONAL SILVER CO. v. WM. G. ROGERS CO. et al.

(Circuit Court, D. Massachusetts. February 17, 1902.)

No. 1,508.

TRADE-MARKS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Complainant, as the successor of the "Wm. Rogers Mfg. Co.," was engaged in manufacturing silver-plated ware, with a right to the use of the trade-mark "Wm. Rogers Mfg. Co." Defendants organized a corporation under the name of the "Wm. G. Rogers Company," using the trade-mark "Wm. G. Rogers." Wm. G. Rogers, its president, was a bank clerk, had never been engaged in manufacturing silver-plated goods, his only previous experience being limited to efforts to establish a business of selling ware stamped "Wm. G. Rogers," which had been crippled by various legal proceedings instituted by complainant. He had only 5 of the 100 shares of stock. Two other stockholders, holding between them

35 shares, had at one time manufactured silver-plated ware for the genuine "Wm. Rogers Mfg. Co." and for other concerns, and organized the new corporation for the purpose of continuing such manufacture. *Held* to conclusively show want of good faith on defendants' part, and that plaintiff was entitled to a preliminary injunction restraining them from making or selling ware stamped with the mark "Wm. G. Rogers."

In Equity.

Mitchell, Bartlett & Brownell and Hiram R. Mills, for complainant.

Elder, Wait & Whitman, for defendants.

COLT, Circuit Judge. This is a motion to enjoin the defendants against the use of the corporate name "Wm. G. Rogers Company" in the manufacture and sale of silver-plated tableware, and from making, marking, or selling silver-plated tableware stamped with the mark "Wm. G. Rogers." The complainant is the successor of the Wm. Rogers Manufacturing Company, and it has acquired the title to the business of that company, and to the trade-mark and trade-name, "Wm. Rogers Mfg. Co." The defendant, Wm. G. Rogers Company, is a corporation organized under the laws of Massachusetts on January 24, 1901. Its location is Greenfield, in that state. The corporation was constituted for the purpose of "the manufacture and sale of silverware and other articles of a like character." The amount of its capital stock is \$10,000, divided into 100 shares of \$100 each. The corporation was organized by the election of William G. Rogers as president and Walter E. Nichols as treasurer. The original incorporators and the directors and shareholders of the company are the defendants William G. Rogers, Walter E. Nichols, J. Henry Nichols, and Heman M. Purdy. Their subscriptions to the capital stock were as follows: William G. Rogers, 5 shares; Walter E. Nichols, 43 shares; J. Henry Nichols, 42 shares; and Heman M. Purdy, 10 shares. The whole question in this case is one of fact, and turns on the good faith of these defendants in organizing a corporation under the name of "Wm. G. Rogers Company" for the purpose of manufacturing silver-plated ware, and in making and selling spoons, forks, and knives having stamped upon them the mark "Wm. G. Rogers."

In one of the many cases concerning the Rogers trade-marks, the circuit court of appeals for the Second circuit, speaking through Judge Shipman, said:

"The fair and honest use of a person's own name in his ordinary and legitimate business, although to the detriment of another, will not be interfered with. A tricky, dishonest, and fraudulent use of a man's own name for the purpose of deceiving the public and of decoying it to a purchase of goods under a mistake or misapprehension of facts, will be prevented. Every case under this branch of the law of trade-marks turns upon the question of false representation or fraud. In this case Rogers helped to establish a corporation which took his name for the purpose of inducing the public to think that they were buying the well-known Rogers goods, and for the purpose of surreptitiously obtaining the advantage of the good reputation which other manufacturers had given to articles stamped with that name. The use by the defendant corporation of this name is not merely an injury to the complainant, but it is an intentional fraud upon the public."

In that case, Judge Wallace said:

"I place my concurrence in the judgment in this cause upon the broad ground that a body of associates who organize a corporation for manufacturing and selling a particular product are not lawfully entitled to employ as their corporate name in that business the name of one of their number, when it appears that such name has been intentionally selected in order to compete with an established concern of the same name, engaged in similar business, and divert the latter's trade to themselves by confusing the identity of the products of both, and leading purchasers to buy those of one for those of the other. No person is permitted to use his own in such manner as to inflict an unnecessary injury upon another. The corporators chose the name unnecessarily, and, having done so for the purpose of unfair competition, cannot be permitted to use it to the injury of the complainant."

R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 17 C. C. A. 576-579, 70 Fed. 1017-1019.

Applying these principles to the case at bar, I think the following facts and circumstances conclusively show the want of good faith and honest purpose on the part of these defendants:

First. The use of the abbreviated form "Wm." instead of "William" in the name of the corporation, and in the mark placed upon the spoons, forks, and knives manufactured and sold.

Second. The relatively small subscription of five shares of the capital stock by William G. Rogers, and making him the president of the company.

Third. The history and calling of William G. Rogers. It appears that he resides in New York, and that he has been for years, and is now, a bank clerk in the Seamen's Bank for Savings of that city; that he has never been engaged in the manufacture of silver-plated goods, and is entirely wanting in knowledge, skill, or experience respecting such manufacture; that his only previous experience in this line was limited to his efforts in a small way to establish a business in New York of selling silver-plated ware stamped with his name, "Wm. G. Rogers"; that his New York business was seriously crippled by proceedings instituted by this complainant against the Bristol Brass & Clock Company, which stopped that company from manufacturing the silverware he was selling, and by notice of threatened proceedings to his principal customer, R. H. Macy & Co., which prevented further sales to that concern.

Fourth. The history of Nichols Bros., defendants, in relation to the manufacture of silver-plated ware. It appears that Nichols Bros. at one time had been engaged in the manufacture of silver-plated ware for the genuine "Wm. Rogers Mfg. Co." and for other concerns; that their desire to continue this manufacture induced them to organize the defendant corporation, and to name it "Wm. G. Rogers Company"; that the capital, plant, manufacturing facilities, knowledge, skill, and experience in the business were furnished by Nichols Bros.; that the management and conduct of the business is substantially in their hands, and that they own nearly nine-tenths of the company's stock.

Fifth. The corporate title of the defendant corporation, the "Wm. G. Rogers Company," closely resembles the "Wm. Rogers Mfg. Co."; the trade-mark "Wm. G. Rogers" closely resembles the

trade-mark "Wm. Rogers Mfg. Co."; and the similarity is so great as to deceive the ordinary purchaser.

From this statement of facts and circumstances, the inference, to my mind, is irresistible that the defendants have adopted the corporate name "Wm. G. Rogers Company" and have placed the mark "Wm. G. Rogers" upon the plated silverware manufactured and sold by the defendant company for the purpose of deceiving the public, and in order to compete in an unfair and illegal manner with the Wm. Rogers Manufacturing Company, of which the complainant is the successor. Following the rule laid down by Judge Shipman in the recent case of *International Silver Co. v. Simeon L. & George H. Rogers Co.* (C. C.) 110 Fed. 955,—a very similar case, involving the same trade-mark,—I will not, on motion for preliminary injunction, enjoin the corporation from any use of its corporate name, but an injunction may issue restraining the defendants from making, marking, selling, or in any manner disposing of silver-plated ware stamped with the mark "Wm. G. Rogers," or any other mark of which the words "Wm. Rogers" are a characteristic part.

Motion for a preliminary injunction granted in accordance with this opinion.

THE BARGE NO. 127.

(District Court, D. Rhode Island. February 4, 1901.)

No. 1,084.

1. SALVAGE—ALLOWANCE.

A tug towed a barge lying at a pier out into the river to save her from danger from burning coal pockets. The barge's cargo was in no danger, and the impending damage would probably not have exceeded \$5,000. There was evidence that the barge could have been saved harmless, without the tug's interference, though the tug's services were rendered promptly, and when good judgment warranted them. They involved no peril or suffering to the tug's crew, and, while it was stated that the tug's side was blistered, yet the location of the fire, the protection afforded the tug by the intervening barge, and a failure to prove pecuniary damage, made serious injury improbable. *Held*, that \$300 salvage, apportioned \$150 to the tug, \$60 to her master, and the balance to the crew in proportion to their wages, was proper.¹

2. SAME—COSTS—EXCESSIVE BOND—EFFECT.

On a libel for salvage the requirement of an excessive bond from claimant should not be permitted to relieve him from costs where the amount appeared to have been agreed on, and the claimant had had an opportunity to apply to the judge for a reduction.

In Admiralty.

Carpenter & Park and Comstock & Gardner, for libelants.

Carver & Blodgett, for claimant.

BROWN, District Judge. This libel is for salvage services rendered by the steam tug *George S. Tice*, her master and crew, to

¹ Salvage awards in federal courts, see note to *The Lamington*, 80 C. C. A. 280.

the steel whaleback Barge 127, in removing her from proximity to burning coal pockets on the Wilkesbarre pier, in the Providence river, and anchoring her in the stream. Fire broke out in the coal pockets on the pier at about 5:40 a. m., December 18, 1900. Barge No. 127 was lying at the Wilkesbarre pier on the northerly side, heading eastward. Behind her was the barge Felix. The George S. Tice was bound up the river with a barge in tow, and was, nearly abreast of the pier when the fire was discovered. The barge in tow was anchored, and the Tice went to the assistance of the barges at the pier. The Tice first towed the Felix, which was most exposed, into the stream, and then Barge 127. Upon all the evidence I am of the opinion that the peril to which the Barge 127 was exposed when the Tice made fast to her was merely to damage which would not have exceeded the sum of \$5,000 had she remained at the pier. Her cargo was in no danger. Furthermore, there is evidence both from those on the barge and from the agent of the Wilkesbarre pier, to which I must give weight, that, without the assistance of the tug, the barge could have been moved, before the fire could have reached her, to the easterly end of the pier, and breasted out; so that it is highly probable that the actual damage would have been slight. I am not satisfied that the libelants have sustained the allegation of the libel that, without the services of the George S. Tice, the barge would have received serious damage. Nevertheless, the services were rendered promptly, and when it was apparently good judgment to remove the barge to the stream. I do not find that the services rendered the Barge 127 involved any peril or suffering to the crew of the Tice, nor do I think that the Tice was seriously exposed to injury. Her entire length was protected by the steel barge, some 36 feet in beam, which was between the tug and the fire. Furthermore, the fire was at some distance from the edge of the pier and at a considerable height above the pier. If the libelants desired to rely upon any actual damage to the tug, this should have been proved in a definite form. The failure to prove the pecuniary amount of the damage to the tug, together with the fact that the tug had previously been working upon the Felix, which was much more seriously exposed to the fire, renders it impossible to attach much significance to the general statement that the tug was blistered on her starboard side. It seems improbable that she could have been blistered seriously while under the side of the barge. I am of the opinion that a fair compensation for the services is the sum of \$300,—\$150 to the tug, \$60 to the master, and the balance to be apportioned among the crew according to their wages.

It was suggested at the hearing that no costs should be allowed, for the reason that an excessive bond had been required; but, as the amount seems to have been agreed upon, and as the claimant was at liberty to apply to the judge, who was then present, for a reduction, I do not think that this should affect the costs of the case.

A further suggestion was made at the hearing that the claimant had offered in satisfaction a sum larger than that now found to

be due by the court. This fact was not admitted by counsel for the libelants, and the claimant was not ready with proof thereon. Leave is given to the parties to present further evidence as to a tender, affecting the question of costs.

THOMPSON v. SNYDER et al.

(Circuit Court, S. D. New York. December 23, 1901.)

ACCOUNTING—BILL—SUFFICIENCY.

A bill which alleges the placing of a certain amount of money in the hands of defendants as a committee for the purchase of certain property, but does not allege what they have done with the money, nor that they have acquired anything with it but the title to the property which they were to acquire, nor that they have received anything from the property, is insufficient as a bill for an accounting, though it alleges that the defendants have refused to account for such money.

In Equity.

George M. Hough, for plaintiff.

Roger Foster, for defendants.

WHEELER, District Judge. The bill well enough alleges the placing of \$3,919.32 at each of two different times into the hands of the defendants, as a committee of mortgage note holders, for the purchase of the property, and alleges no more as to what was done with it. Nothing is alleged but that they have done exactly what they were to do with the money; nor is there any allegation that they have acquired anything with the money but the title to the property which they were to acquire; nor that they have received anything from the property. The bill does allege that they have refused to render any account of the moneys, but this does not supply the want of showing that there is anything yet to be accounted for. The refusal was merely of information, for rendering which alone a bill of complaint does not lie. In this respect the bill lacks equity.

Demurrer sustained.

ROYAL TRUST CO. et al. v. WASHBURN, B. & I. R. RY. CO.

FROST v. McLEOD et al.

(Circuit Court, W. D. Wisconsin. January 16, 1902.)

1. EQUITY — AMENDMENT OF DECREE OF FORECLOSURE — MANNER OF SELLING PROPERTY.

A decree of foreclosure is not final, so far as relates to the provisions therein for its own enforcement, directing the manner in which the mortgaged property shall be sold, etc.; and in such respects it may be amended at any subsequent term.

2. RAILROADS—FORECLOSURE OF MORTGAGE—JURISDICTION OF COURT.

A supplemental decree entered by a court of equity in a suit to foreclose a mortgage on railroad property, finding that the road could not be sold as an entirety, as ordered in the former decree, owing to the

fact that it was unprofitable and could not be operated so as even to pay expenses, and that the receiver had operated it at a loss, thereby creating an indebtedness, and directing him to suspend its operation, tear up the track, and sell the same, together with the equipment, for the best prices obtainable, is one which it was within the jurisdiction of the court to make, and, even if erroneous and unwarranted, is valid and binding until reversed by a court of competent jurisdiction.

2. FEDERAL AND STATE COURTS — CONFLICT OF JURISDICTION — INTERFERENCE BY STATE COURT WITH EXECUTION OF FEDERAL DECREE.

A state court has no power to interfere with the execution of a decree of a federal court ordering its receiver to suspend the operation of a railroad over which it has acquired jurisdiction in foreclosure proceedings, and to take up the track and sell the materials, by granting a writ of mandamus to compel the receiver of the federal court to operate the road, or by issuing an injunction restraining him from taking up the track.¹

4. SAME—SUITS AGAINST FEDERAL RECEIVER.

Section 3 of Act Aug. 13, 1888 (25 Stat. 436), providing that "every receiver of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court," does not authorize a state court to entertain an action against a federal receiver to prevent him from carrying out the orders of the court of which he is an officer.²

3. CONTEMPT—INTERFERENCE WITH ENFORCEMENT OF DECREE — SUIT AGAINST RECEIVER.

A federal court, in a suit to foreclose a railroad mortgage, in which it acquired jurisdiction over the property, and operated the road for a considerable time by its receiver, after entry of a decree of foreclosure ordered the receiver to cease operating the road, and to take up the rails and sell the same, with the other equipment. A number of persons, under the advice of the district attorney of one of the counties of the state, and joined by such county, brought actions in a state court against the receiver to prevent him from executing such order. Writs were issued therein and served on the receiver, enjoining him from removing the rails, and commanding him to operate the road. After serving such writs, the sheriff of the county, without any further process, but under advice of the district attorney, forcibly interfered with the work of the receiver, and took his servants engaged in such work into custody. *Held*, that all such persons were guilty of contempt of the federal court, which, in the case of the district attorney, who advised the proceedings, and the sheriff, who was an officer charged with the enforcement of the law, was most flagrant and without mitigation.

4. SAME—PROCEEDINGS FOR PUNISHMENT—DEFENSES.

Advice of counsel is no defense to a proceeding for contempt of court, although where the person charged with the contempt is a layman, and not an officer charged with the enforcement of the law, it may be considered in mitigation.

In Equity. Suit for foreclosure of railroad mortgage. Proceeding on petition of the receiver against sundry persons for contempt.

Horace S. Oakley, for petitioner.

H. H. Hayden, for respondents R. D. Pike, John A. Jacobs, and L. H. Lien.

H. B. Walmsley, for respondents M. A. Sprague, W. H. Lemke, Carl Hirsch, D. M. Maxcy, and A. W. McLeod.

¹ Conflicting jurisdiction of federal and state courts, see note to *Louisville Trust Co. v. City of Cincinnati*, 22 C. C. A. 356.

² Actions by and against receivers, see note to *Plow Works v. Finks*, 26 C. C. A. 49.

Before JENKINS, Circuit Judge, and BUNN, District Judge.

JENKINS, Circuit Judge (orally). The facts in the matter presented to the court are not greatly involved, and are substantially uncontradicted. The Washburn, Bayfield & Iron River Railway Company was incorporated in 1895, under the general laws of the state of Wisconsin, to construct a railroad from Iron River to Washburn, in the county of Bayfield. This road ran through timber land, and manifestly, from the evidence here, it depended for its profitable operation upon the timber to be gotten out of that country. Spur lines or branches were constructed from the main line into the woods, and used for the purpose of hauling timber. On or before the 1st of January, 1898, the railroad company issued its trust deed to the complainant, to secure its bonds to the amount of \$535,000, payable in 20 years, of which amount of bonds \$237,000 were issued, put upon the market, and disposed of. The county of Bayfield also issued its bonds, and delivered them to the company, to aid in the construction and operation of the road. These bonds of the railway company were issued on the 1st of January, 1898, and default was made in the payment of the first installment of interest accruing thereon, July 1, 1898. In December, 1898, by reason of such default, and for the purpose of foreclosing the mortgage upon the road, the trustee in the trust deed filed its bill in this court for the foreclosure of the trust deed. A receiver was thereupon appointed, by the consent of all of the parties to the suit, to take possession for the court of this road, and to operate it in the interest of all parties concerned. The receiver and his successors in office have so operated that road from that date until nearly the present time,—a period of a little less than three years. During that period the court found it necessary, for the protection of the road and for the interest of the parties, to cause to be issued receiver's notes and receiver's certificates. It would seem that, aside from the debt which the road was under to the trustee and bondholders, it must have had quite a large floating debt at the time of this foreclosure, for receiver's certificates and notes were issued to the amount of over \$220,000 for obligations incurred by the receiver in the management and operation of the road during the time mentioned, and for preferred claims against the road. It would also seem that the country between the termini of this road had been largely, if not wholly, denuded of its timber, and that the road was operated at great loss, and that it has resulted that the bondholders, interested to the amount of over a quarter of a million of dollars, have abandoned all hope of receiving anything upon their debt, and that the road, in possession of this court, must be disposed of by the court merely in the hope to recover, if possible, the whole or a part of the obligations which the court, through its receiver, had incurred in the maintenance and operation of the road. On July 23d a decree of foreclosure was passed; the total obligations of the road at that time, including receiver's certificates, being \$546,857. The decree provided for the sale of the road at an upset price of \$225,600, which was then the amount supposed to be due for the receiver's obliga-

tions, as determined by the amended decree of July 23d, as I recall it. On October 12th, at a subsequent term of the court, an amendment to the decree was entered, which recites that the court expressly finds that it is impossible to sell the property of the railroad company as an entirety, as was adjudged by the original decree; that the road has been constantly insolvent, and a losing venture from its inception; that, although every possible effort had been made to operate the road economically and advantageously, it had been found impossible to operate the same for any length of time so as to even pay operating expenses, and that there was a deficit arising therefrom; that there is no prospect of any decrease in the losses incident to the operation of the road; that the timber along the main line of the road and its branches has been substantially cut off, depriving the road of any value, except in the value of its rails; that there are no funds available to continue the further operation of the road; that no one will loan money to the receiver for that purpose; that the rails, motive power, rolling stock, and equipment are constantly depreciating in value, and that the longer a sale is delayed, the less will be realized, and that there is no such public interest or business in the territory through which said road passes as will support the railroad, or justify any one in advancing any money to operate it, and that, if the railroad property is held intact, it will mean simply absolute loss of the capital therein invested; that it is impracticable and injudicious to attempt to sell the property at public sale, or for the court to decree any public sale; and that, in the opinion of the court, no such sale should be ordered. Therefore the court ordered that the special master, Mr. Frost, who is receiver, be directed to proceed to take up the rails and fastenings of the road, and get the same ready for immediate sale; and he was authorized and directed with all reasonable diligence to sell for cash all of the rails, motive power, rolling stock, equipments, machinery, tools, furniture, and fixtures, and all other personal property of every kind now in his hands, except the property theretofore ordered to be turned over to the Pike Lumber Company and the American Car & Foundry Company, and that it be sold in such quantities as the special master, according to his judgment, may determine, at public or private sale, for the best prices that can be obtained for the same, and return the money into court. Subsequently to that decree, and on the 13th of December, the respondents Pike, Sprague, Jacobs, Lemke, Hirsch, Maxcy, and also Bayfield county, acting through its district attorney, Mr. McLeod, filed in the circuit court of the county of Bayfield a petition for a writ of mandamus to compel the receiver to operate this road, and substantially to refrain from carrying out the decree of this court of October 12th. That suit was disregarded by the receiver, and subsequently a peremptory writ issued on the judgment of the circuit court for the county of Bayfield, which modified in some respects the alternative writ; reciting, however, as did the original petition and the alternative writ, all the proceedings had in this court with respect to the foreclosure of the mortgage or trust deed. This peremptory writ enjoined and

required this receiver that he, without delay, continuously maintain the main line of the Washburn, Bayfield & Iron River Railway Company; that he maintain the track in a reasonable condition for use in the operation of it as a railroad; and, in substance, that he refrain from doing that which the decree of this court of October 12th required him to do. On the 23d of December a suit in equity was also commenced by the same parties in the same court against the receiver, and an order of injunction was obtained ex parte, enjoining the defendant in that suit,—the receiver in this suit,—in effect, from carrying out the orders of this court in respect to the manner of disposition of this railroad. In January of the present year the receiver proceeded to execute the decree of this court, and, by his servants, to take up the rails, with a view of marketing and selling them. It is estimated, I perceive, from proceedings here, that those rails at the present market price would bring in the market something like \$140,000 or \$150,000, and the avails can be used in part payment of the receiver's obligations. He was met in the attempt to execute the decree of this court by the forcible resistance of the defendant Lien, who is the sheriff of the county of Bayfield, and prevented by force from the execution of the decree as directed by the court. Thereupon this proceeding was instituted by the receiver, by his petition, seeking to punish all these parties for contempt,—as to the parties named, for the institution of the suits against the receiver; and as to Mr. Lien, the sheriff, for his forcible resistance to the attempted execution of the decree. The answers of the defendants, except the sheriff, say that their only act was the institution of the proceedings in the court, and that in so doing they acted on the advice of counsel, and believed they were right; counsel advising them that this decree of October 12th was absolutely void. The sheriff says that, in thus forcibly resisting the officer of this court in the execution of the decree of this court, he acted upon the advice of the district attorney, Mr. McLeod, who is one of the respondents here, and that he prevented the receiver from so acting under and by virtue—this is the justification for his conduct—of the said peremptory writ of mandamus, and the said injunction so in his hands for service, and by virtue of the further fact that they were committing in his presence a crime against the state of Wisconsin and its laws, and contrary to the provisions of section 4386 of the Revised Statutes of Wisconsin. It is further asserted by the parties that the decree of October 12th was absolutely void: First, because it was made and entered at a term subsequent to that at which the original decree was entered, and the court was without power; secondly, that the abandonment of the operation of the road operated to turn this property—the rails and ties and the rolling stock—over to the state of Wisconsin, the road being a public highway.

As to the first objection,—that this decree was entered at a subsequent term, and was without authority,—assuming that any one but the parties to the suit and their privies may raise the objection, the court is of opinion that the objection is not well founded. A decree of foreclosure is, in a sense, a final decree, adjudging the

rights of the parties as between themselves, but a decree of foreclosure is something more than that. It is not only a decree adjudging those rights, but is also a sort of equitable execution, providing the manner in which the decree shall be enforced, and for the assertion of the rights declared; and the provisions of a foreclosure decree with respect to the manner and the terms of the sale are part of the terms of the execution of the decree, and not of the decree, so far as adjudging the rights of the parties. There is no vested right in the party to a suit to have execution of the decree for the enforcement of his right performed in any particular manner. It is within the province of a court of equity to determine how and in what manner its decree adjudging the rights shall be carried out so as to render restitution. It is always within the province of the court of equity at any term of the court to modify the terms of a decree so as justly and equitably to enforce its judgment, and render to the parties that to which they are entitled.

An interesting and important question is suggested by the proposition that, upon the abandonment of operation of a railroad, the property—the rails, the rolling stock, engines, and equipment—of the road passed to the state, upon the theory that it is a public highway. In support of that doctrine,—which at first blush seems startling and novel, because the state of Wisconsin has authorized railroad companies to mortgage their property and to issue their bonds, and for the foreclosure of all such mortgages, and for reorganization of the road by the owners of the bonds,—they insist that the doctrine is maintained by a decision of the supreme court of Pennsylvania, rendered by no less a distinguished jurist than Judge Black. *Railroad Co. v. Casey*, 26 Pa. 287. If that decision is fully applicable here, it certainly is entitled to great weight as the expression of a distinguished jurist, although it is proper to say that the decision was by a divided court, of three to two; one of the dissentients being a no less distinguished jurist than Judge Woodward. But there the road had, under the act, for one of its termini, the city of Erie, and it was sought in a way to pass by the city of Erie, and make the road a connecting link with a road to the West; and the legislature repealed its charter, and appointed an agent to take possession of the property and operate it as a public highway; and an injunction was sought, which injunction was denied; and finally an act of the legislature was passed restoring the railroad company to its former rights, under certain conditions; and the bill was still prosecuted, after the complainant had been put into possession under the act of the legislature, for the profits arising from the operation of the road by the agent of the state, and that right was denied by the court. There are some expressions by Mr. Justice Black in that opinion which are, as were most of his opinions, couched in strong and vigorous language, and which seem, in a measure, to support the contention of counsel. There are, however, other decisions, which have more or less bearing upon the proposition, to the effect that the courts would not undertake to compel a railroad company to operate a railroad at a loss

(Com. v. Railroad Co., 12 Gray, 180, and Ohio & M. R. Co. v. People, 120 Ill. 200-208, 11 N. E. 347), and one from the supreme court of Kansas (Kansas v. Dodge City, M. & T. R. Co., 53 Kan. 329-336, 36 Pac. 755, 24 L. R. A. 564) which maintains the right, where a railway company was insolvent and had disposed of its road, the operation of which had been abandoned, of the purchasers to take up the rails. I do not find it necessary, nor is it possible for me within the time that has been permitted me in this discussion, to come to a fixed conclusion upon that important and interesting question. There is somewhat of a conflict between the authorities, and it is a question of importance. It is not needful to here determine the question. This road was in the possession and custody of this court. The res was here,—here with the court for its management and operation and sale. The jurisdiction of this court was complete over this road. It had jurisdiction to determine when it should be sold, and how it should be sold; and if it was improper for the court to order the rails to be taken up and sold; if its decree was improvident, and failed to recognize the supposed right of the state and the public in the road; if it was the duty of the court, under the circumstances, to keep those rails there, notwithstanding the road could not be sold, and that no one would purchase it for the purpose of operation,—still, as the late Chief Justice Ryan once observed, if it was an error, the court had jurisdiction to commit the error. That decree was valid and binding until it was reversed by a court of competent jurisdiction. So that, as the court views this case, it stands in the position of a decree of this court, valid, authorized, which should be respected and obeyed by all who are bound by it and by all who have knowledge of it.

It is to my mind—and I regret to be compelled to refer to the subject—a matter of astonishment that the distinguished jurist who presides over the circuit court for the county of Bayfield could by any possibility have issued such a judgment and writ and order of injunction as are here presented. I cannot but believe that he was either deceived in the issuance of the writ and order, or labored under gross misapprehension of his duty. If there is one principle of the law which should be known to all lawyers, which is absolutely essential to the preservation of order in society, and to the enforcement of the rights of parties, it is that the final decree of a court having jurisdiction shall not be interfered with by any other court. These parties saw fit to invoke the supposed aid of that court. With the exception of Mr. McLeod, they were all laymen. They claimed to be interested, as taxpayers of Bayfield county, and as merchants, in having that road maintained. I do not know if they supposed they had a right to have the railroad company or its bondholders or its receiver operate the road at a loss for their benefit; but, whatever their motive, they saw fit to invoke the supposed aid of that court, and to obstruct and hinder and resist the receiver in the execution of the decree of this court. It is said that they had a right to sue the receiver in that court, and they base their right upon section 3 of the act of congress of August 13, 1888 (25 Stat. 436), which is:

"That every receiver of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver was appointed, so far as the same shall be necessary to the ends of justice."

As I remarked during the argument, the history of that provision is well known. Before that act the receiver of a railroad, standing in the shoes of the railroad corporation, operating the road, incurring indebtedness, incurring obligations with respect to the carriage of property and persons, and subject to liability for accidents upon the road, could not be sued, except by leave of the court, even in the court which appointed him. The consequence was that, with respect to a road running through a great extent of country, persons having lawful and just claims against the receiver, either for property sold him, or for wrongs suffered through the operation of the road, were obliged to go to a great distance, and to resort to the court having jurisdiction of the matter. That was found to be burdensome to litigants, and so it was provided that, with respect to such claims (for you will observe the language of the act, "may be sued in respect of any act or transaction of his in carrying on the business connected with such property"), he may be sued in any court of any jurisdiction which could properly assume jurisdiction under any circumstances, and have his right determined. The execution of that judgment was not according to the ordinary forms of execution of judgments rendered by such court, but that judgment must be brought into the court of original jurisdiction, and satisfied by that court out of the funds in the possession of that court; courts of original jurisdiction recognizing, by comity, the action of other courts in adjudging the claims. But the statute most certainly has no reference to a suit brought to direct the receiver or special master to disobey the decree of the court which specifically directed him to do certain things. It most certainly was not designed to permit a state court to render nugatory the decree of the federal court having jurisdiction, by enjoining the officer of the federal court from executing the decree of the court under whom he was acting; for that is simply to bring about anarchy, and to render the administration of justice a travesty. I cannot but think, therefore, that the action of these parties in instituting these proceedings was a resistance to the decree of the court. They knew of it. They set the entire proceedings forth in their petition for this writ. They say to this circuit court of Bayfield county:

"The circuit court of the United States for the Western district of Wisconsin has decreed thus and so. We insist the decree is void, and we ask you to prevent and enjoin the officers of the federal court from carrying out the instructions of the federal court, and the decree of that court."

But they say that they were advised that this decree was void,—advised by their counsel, one of whom verified this petition to that court. This is no justification, although it may be matter of mitigation. The advice of counsel to a party that he may commit a crime

is no sort of defense. The advice of counsel that a party may set himself up in judgment against the decree of the court is no justification for resisting and violating the decree of that court. That could not be tolerated, because then no decree of court could be enforced.

The action of the other two respondents, the sheriff and Mr. McLeod, stands upon different footing. The sheriff made actual, forcible resistance to the execution of this decree. He seeks to justify his conduct, but he seems somewhat doubtful upon what ground to justify it, for he first pleads justification under the peremptory writ of mandamus; secondly, under an order of injunction that was in his hands for service; and, thirdly, under a statute of the state of Wisconsin which forbids a person from taking up a spike or rail or in any way injuring any railroad. As to his first excuse, he had no more to do with that peremptory writ of mandamus, as it was called, than a child, and it was a matter with which he was not concerned. He had no more to do with that order of injunction, except to serve it upon the parties, than a child. He had no right to set himself up as judge and executioner. He had no right to determine whether these parties were violating the orders of the circuit court of Bayfield county. He had no writ from any court commanding him to interfere with the execution of the decree of this court. This writ—this order of injunction—ran to this receiver. If he violated the lawful order of the circuit court of Bayfield county, he was responsible to that court, and the sheriff had no right of interference. Nor does the statute invoked have any reference to any such case as the present. It seeks to punish one who for a wicked purpose should interfere with the operation of a railway, and make possible the destruction of life or property, by maliciously taking up a spike or rail, seeking to destroy life or property. It had no reference to the act of an owner, or one lawfully taking up a rail. The conduct of the sheriff is without justification or mitigation, except that he says he acted upon the advice of Mr. McLeod; and that, as I have said with reference to the other respondents, is no justification. Whether in his case it may be considered even in mitigation is to my mind extremely doubtful. Here was an officer of the law, bound to respect and to execute the law,—bound to confine himself to the legitimate exercise of his powers,—undertaking, without writ and without warrant, to obstruct and resist the process of the law issued from this court; of his own motion, except as he acted under the advice of the district attorney, surrounding himself with a posse of deputy sheriffs to prevent the execution of the decree of this court. He knew—he was bound to know—that he ought not to follow such advice. He was bound to know that no advice to resist the law could shield him in the performance of the acts which he did. He arrested the servants of this receiver,—carried them 30 miles away,—as he asserts, for violation of the injunction, of which they had not been convicted, with which they had not been charged in court, and held them to bail. Who held them, and for what they were held, and under what sort of statute or law, the answer is silent, and the fact does not appear.

With respect to the case of Mr. McLeod. He also was an officer of the court, a member of the legal profession, counsel learned in the law, representing one of the divisions of sovereignty of the state of Wisconsin. He knew the sanctity of judgments and decrees. He knew that which was due to a court; and he and the sheriff—officers of the law—set a bad example to the community when they undertook to set up their judgment against the decree of a court of record and to counsel, and advise forcible resistance to the execution of that decree. He seems to have advised all these proceedings. He joined in the petition for a peremptory writ; he verified the petition; he boldly sets up the decree of this court, and assures the circuit court of Bayfield county that, in his judgment, that decree is void; and therefore he advises the sheriff, as the sheriff states, to make forcible resistance to that decree, and the latter acts thereon. I have no sort of question, without reference to the other question, whether the decree of this court of October 12th was erroneous—I have no sort of question that here has been a flagrant resistance to the decree of this court, and one that cannot be passed over; for, if a decree of a court is not to be binding, is not to be respected, is not to be obeyed, and the court does not enforce obedience and respect, we might as well abolish all courts, adopt the theories of the anarchist, and allow every man to judge for himself, to decree for himself, and to execute his own decrees. If we are to have a government of law, a government of order, if society is to be protected, men must learn that the decree of a court is not mere waste paper; that it is to be enforced; that it is to be obeyed and is to be enforced, if necessary, by the strong arm of the government.

With respect to these men who, so far as the record shows, simply attempted to resist the decree of this court by undertaking to annul its decree by applying to another court, I have doubted somewhat as to the extent of the punishment which would be adequate. I have sought to look at their conduct leniently. I have considered they were laymen. I have considered that they were, in a sense, interested as taxpayers, and had, perhaps, a strong interest that this road should be maintained. I have sought to consider and to recognize the weakness of human nature, and that they have allowed their feelings to run away with their judgment. I have come to the conclusion, as to them, that a fine of not a large amount would be sufficient in the present case. And the judgment of the court as to them will be that each of them—there are six of them—be fined, for the contempt it is found they have committed, in the sum of \$250, and that each of them be imprisoned in the county jail of the county of Dane until such fine be paid.

With respect to Mr. McLeod and the sheriff, Mr. Lien, the court cannot deal with them upon the same basis. There has been in their case flagrant and unwarranted resistance to the decree of this court, and that by parties who knew better, whose education taught them better, whose position demanded of them respect of the judgment of the court, not forcible resistance to it. It is a very sorry sight for a district attorney of a county, and a member

of the legal profession, to advise any one to forcibly resist the decree of the court. It is a very bad example to the community when the sheriff of the county, the executive of the law, seeks to take the law into his own hands, and to give defiance and forcible resistance to a court established by the government of the United States. I cannot pass over that conduct with a fine. In their case—the case of McLeod and the case of Lien—the judgment of the court will be, for the contempt which they have committed, and of which they are respectively convicted, that each of them be imprisoned in the county jail of the county of Dane for the period of 60 days.

I trust that this will be the end of forcible resistance to this decree. I trust that those who recognize the situation will see to it that the time for forcible resistance to the law is passed,—will see to it that, whatever rights the state of Wisconsin may have, and whatever rights these parties may have, they are not to be obtained by defiance of a decree of the court. If any error has intervened in the proceedings of this court, there are methods in the courts of the land by which such error may be corrected, but it cannot be tolerated that there shall be forcible resistance to a decree of a court.

THE ZAMPA.

(District Court, N. D. California. January 16, 1902.)

No. 12,041.

1. COLLISION — SAILING VESSELS MEETING — APPEARANCES JUSTIFYING PRIVILEGED VESSEL IN CHANGING HER COURSE.

Under the navigation rules (26 Stat. 320), which require a vessel sailing closehauled on the starboard tack on meeting another closehauled on the port tack to keep her course, unless a departure from such rule is "necessary in order to avoid immediate danger" (article 27), and make it the duty of the other vessel to keep out of the way, the privileged vessel is justified in changing her course when in the opinion of the officer in command, in the exercise of good judgment and seamanship, a collision will otherwise be unavoidable because of the failure of the burdened vessel to take timely action to keep out of the way, and in such case she cannot be held in fault, although a collision in fact results.

2. SAME—INSUFFICIENT LOOKOUT.

The ship *Reliance* was sailing closehauled on the starboard tack at night in the Pacific, when she saw the red light of the schooner *Zampa* off her port bow at a distance of a mile and a half. The *Zampa* soon showed both lights, and thereafter her green light only. When the *Zampa* was quite close, and almost directly ahead, still showing her green light, the officer in command of the *Reliance*, believing a collision otherwise inevitable, changed his course to port. Immediately afterward the *Zampa* changed her course to starboard, and a collision resulted. *Held*, that the *Reliance* was justified, under the circumstances, in changing her course when she did, and that the fault for the collision must be placed on the *Zampa* for failing to sooner change her own course so as to avoid the appearance of danger, which apparently resulted from her not keeping a proper lookout, and failing to see the lights of the *Reliance* until immediately before the collision.

In Admiralty. Suit for collision.

Andros & Frank, for libellant.

Page, McCutchen, Harding & Knight, for respondent.

DE HAVEN, District Judge. This is an action brought by the owner of the British ship *Reliance* to recover damages on account of a collision between that vessel and the schooner *Zampa*. The collision occurred on the Pacific Ocean, between the hours of 9 and 10 o'clock on the night of January 26, 1900, the *Zampa* striking the *Reliance* abaft the forerigging, on her starboard side. There was at the time a fresh breeze from the southeast, and the weather was a little hazy. The lookout on the *Reliance* sighted the red light of the *Zampa* about two points off the port bow, when the vessels were perhaps one mile and a half apart. At this time the *Reliance* was sailing closehauled on the starboard tack, heading N. E. by E. $\frac{1}{2}$ E., at a speed of between 7 and 8 knots an hour. The *Zampa* was sailing closehauled on the port tack, making a course about S. by W., and proceeding at a speed of between 4 and 5 knots an hour.

The *Zampa* being closehauled on the port tack, it was her duty, under the provisions of article 17 of the act of August 19, 1890 (26 Stat. 320), to keep out of the way of the *Reliance*, and it was the duty of the latter to keep her course (article 21, *Id.*), unless there were special circumstances which made a departure from this rule "necessary in order to avoid immediate danger," as provided in article 27 of the same statute. It appears from the evidence that just prior to the collision the helm of the *Zampa* was put hard to port, and she had fallen off one-half point, and that of the *Reliance* was put hard to starboard, and she had swung around five points from the course on which she was sailing at the time the red light of the *Zampa* was first observed by her. It is claimed by the libellant that the *Zampa* did not keep out of the way, as required by article 17 of the act of August 19, 1890 (26 Stat. 320), but approached so near to the course of the *Reliance* that there was danger of an immediate collision, and that the *Reliance* in attempting to avoid such collision was justified in changing her course. The burden of establishing this alleged justification for the departure from her course is upon the *Reliance*. The *Chesapeake*, 5 Blatchf. 411, Fed. Cas. No. 2,643; The *Corsica*, 9 Wall. 633, 19 L. Ed. 804. "When a change of course is admitted or established on the part of a vessel which is under obligations to keep her course, as against another vessel which is bound to avoid the former vessel, a very close scrutiny of the conduct of the former is necessary." The General U. S. Grant, 6 Ben. 465, Fed. Cas. No. 5,320. But, while this is so, there can be no doubt that when the vessel bound to give way does not do so in time, and as a result there is immediate danger of collision, the other may change her course for the purpose of avoiding the apprehended collision. The *Catharine* and *Martha*, Fed. Cas. No. 2,512; The *Richard R. Higgins*, 1 Low. 290, Fed. Cas. No. 11,768; *Waldorf v. The New York*, 1 Flip. 49, Fed. Cas. No. 17,057. There is but little difficulty in ascertaining the controlling facts in this case. The testimony of Doyle, second officer of the *Reliance*, and who was officer of the deck at the time of the collision, is, in substance, that the red light

of the Zampa was first observed two points off the port bow of the Reliance, when the vessels were, in his judgment, one mile and a half apart. This light was kept in view by him for a short time, when the Zampa showed both her red and green lights, and immediately thereafter her red light was shut out, and only her green light could be seen. The Reliance kept her course until the green light, steadily drawing nearer, was a quarter of a point on her port bow, when, in the judgment of the witness, a collision was imminent, and for the purpose of avoiding it he directed the helm of the Reliance to be put to starboard, which was done, and she had swung off five points when the collision occurred. The testimony of this witness was corroborated by others of the crew of the Reliance. It furnishes a reasonable explanation of the action of that vessel in changing her course, and must, in my opinion, be accepted as true. Indeed, as to the important fact that the Reliance changed her course just before the collision, it is supported by the evidence given upon the part of the Zampa to the effect that the red light of the Reliance was first observed about one point off the port bow of the Zampa; that immediately thereafter both her green and red lights came into view; that next her green light only was seen, and then the collision took place; and as to the time which intervened between first seeing the red light of the Reliance and the collision the mate of the Zampa testified that when that light was sighted he at once gave orders to keep the Zampa off, and between this time and the collision the Zampa only changed her course about one-half point. This evidence shows conclusively that the events described by it were crowded into a very short space of time before the collision, and makes it reasonably certain, not only that the Reliance changed her course at the last moment, but also shows that she was not observed by the Zampa until at or about the time she changed her course, because the history of the transaction, so far as the Zampa is concerned, is confined to the short space of time intervening between the order to keep her off and the collision, and it is apparent that it was during this time the Reliance changed her course. Upon the finding that the facts are as testified to by Doyle, the second officer of the Reliance, that vessel was not in fault in changing her course, provided that officer exercised a reasonable judgment as to the necessity for such maneuver, in view of the conditions as then presented to him. It is urged on behalf of the Zampa that if the Reliance had kept her course there would have been no collision, and from this it is argued that no blame can attach to the Zampa. Whether, if the Reliance had continued on her course, the collision would have been avoided by the subsequent action of the Zampa, need not be determined. The question here is whether, at the time the Reliance changed her course, the officer in command was justified in believing that the Zampa was about to fail in her duty to keep off, and that there was immediate danger of collision, unless her course was changed. She had a right to depart from her course if necessary in order to avoid immediate danger, and, having this right, it must follow that, if the officer in command exercised a reasonable judgment in view of all the conditions then present, the action taken by him in changing

the course of the *Reliance* cannot be attributed to her as a fault. This general principle, stated in different language, has often been announced. Thus: "When the vessel that has the burden of avoiding the danger has come so near that, to a reasonable, firm, and skillful navigator, it appears that the collision is unavoidable, it shall be taken to have been so." *The Richard R. Higgins*, 1 Low. 290, Fed. Cas. No. 11,768. And the supreme court said in the case of *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126:

"But the fact that a steamer is entitled to hold her course does not excuse her from inattention to signals, from answering where an answer is required, or from adopting such precautions as may be necessary to prevent a collision, in case there be a distinct indication that the obligated steamer is about to fail in her duty."

Again, in the case of *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771, the same court said:

"The weight of English, and, perhaps, of American, authorities is to the effect that, if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a 'special circumstance,' under rule 24, 'rendering a departure' from the rules 'necessary to avoid immediate danger.'"

The question, then, is this: Did the officer in charge of the *Reliance* have reason to believe that the *Zampa* would not keep off, and that in order to avoid a threatened collision it was necessary to change the course of his vessel? Or, stated in another form: Was the situation such that a competent master on board the *Reliance*, exercising reasonable care and judgment, would have concluded that the vessels were in such proximity that in order to avoid collision it was necessary to change her course at the time it was done? Upon this point, Doyle, the officer in charge of the *Reliance*, in referring to the time when he gave orders to change her course, said: "At this time I allowed I was just near enough to the schooner to avoid collision. If I had not done what I did, I would have run her down." And in this he was corroborated by the third mate and by a seaman who was on watch. There is no evidence in the case which would warrant the court in finding that the judgment thus formed by the officer in command of the *Reliance* was unreasonable, or that the same conclusion would not have been reached by any skillful navigator placed in the same situation. Putting aside, as not entitled to any great weight, the estimates of the various witnesses as to time, it is clear that, when the course of the *Reliance* was changed, the vessels were very near to each other,—much nearer than they ought to have been permitted to come when the weather was such that each should have been seen by the other for the distance of at least one mile and a half.

Upon this state of facts, the collision must be attributed to the fault of the *Zampa* in holding on to her course too long. It is probable that her action in this respect was due to the fact that the *Reliance* was not seen by her as soon as she should have been; but, whatever may have been the reason, it is perfectly clear there was no attempt to keep her off until immediately before the collision, and until after the helm of the *Reliance* had been put to starboard.

This was too late. The real fault, therefore, and that which fixes the liability for the collision upon the Zampa, was her failure to keep off; thus bringing on the situation which justified the officer in charge of the Reliance in believing that there was immediate danger of collision unless the course of his ship was changed.

There will be a decree in favor of the libellant for the damages sustained by him and costs, and the case will be referred to United States Commissioner Morse to ascertain and report the amount of such damages.

In re CHAPPELL.

(District Court, E. D. Virginia. December 31, 1901.)

1. BANKRUPTCY—PAYMENTS WITHIN FOUR MONTHS—INSOLVENCY—PRESUMPTION—BURDEN OF PROOF.

Where the trustee of one who was adjudged bankrupt on his voluntary petition files a petition alleging that certain partial payments to creditors, made within four months of filing the bankrupt's petition, were made while he was insolvent, and praying that such creditors be required to return such preferential payments before being permitted to receive dividends on their claims, and the creditors answer that the bankrupt was not insolvent at the times such payments were made, no presumption arises from the adjudication in bankruptcy that the bankrupt was insolvent for four months, or any period, before his petition was filed, and hence it is incumbent on the trustee to prove the insolvency.

2. SAME—AMOUNT OF PROPERTY—SUFFICIENT TO PAY DEBTS—EVIDENCE.

A merchant, seven months before filing his petition in bankruptcy, sent a creditor a postdated check and a note for the balance of his debt, and afterwards renewed the note, paying it a little less than four months before the petition was filed. *Held*, that such acts, while showing that he was not in possession of ready money to meet this particular debt, were not evidence that he was insolvent, within the meaning of Bankr. Act, § 1, subd. 15, providing that a person shall be deemed insolvent whenever the aggregate of his property, exclusive of any which he may have fraudulently concealed or conveyed, shall not, at a fair valuation, be sufficient in amount to pay his debts.

3. SAME—SCHEDULES—ASSETS IN EXCESS OF DEBTS.

The schedules of a voluntary bankrupt prepared and filed with his petition as required by Bankr. Act, § 7, subd. 8, showed the value of his assets, as estimated by him, to be largely in excess of his debts. Subsequently additional claims were filed, which increased the indebtedness to nearly the estimated value of the assets, and sufficient was not realized out of the assets to pay the debts in full. During the four months prior to filing his petition, the amount and value of assets and amounts of his debts had remained relatively about the same. *Held*, that he was not insolvent at the times of making certain part payments to his creditors during such four months.

In Bankruptcy.

The following is the report of George S. Bernard, Referee:

The undersigned referee respectfully reports to your honor that after the supreme court of the United States rendered its decision in the case of *Pirie v. Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, touching preferences, and there was no longer reason for deferring the consideration of the matter of controversy between R. D. Gilliam, the trustee representing the general creditors of the bankrupt, and the nineteen several creditors who were alleged in the petition filed by the trustee to have received from the bankrupt, in part payment of their respective claims, sundry sums of

money as preferences, within the meaning of the bankruptcy act, and who said trustee prayed might be required to surrender said preferences before being permitted to receive their dividends from the bankrupt's estate, the referee, on the 26th day of June, 1901, made an order directing that said nineteen creditors appear before him at a time and place in the order mentioned, to show cause, if any they could, why the prayer of said petition should not be granted. A copy of this order, and of the extract from said petition served upon said nineteen creditors, marked "O," is filed with this report, from which it will be seen that these creditors had proved claims aggregating the sum of \$3,938.42, and at different dates from July 13 to November 1, 1900, received sundry payments, aggregating the sum of \$2,914.42. Upon inspection of the record in this cause, it will be seen that the dividends of these creditors, aggregating fifty-five and one-third (55 $\frac{1}{3}$) per centum of their said claims so proved, are held to await the decision of the questions raised by said petition, except the parts of said dividends which in the cases of six creditors exceed the amounts so received. With a few exceptions, not necessary to be mentioned, all of these creditors filed answers to the trustee's petition, in each of which the respondent or respondents gave as a reason why the prayer of the petition should not be granted that the bankrupt was not insolvent at the time he made the alleged payment or payments. Other reasons were also given in said answers, not necessary to be stated, under the view taken of this case.

At the hearing of the issues joined between the parties, the creditors to whom said payments were made contended that on the trustee rested the burden of proving the insolvency of the bankrupt at the time he made them. The trustee, on the other hand, contended that, as the bankruptcy act fixes four months preceding the filing of a petition for or against a bankrupt as the period, all preferences given within which are voidable by the trustee, this raises the presumption of insolvency during that period, and that creditors receiving such preferences must accordingly show that the bankrupt was solvent at the time the preferences were given.

Under a well-settled rule of pleading, in legal proceedings of all kinds, a party making an allegation of a fact necessary to sustain his case must prove the truth of the allegation; and this rule, in the absence of any statutory provision affecting it, governs the allegations made in the trustee's petition. He must prove that the bankrupt was insolvent when he made the payments in the petition alleged. Is his contention that there is a presumption of insolvency within the four months preceding the filing of the petition by or against the bankrupt correct? Clearly, in the case under consideration,—that of an adjudication on a petition filed by, and not against, the bankrupt,—there is no such presumption. In an involuntary proceeding, wherein the allegation is that at a certain date the defendant, "while insolvent," did some one of the acts declared by subdivisions 2 and 3 of section 3 of the bankruptcy act to be acts of bankruptcy, the adjudication would, of course, show insolvency at such date,—insolvency being one of the issues; but as was held in the case of *George M. West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, an adjudication, when the alleged act of bankruptcy was one of the acts declared by subdivisions 4 and 5 of said section 3 to be acts of bankruptcy,—as, for instance, the making of a general assignment for the benefit of creditors,—does not establish insolvency, insolvency in such case not being an issue. This is apparent upon examination of the opinion of the court in the case referred to. Mr. Justice White, delivering the opinion, having quoted paragraph "a" of section 3 of the act, says: "It is patent on the face of this paragraph that it is divided into five different headings, which are designated numerically from 1 to 5. Now, the acts of bankruptcy embraced in divisions numbered 2 and 3 clearly contemplate not only the commission of the acts provided against, but also cause the insolvency of the debtor to be an essential concomitant. On the contrary, as to the acts embraced in enumerations 1, 4, and 5, there is no express requirement that the acts should have been committed while insolvent. Considering alone the text of paragraph 'a,' it results that the nonexistence of insolvency at the time of the filing of a petition for adjudication in involuntary bankruptcy, because of the acts enumerated in

1, 4, or 5, which embrace the making of a deed of general assignment, does not constitute a defense to the petition, unless provision to that effect be elsewhere found in the statute. This last consideration we shall hereafter notice." Justice White, in a subsequent paragraph of this opinion, referring to paragraph "c" of section 3, which provides that "it shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt," says: "We are concerned only with the meaning of the words as used in the law we are interpreting. Now, the context makes it plain that the words relied on were only intended to relate to the first numerical subdivision of paragraph 'a.'" From what was said by the court in this well-considered case, it appears that an adjudication in an involuntary proceeding is only evidence of insolvency in certain cases and at certain dates, and not of insolvency in all cases. Of what is evidence in a case of voluntary bankruptcy, Mr. Collier, in his work, *Coll. on Bankr.* (3d Ed.) p. 46, says: "Any person owing debts, as defined in section 1 (11), may file a voluntary petition. The present act does not in express terms require that the person shall be insolvent, or unable to pay all his debts in full, as did the act of 1867; and there seems to be no reason why, if a solvent person cares to have his property distributed among his creditors in bankruptcy, he should not be allowed to do so. It will not be necessary to allege insolvency in the petition, nor to prove it, to procure an adjudication." If this careful text writer is correct—and he appears to be—in his statement that a solvent person may be adjudged a voluntary bankrupt, the adjudication, so far from creating, as contended by the trustee, a presumption that the bankrupt was insolvent during a period of four months before the filing of his petition, does not even show that he was insolvent at the date of the filing of the petition. It is true that the bankrupt in his petition alleged that he owed debts which he was unable to pay in full; but, as Mr. Collier says, this was an allegation neither necessary to be made nor necessary to be proved. Let us, however, for argument's sake, assume that the adjudication established the fact of insolvency on the 8th of November,—the date of the filing of the bankrupt's petition and of the adjudication. This fact alone, whilst consistent with, did not show, insolvency at a previous date. In the case of *In re Rome Planing Mill* (D. C.) 96 Fed. 812,—a proceeding in involuntary bankruptcy, wherein the petition was filed on the 8th day of November, 1898, and the controversy was whether or not certain judgments against the bankrupt corporation obtained on the 17th day of October, 1898, were suffered or permitted by the debtor "while insolvent,"—District Judge Cox, of the Northern district of New York, said: "As before stated, it is necessary for the petitioners to prove the judgments, the levy, the sale, and the insolvency on October 17, 1898, the date of the judgments. The referee finds all of these facts except the insolvency. The finding that the company was insolvent November 1st does not meet the requirements of the statute. The company might have been solvent on October 17th, and hopelessly insolvent two weeks later." The bankrupt, Jno. A. Chappell, might have been insolvent on the 8th of November, 1900, the day on which he filed his petition and was adjudged a bankrupt, and yet solvent during the period of time from July 13 to November 1, 1900, covering the several payments in the trustee's petition mentioned. The simple fact that he was adjudged a bankrupt proves nothing beyond insolvency at the date of the filing of the petition, if it proves this.

If, then, there is no presumption of insolvency at any date previous to the filing of the bankrupt's petition arising from the adjudication,—a proposition which seems clear,—was there any fact produced in evidence to show such insolvency? Let us now consider this question: From two letters of the bankrupt written to the creditors Jonas Bros., and filed with their answer to the trustee's petition, it appears that on the 4th of April, 1900, the bankrupt, being indebted to said creditors, sent to them a check for a

part of his indebtedness, and a note for the residue, with the request that the check, which he dated April 20th, be held until that date. When the note fell due, on the 21st of June, he paid it, but drew on his said creditors for \$100 with which to make the payment, at the same time sending them a note for that sum, payable 30 days after date, which note he paid at its maturity; this being the \$100 alleged by the trustee to have been paid July 23, 1901, as a preference. This transaction, the trustee contends, is evidence tending to show the bankrupt's insolvency. It shows that the bankrupt was not in possession of sufficient ready money to meet this particular debt at the time when it first became due, and accordingly asked for an extension of credit upon it; but it is far from showing that at the time he paid his note for \$100, that matured on or about July 23, 1900, he was insolvent, within the meaning of the bankruptcy act, subdivision 15 of section 1 of which provides that "a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." In the case of *Duncan v. Landis*, 106 Fed. 839, 45 C. C. A. 666, Circuit Judge Gray, delivering the opinion of the circuit court of appeals, Third circuit, referring to and criticising a charge of the lower court, says: "We think the learned judge of the court below, in thus charging, gave the jury an erroneous impression as to how a fair valuation of the property of the debtor was to be arrived at. We think that the present market value of the property in question would be a fair valuation of the same, but there is nothing in this section of the act that market value should be ascertained by what a purchaser would give who desired to take advantage of the necessities and embarrassments of the owner, in order to procure the same at a price less than its real or market value. We think the words above quoted from the charge of the court below, which we have italicised, have no place in an explanation of what is the criterion of a fair valuation." Taking as a guide the statutory definition of "insolvency" as interpreted in this judicial decision, we find nothing in the record to show that Jno. A. Chappell was insolvent at any time during the period from July 13 to November 1, 1900, during which time he appears to have conducted in the ordinary way his business as a retail dry goods merchant, replenishing his stock from time to time, and keeping it in quantity and value about the same relatively to the aggregate amount of his debts as at the date of the filing of his petition. In the schedules filed with the petition on the 8th day of November, 1900, which he prepared and made oath to as required by subdivision 8 of section 7 of the bankruptcy act, providing that the schedules so prepared and sworn to must show "the amount and kind of his property, the location thereof, its money value, and a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amount due each of them, * * *" the bankrupt valued his total property at \$14,200, of which he valued his stock of goods at \$11,500, the debts due him on open account at \$2,500, and his property claimed as exempt at \$200. His total debts and liabilities he scheduled as aggregating the sum of \$10,364.50. These statements, made under his oath and in conformity to law, show the bankrupt's opinion of the value of his assets, and his estimate of the aggregate amount of his debts. Whilst he stated in his petition that he owed debts which he was "unable to pay in full," the facts stated in the schedules—facts which the statute required him to state—show that he was not insolvent, within its meaning. It is true that the record shows that the aggregate debts proven amount to the sum of \$12,887.70, whilst the total money realized from the bankrupt's estate amounts only to the sum of \$8,025, with additional assets, according to the statement of the trustee, of the value of probably less than the sum of \$200, yet to be administered; but it is also true that, in the inventory of the bankrupt's stock of goods and store fixtures made and returned by the receiver shortly after the adjudication, this portion of his property was valued at the sum of \$14,391.32,—a sum exceeding by more than a thousand dollars the aggregate indebtedness so proven.

With all these facts before him, the referee finds no difficulty in reaching the conclusion that the bankrupt was not insolvent when he made the several payments to the nineteen creditors in the trustee's petition mentioned, and that the dividends of these creditors should now be paid to them. He accordingly submits herewith, marked "Decree," a draft of a decree so providing, to be entered by the court if your honor concurs in this opinion.

All of which is very respectfully submitted.

Wm. B. McIlwaine, for trustee.

Wm. & Henry Flegenheimer, Wm. R. McKanney, Hamilton & Mann, Davis & Davis, Bartlett Roper, Jr., Williams T. Davis, George Mason, and Thos. G. Watkins, for opposing creditors.

WADDILL, District Judge. The foregoing report of the referee is approved and adopted as the opinion of the court, and a decree of distribution may be entered in accordance therewith.

WORRALL v. DAVIS COAL & COKE CO. et al.

(District Court, S. D. New York. January 21, 1902.)

1. EVIDENCE—DOCUMENTS—SHIP'S LOG BOOK.

It is doubtful if the mere inspection of a ship's log book by the adverse party against whom it is produced and sought to be used renders it competent evidence for the party who made it.

2. SHIPPING—CONSTRUCTION OF CHARTER—DUTY OF VESSEL TO PROVIDE AGAINST DAMAGE FROM USUAL METHOD OF LOADING.

The owner chartered a steamship, by a time charter, to be employed in carrying lawful merchandise, for which she was warranted in every way fitted. The owner agreed to maintain her in a thoroughly efficient condition during the service, and it was stipulated that the hire should cease during time lost by reason of her becoming unfit, if exceeding 24 hours. The charterer subchartered her, and she was again subchartered for two voyages to carry cargoes of iron ore from Cuba to an American port. In the loading of the first cargo she received some slight injury, particularly to her hatch coamings and their appurtenances, and in loading the second time more serious injury, which rendered her unseaworthy, and made it necessary to make repairs after her discharge, which occupied five days. The owner brought suit against the charterer to recover charter hire during such five days, and the cost of the repairs, and by petition of respondent the subcharterers were both brought in. It appeared that the ore was loaded in the usual manner, by means of chutes, and that the injuries received, beyond those which were to be expected from the character of the cargo, which was necessarily hard on ships, resulted from the fact that the ship was not constructed in the best manner to receive such cargo, and that the master failed to take such measures as he might have done, and as were customary, to protect the deck and hatchways. *Held*, that the subcharterers were protected from liability for injuries due to such causes by the subcharters, which warranted the ship to be in every way fitted for that particular service; that the original charterer was also protected, the service being a lawful one, in which he was authorized by the charter to engage the vessel, and the ordinary risks from which were assumed by the owner, and hence it was not liable either for the cost of the repairs, or for charter hire during the time they were being made.

In Admiralty. Suit to recover charter hire and for damages to vessel.

Convers & Kirlin, for libellant.

Wing, Putnam & Burlingham, for Davis Coal & Coke Co.

Butler, Notman, Joline & Mynderse, for the United States Shipping Co. and the Spanish-American Iron Co.

ADAMS, District Judge. The libel was filed herein to recover against the Davis Coal & Coke Company a balance of hire of the steamer, amounting to \$1,043.96, under a charter party dated at New York the 28th day of June, 1900, between the owners of the steamer and the Davis Coal & Coke Company, called hereinafter, for convenience, the "Davis Company," and for the cost of certain repairs to the steamer, amounting to \$770.37, alleged to have been rendered necessary by the manner in which she was employed. The Davis Company brought in the other respondents by petition.

The material parts of the charter party are as follows:

"Witnesseth, that the said owners agree to let, and the said charterers agree to hire, the said steamship, from the time of delivery, for about (3) three calendar months. Steamer to be placed at the disposal of the charterers at Baltimore, Md., * * * and being, on her delivery, ready to receive cargo, and tight, staunch, strong, and in every way fitted for the service. * * * to be employed in carrying lawful merchandise, including petroleum or its products, in cases, within the following limits: Any safe port in United States, West Indies, Mexico, and/or Carribbean Sea, as the charterers or their agents shall direct,—on the following conditions: (1) That the owner shall * * * maintain her in a thoroughly efficient state in hull and machinery for and during the service. * * * (4) That the charterers shall pay for the use and hire of the said vessel (£1,200) twelve hundred and sixty pounds British sterling per calendar month, commencing on and from the day of her delivery as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery in like good order and condition to the owners (unless lost) at a port in the United States north of Hatteras. * * * (7) That the cargo or cargoes to be laden and/or discharged in any dock or at any wharf or place that the charterers or their agents may direct, provided the steamer can always safely lie afloat at any time of tide. * * * (9) That the captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew and boats. That the captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading, or otherwise complying with the same. (10) That if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments. * * * (12) That the master shall be furnished from time to time with all requisite instructions and sailing directions. * * * (16) That in the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, or damage preventing the working of the vessel for more than twenty-four consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service. * * * (23) That the owners are to provide ropes, falls, slings, and blocks necessary to handle ordinary cargo up to two tons (of 2,240 lbs. each) in weight; also lanterns for night work. Charterers to provide necessary dunnage and shipping boards, but owners to allow them the use of the dunnage and shipping boards already on board the steamer."

The material parts of the libel are as follows:

"Third. Under and pursuant to the terms of this charter party the said steamship Acanthus was delivered to and taken over by the charterer at

Baltimore on the 9th day of July, 1900, and entered upon the performance of the said charter party; being at the time classed 100 A1 at British Lloyd's, and tight, staunch, and strong, and in every way fitted for the service. During the life of the said charter party; and pursuant to orders received from the said charterer, she proceeded to Daiquiri, Cuba, where she arrived on August 11, 1900, and there loaded a cargo of iron ore from the Spanish-American Iron Company, to whom as the libellant is informed and believes the said steamer had been subchartered by the respondent. Solely by reason of the careless, reckless, and negligent manner in which the said cargo was put aboard by the said Spanish-American Iron Company, notwithstanding the protests of the master, and without fault on the part of the steamship or her officers, the said steamship Acanthus sustained some damage, particularly to her hatch coamings and their appurtenances. Subsequently, and during the life of the said charter party, and upon the orders of the said charterer, the said steamship Acanthus proceeded a second time to Daiquiri, Cuba, arriving there on September 23, 1900, and received a cargo of iron ore from the Spanish-American Iron Company, to whom, as the libellant is informed and believes, the said steamer had again been subchartered by the respondent. Solely by reason of the careless, reckless, and negligent manner in which the said cargo was loaded by the said company, notwithstanding the protests of the master, and without fault on the part of the steamship or her officers, the said steamship Acanthus sustained considerable further damage to the decks, coamings, and other parts of her structure.

"Fourth. The said steamship Acanthus duly proceeded to the port of Baltimore, to which she had been ordered with the said cargo so loaded, and on the discharge of the said cargo a survey was held upon the said vessel; and the master was informed by Lloyd's surveyor that said steamship Acanthus was unseaworthy, because of the aforesaid damages, and would not be allowed to leave port unless repairs were made to the portions of the vessel damaged as above set forth. That accordingly the said repairs were immediately begun, on the 5th day of October, 1900, and were concluded on the 10th day of October, 1900. That the cost of such repairs had been the sum of \$750, and the cost of such survey \$20.37, making in all \$770.37, no part of which has been paid by the respondent, although due demand therefor has been made.

"Fifth. The said steamship Acanthus was redelivered to the owners in New York on the 19th day of December, 1900, but the respondent has withheld and deducted from the charter hire the sum of £215.5.0., or, in money of the United States, \$1,043.96, as and for the time occupied in repairing the damage above set forth, and has refused to pay the same, although due demand therefor has been made.

"Sixth. The cost of such repairs and the charter hire for the time so withheld are a charge upon the respondents, and not upon the owners of the vessel, according to the terms of the charter party hereinbefore set forth, providing that the hire of the said vessel was to continue until her delivery to the owners in the like good order and condition in which she had entered on the performance of the charter party."

The respondent the Davis Company excepted to the libel, and answered (the immaterial parts being omitted) as follows:

"(1) Because it states no cause of action against the respondent, inasmuch as, under the terms of the charter party exhibited in this case, no hire was due during the time that the steamship Acanthus was unseaworthy, and while not in an efficient state to resume her service; and, further, that the alleged damage sustained by said steamer that made her unseaworthy is set forth to have been by the careless, reckless, and negligent manner in which the cargo was put aboard by the Spanish-American Iron Company (article 3), for whose actions this respondent is in no wise responsible.

"(2) In that it does not appear that on the 19th day of December, 1900, when the steamship Acanthus was redelivered to the owners in New York

(article 5), the steamship was not in the like good order and condition as when originally chartered to the respondent.

"(3) That under clause 16 of the charter party, providing for 'damage preventing the working of the vessel for more than 24 consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service,' the respondent was entitled to withhold and deduct from the charter hire the sum of £215. 5s. (\$1,043.96) as and for the time thus agreed to be off hire, and that no claim therefor can be made on this respondent under the terms of said contract.

"Without waiving the foregoing exceptions, but insisting upon all and every thereof, this respondent makes answer unto said libel as follows:

"Third. This respondent also admits that, on or about the 9th of July last, the said steamship entered upon the performance of said charter party, and was accepted by the charterer, by whom she was subchartered to the United States Shipping Company, a corporation of New Jersey, by whom said vessel was again let unto the Spanish-American Iron Company,—the same corporation named in the third article of the libel. This respondent further admits that it has now just learned, by the perusal of the libel herein, that on or about the 11th of August, 1900, while the Acanthus was loading a cargo of iron ore from said Spanish-American Iron Company, she received some damage, either through the manner in which the said cargo was taken on board, or from the unfitness and weakness of her hatch coamings to receive iron ore, but that no intimation thereof was ever given to this respondent, except by the filing of the libel herein. Further answering, this respondent admits that it did receive notice that on the second trip to Daiquiri the master did claim that his vessel had received certain damage in and about the hatches in the loading of said cargo, but as to the facts thereof this respondent has no knowledge, having no representative at Daiquiri, and having had no control over the said vessel, or over the parties then engaged in loading cargo on board thereof.

"Fourth. This respondent admits that the steamship arrived at Baltimore, and that on the discharge of her cargo it was notified that Lloyd's surveyor had pronounced the Acanthus unseaworthy because of the state of her hatches, and the coamings thereof, and would not allow her to leave port until they could be made efficient so as to carry general cargo. This respondent also admits that repairs were being made from the 5th to the 10th of October, 1900. This respondent has no knowledge as to the cost of such repairs, and it alleges that the same have been formally demanded from it, although such claim was presented to the respondent to be passed over to the Spanish-American Iron Company.

"Fifth. This respondent admits that the said steamship was redelivered to the owners in New York on or about the 19th of December, 1900; that it has not paid the charter hire during the time that the vessel was repairing and was off hire under the charter party."

The respondent the Davis Company also filed a petition, the material parts of which are as follows:

"Second. On the afternoon of December 24, 1900, the New York agent of this petitioner was served with process of this honorable court, citing it to appear on January 1st next, and answer unto a libel against this respondent filed by the above-named John P. Worrall, as master of the steamship Acanthus, for \$770.37, costs of repairs made to said vessel, together with £215. 5s. Od., or, in United States money, \$1,043.96, as hire for the time occupied in repairing such damage. The petitioner is sued as charterer of said vessel, under a time charter annexed to said libel, bearing date the 28th day of June, 1900.

"Third. In said libel it is alleged (article 3): 'During the life of the said charter party, and pursuant to orders received from the said charter, she proceeded to Daiquiri, Cuba, where she arrived on August 11, 1900, and there loaded a cargo of iron ore from the Spanish-American Iron Company, to whom as libellant is informed and believes the said steamer had been subchartered by the respondent. Solely by reason of the careless, reckless,

and negligent manner in which the said cargo was put aboard by the said Spanish-American Iron Company, notwithstanding the protests of the master, and without fault on the part of the steamship or her officers, the said steamship Acanthus sustained some damage, particularly to her hatch coamings and their appurtenances. Subsequently, and during the life of the said charter party, and upon the orders of the said charterer, the said steamship Acanthus proceeded a second time to Daiquiri, Cuba,—arriving there on September 25, 1900,—and received a cargo of iron ore from the Spanish-American Iron Company, to whom, as the libelant is informed and believes, the said steamer had again been subchartered by the respondent. Solely by reason of the careless, reckless, and negligent manner in which the said cargo was loaded by the said company, notwithstanding the protests of the master, and without fault on the part of the steamship or her officers, said steamship Acanthus sustained considerable further damage to the decks, coamings, and other parts of her structure.

“Fourth. It is also in said libel alleged that by reason of such damage the said steamship was pronounced unseaworthy, and the repairs to the same were made in Baltimore from the 5th of October, 1900, to and including the 10th of October, 1900, and that the cost of the same was the sum of \$770.37. Under the terms of the charter party to this respondent, copy of which is annexed to the libel, it was provided (clause 16) ‘that in the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, or damage preventing the working of the vessel for more than twenty-four consecutive working hours, the payment of hire shall cease until she be again in an efficient state to resume her service,’ and that accordingly the respondent did withhold and deduct from the charter hire of the vessel the sum of £215. 5s. 0d. during the time of such repairs, and until the said steamship had been made seaworthy and fit to resume her service.

“Fifth. This respondent had no direct privity or knowledge in regard to the loading of said steamship at Daiquiri upon the times mentioned in the libel, and is unable to admit or deny the same. On both of said times the respondent had subchartered the said steamship unto the United States Shipping Company, a corporation of New Jersey, by whom the Acanthus had been again subchartered to the Spanish-American Iron Company,—the same corporation named in said libel,—who had sole charge of the loading and dispatch of the steamer Acanthus at Daiquiri on both occasions mentioned in the libel.

“Sixth. Upon receiving notice from the libelant that he claimed the steamship Acanthus had sustained damage while loading at Daiquiri, which notice was first communicated to the respondent on or about October 4th last, the respondent passed the same over to its subcharterer, the United States Shipping Company, and requested information concerning the same, to which the United States Shipping Company replied in writing, denying liability, and alleging that, if any such damage was sustained, the Spanish-American Iron Company was alone responsible, as appears by a copy of said letter hereto annexed, marked ‘A,’ to be taken as part of this petition.

“Seventh. These claims now put forward against this petitioner, having arisen primarily between the vessel and the said Spanish-American Iron Company, require that the company be brought in to defend this suit; and as this petitioner has no direct contract with the Spanish-American Iron Company, save by its subcharter to the United States Shipping Company, the United States Shipping Company is also a necessary party defendant herein. Thereby this court will have all parties before it, so that its decree herein may be effectual to do final and complete justice and settle the ultimate liability of the party in fault, if anything should be found due the libelant for the causes of action stated in the libel.

“Eighth. The Spanish-American Iron Company is a corporation of West Virginia, but transacts business in New York, at No. 28 Broadway, where it has an office and general manager. The United States Shipping Company is a corporation of New Jersey, but has its general office in New York, in the Produce Exchange Annex Buildings, where are also, its president and executive offices.”

The United States Shipping Company, hereinafter called the "Shipping Company," answered the libel, the material parts being as follows:

"First. Heretofore, to wit, on or about the 27th day of December, 1900, the Davis Coal & Coke Company theretofore proceeded against upon the libel of John P. Worrall, master of the British steamship *Acanthus*, filed its petition in this court, praying that this respondent, to wit, the United States Shipping Company, might be cited to appear and answer unto said libel and unto said petition, which said prayer was granted by this court, and a citation issued accordingly. * * *

"Third. This respondent, upon information and belief, admits that the steamship *Acanthus* loaded a cargo of iron ore from the Spanish-American Iron Company in Daiquiri, Cuba, on or about August 11, 1900, and a second cargo of iron ore on or about September 25, 1900, as alleged in article 3 of the libel. This respondent alleges that at said times said steamer had been furnished to said Spanish-American Iron Company by this respondent, and not by the Davis Coal & Coke Company, as alleged in said article of the libel.

"Fourth. Further answering the libel herein, the respondent alleges that the authority under which it furnished the steamer *Acanthus* to the Spanish-American Iron Company for the first cargo of iron ore as aforesaid was derived from a charter party entered into on the 1st day of August, 1900, between the Davis Coal & Coke Company, therein named, as chartered agents for the owners of said steamship, and this respondent, in and by which said charter party it was provided, among other things: '(1) That said steamship, being warranted tight, staunch, and strong, and in every way fitted for the voyage, shall, with all convenient dispatch, proceed in ballast, unless otherwise permitted by charterers, to Daiquiri, Cuba, and there load, as customary, always afloat, as directed, in the customary manner, from the charterers' agents or shippers, a full and complete cargo of ore, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, fuel, and furniture, say about 3,800 tons,—no ore to be carried in the bunkers,—and, being so loaded, shall therewith proceed to Baltimore direct, and deliver the same as customary, in good order, where and as directed by the consignees, always afloat.' And the respondent further alleges that the authority under which it furnished the steamer *Acanthus* to the Spanish-American Iron Company for the second cargo of iron ore as aforesaid was derived from a charter party entered into on the 21st day of August between the Davis Coal & Coke Company, therein named, as chartered agents for the owners of said steamship, and this respondent. The said charter party for the second cargo of iron ore aforesaid contained the same clause above quoted, in identical language.

"Fifth. This respondent further alleges, upon information and belief, that the charter parties aforesaid executed by the Davis Coal & Coke Company, as chartered agents for the owners, were duly ratified by the owners of said steamship, and that, if the steamship *Acanthus* sustained any damage at the times mentioned in the libel, such damage was due to the fact that the steamship *Acanthus* was not properly constructed, equipped, and provided for the transportation of cargoes of iron ore, and that the hatchways, hatch coamings, angle irons, holds, and shaft tunnel were not protected, by the use of planks and dunnage, against injury.

"Sixth. Further answering the libel herein, the respondent alleges, upon information and belief, that the steamship *Acanthus*, at the times mentioned in the libel, was loaded in a suitable, proper, and customary manner, and sustained no damage other than ordinary wear and tear."

The Shipping Company also answered the petition, the material parts being as follows:

"Second. This respondent admits that the averments of the libel set forth and referred to in articles 3 and 4 of said petition are therein correctly stated.

"Third. This respondent admits the matters alleged in article 5 of said petition.

"Fourth. This respondent has no knowledge as to when the notice of the libellant's claim for damages sustained by the steamship Acanthus was received by the Davis Coal & Coke Company; but it admits that said notice was passed over to this respondent, to wit, on or about October 6, 1900, with a request for information concerning the same. This respondent admits the other matters alleged in article 6 of said petition.

"Fifth. This respondent has no knowledge as to the matters alleged in article 7 of said petition, but admits those alleged in article 8 thereof.

"Sixth. This respondent has no knowledge as to whether all the premises of said petition are true, but admits that they are within the admiralty and maritime jurisdiction of this honorable court.

"Seventh. Further answering the petition herein, this respondent alleges that the charter parties to this respondent referred to in article 5 of the petition herein were executed by the petitioner, the Davis Coal & Coke Company, on the 1st day of August, 1900, as to the first cargo of iron ore mentioned in the libel, and upon the 21st day of August, 1900, as to the second cargo of iron ore mentioned in the libel, and that each of said charter parties provided, among other things, as follows: '(1) That said steamship, being warranted tight, staunch, and strong, and in every way fitted for the voyage, shall, with all convenient dispatch, proceed in ballast, unless otherwise permitted by charterers, to Daiquiri, Cuba, and there load, as customary, always afloat, as directed, in the customary manner, from the charterers' agents or shippers, a full and complete cargo of ore, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, fuel, and furniture, say about 8,800 tons,—no ore to be carried in the bunkers,—and, being so loaded, shall therewith proceed to Baltimore direct, and deliver the same as customary, in good order, where and as directed by the consignees, always afloat.'

"Eighth. This respondent further alleges, upon information and belief, that the steamship Acanthus was not adapted to the carrying of cargoes of iron ore, in that said vessel was constructed with between-decks, and otherwise improperly constructed for said purpose, and in that said vessel was improperly equipped and provided for the transportation of cargoes of iron ore, and in that the hatchways, hatch coamings, angle irons, holds, and shaft tunnel of said vessel were not protected, by the use of planks and dunnage, against injury; and the respondent thereupon avers that if, during the loading of the cargoes referred to in the libel, said vessel sustained any damage, said damage was due to the defects aforesaid.

"Ninth. Further answering the petition, this respondent alleges, upon information and belief, that at the times mentioned in the libel and in the petition the steamship Acanthus was loaded in a suitable, proper, and customary manner, and sustained no damage other than ordinary wear and tear."

The Spanish-American Iron Company, hereinafter called the "Spanish Company," answered the libel, the material parts being as follows:

"First. Heretofore, to wit, on or about the 27th day of December, 1900, the Davis Coal & Coke Company, theretofore proceeded against upon the libel of John P. Worrall, master of the British steamship Acanthus, filed its petition in this court, praying that this respondent, to wit, the Spanish-American Iron Company, might be cited to appear and answer unto said libel and unto said petition, which said prayer was granted by this court, and a citation issued accordingly. * * *

"Fourth. This respondent has no knowledge as to the delivery of the steamship Acanthus to the charterer, the Davis Coal & Coke Company, on the 9th day of July, 1900, or as to the classification or condition of said vessel at said time. It admits that on the 11th day of August, 1900, the steamship Acanthus arrived at Daiquiri, Cuba, and there loaded a cargo of iron ore from this respondent, to which said steamer had been subchartered; but it alleges that said steamer was chartered to this respondent by the United States Shipping Company, and not by the Davis Coal & Coke

Company, as alleged in the libel. This respondent alleges that said vessel was loaded in a suitable, proper, and customary manner, and it denies that said loading was careless, reckless, or negligent, and it denies that any protest whatsoever was made by the master of said vessel. This respondent has no knowledge, nor any information sufficient to form a belief, as to any damage whatever sustained by said vessel at said time; and it alleges that no notice or claim that such damage had occurred was brought to its attention or to that of its officers or employees, prior to the filing of the libel herein. This respondent denies that, in case said vessel sustained damage at said time, said damage was without fault on the part of the steamship or her officers. This respondent admits that the steamship *Acanthus* proceeded a second time to Daiquiri, Cuba, arriving there on September 25, 1900, and that said vessel again received a cargo of iron ore from this respondent, to which said vessel had been subchartered by the United States Shipping Company as aforesaid. This respondent alleges that said vessel was loaded in a suitable, proper, and customary manner, and it denies that said loading was careless, reckless, or negligent, and it denies that the damage sustained by the vessel at said time, if any such damage there was, occurred without fault on the part of the steamship or her officers. This respondent alleges that no protest or complaint as to the manner of loading, or as to any damage sustained by the vessel, was made until about 3 p. m., when the master of said steamship stopped the loading and complained that his vessel was being damaged. After a detention of about forty minutes said loading was resumed, and was completed on the morning of the following day. This respondent denies that said vessel sustained any damage after 3 p. m. of September 25, 1900, but it has no knowledge as to whether any damage occurred on said day earlier than said hour. It alleges that such damage, if any, was trifling.

* * *

"Seventh. Further answering the libel herein, the respondent alleges that the steamship *Acanthus*, upon the voyage mentioned in the libel, was furnished to it under the terms and provisions and subject to the conditions of an agreement or charter party entered into on the 30th day of September, 1897, between the United States Shipping Company, therein referred to as the 'Shipping Company,' and this respondent, therein referred to as the 'Mining Company,' in and by which said agreement or charter party it was provided, among other things: '(1) Ships to be furnished at regular intervals specified by the Mining Company; the latter giving the Shipping Company reasonable notice; and the Shipping Company warrants that all steamships to be employed in this traffic shall be tight, staunch, and strong, and in every way fitted for the voyage. The Shipping Company also agrees to furnish steamships, the construction of which is suitable for this trade, and approved by the Mining Company. * * * (19) Any damage suffered by a vessel in loading or discharging shall be borne by the vessel, unless due to negligence or fault on the part of the Mining Company.'

"Eighth. This respondent further alleges, upon information and belief, that the steamship *Acanthus* was not adapted to the carrying of cargoes of iron ore, in that said vessel was constructed with between-decks, and otherwise improperly constructed for said purpose, and in that said vessel was improperly equipped and provided for the transportation of cargoes of iron ore, and in that the hatchways, hatch coamings, angle irons, holds, and shaft tunnel of said vessel were not protected, by the use of planks and dunnage, against injury; and the respondent thereupon avers that if, during the loading of the cargoes referred to in the libel, said vessel sustained any damage, said damage was due to the defects aforesaid."

The Spanish Company also answered the petition, the material parts being as follows:

"First. This respondent admits the matters alleged in articles 1, 2, 5 and 8 of said petition.

"Second. This respondent admits that the averments of the libel set forth and referred to in articles 3 and 4 of said petition are therein correctly stated.

"Third. This respondent admits that it has no direct contract with the Davis Coal & Coke Company, but as to the other matters alleged in articles 6 and 7 of the petition it has no knowledge, and it neither admits nor denies the same.

"Fourth. This respondent has no knowledge as to whether all and singular the premises of said petition are true, but admits that they are within the admiralty and maritime jurisdiction of this honorable court."

The question for consideration is whether the vessel was damaged at Daiquiri in such a manner as to entitle the libelant to repair her at the expense of the respondents, or of any of them. If that is determined in the affirmative, the hire continued during the period necessary for such repairs, and the libelant is entitled to recover in both respects; otherwise the steamer was off hire during the period, and there cannot be a recovery in either respect.

At the trial the question as to the admissibility of the steamer's log book was raised. It was offered by the libelant, objected to by the respondents, and received subject to the objection. It appears that its production was asked for by the proctors for the Shipping Company and the Spanish Company at the time of the taking of the deposition of the master of the ship. It was not then produced, but it was produced during the examination, which immediately followed, of the first officer, who kept it, and it was marked in evidence as an exhibit for the libelant. The log book was then subject to the respondents' use, if they wished to examine it; and it appears by the admission of the proctors for the Shipping Company and Spanish Company that they did examine it, but too late for cross-examination of the witnesses in connection with it. It is well established that a log book is not ordinarily receivable in evidence in favor of the persons concerned in making it, except in a few cases relating to seamen, provided for by statute. 1 Greenl. Ev. § 405. It is not necessary to decide here the vexed question whether an inspection by the other party after a production at the time of the trial upon a subpoena duces tecum makes it evidence for the one producing it. *Edison Electric Light Co. v. U. S. Electric Lighting Co. (C. C.)* 45 Fed. 55, 59; *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54, 15 L. R. A. 138. I doubt if a mere inspection of a log book by the party against whom it is sought to be used makes it evidence for the party who made it, but, under the circumstances of the case, I have examined this one. I do not see that it adds anything to the testimony of the officers, but regard it as corroborative of their statements.

The steamer was delivered to the Davis Company in Baltimore on July 29, 1900, at 9 o'clock a. m. She was classed 100 A1; having passed her second Lloyd's survey in November, 1899, at South Shields, at which time some \$2,000 were spent upon her. At the time of her delivery she was in good order, and all the hatch coamings were in good condition. She was accepted by the Davis Company as being in accordance with the contract, and subchartered by it to the Shipping Company, which subchartered her to the Spanish Company. The subcharters were in substantial conformity with the allegations of the pleadings, and thereunder the steamer made two trips to Daiquiri, Cuba, where she was loaded with iron ore,

which she delivered in Baltimore, Md. Upon the occasion of her first loading at Daiquiri, the libelant claimed that some damage was done thereby to the angle irons of the hatch coamings, but it was not of serious consequence, and the claim therefor in the libel was not pressed upon the trial. Upon the second loading, however, it was claimed that such serious damage was done that the vessel was rendered unseaworthy thereby, and that in consequence the repairs which are the subject of dispute were necessarily made in Baltimore. On the other hand, the respondents contend that the vessel was not damaged in the loading beyond the ordinary wear and tear incidental to the loading of iron ore, and that the steamer's owners were bound to repair the damage, under the terms of the charter party. That there was considerable damage admits of no dispute. A survey was called in Baltimore for the purpose of ascertaining the extent of the damage, and Lloyd's surveyor recommended certain repairs to the coamings, etc., which he testified were necessary to render the steamer seaworthy. I accept this testimony as controlling upon the condition of the steamer, and conclude that the damage exceeded ordinary wear and tear. The question remains whether the excess of damage could have been prevented by the use of proper precautions on the part of the steamer at the time of loading. The surveyor mentioned (libelant's witness) testified that, even with coal cargoes, it was usual for a steamer receiving them to take preventive measures in the way of coverings for the coamings and other parts liable to injury, and that, iron ore being a harder cargo to receive, greater precautions were necessary in such cases. The loading at Daiquiri was from an ore dock projecting about 500 feet out into the bay. There were 12 ore pockets located near the outer or northerly end of the dock, about 20 feet apart. Each pocket had an iron chute, semicircular in shape, about 25 or 30 feet long, and $2\frac{1}{2}$ feet wide, attached to it at its lowest point. These chutes were fed through openings in the pockets immediately over them. The pockets were at two elevations; a part having their orifices about 32-35 feet above the water; the other being tapped at an elevation of about 22-25 feet above the water. The ore passed through these pockets into the chutes, and thence into the vessel. A part of the loading apparatus was a large square sheet of iron, called a "devil," which was suspended by the ship's tackle in the center of the hatchway, opposite the mouth of each chute, and served to break the force of the fall of the ore, and to distribute it in the hold of the vessel. Ordinarily it was necessary to use the upper chutes first in loading, because the vessels would be too high out of the water for the use of the lower chutes, which were brought into requisition when cargo enough was taken in by means of the upper chutes to bring the vessel down in her bearings to the necessary depth for the lower chutes. The rise and fall of the tide at Daiquiri is only about 18 inches, so that no substantial difference is made by its state. The testimony is to the effect that this method of loading iron ore is generally adopted in this country and Cuba, and is one to which vessels undertaking to carry iron ore are expected to have in view when chartering for such trade. Notwithstanding precautions taken by vessels to pro-

tect themselves, some slight damage to the hatch openings, amounting to \$50 or \$75, usually occurs on each occasion, and is borne by the vessel. I am inclined to the opinion that the excess of damage in this case, over ordinary wear and tear, was caused by the absence of proper precautions on the part of the vessel, or at least there is no satisfactory proof to the contrary, and not by any negligent loading on the part of the shipper, which used the ordinary method. During the loading the captain of the vessel complained to the shipper that the vessel was being injured, and the loading was temporarily suspended. The shipper's agent, in reply to the complaint, wrote to the master that they were "loading the vessel in the usual manner. In case you find any damage to her, please write me a letter detailing the same, and I will forward the same to our New York office, where such claims are adjusted." The master sent such a letter to the agent, and the loading then went on again without further objection on the master's part, who appears to have relied upon his complaint and the letters to cover any damage the vessel might receive. It would have been better if the master, being advised of the probability of damage by his experience on the first loading and what was taking place at the second loading, had endeavored to protect his vessel by suitable devices, such as covering the coamings and other places where the ore would strike by old chains, boards, and planks, as was sometimes done on vessels which were being loaded at this dock. And apart from the practice, ordinary care on the part of the vessel would have required some attempt to prevent the damage, which was entirely neglected. The duty of prevention belonged to the ship. *Olivari v. Merchant* (D. C.) 18 Fed. 554. Moreover, this steamer was of a different type from those usually employed in the trade, in that she had between-decks, which received the principal part of the damage, and probably had some effect in producing damage to the upper coamings and other parts, through a difficulty of distributing the ore by the usual means. Such fact was necessarily influential in exonerating the Shipping Company and the Spanish Company, which were entitled by their subcharters from the Davis Company to a vessel suitable for their trade. I find that they are not liable.

As to the Davis Company, it was entitled to the use of the vessel in "carrying lawful merchandise" within the limits in which she was to be used, and in subchartering for the iron trade it was acting within its legal rights. Such trade is a hard one on vessels, but iron ore is not unlawful merchandise. If the steamer's owners had wished to exclude such use of their vessel, they should have procured a stipulation to that effect to be included in the contract. The fact that the vessel would be subjected, by reason of the character of the ore and the method of loading, to more than the ordinary wear and tear incident to other cargoes, was known to the master when he entered upon the performance of the second voyage. It is evident that, from what he ascertained upon the first voyage, he did not then consider the proposed use of the vessel as improper, and it was incumbent upon him to take adequate means to adapt her to the contingencies of the trade. If he had done so, and endeavored by some

proper means to avert or minimize the danger of damage, and it nevertheless had occurred, he would now be in a better position to assert the claim of negligent loading. I also find that there is no liability on the part of the Davis Company.

Libel and petition dismissed, with costs to the Davis Company against the libelant, and with one bill of costs to the Shipping Company and the Spanish Company against the Davis Company.

FIDELITY TRUST & GUARANTY CO. v. FOWLER WATER CO. et al.

(Circuit Court, D. Indiana. January 21, 1902.)

No. 9,677.

1. MUNICIPAL CORPORATIONS—POWERS—GRANTING FRANCHISE TO WATER COMPANY.

Under the law of Indiana, as settled by decision, the fact that a town is financially unable to construct a system of waterworks does not disable it from granting a franchise to a water company for the construction by it of such system for the benefit of the town and its inhabitants.

2. SAME—INDEBTEDNESS—CONTRACT TO PAY WATER RENTALS.

A contract by a city or town to pay hydrant rentals to a water company at stated times in the future does not create an indebtedness for the aggregate amount of such rentals, within the meaning of the provision of the constitution of Indiana limiting the indebtedness of such corporations.

3. SAME—CONTRACTS—DISCRETION OF COUNCIL.

In a contract between a city or town and a water company for the rental of fire hydrants, the number of hydrants to be furnished, the rental to be paid therefor, and the times and amounts of the several payments, are all matters which it is competent for the parties to agree upon, and as to which the discretion of the municipal authorities cannot be controlled by the courts, in the absence of fraud or such a gross abuse of discretion as to evince bad faith.

4. SAME—POWERS—PURCHASE OF PROPERTY SUBJECT TO MORTGAGE.

A municipal corporation, having no power to incur its property by mortgage, in the absence of express legislative authority, is without power to purchase and hold property which is subject to a mortgage. Such a purchase, moreover, would create an indebtedness on the part of the corporation to the extent of the mortgage debt, although it did not obligate itself to pay such debt.

5. SAME—VALIDITY OF ORDINANCE—CREATION OF ILLEGAL INDEBTEDNESS.

A town in Indiana, having voted to construct waterworks, but being unable to do so without incurring an indebtedness beyond the constitutional limit, passed an ordinance granting a franchise to a water company to construct the works in accordance with certain specifications. It authorized the company to issue a series of bonds, maturing in from 1 to 30 years, and secured by a mortgage on the plant. It further contained a contract by which the company was to furnish a number of fire hydrants, for which the town agreed to pay a stipulated rental semiannually; the same to be paid directly to the trustee for the bondholders; such rentals being sufficient in amount to keep up the interest on the bonds and to pay the same as they matured,—and such provisions were printed on the back of the bonds. *Held* that, in the absence of fraud which would render the agreement to pay hydrant rentals invalid, neither the ordinance, nor the bonds issued in accordance therewith, were rendered invalid, as against bona fide purchasers, by a further provision of the ordinance giving the town an option to

purchase the waterworks, subject to the mortgage, within 30 days after their completion, although the town had no lawful power to make such purchase, since the option created no obligation on the part of the town to purchase or to create an illegal indebtedness.

6. SAME.

The bonds having been issued and sold to bona fide purchasers, such purchasers were charged only with knowledge of such facts as were disclosed by the ordinance and records; and the contract by the town to pay hydrant rentals, on the strength of which the bonds were sold, being in itself legal and within the corporate powers of the town, the latter could not invoke to defeat such contract as against the bondholders a secret agreement between its officers and the water company that the town should exercise its option to purchase the works, in violation of law, nor the actual exercise of such option after the bonds were sold, by taking a conveyance of the works subject to the mortgage, but the bondholders had the right to have such conveyance adjudged illegal in so far as it affected their rights.¹

7. EQUITY JURISDICTION—ENFORCING LEGAL DEMANDS—DETERMINING ENTIRE CONTROVERSY.

A town, having taken a conveyance of waterworks from a company which had previously executed a mortgage thereon to secure its bondholders, and having gone into possession, was a necessary party to a suit against the company to foreclose the mortgage; and a court of equity, having thus obtained jurisdiction of the parties and of the subject-matter, has jurisdiction in such suit to enforce a contract between the town and company, made prior to the issuance of the bonds, by which the town agreed to pay hydrant rentals directly to the mortgage trustee for the benefit of the bondholders.

In Equity. On exceptions to report of special master.

This is a suit in equity to procure the foreclosure of a deed of trust executed by the water company to secure the payment of bonds issued by it amounting to \$30,000. The deed of trust covers all the tangible property, franchises, and rights of the water company. On June 17, 1895, an election was duly had and held by the qualified voters of the town of Fowler to determine whether or not the town should construct a system of waterworks, at which election 283 voted for, and 9 against, such proposed construction. The board of trustees advertised for bids for the construction of the proposed works, and three bids were received, namely, one for \$37,800, one for \$35,300, and one for \$34,985. These bids were rejected; the board of trustees being of opinion, and so resolving, that the town was not financially able to construct the works. The board, on further consideration, determined that there was urgent need for a system of waterworks, and thereupon determined to negotiate a franchise on the best terms obtainable with the Fowler Water Company. On August 9, 1895, the board unanimously adopted an ordinance for the supply of wholesome water to the town and its inhabitants, and authorizing the Fowler Water Company to construct, maintain, and operate a system of waterworks therein.

The first section grants authority and permission to the Fowler Water Company to construct, maintain, and operate a system of waterworks in the town according to certain prescribed plans and specifications, and for that purpose permission is granted to use the streets, alleys, bridges, sidewalks, and public grounds for laying, placing, taking up, repairing, and connecting water mains, hydrants, pipes, and valves for the service of water. The rights, privileges, and franchises were vested in the water company for 50 years from and after the adoption of the ordinance, subject to the right of the town to purchase as hereinafter provided.

The second section provides that the water shall be wholesome in quality, and shall be pumped from tubular wells; that the pumps, engines, boilers, standpipe, engine house, and other buildings and machinery

¹ Bona fide purchasers of municipal bonds, see note to *Pickens Tp. v. Post*, 41 C. C. A. 6.

shall be erected on ground within the corporate limits; that the pumping station shall be constructed of brick, practically fireproof, and the pumps shall be set as shown on the plans, or as directed by the consulting engineer; that the pumps shall have an aggregate capacity of not less than 1,000,000 gallons in 24 hours; that all mains and piping shall be cast iron, and tested under a pressure of 300 pounds to the square inch, and of various sizes, quality, and finish, as required by the plans and specifications; that all mains shall be laid in accordance with the plans and specifications, and joined in the most skillful manner, and placed where indicated on the plans and specifications; that the fire hydrants shall not be less than 49, and shall be placed as required by the plans, and shall be of modern standard style; that the standpipe shall consist of a steel reservoir 100 feet high by 12 feet in diameter, on a stone and concrete foundation; that the engines, boilers, pumps, and all other machinery, and all kinds of materials for the erection and completion of the waterworks system, shall be of the pattern and quality described in the plans and specifications, and all work shall be done in strict accordance therewith, and subject to the approval of the consulting engineer or superintendent.

The third section provides that the waterworks shall be completed and ready to be finally tested on or before December 1, 1895; that the water company shall furnish a bond in the sum of \$10,000 for the completion of the works according to the plans and specifications, and to hold the town harmless from all damages by reason of the construction of the same.

The fourth section provides that the streets, etc., shall not be unnecessarily obstructed in constructing the works; that the streets, etc., shall be restored to their former condition, and that the water company shall hold the town harmless on account of the negligence of itself or its agents; that danger lights and temporary barricades shall be erected at night.

The fifth section provides that as soon as the works are completed the engineer or superintendent shall report to the board of trustees, and a final test shall be made; that if, on such test, the works comply with the test prescribed in the specifications, and if the work shall in all respects conform to the plans and specifications, the board of trustees shall accept the same, and a certificate to that effect signed by the president of the board of trustees, and attested by the town clerk, shall be delivered to the water company.

Section 6: "For the purpose of enabling said water company to realize a portion of the money with which to erect and complete said waterworks, said corporation may mortgage said entire water works plant, including the engines, pump-house and stand-pipe and real estate connected therewith, all machinery, mains and piping, and all other property forming a part of said water works system, including the rights and franchises of this ordinance, to secure a loan of said corporation not exceeding at any time within one year from the date of the completion of said water works, the sum of \$30,000. But said company shall not alienate said plant otherwise except to the town of Fowler within one year from the date of the completion of the said water works plant according to said plan and specifications. But nothing herein nor in this ordinance shall be so construed as to make the town of Fowler liable for the payment of any portion of said \$30,000 of bonds and mortgage."

Section 7: "In consideration of the furnishing of water for the hydrants hereinafter enumerated, and in further consideration of the benefits to accrue to the town of Fowler by the erection of said system of water works, and of the mutual covenants and agreements in this ordinance contained, the said town of Fowler agrees to rent and hereby rents from said Fowler Water Company, its successors or assigns, forty nine fire hydrants such as are described in the plans and specifications herein mentioned, for the period of twenty years beginning December 1, 1895, which hydrant rentals the town of Fowler hereby agrees to pay to the said Fowler Water Company, its successors or assigns, semi-annually, at the following rates: [Here follows a detailed statement of the amount of each semiannual payment.] And in case the said water company causes an encumbrance by mortgage to be placed upon its property to secure an issue of bonds for

an amount not exceeding the sum hereinbefore mentioned, then the town of Fowler agrees to pay each and all of the hydrant rentals herein named during the existence of such encumbrance or mortgage directly to the trustees named in said encumbrance or mortgage. And in the event that hydrants are constructed on such water works system in excess of forty nine in number, said town agrees to pay an annual rental of forty dollars for each such additional hydrant so placed on the system; such additional hydrant rental to be payable semi-annually on June first and December first in each year to the said Fowler Water Company, its successors or assigns."

The eighth section provides that the water company shall keep the hydrants supplied with water, and keep them in good repair; that the chief of the fire department of the town shall have supervision of them, and shall cause them to be inspected and tested at any time, and, if he finds any defective, he shall give notice at once to the person in charge of the water-works, and the water company shall at once put the same in repair.

The ninth section provides for the rates which may be charged to private consumers of water.

Section 10: "Said town shall annually, during said term hereinafter mentioned, levy and collect a tax sufficient to pay said hydrant rentals accruing said years; the said tax when collected shall be kept and known as the 'Hydrant Fund,' and shall be held inviolate and is hereby irrevocably pledged and appropriated for the payment of such hydrant rental in the manner herein provided. Provision to meet the requirements of this section shall be made in the annual appropriation bill."

Section 11: "The town of Fowler shall have the right, for the period of thirty days as hereinafter specified, to purchase said water works from the said water company; and in case the said town shall exercise the option hereby granted, said water company shall convey to said town said water works plant, together with all real estate, buildings, machinery, fixtures and piping connected therewith, and all the rights and franchises appertaining thereto, upon the terms and conditions following, to-wit: If said town shall exercise the said option within thirty days after said water works shall have been completed, tested, appraised and accepted by said town as hereinbefore provided, said water company shall convey to said town by good and sufficient deed said water works plant, with all the real estate, buildings, machinery, tools, fixtures and piping connected therewith, and all the rights and privileges appertaining thereto, for the sum of four thousand dollars, such payment to be made at such time and in such manner as may be agreed upon between said town and said water company, but to be made on or before said town shall take possession of said water works. Said sale to be made subject to the encumbrance of any bonded indebtedness theretofore placed upon said plant by said water company as aforesaid, but free and clear from all liens, claims and charges other than said mortgage indebtedness and accrued interest thereon; said town shall covenant in said conveyance to it to keep said plant in good repair and operating condition. Said deed of conveyance shall recite that said conveyance is made expressly subject to said encumbrance and all its terms and conditions, but that said town does not assume the payment thereof."

The twelfth section provides for the acceptance by the water company of the ordinance within ten days from the date of its adoption.

The acceptance of the water company was duly executed and filed on August 14, 1895, together with the required bond, which was accepted and approved by the board of trustees of the town of Fowler on said date. The town became a stockholder in said water company, by subscribing for and taking \$1,450 of its capital stock.

On September 2, 1895, the water company executed its deed of trust to the complainant to secure 60 negotiable bonds, in the sum of \$500 each. These bonds were duly issued, and have passed into the hands of innocent holders for value, who were such owners and holders prior to November 9, 1895. The waterworks were completed on and before November 9, 1895, and on that date the same were duly tested and accepted by the town of Fowler; and a certificate showing their completion in all particulars

as required by the plans and specifications, and their test and acceptance by the town, was duly issued and furnished to the water company. On November 9, 1895, the town exercised its option to purchase said waterworks, and on November 11th the water company executed to the town a deed of conveyance on the terms and conditions required by section 11 of the ordinance. The town has paid the first four of said installments of hydrant rentals in full to the complainant. These rentals were applied to the payment of the first four of said bonds and the interest coupons falling due prior to June 1, 1898. The town has made default in paying the hydrant rentals falling due June 1, 1898, and from thence hitherto. The town having defaulted in paying the rentals, the water company has been unable to pay any part of the principal and interest falling due on said bonds and coupons on and after June 1, 1898, and has wholly failed to do so. Thereupon the Fidelity Trust & Guaranty Company, on the request of the bondholders, filed its bill against the town of Fowler and the Fowler Water Company for the foreclosure of said trust deed. The bill alleges the execution of the deed of trust to the complainant, its acceptance of the trust, and the due recording of the deed of trust; that it secured the payment of 60 negotiable bonds, of \$500 each, payable to bearer, at semiannual intervals from June 1, 1896, to June 1, 1915; that the bonds were negotiated, and are in the hands of innocent purchasers for value; that default has been made in the payment of the principal and interest which has fallen due on and since June 1, 1898; that the whole debt has been matured as provided for in the deed of trust; that the water company on November 9, 1895, without the knowledge or consent of the complainant or of the holders of any of the bonds, conveyed the waterworks to the town of Fowler, and the town immediately took, and still retains, possession of the same.

The answer need not be referred to, except as to those parts which assail the validity of the ordinance of August 9, 1895. It alleges that, as matter of fact, the ordinance was enacted and the contract entered into between the town of Fowler and the Fowler Water Company, and the bonds and mortgage were issued by the latter company, "in pursuance of a scheme, plan, and purpose entered into between said Fowler Water Company, its officers and agents, and the said town of Fowler, its board of trustees and agents, to procure, in violation of law and in defiance of the thirteenth article of the constitution of Indiana, the construction of a system of waterworks to be ultimately owned by said town of Fowler, and at the same time to evade the provisions of said article of the constitution forbidding the creation of a debt in excess of two per cent. of the taxable property of the town." It further alleges "that the said Fowler Water Company and the trustees and officers of the said town of Fowler formed, concocted, and contrived a scheme to enable the said town of Fowler to buy said waterworks plant and system, and ostensibly to pay therefor the sum of four thousand dollars, as recited in the deed of said Fowler Water Company to said town of Fowler, and to carry into effect the said scheme so contrived, formed, concocted, and carried into effect, in order to enable the said town of Fowler to evade and avoid the provisions of article 13 of the constitution of the state of Indiana, imposing a limit upon the power of a municipal corporation to incur any debt in excess of two per centum of the taxable property of such municipal corporation."

There was a general replication. The case was referred to a special master, who has made his report, to which the complainant has filed exceptions, assailing both findings of fact and conclusions of law. The language employed by the special master in his third conclusion of law raises a doubt as to whether he meant to hold that the ordinance of August 9, 1895, was void on its face, or whether he meant to hold that some plan or scheme outside of the ordinance renders it void. Other facts in the case, so far as material, will appear in the opinion of the court.

W. H. Latta, Rogers, Locke & Milburn, and Wood & Oakley, for complainant.

Miller, Elam & Fesler, Elliott, Elliott & Littleton, and Rollo B. Oglesbee, for defendants.

BAKER, District Judge (after stating the facts). Whether or not any of the exceptions ought to be sustained must be resolved by the consideration and determination of three principal questions: First. Is the ordinance rendered invalid, as to the holders of the bonds, by what appears on its face, taken in connection with the recitals in the record of the board of trustees of the town of Fowler at and before the adoption of the ordinance, and its acceptance by the water company? Second. Is the ordinance rendered invalid by the subsequent purchase of the waterworks by the town of Fowler pursuant to the option reserved therein, or by any other subsequent act or acts of the board of trustees of said town? Third. If the ordinance, as between the holders of the bonds and the town of Fowler, is valid, may the court determine the amount now owing by the town of Fowler for hydrant rentals, and decree that said town pay the same to the complainant?

1. On June 17, 1895, pursuant to the petition of 171 freeholders therefor, the board of trustees of the town of Fowler caused an election to be held by the qualified voters of the town to determine whether or not the town should construct, own, and operate a system of waterworks. At the election there were cast 283 votes for, and 9 votes against, the construction of the proposed works to be erected and owned by the town. The board of trustees advertised for bids for said waterworks, and three bids were received for their construction, as follows: One for \$37,800, one for \$35,300, and one for \$34,985. On consideration, all the bids were rejected; the board of trustees deciding that the town was not financially able to construct the waterworks. The board, on further consideration, determined and resolved that there was urgent need for a system of waterworks, and thereupon resolved to negotiate a franchise for their construction on the best terms obtainable. These are the only facts shown by the record of the board of trustees prior to the adoption of the ordinance. The water company on September 2, 1895, pursuant to the ordinance, issued 60 negotiable bonds, of \$500 each, bearing interest coupons; the bonds and coupons payable to bearer at different times, as specified in said bonds and coupons, beginning June 1, 1896, and ending June 1, 1915. On the back of each bond was printed the list of payments of hydrant rentals to be made as provided in the ordinance, with the statement "that the town of Fowler, by an ordinance passed by its board of trustees, and approved August 9, 1895, agreed and bound itself to pay semiannually, on June first and December first of each year, rentals for forty-nine hydrants on the waterworks plant of the Fowler Water Company, in said town," in the sums specified in the ordinance. On the back of each bond was also indorsed the following statement:

"Such hydrant rentals to be paid by said town directly to the Fidelity Trust and Guaranty Company of Buffalo, New York, trustee, to be applied to the payment of the principal and interest of the series of first mortgage bonds of the Fowler Water Company, aggregating \$30,000, of which series the within bond is one."

This last recited statement was attested on each bond by the signatures thereunder of the president and clerk of the board of

trustees of the town of Fowler. The complainant and the holders of the bonds are chargeable with notice and knowledge of the foregoing facts.

But the fact that the town was financially unable to construct a system of waterworks did not disable it from granting a franchise to a water company for the construction by it of such system. This doctrine is too firmly settled in this state to be longer open to debate. *City of Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Crowder v. Town of Sullivan*, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 547; *City of South Bend v. Reynolds*, 155 Ind. 70, 57 N. E. 706, 49 L. R. A. 795, and cases therein cited. No inference of fraud or wrongdoing can be drawn from the fact that the town, being financially unable to construct a system of waterworks, granted a franchise to the Fowler Water Company, authorizing it to erect such system for the benefit of the town and its inhabitants. It had, incontestably, the right to adopt an ordinance granting a franchise to the Fowler Water Company for that purpose, if it chose to do so, in the absence of fraud. Having, then, the right to adopt the ordinance, does the ordinance contain anything within its four corners showing a violation of the constitution or laws of this state? We will first examine the ordinance, omitting for the present the consideration of section 11. By a long line of decisions, beginning with *City of Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416, and continuing unquestioned to *City of South Bend v. Reynolds*, 155 Ind. 70, 57 N. E. 706, 49 L. R. A. 795, it has been uniformly held that an agreement by a city or town to pay, for water, light, or other thing pertaining to its ordinary and necessary expenses, a certain sum, annually or semiannually, out of its revenues to be raised by an annual tax levy, does not create a debt, within the true construction of article 13 of the constitution of this state. It is said in *City of South Bend v. Reynolds*, supra:

"It is settled in this state that if a city contracts for water, light, or other thing which pertains to its ordinary and necessary expenses, and agrees to pay for the same annually or monthly as furnished, such contract does not create an indebtedness for the aggregate sum of all the annual or monthly payments, because the debt for each year or month does not come into existence until it is earned."

The hydrant rentals agreed to be paid would not become an indebtedness until they had been earned. The evidence shows that the annual revenues of the town, if the tax levy had been made as it was agreed that it should be, would have been in excess of the amount of the semiannual hydrant rentals agreed to be paid. If the hydrants put in were no more than the needs of the town required, and if the rentals agreed to be paid therefor were reasonable, no reason is perceived why the town and the water company might not arrange the time and amount of such payments as would best subserve the interests of either party. It is said that the amount to be paid differs in different years, and that some of the semiannual payments are larger than others. That was a matter within the discretion of the board of trustees of the town, provided the rentals agreed to be paid did not exceed the revenues which might lawfully be ap-

plied to their payment. Within these limits, the discretion of the board of trustees is uncontrollable by the court, in the absence of fraud or an abuse of discretion so gross as to evince bad faith. The power given to municipal corporations to contract for water is purely a business power, and the method of its exercise is discretionary. *City of Valparaiso v. Gardner*, supra. The law is firmly settled that discretionary powers vested by law in municipal corporations are not subject to judicial control, except in cases where fraud is shown to exist, or the discretion is being grossly abused, to the oppression of the citizen. *Seward v. Town of Liberty*, 142 Ind. 551, 42 N. E. 39. The making of a contract for the supply of water was a matter delegated to the board of trustees of the town of Fowler, to be exercised according to its discretion; and in the absence of fraud, or of an abuse of discretion so gross as to evince bad faith, its action, while within the authority delegated to it, is not subject to review by the courts. *City of Vincennes v. Citizens' Gaslight Co.*, 132 Ind. 114, 126, 127, 31 N. E. 573, 16 L. R. A. 485.

The special master has found that more hydrants were rented than the needs of the town required, so as to create a fund sufficient to pay the mortgage indebtedness, and that this was a mere device to evade the constitutional prohibition against creating a debt in excess of 2 per cent. of the value of the taxable property of the town. The court has read the evidence, and is of opinion that it does not warrant the special master's conclusion. The question of how many hydrants were needed by the exigencies of the town was one to be determined by the board of trustees according to its judgment, in the absence of fraud. There is no evidence of fraud, nor does the evidence show any gross abuse of discretion. The most that can be gathered from the evidence is that there was a difference of opinion on this question. The same observation is true as to the amount agreed to be paid for hydrant rentals. In the case of *Seward v. Town of Liberty*, supra, it was shown that the board of trustees of the town had entered into a contract agreeing to take and pay for gas three times the amount for which the same company furnished gas to its private consumers, and it was held that this neither showed fraud, nor such gross abuse of discretion as would justify judicial interference. No such case of abuse of discretion is shown here. Indeed, as appears from an examination of the answer, no charge of fraud is made against the board of trustees; nor is there shown to have been any abuse of discretion, having regard to the present and future needs of the town. The amount agreed to be paid for hydrant rentals is shown to be about the same as was paid in other towns at the time the ordinance was adopted. In the opinion of the court, nothing is found in the ordinance to invalidate it, unless it be found in section 11, and in what was done under and pursuant to that section.

And, first, did the section, prior to the exercise of the option, render the ordinance invalid and unenforceable? At the time the ordinance was adopted, as well as at the time when the option was exercised, the town of Fowler had no authority or power to purchase the waterworks subject to the incumbrance of \$30,000. If the town had

owned the waterworks free of incumbrance, it could not have executed a valid mortgage upon them. No municipal corporation has any power or authority to incumber its property by mortgage, in the absence of legislative authority so to do. If a municipal corporation should accept a conveyance of property subject to a mortgage, it must pay off the mortgage debt, or lose the property. The purchase of the waterworks by the town of Fowler, subject to the incumbrance created by the deed of trust, would create an indebtedness to the full extent of such incumbrance. *Mayor, etc., v. Gill*, 31 Md. 375; *Waterworks Co. v. Trebilcock* (Mich.) 58 N. W. 371; *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964, 59 Am. St. Rep. 886; *Brown v. City of Boston* (Mass.) 60 N. E. 934. It is apparent that the town of Fowler on August 9, 1895, as well as on November 9, 1895, was constitutionally disabled to purchase the waterworks from the Fowler Water Company. Did such disability render the other provisions of the ordinance invalid and unenforceable, prior to the exercise of such option? This is a question of municipal power, to be determined by the constitution and laws of this state.

It is settled by the decision of the supreme court in *City of South Bend v. Reynolds*, 155 Ind. 70, 57 N. E. 706, 49 L. R. A. 795, and authorities there cited, that an option to purchase, contained in an ordinance granted by a city indebted at the time to an amount which disabled it to purchase, does not impair the validity of the ordinance in other respects. In this case the city of South Bend, by an ordinance duly accepted, entered into a contract with James Oliver which provided that he should erect a suitable building for a city hall, at a cost not exceeding \$75,000, upon a lot owned by the city. The building, when completed, was to be leased to the city for 12 years, with a right of renewal, at an annual rental of \$7,200, which the city agreed to pay annually. Oliver gave and the city reserved an option to purchase the building at the termination of the lease, or at any time during the term. Reynolds, a taxpayer, brought suit against Oliver and the city to enjoin them from carrying the ordinance into effect. It was held that the contract for the payment of rent was valid. The court said:

"The only contract of the city is to pay an annual rent of \$7,200, which is admitted to be only a fair rental value for said building. * * * Under said contract the city is under no obligation whatever to pay anything for the erection of said building, or to purchase the same when erected. If it should attempt to exercise its option to purchase said building, but cannot do so without violating the constitutional limitation as to becoming indebted, it may be enjoined from exercising such option. No facts are alleged in the complaint showing that the current revenues of the city will not be sufficient to pay the indebtedness for rent under said contract each year when the same comes into existence, including all other expenses for which the city is liable. The allegations of the complaint do not show, therefore, that said contract creates any indebtedness in violation of the constitution."

The same doctrine is maintained by other courts of high authority. In *Stedman v. City of Berlin* (Wis.) 73 N. W. 57, the ordinance contained an option authorizing the city to purchase the system of waterworks within six months after its completion, and provided that the amount to be paid should be the amount of the bonded indebtedness

of the water company, and, in addition thereto, the amount which the enlargement of the plant should cost in excess of such bonded indebtedness. In a suit brought by a taxpayer of the city to enjoin the carrying out of the contract, and to set aside the ordinance on the ground that it was beyond the power of the city to enact the same, because thereby a debt was created in excess of the constitutional limit, it was held that the contract to pay rent for the hydrants was valid and enforceable, notwithstanding the option reserved. After deciding that the contract for the payment of annual hydrant rentals did not create a debt, but was only a current expense to be paid as the water was furnished, the court held that the option clause in the ordinance created no liability and imposed no obligation. The court said :

"It is clear that the city has not exceeded its constitutional limit to contract indebtedness. The city is under no obligation to buy the waterworks constructed under the franchise in question. It has simply stipulated for an option to buy the same on the terms stated, as it may find it prudent or advantageous for it to do so or not. It may decline to purchase, whenever the proper time for that purpose arrives, and this will put an end to the entire matter."

To the same effect is the case of *Water Co. v. Woodward*, 49 Iowa, 58. There, as here, it was insisted that the stockholders of the water company were not required to pay anything; that the waterworks were in fact constructed with bonds, or the proceeds thereof; and that the water company did not contribute anything for the purpose of construction. It was further urged there, as here, that the ordinance attempted to do by indirection what could not be done directly, and thus to evade the constitutional limitation on the power of the town to create an indebtedness. We say, as was said by the supreme court of Iowa :

"If this be conceded, and yet by the means adopted no debt is incurred or obligation assumed by the city which is illegal, it is difficult to see why the means adopted are unconstitutional."

It follows, therefore, that the reservation by the town of an option to buy the waterworks within 30 days after their completion and acceptance did not render the ordinance invalid or unenforceable.

Nor is there anything disclosed on the face of the bonds, or in the indorsement on their back, which would impart notice of the invalidity of the ordinance or of the trust deed or of the bonds. Such negotiable bonds, in a certain sense, are the representatives of money, and freely pass by delivery in the markets of all commercial countries. To accomplish this purpose, the holder of a perfected bond must be deemed to be the true owner, and be able to invest an innocent purchaser for value and before maturity with an unimpeachable title. The title of a bona fide holder of such bond ought to stand on as secure a foundation as that of a person who receives a bank note in the ordinary course of business. Any other doctrine would undermine the very structure of commercial law, and shake the foundations of such paper credits.

The certificate of the president and clerk of the town of Fowler indorsed upon the bonds constituted a representation of the validity

of the contract to pay rent, and that such rent would be applied to the payment of the principal and interest of the bonds. The town ought not now, after money has been paid to the waterworks company on such bonds on the faith of such representations, to be permitted to repudiate them. *Goodman v. Simonds*, 23 How. 343, 15 L. Ed. 934.

2. Is the ordinance rendered invalid, in so far as the town of Fowler has contracted to pay semiannual hydrant rentals, by the subsequent purchase of the waterworks pursuant to the option reserved, or by other subsequent acts of its board of trustees? The only act set up in the answer subsequent to the adoption and acceptance of the ordinance, material to be considered, in addition to the purchase of the waterworks, is the passage of an ordinance by the board of trustees of the town on August 27, 1897. This ordinance provided for the issue of \$9,000 of funding bonds for the purpose of raising money with which to discharge the outstanding indebtedness of the town incurred in the payment of the cost of constructing, acquiring, extending, and equipping the waterworks. The bonds were executed and delivered to Farson, Leach & Co. at their office in Chicago, where the same were executed by the board of trustees of the town of Fowler, who were there present for that purpose; and said bonds were then and there sold to Farson, Leach & Co. for their par value, and the purchase price was received by said town. So far as the rights of the bondholders of the water company are concerned, this transaction is wholly immaterial. Nothing could be done by the board of trustees after the bonds had been issued and had gone into the hands of innocent holders for value which could affect or impair their validity. The purchasers of the bonds were not bound to look beyond the ordinance and the records of the town leading up to its adoption. The town is estopped to set up any secret contract or understanding between it and the water company dehors the ordinance and the records of the town relating to its adoption. The purchasers of the bonds had the right to act on the faith that the ordinance spoke the truth, and that no undisclosed fraudulent plan or scheme lurked in ambush to entrap the unwary investor. No evidence was admissible to show that there existed between the board of trustees and the water company some secret and corrupt plan or scheme outside of the ordinance. To permit such evidence against innocent purchasers of negotiable bonds would be to offer a premium on fraud, and open wide the door to successful swindling.

Nor does the exercise of the option by the town to buy the waterworks, when the constitution forbade it, invalidate the contract or the grant contained in the ordinance. In *Hynds v. Hays*, 25 Ind. 31, 36, 37, it is said:

"It is, we believe, well settled that when a party has contracted to perform anything, and an illegal act is included therein, that he shall nevertheless be held to perform so much of his contract as it is lawful to perform, if it can be separated from that part which is illegal. In other words, so far as the contract is lawful it will be supported, but beyond that the parties will be left without aid. But if the contract be of such a nature that no separation can be made between the legal and illegal

stipulations, then the whole will be held void, and no action can be maintained upon it."

In the present case the contract to pay the hydrant rentals is perfectly valid and legal, and is in no wise dependent upon or connected with the exercise of the option to buy the waterworks. It is entirely practicable to separate the contract to pay rentals, which was lawful, from the option to buy, which was vicious. It is difficult to see how a contract valid and enforceable before the exercise of the option to buy can be rendered invalid by the unlawful act of the town in attempting to purchase. The bondholders had the right to assume that the town would exercise the option to buy in good faith, and would not attempt to do so when it knew the constitution prohibited it from making a lawful purchase. It may be that, as between the town and the water company, the conveyance would not be set aside by a court of equity, at the suit of the water company, on the ground that each party was in *pari delicto*. The complainant and the bondholders, however, are in no wise implicated in the unlawful act, and they have a right to have the conveyance of the waterworks adjudged illegal. The town of Fowler can claim no advantage or benefit, as against the complainant and the bondholders, by reason of its receiving a conveyance of the waterworks pursuant to the option reserved in the ordinance.

3. May the court in this suit ascertain and determine the amount of the hydrant rentals due and owing by the town of Fowler to the complainant, and decree the payment of the same? It is contended that the right to the rentals grows out of contract, and that their recovery must be sought in an action at law. As a general proposition, this contention is well founded, but is it applicable here? The title of the waterworks stands of record in the town of Fowler. The town is in the actual possession of the tangible property covered by the deed of trust. It is therefore not only a necessary, but an indispensable, party to a suit for the foreclosure of the trust deed. A decree of foreclosure against the water company alone would not enable the purchaser at the foreclosure sale to obtain possession of the waterworks without further litigation against the town. The complainant was therefore under a necessity to make the town of Fowler a party defendant to the bill to procure an effective decree of foreclosure; and in such case it is according to the established course of procedure, in order to avoid multiplicity of suits and to prevent expense and delay to the parties, to proceed and give such final relief as the circumstances of the case may demand. It is not to be overlooked that the town covenanted to pay the hydrant rentals directly to the complainant. In *Tayloe v. Insurance Co.*, 9 How. 390, 13 L. Ed. 187, an agreement to insure had been entered into between the parties, but the policy had not been issued by the company. Upon the happening of a loss the assured filed a bill praying that the company be decreed to pay the loss, or for such other relief as the complainant might be entitled to. The court maintained jurisdiction, saying:

"No doubt, a count could have been framed upon the agreement to insure so as to have maintained an action at law. But the proceedings would

have been more complicated and embarrassing than upon the policy. The party, therefore, had a right to resort to a court of equity to compel the delivery of the policy either before or after the happening of the loss; and, being properly in that court after the loss had happened, it is according to the established course of proceeding, in order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand."

In the case of *Ober v. Gallagher*, 93 U. S. 199, 206, 23 L. Ed. 829, 831, it is said:

"Having obtained rightful jurisdiction of the parties and the subject-matter of the action for one purpose, the court will make its jurisdiction effectual for complete relief."

See, also, *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 12 Sup. Ct. 235, 35 L. Ed. 1025.

This court having acquired rightful jurisdiction of the town of Fowler and of the subject-matter, it will make that jurisdiction effectual by granting complete relief, and will not remit the complainant to an action at law.

The exceptions of the complainant to the findings and conclusions of the special master are sustained. A decree may be prepared in conformity with this opinion.

JOHN HANCOCK MUT. LIFE INS. CO. v. HOUPY.

(Circuit Court, W. D. Pennsylvania. August 14, 1901.)

1. **REFERENCE—FINDINGS OF MASTER—REVIEW.**

Findings of a master on matters of fact are not to be disturbed unless clearly in conflict with the weight of evidence.

2. **LIFE POLICY—CANCELLATION—MATERIAL MISREPRESENTATIONS.**

Where a life policy provides that it shall be void if any of the statements in the application are untrue, and the applicant expressly warrants that all his statements are true, but the application contains material misrepresentations as to his health and as to the pendency of applications for insurance with other companies, etc., which misled the company, and induced the issuance of the policy, and which are apparently intended for that purpose, the company is entitled to have the policy canceled on bringing suit within the proper time, especially where, even if the misrepresentations are not intentional, the policy, when delivered, plainly discloses the untruthfulness of the representations.

3. **SAME—KNOWLEDGE OF MEDICAL EXAMINER—EFFECT.**

The fact that the physician who makes the medical examination has knowledge of the untruthfulness of the representations will not affect the company's right to the cancellation of the policy, he not having any power to enter into a contract of insurance or to make a waiver.

4. **SAME—INCONTESTABLE CLAUSE—EFFECT.**

A provision in a life policy that it is incontestable after two years cannot affect a suit by the company to obtain its cancellation, brought within three months from its date, the company's rights depending on the facts as existing at the filing of the bill.

In Equity.

E. N. Willard, for plaintiff.

J. B. Woodward, for defendant.

ACHESON, Circuit Judge. This suit was commenced on October 21, 1898. The bill is for the cancellation of a policy of insurance for \$10,000, dated July 29, 1898, and on that day issued by the plaintiff to the defendant upon the life of the latter, on a written application dated July 15, 1898, made and signed by the defendant. The policy recites that the insurance is made "in consideration of the representations and statements made in the application for this policy, which are referred to and made a part hereof," and stipulates that, "if any of the statements in the application for this policy are in any respect untrue, this policy shall become void, except as hereinafter agreed," and that the "policy shall be incontestable after two years from its date, except for nonpayment of premium, or military or naval service in time of war." Accompanying the application were questions propounded by the medical examiner to the applicant, the latter's answers to the same, and the following stipulation thereunder, subscribed by the applicant:

"I hereby warrant that all the statements and answers made by me above are complete and true. I agree that there shall be no contract of insurance until a policy shall have been issued and delivered, and the first premium thereon paid, while I am in good health; and, if said policy be issued, this application, with answers made to the medical examiner, shall be a part thereof."

A true copy of the questions by the medical examiner and the applicant's answers thereto were plainly printed and written on the reverse side of the policy as issued and delivered. The ground for the cancellation of the policy alleged in the bill is that certain specified representations and statements made by the defendant in his said application and answers to the medical examiner, material to the risk, and upon the faith of which the policy was issued, were untrue, and were known by the applicant to be false when made.

After the cause was at issue, and at the instance of both parties, and in pursuance of a written stipulation signed by their counsel, the court referred the case to a master named by them. The order appointing the master did not expressly define his powers, but throughout the proceedings before him both parties acted upon the theory that he was authorized to hear and decide all questions of fact and law, and each party requested the master to make findings of fact and law in accordance with propositions submitted by them respectively. In the main, the findings of the master were in favor of the plaintiff, and he has recommended a decree in accordance with the prayers of the bill, canceling the policy in question. The master found and has reported, among other things, that "the defendant was not fairly insurable, and this fact was known both to him and to the examining physician"; that "the application and medical examiner's report signed by the applicant contained misstatements calculated and intended to, and which did in fact, deceive and mislead the company's officers"; that, "had the questions of the application been truthfully or fairly answered, the policy would not have been issued"; and that on "October 11, 1898, promptly on discovery of the misrepresentations, and within three months from the date of the original application, plaintiff tendered the defendant the return

of the premium paid." Specifically answering certain of the plaintiff's requests, the master found thus:

"In his application the defendant stated as follows:

"The only insurance on my life is as follows: New England, \$15,000; Northwestern, \$10,000; Mutual Life, New York, \$10,000; State Mutual, \$20,000; Aetna, \$10,000.' He further stated in his application as follows: 'I have never made an application to insure my life to any company nor agent upon which a policy has not been issued, nor is there one now pending, unless so stated above.' He further stated as follows, 'Have applied to State Mutual for \$10,000 additional,' in his declaration to the medical examiner. Answer. I so find and report."

"That said answer [statement] was untrue, and at the time it was made, on July 15, 1898, the defendant had an application pending, which he made to the Phoenix Mutual Life Insurance Company of Hartford, Conn., for insurance on his life in the sum of \$10,000 on June 29, 1898, which was received at the office of the Phoenix Mutual Life Insurance Company, in Hartford, Conn., on July 6, 1898, and rejected August 8, 1898. Answer. I so find and report. The date of rejection, however, was August 6th."

"That question 11a, put by the medical examiner in his question, was as follows: '(11a) Have you been obliged to consult a doctor at any time during the last ten years? If so, when, and for what?' To which the defendant answered, 'Pneumonia, 1½ years ago.' Answer. I so find and report."

"That said answer was false and misleading, and the defendant had consulted Dr. F. H. Bosworth, of New York, a specialist in throat diseases, in the month of April, 1897, and from that time to October 1, 1898, for a disease of the throat which the doctor pronounced 'perichondritis of the cricoid cartilage of the larynx.' That he consulted Ernest U. Buckman and Dr. L. H. Taylor, both specialists in throat diseases, of the city of Wilkesbarre, Pa., for the same disease, from April, 1897, to November, 1898. That he was treated for throat disease by these physicians in the month of April, 1897, and every month thereafter until November, 1898, from two to ten times a month, and they treated him by sprays, applications to the throat, and by applying electricity to the throat externally. Answer. I so find and report."

"That the defendant was also asked by the medical examiner this question: '(11b) When, and for what, did you last consult a doctor?' To which the defendant answered: 'As above' (which above answer was 'pneumonia, 1½ years ago'). That said answer was false and misleading, as the uncontradicted evidence is that he consulted and was treated for disease of the throat by Drs. Bosworth, Taylor, and Buckman, from April, 1897, to November, 1898. Answer. I so find and report."

"That the defendant was also asked by the medical examiner this question: 'Are you now under a doctor's care? If so, for what?' To which the defendant answered, 'No,' which answer was false and misleading, according to the testimony of Drs. Bosworth, Taylor, and Buckman. Answer. I so find and report."

"That the thirteenth question put by the medical examiner to the defendant was as follows: 'Has any proposal or application to insure your life ever been made to any company or agent upon which a policy has not been issued, or is any now pending? If so, give full particulars.' To which the defendant answered, 'Have applied to State Mutual for \$10,000 additional,' which answer was false, and there was an application by the defendant for a policy of \$10,000 upon his life pending in the Phoenix Mutual Life Insurance Company of Hartford, Conn., dated June 29, 1898, received by the Phoenix Mutual on July 6, 1898, and rejected on August 8, 1898. Answer. I so find and report, except that the date of rejection was August 6th."

"Question 18 put by the medical examiner to the defendant was as follows: 'Have you ever had or been predisposed to any of the following diseases or infirmities? If so, state the full particulars, giving dates, severity, duration, nature, and number of attacks.' Among the diseases then inquired about was this: 'Have you ever had or been predisposed to

disease of the throat? To which the defendant answered, 'No, except pneumonia, above.' That said answer was false. Answer. I so find and report."

"That the plaintiff was induced to issue its policy, No. 56,098, insuring the defendant's life, by false declarations and representations made to it by the defendant as to the state of his health and medical attendance. Answer. I so find and report."

"That, had the defendant stated the truth in his application and in his answers to the questions put to him by the medical examiner as to his previous health and medical attendance, the policy would not have been issued. Answer. I so find and report."

"At the time M. B. Houpt made his application to the plaintiff he knew he had disease of the throat; he knew that he had consulted and been attended by Drs. Bosworth, Taylor, and Buckman, specialists in throat diseases, for diseases of the throat; and he knew that he had had illness and disease other than as stated by him in his application and in his answers to the questions put to him by the medical examiner. Answer. I so find and report."

"From April, 1897, to and including July 15, 1898, the defendant had perichondritis of the cricoid cartilage of the larynx. Answer. I so find and report."

"Perichondritis of the cricoid cartilage of the larynx is a disease of the throat, and tends to shorten life and increase the risk of loss in the matter of life insurance. Answer. I so find and report."

"The concealment of the fact by the defendant that he had consulted and been attended by Drs. Bosworth, Taylor, and Buckman for throat disease was the concealment of a fact material to the risk. Answer. I so find and report."

"The concealment of the fact by the defendant, on July 15, 1898, that he had an application pending in the Phoenix Mutual Life Insurance Company of Hartford, Conn., for a policy of \$10,000, on his own life, was the concealment of a material fact. Answer. I so find and report."

"That under all the evidence in this case the answers of the defendant to the questions put to him by the medical examiner, Nos. 11 a, b, and c, 13, 18, and 19, were made with actual intent to deceive the plaintiff. Answer. From a careful consideration of the evidence, I believe this to be so. I so find and report."

"The policy, which the defendant read upon its delivery, contained this clause: 'No person except the president or secretary is authorized to make, alter, or discharge contracts, or waive forfeiture.' Answer. I so find and report."

To the report and findings of the master the defendant filed exceptions, and, accordingly, the cause came on for final hearing. The case, however, has been considered by the court as well on the pleadings and proofs as on the report of the master and the exceptions to his findings. Now, it is settled that the findings of a master upon matters of fact are not to be disturbed unless clearly in conflict with the weight of the evidence. *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289. No such clear conflict is apparent here. Certainly there was evidence to sustain all the findings of fact here excepted to, and I am not convinced that the determinations of the master were against the weight of the evidence in any essential particular whatever.

In the brief of the defendant's counsel it is said:

"It is not denied that the application contained misrepresentations, and that the misrepresentations were material to the risk. It is strenuously denied, however, that they were made by the defendant with intent to deceive the plaintiff."

But, under the circumstances, and having regard to all the evidence, it is hard to acquit the defendant of positive bad faith. I cannot say that the master went too far in holding, as he has done, that the defendant actually intended to deceive the plaintiff.

It does not help the defendant's case that the medical examiner, who acted in this one instance, was informed or had knowledge of what the facts were. The medical examiner was not authorized to enter into a contract of insurance, or to make any waiver. The defendant well knew that his application and accompanying answers to the questions of the medical examiner were addressed to the insurance company, and were to be submitted to its officers as the basis of the proposed contract of insurance. He subscribed his application and the said answers, and must be taken to have known the contents thereof. He is not to be heard to assert the contrary under the circumstances of this case. Moreover, he expressly warranted the truth of his statements and answers as subscribed by him. Furthermore, aside from the warranty, his misrepresentations were most material, and, in fact, misled the plaintiff, and induced it to issue the policy. Still further, even if it could be believed that the defendant did not originally know what his answers stated, the policy, when delivered to him, plainly disclosed his untruthful answers, and he could not, in good faith to the plaintiff, hold the policy. *Insurance Co. v. Fletcher*, 117 U. S. 519, 534, 6 Sup. Ct. 837, 29 L. Ed. 934. Under the findings of fact by the master and the proofs, the defendant is without any solid ground upon which to place a defense to this bill.

A word as to the suggestion made by the defendant's counsel touching the effect of the clause providing that the policy shall be incontestable after two years from its date. That clause, and the authorities cited under this head, plainly have no application to this case. This suit is for cancellation of the policy, and was brought within two years—indeed, within three months—after its date. The suit proceeded upon the ground that there never was a valid contract of insurance, and that the policy was fraudulently obtained. Of course, the case is to be determined upon the facts as they exist at the date of the filing of the bill.

The exceptions to the master's report must be overruled, and his findings of fact confirmed. Let a decree be drawn in favor of the plaintiff in accordance with the recommendation of the master.

AMERICAN SCHOOL FURNITURE CO. v. J. M. SAUDER CO. et al.

(Circuit Court, E. D. Pennsylvania. January 22, 1902.)

No. 24, Oct., 1900.

PATENTS—INFRINGEMENT—COMBINATION.

A claim for a combination is not infringed by another combination in which one of the described or specified elements of the patented combination is omitted without substitution of any equivalent thereto.

On Final Hearing.

For former opinion, see 105 Fed. 731.

J. B. McPHERSON, District Judge. This case presents an unusual situation. Although it is a suit charging the infringement of a patent, the defendants admit that the patent was for a useful invention, and that it had not been anticipated. The only issue is infringement, and even upon this point the defendants have taken no testimony, relying wholly upon the alleged weakness of the complainant's case. Unusual as the facts may be, however, an examination of the evidence has satisfied me that the defendants' course was justified, and that the charge of infringement has not been made out. The patent in suit is in no sense a primary patent. It is for improvements in adjustable school desks and seats, and consists essentially in a combination of old elements, as will be seen by an examination of the sixth and seventh claims of the patent, which are the only two claims involved in this controversy:

"(6) In an adjustable desk, the combination with the legs or standards, each provided with a slot, of a rack-bar on one side of said slot, the desk proper having depending arms adapted to bear against the legs or standards, a rod connecting said arms and provided with screw-threaded ends, a hollow clamping-nut on each of said ends, a hollow shaft on the rod, and a pinion on each end of the hollow shaft and engaging the rack-bars of the slots, and adapted to bear against the legs or standards, when the clamping-nuts are tightened; all said parts substantially as and for the purposes described.

"(7) In an adjustable desk, the combination with the legs or standards, each provided with a slot, of a rack-bar on one side of said slot, the desk proper having depending arms adapted to bear against the legs or standards, a rod connecting said arms and provided with screw-threaded ends, a hollow shaft on said rod, a blind nut on one end of said rod and secured to said hollow shaft, a pinion on each end of said hollow shaft and engaging the rack-bars of the slot and adapted to bear against the legs or standards, and a hollow clamping-nut on each end of the rod and bearing against the outer faces of the depending arms; all said parts substantially as and for the purposes described."

It will be observed that the connecting rod is an essential part of this combination. Without it the desk would not be operative; for, to use the phrase of the complainant's counsel, unless there were an "interposed medium" against which the clamping-nuts could abut, the device would not work. Now, what the defendants have done is to rearrange the same elements that have been combined in the complainant's patent, so as to omit the connecting rod altogether, and to make the body of the desk proper serve as the "interposed medium" against which the clamping-nuts abut. By this simpler combination, the desk, as a whole, performs the same function as does the desk of the complainant. This, as it seems to me, is clearly permissible, and does not constitute infringement. A very recent decision of the circuit court of appeals of this circuit (*Pittsburg Meter Co. v. Pittsburg Supply Co.*, 48 C. C. A. 580, 109 Fed. 644) relieves me of the necessity of discussing the subject further. The principle applied in that case was thus stated:

"Nothing in the law of patents is better settled than the rule that a claim for a combination is not infringed if any one of the described or specified elements is omitted, without the substitution of anything equivalent thereto."

This, as I understand it, is precisely what was done in the present case. The complainant's connecting rod was omitted, and nothing has been substituted equivalent thereto, the function performed by the rod in the complainant's device being now performed by the remaining elements in the combination. A better arrangement has produced a less complex result, and in combination patents such a product of the inventive faculty is to be encouraged.

A decree may be entered dismissing complainant's bill, with costs.

THE SEVERN.

(District Court, E. D. Virginia. January 21, 1902.)

1. ADMIRALTY—EVIDENCE IN SUIT FOR COLLISION—ADMISSIONS OF MASTER.

Statements made by the master of a vessel, after a collision, as to the manner of its occurrence, are receivable as admissions against the owners in an action against them for the collision.

2. COLLISION—DEFENSES—INEVITABLE ACCIDENT.

The defense of inevitable accident in a suit for collision will not avail a vessel unless she is shown to have been free from fault.

3. SAME—ANCHORED VESSELS—DRAGGING ANCHOR IN STORM.

Evidence that the dragging of a vessel's anchor, which resulted in her collision with another anchored vessel, was due to a sudden and severe squall, does not make out a defense of inevitable accident, where it is further shown that she had out only one of her two anchors, that the squall lasted only about five minutes, and that only one other of a number of vessels at the anchorage grounds dragged anchor, but such evidence, taken together, tends to show that the collision was due to the fault of such vessel in failing to be properly anchored.

4. SAME—PRESUMPTION OF CARE.

In case of collision between two anchored vessels, one of which dragged its anchor while the other did not, the latter is presumed to have been free from fault.

5. SAME—FAULT OF PILOT—IMPROPER PLACE OF ANCHORAGE.

The fault of a licensed pilot in anchoring a foreign vessel without cargo in the place allotted to loaded vessels by the harbor regulations is not attributable to the vessel.

In Admiralty. Suit in rem to recover damages for collision.

This is a libel filed by Lewis Luckenbach, owner of the barge Frank Pendleton, against the steam bark Severn, and a cross-libel filed by the owners of the Severn against the Frank Pendleton, to recover damages arising from a collision which occurred on the night of the 16th of August, 1900, between 8:15 and 8:30 p. m., near the mouth of James river, about abreast of Newport News; said barge and bark being, respectively, at anchor in the anchorage grounds prescribed by the harbor master of Newport News for loaded vessels. The barge Frank Pendleton was an ocean-going barge of a burden of about 1,300 tons gross, and the steam bark Severn was a British steam bark of a burden of about 2,000 tons. While so lying at anchor, a collision occurred in a storm by reason of the bark dragging its anchor and colliding with the barge.

Bickford & Stuart, for the Pendleton.

George Whitelock, E. I. Koontz, and Hughes & Little, for the Severn.

WADDILL, District Judge (after stating the facts). The faults assigned by the Pendleton are that the Severn was wrongfully anch-

ored within the space allotted for loaded shipping, it being at the time light; that it had out only one anchor,—its port anchor,—when both should have been out, and that at least its starboard anchor should have been kept in position to be immediately released in case of emergency or storm arising; that the Severn's yards should have been trimmed fore and aft, instead of athwart-ship, as they were; and that the bark was not supplied with a sufficient crew. The defense of the Severn is that the collision was inevitable, arising from a sudden and violent hurricane, that could not reasonably have been foreseen, and that the velocity of the wind was such that it was impossible to have avoided what occurred, and that the Pendleton was negligently anchored in too close proximity to it.

Considerable evidence was taken by the parties, respectively, including that of the master and crew of the Pendleton, though only the first mate of the Severn was examined; the bark, with its entire officers and crew, on the next voyage after the collision, having been lost at sea, with the exception of the mate, who had left the ship by reason of sickness. One of the questions much discussed was whether or not certain statements made by the master of the Severn the day after the collision, as to how the same occurred, was admissible in evidence against the ship. Objection was made to the admissibility of this evidence upon the examination of witnesses orally before the court, and the same was received subject to exception. The same admissions, however, had been previously received during the taking of depositions without exception. The objection should have been then made and insisted upon; but, in any event, it seems quite clear that such admissions from the master of the ship are received against the owner in proceedings in admiralty. *The Enterprise*, 2 Curt. 320, Fed. Cas. No. 4,497; *The Potomac*, 8 Wall. 590, 594, 19 L. Ed. 511; *Packet Co. v. Clough*, 20 Wall. 528, 541, 22 L. Ed. 406.

The defense of inevitable accident, assuming that the evidence in this case established the respondent's contention in reference thereto, will not avail the Severn, unless it is shown itself to be free from fault, which it has utterly failed to do. *Union S. S. Co. v. New York & V. S. S. Co.*, 24 How. 307, 313, 16 L. Ed. 699; *The Morning Light*, 2 Wall. 550, 556, 557, 17 L. Ed. 862; *The Mabey*, 14 Wall. 204, 215, 20 L. Ed. 881; *The Clara Clarita*, 23 Wall. 1, 12, 23 L. Ed. 146; *The Colorado*, 91 U. S. 692, 703, 23 L. Ed. 379. Moreover, the evidence fails to make out a case of inevitable accident; that is to say, that the storm was of such a character as that the collision could not have been avoided by the exercise of ordinary precaution and good seamanship on the part of those in charge of the Severn. The storm, it is true, was a violent one, but it only lasted at most five minutes, and at great height for only a minute. While it did appear to have been a thunder squall, rather than a cyclonic storm, still the threatening character of the weather was sufficiently manifest to have caused the Severn to have anticipated the coming trouble, at least to the extent that it could instantly have lowered its anchor, and have avoided the very trouble that ensued; and, although the storm was extremely violent for a short while, the fact that only the

Severn and one other vessel lying at anchor in the harbor actually dragged anchor clearly indicates that the collision was attributable rather to the failure to have the necessary anchorage than to inevitable accident as the result of the suddenness and violence of the storm. My conclusion upon the whole evidence is that the collision was the result of the failure on the part of the Severn to have out its starboard anchor, and this, I think, sufficiently appears from the Severn's own evidence, independent of the admissions of its master, viz., that of the mate, Drake, and the other witnesses examined by the barge. It is conceded that the starboard anchor was not out, and it is plain from the evidence of the mate that it was, if in proper position to be let out, at least not put out in time to avert a collision, and, indeed, until the same was well nigh inevitable. The witness Drake and each of the expert witnesses examined by the Severn admit on cross-examination that it was not good seamanship to have been at anchor, under the circumstances, with only the port anchor out, and the starboard anchor not in position to be immediately let out. Had the two anchors been out, no collision would have ensued. The barge Frank Pendleton, having been collided with while at anchor, is presumed to have been free from fault, although in collision with another vessel which dragged its anchor. *The Mary Fraser* (D. C.) 26 Fed. 872; *The Anerly* (D. C.) 58 Fed. 794; *The Carl Konow* (D. C.) 64 Fed. 815. No fault should be imputed to the Pendleton because of its proximity to the Severn, as the preponderance of evidence establishes that it was anchored at an entirely safe distance from the Severn.

It is unnecessary, from the view taken by the court, to determine whether any fault should be attributed to the Severn for having been anchored in the space allotted to loaded instead of light vessels. The bark was put where it was by a licensed pilot, who himself, it seems, did not know as to the particular harbor regulation, and it would seem that fault should not be attributed to it on that account. *The E. A. Packer*, 10 Ben. 521, Fed. Cas. No. 4,241; *The City of Reading* (D. C.) 103 Fed. 696.

It follows from what has been said that the collision occurred solely from the fault of the Severn, and a decree may be entered so declaring.

BOYER v. KELLER et al.

(Circuit Court, E. D. Pennsylvania. January 30, 1902.)

No. 50.

EQUITY PLEADING—FAILURE TO ANSWER INTERROGATORIES—STATEMENT OF REASONS IN ANSWER.

Statements in an answer in excuse of the failure of defendant to answer interrogatories contained in the bill, framed under equity rule 44, should be as specific in setting out the grounds for such refusal as would be required in a demurrer for the same purpose.

In Equity. On exceptions to answer.

Edward Rector and Frank P. Prichard, for complainant.
E. Hayward Fairbanks, for respondents.

J. B. McPHERSON, District Judge. The first four exceptions to the answer do not need discussion. They seem to me to be clearly well founded, and they are accordingly sustained. The fifth exception complains of the defendants' failure to answer the interrogatories contained in the bill, and may, perhaps, call for a few words concerning the excuse offered for such failure. The excuse, which is evidently framed under rule 44, is as follows:

"As to the several interrogatories, Nos. 1 to 14, both inclusive, as these defendants may not have answered, they are advised and humbly submit that they are not bound to answer the same, and they therefore decline to answer said interrogatories; and these defendants claim the same benefit of the objection as if they had demurred to the same, or to the discovery sought thereby."

I do not think it to be my duty to go carefully over the bill and answer 14 times, in order to discover whether the interrogatories have been substantially answered; nor do I feel obliged to consider what the undisclosed reasons may be that relieve the defendants altogether from answering such of the interrogatories as they may not have replied to in substance. If the defendants have in effect already answered the interrogatories, it will do no harm to answer them again specifically and in regular order. If they have not answered some of them at all, the reasons for refusing so to do should be distinctly stated, so that the court may be able to judge whether the refusal stands upon a sufficient ground. If the defendants had attempted to protect themselves by demurrer, they would have been obliged to specify the reasons for asking protection; and the same obligation exists where the same result is sought by a different form of pleading.

It is therefore ordered that each interrogatory be separately answered, unless the defendants set forth distinctly the reason why they believe an answer may not lawfully be required; these amendments and additions to be filed within 15 days.

SEVERY PROCESS CO. et al. v. HARPER & BROS.

(Circuit Court, S. D. New York. January 30, 1902.)

1. PATENTS—CONSTRUCTION OF CLAIMS—SUCCESS OF DEVICE.

When the question of infringement depends upon the construction of the claims, the court, in the endeavor to find out what it is that the inventor has given to the world, is justified in considering the invention as measured by the success achieved, and where the alleged infringer has taken the "last step," and has attained the first commercially successful solution of the problem, care should be taken to protect him to the extent of his actual invention.

2. SAME—IMPROVER OR INDEPENDENT INVENTOR.

Claims of a patent should not be so broadened by construction as to include devices which, though accomplishing the same function, do so by new combinations, operating upon principles so different as to entitle their originator to be considered as an independent inventor.

3. SAME—INFRINGEMENT—PLATEN FOR PRINTING PRESS.

The Severy patent, No. 549,601, for a bed or surface for platens for printing presses, composed of a number of fixed, independently yielding bristles or wires, cannot be so broadly construed as to cover the device

of the Allen patents, Nos. 613,217-613,221, in which the bed or blanket consists of fine wire coils, interlocked and held in place between two sheets of rubber, which are not "independently yielding," and especially in view of the fact that the Severy device has never been commercially successful, owing to its cost, while the Allen device was immediately successful.

In Equity. Suit for infringement of patent. On final hearing.
William Houston Kenyon, for complainants.
Frederick P. Fish and Charles Neave, for defendants.

COXE, District Judge. This is an equity action for the infringement of letters patent, No. 549,691, granted November 12, 1895, to Melvin L. Severy for an improvement in platens for printing presses. The object of the invention is to produce a uniform impression without the previous preparation of the platen, impression-cylinder, or type, known in the art as the "make-ready." This is accomplished by providing under the covering of the platen, or its equivalent, a surface "formed by the ends of a number of fixed, independently yielding, and elastic wires or bristles, or their equivalents, arranged in close proximity to one another and smoothed off evenly, whereby a yielding surface is formed which accommodates itself to irregularities in the printing surface and to varying thicknesses in different parts of the material upon which the impression is to be made." The inventor describes the "make-ready" of the prior art as a tedious, expensive and unsatisfactory process, requiring skilled labor and wearing out the type. The substitution of the patented bed or surface for the "make-ready" removes all these disadvantages. The inventor likens the surface which he uses to the independently yielding bristles of an ordinary hairbrush, but he does not limit himself to this particular means of producing it. He illustrates different methods of reaching the same result by bending, in various ways, elastic wires placed in close proximity to one another, and having their free ends ground off to form a perfectly flat surface. He says:

"The finer the wires and the closer their proximity to one another the better will be the result attained. Fine 'card clothing,' so called, illustrates the desired proximity of the wires and the evenness of the surface."

The claims are as follows:

"1. A bed or surface for platens for printing presses and the like composed of a number of fixed, independently yielding, elastic bristles or wires, substantially as set forth.

"2. A bed or surface for platens for printing presses and the like composed of a number of fixed, independently yielding, elastic bent wires or bristles, substantially as set forth."

The defense of noninfringement is the only one argued.

The defendant's device is described in and protected by five letters patent, granted to Arthur S. Allen, all being dated October 25, 1898. It consists of a series of fine wire coils, interlocked, and held in place between two thin sheets of rubber. The upper and lower portions of the coils are imbedded in the rubber, the crests standing out for an infinitesimal distance from the rubber. To the underside of the coils is attached a sheet of woven fabric which

adheres to the rubber and rests on the platen. When in use a stiff paper board, known as "fibrellyn," is laid on top of the device, sheets of manila paper are laid on the top of the "fibrellyn" and between the sheets forms of paper, corresponding to the old "make-ready" are frequently placed, then comes the paper upon which the impression is to be made.

Considered from a practical and commercial point of view two propositions are incontestably established by the proof. First. That the complainants' blanket is a lamentable failure. Second. That the defendant's blanket is a pre-eminent success. The Severy patent has been in existence for over six years and as late as October, 1900, the complainants had not succeeded in producing a successful commercial blanket. At that time they had, apparently, abandoned the device as shown in the specification and drawings and were experimenting with a blanket consisting of a thin sheet of brass perforated with parallel cuts about three-quarters of an inch long, uniformly distributed over the brass sheet which is to be backed by a blanket of rubber. This device was lauded by the complainants' representatives as being incomparably superior to the "old bent wire arrangement" and is asserted by them to be within the Severy patent, although, upon a casual examination of the exhibit in evidence, the assertion seems a most extravagant one. In short, with unlimited capital, with "no lack of brains or money," with ample time and every facility for making a favorable impression, the promoters of the Severy blanket have made a complete failure in their efforts to have it adopted by the printing trade. Printers have examined it, tried it, experimented with it and rejected it. The fact of the complete commercial failure of the patented device is not denied, but the excuse is made that it was impossible to procure the necessary wire or a machine that would weave it into the desired fabric. At least \$50,000 has been, it is said, expended in endeavoring to develop a practical commercial blanket, but without success. The blanket is too thick to be used on cylinder presses and too expensive for practical purposes. As complainants' counsel says in the brief:

"The blankets which were made were very expensive, and had to be treated as precious things, as they certainly were."

It is not denied that it is possible to construct the Severy blanket; that numbers of them have been constructed; that cylinder presses can be cut down to fit them, and that they are capable of doing excellent work, but the expense and difficulty of making them seems prohibitive. Theoretically they are a success; practically they are a failure. The old "make-ready" also did excellent work; the only difficulty with it was the expense. It is apparent, therefore, that no substitute for "make-ready" can be popular and successful which offers no advantages in the way of cost. The defendant's blanket, though it was not put on the market until the autumn of 1898, was successful from the start. Large numbers of the devices are in actual use in various printing establishments and are paying royalty to the manufacturer, the Tymphalyn Company. The defendant alone

is paying annually \$12.50 per square foot on over a hundred square feet of the material.

Of course, it is not asserted that the failure and success of these devices, respectively, should be considered by the court if the patentee is clearly entitled to a broad claim covering the use of wire in every form as applied to a platen bed. It frequently happens that improvements are made in patented structures and methods by subsequent patentees, but this does not give these patentees the right to use the broad invention, neither has the broad inventor the right to use the subsequent improvements. When, however, the question of infringement depends upon the construction of the claims, the court, in the endeavor to find out what it is that the inventor has given to the world, is justified in considering the invention as measured by the success achieved. "In the law of patents it is the last step that wins." The last step in this art has certainly been taken by Mr. Allen and it is the step that has won. In such circumstances care should be taken not to reward the one who is still wandering in the realms of theory at the expense of the man who has actually solved the problem.

To quote again from the Barbed Wire Patent, 143 U. S. 275, 283, 12 Sup. Ct. 443, 446, 36 L. Ed. 154, 158:

"It may be strange that, considering the important results obtained by Kelly in his patent, it did not occur to him to substitute a coiled wire in place of the diamond shaped prong, but evidently it did not, and to the man to whom it did ought not to be denied the quality of inventor. There are many instances in the reported decisions of this court where a monopoly has been sustained in favor of the last of a series of inventors, all of whom were groping to attain a certain result, which only the last one of the number seemed able to grasp."

Claims should not be so broadened by construction as to include devices which, though accomplishing the same function, do so by new combinations operating upon principles so different as to entitle their originator to be considered as an independent inventor.

The case of Westinghouse v. Power-Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, is instructive upon this subject. A pioneer patent was held not to be infringed by the defendant's device, because the latter, though within the letter of the claims, departed from the principle of the patent and solved at once and in the most simple manner the problem in question. At page 568, 170 U. S., page 722, 18 Sup. Ct., page 1147, 42 L. Ed., the court says:

"The patentee may bring the defendant within the letter of his claims, but if the latter has so far changed the principle of the device that the claims of the patent, literally construed, have ceased to represent his actual invention, he is as little subject to be adjudged an infringer as one who has violated the letter of a statute has to be convicted when he has done nothing in conflict with its spirit and intent. 'An infringement,' says Mr. Justice Grier in *Burr v. Duryee*, 1 Wall. 581, 572, 17 L. Ed. 650, 659, 'involves substantial identity whether the identity be described by the terms, 'same principle,' same 'modus operandi,' or any other. * * * The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term equivalent."

And, again, at page 573, 170 U. S., page 724, 18 Sup. Ct., page 1149, 42 L. Ed.:

"Although Mr. Boyden may have intended to accomplish the same results, the Westinghouse patent, if he had had it before him, would scarcely have suggested the method he adopted to accomplish these results. Under such circumstances, the law entitles him to the rights of an independent inventor."

In *Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co.* (C. C.) 86 Fed. 315, the court, at page 320, says:

"It is contended by the complainant that Kidder is entitled, under his patent, to claim, broadly, a printing machine having either vertical or horizontal type beds. Assuming that his combinations were patentable, which to me admits of some doubt, in view of the state of the art, and the facts that his machine is scarcely an improvement in the art, and certainly not a commercial success, that its capacity did not exceed that of presses then in use, and it failed to meet the demands of the trade for expedition and cheapness, while the defendant's machine has met with a large sale and prints more than three times as rapidly as Kidder's, while but one of the latter has been put in use since the issue of the patent in 1884, a radical difference in operation and mechanism between the Kidder machine and that of the defendant is strongly, if not conclusively, suggested." See, also, *Jensen v. Norton*, 12 C. C. A. 324, 64 Fed. 590, 603; *Howell Torpedo Co. v. E. W. Bliss Co.* (C. C.) 111 Fed. 907, 916.

There is nothing in the patent to indicate that Severy ever contemplated any other surface than that produced by the ends of bristles, the ends of wires, the ends of teeth sawed from sheet steel or the ends of other similar material. In every instance the free ends of the elastic bristles, wires, or teeth, when smoothed off evenly, form the surface. These wires, etc., may be straight or bent in various ways, but always it is the ends which receive the printing pressure, each end being an independently yielding unit. It is this novel characteristic which distinguishes the Severy blanket from the prior art, which shows rubber surfaces having independently yielding rubber springs and areas. In short, it is the brush-like formation which is described in the specification and is distinctly pointed out in the claims. The first claim is for a bed or surface composed of a number of bristles or wires which must have the following characteristics: First. They must be fixed vertically. Second. Their lower ends must be fixed in a backing. Third. Their upper ends must be free. Fourth. They must yield independently of each other. Fifth. Their free ends must form the printing surface. The second claim is similar, except that it specifically covers bent wires or bristles. Even allowing for a wide range of equivalents it is thought that the claims cannot be expanded to cover structures which operate upon a different principle and do not possess any one of the above-mentioned characteristics. Where it is manifest that a claim is limited to certain features it is not material whether such limitation was or was not necessary. See cases cited in *Safety Oiler Co. v. Scovill Mfg. Co.* (C. C.) 110 Fed. 203.

As before stated, the defendant's bed consists of a series of fine, interlaced wire coils laid horizontally between two sheets of rubber, the summits of the coils being imbedded in the rubber. There are no bristles and nothing approximating thereto. There are no wires

having a fixed lower end and a free upper end. There are no vertical wires or bristles with their free ends for the printing surface. There are no independently yielding wires, in the sense that the Severy wires are independent. The resiliency or elasticity of the patented structure is of a very different character from that produced by a fabric made of fine wire coils laid on their sides and backed and faced by rubber. In the one case the pressure falls upon a surface made of the ends of independent wires, there being from 600 to 1,300 points to the square inch; in the other it falls upon a composite surface, the coils of wire being continuous, interacting and reacting. It requires little expert knowledge to perceive that the yield and recovery of a straight or slightly bent wire from pressure applied to one end must be quite different from the action of a coiled spring lying upon its side, the pressure being applied to the crest of one of the turns, and that the difference must be more marked as the coils and wires are, respectively, increased. To adopt the language of Mr. Livermore:

"The separate turns of a coil in defendant's typalyn have no individual existence, but are essentially a co-operative part of the continuous coil, and the turns are not independently yielding in the sense that any turn may yield without affecting, and without being affected by, the condition of the adjoining turns. * * * Neither are the turns of wire, structurally or functionally, equivalent to the bristles or wires of the Severy blanket, nor is the typalyn blanket as a whole, composed of the intermeshing wire coils, an equivalent for the Severy blanket as a whole composed of a brush or comb-like structure."

When in addition to the structural differences referred to it is remembered that pressure reaches the coils through a thick, stiff paper board, which cannot be depressed in small areas, the impossibility of independent, individual action of the crests will be readily perceived.

Mr. Severy, in describing his experiments, says: "No one bristle had any possible means of knowing what another one was doing," but when pressure is applied to any given point of "fibrellyn" not only is the crest directly beneath the point of pressure informed, but so are all the crests in the immediate vicinity. Each knows immediately what the others are doing and assumes its share of the load.

It is unnecessary to pursue the discussion further.

The court has devoted considerable time to the study of the record and finds it impossible to escape the conviction that it will not only be an injustice to the defendant and its licensors, but to the public as well, to compel them, and future improvers also, to pay tribute to the Severy patent. The patent cannot fairly be given the wide scope insisted on. It may be that means will yet be discovered to make the patented blanket a commercial success. When this time arrives it is highly probable that its characteristic features will make it popular for high class printing, but there is no reason why it should monopolize the entire field. Each of the devices in controversy has advantages peculiarly its own. There is room enough in the art for both.

The bill is dismissed.

**CENTRAL TRUST CO. OF NEW YORK v. UNITED STATES FLOUR
MILLING CO. et al.**

(Circuit Court, S. D. New York. Sept. 2, 1901.)

**MORTGAGE FORECLOSURE—RIGHT OF COMPLAINANT TO DISCONTINUE AFTER
DECREE.**

Where a federal court has entered a decree of foreclosure and sale in a suit to foreclose a corporation mortgage, and such decree remains unreversed, another judge of the same court will not entertain a motion by complainant trustee to discontinue the suit, against the objection of bondholders who are interested in such decree.

In Equity. Suit for foreclosure of mortgage. On motion for order of discontinuance.

See 112 Fed. 371.

Butler, Notman, Joline & Mynderse, for the motion.
Charles Thaddeus Terry, opposed.

LACOMBE, Circuit Judge. While the decree for foreclosure and sale signed by Judge THOMAS remains on the record, it should be accepted by this court as a decision upon the merits, to which future action should be conformed. If, as is asserted, that decree was made without notice to any of the parties, or was contrary to a prior adjudication, or was improvident, it may be corrected by application to modify or by appeal. Until this is done, however, it must be assumed that such decree has secured some benefit to nonassenting bondholders, which they would not otherwise have obtained. Therefore it would be an abuse of discretion for another judge of the same court to nullify the advantages thus secured to third parties, even though not parties strictly of record, by ordering a discontinuance against their objection.

Motion denied. The order denying the motion may also contain a clause forbidding the receivers or any of the parties from removing out of the jurisdiction of this court any property affected by the decree, and now within such jurisdiction.

MIDDLETOWN NAT. BANK v. TOLEDO, A. A. & N. M. RY. CO.

(Circuit Court, S. D. New York. October 9, 1901.)

PARTIES—ACTION AGAINST STOCKHOLDERS—OHIO STATUTE.

An action cannot be maintained to enforce the statutory liability of stockholders under Rev. St. Ohio, § 3260, as amended in 1894, which expressly provides for an action jointly against all the stockholders, including those who are out of the jurisdiction, or for other cause cannot be served, where the complaint shows that there are stockholders who are not made parties.

On Demurrer to Complaint.

See 105 Fed. 547.

Lucius H. Beers, for demurrer.

Schuyler C. Carlton and Charles N. Judson, opposed.

LACOMBE, Circuit Judge. It is thought that the question raised by this demurrer should be decided upon the assumption that the action is the one provided for by section 3260, Rev. St. Ohio, as it stood after the amendment of 1894. Inasmuch as that section expressly provides for an action jointly against all the stockholders, including such as are out of the jurisdiction or for other cause cannot be served, and the complaint avers that there are stockholders who have not been made parties, there is a lack of parties defendant, and the demurrer is sustained. If, moreover, the amendments of the statute passed in 1900 are to be considered, the position of the demurrants is even stronger. Manifestly this action is not the one thereby provided for.

Demurrer sustained and complaint dismissed.

In re GAYDE.

(Circuit Court, S. D. New York. December 23, 1901.)

ALIENS—EXCLUSION OF IMMIGRANTS—CONCLUSIVENESS OF DECISION.

Permission given an immigrant to go on shore temporarily while awaiting the action of the board of special inquiry, does not release such immigrant from the obligation of satisfying the board of the right to land; and its adverse determination, where the immigrant is conceded to be an alien, is not reviewable by the courts under act March 3, 1891.

Petition by Paulina Schmidt Gayde for Writ of Habeas Corpus.

Joel M. Marx, for the writ.

Lorenzo Ullo, opposed.

LACOMBE, Circuit Judge. Upon her own statement it is manifest that petitioner is not a citizen. The question whether or not she is an immigrant is one no longer open for determination by the courts as it was when the cases of *In re Martorelli* (C. C.) 63 Fed. 437, and *In re Maiola* (C. C.) 67 Fed. 114, were decided, where it is conceded that the person is an alien. All decisions of the inspecting officers touching the right to land, when adverse to such right, are made final, except by appeal to the superintendent and secretary of the treasury. Act March 3, 1891. The return does not specifically set forth the facts as to her alleged landing, but, assuming them to be as alleged in the petition,—that an inspector allowed her to go ashore, where she remained a few hours, taking a meal, and then returned to the office, before action by the board of special inquiry,—I do not think she was thereby released from the obligation of satisfying the board that she was not likely to become a public charge.

The writ is dismissed.

OLMIOTTI UNHAIRING CO. et al. v. NEARSEAL UNHAIRING CO.

(Circuit Court, S. D. New York. July 17, 1901.)

PATENTS—INFRINGEMENT—UNHAIRING MACHINES.

The Sutton patent, No. 383,258, for a machine for removing the hairs from fur skins, claim 8, held infringed on a motion for a preliminary injunction, on the ground that the mechanism of defendant's machine, while operating in a somewhat different manner, was the substantial

equivalent of that described in the claim, performing the same functions in substantially the same manner, and producing no better or different results.

In Equity. Suit for infringement of patent. On motion for preliminary injunction.

Louis C. Raegener and T. B. Reed, for complainants.
Redding, Kiddle & Greeley, for defendant.

THOMAS, District Judge. The bill is filed to enjoin the infringement of claim 8 of letters patent No. 383,258, issued May 22, 1888, to John W. Sutton. The complainants have succeeded to the rights under the patent, and the present motion is for an injunction pending final hearing. Claim 8 is as follows:

"8. The combination of a fixed stretcher bar, means for intermittently feeding the skin over the same, a stationary card above the stretcher bar, a rotary separating brush below the same, and mechanism, substantially as described, whereby the rotary brush is moved upward and forward into a position in front of the stretcher bar, substantially as set forth."

The patent has been considered and sustained by Judge Townsend, in *Cimiotti Unhairing Co. v. Bowsky* (C. C.) 95 Fed. 474; Same v. *American Unhairing Mach. Co.* (C. C.) 108 Fed. 82; and by Judge Wheeler, in *Same v. Mischke* (C. C.) 98 Fed. 297. The defendant denies infringement, and seeks to differentiate its device in several particulars, only two of which require discussion—First, that a stationary card above the stretcher bar is not used, but that on the upper side of the stretcher bar, and very close to the edge thereof, are arranged two rollers, hereinafter described; and, second, that a rotary separating brush is not used below the stretcher bar, but rather a segmental rotary brush, which is not a separating brush, and which is in a fixed location, and has no movement with relation to the fixed stretcher bar other than its rotary movement. The defendant's evidence furnishes the following description of its device and the manner of its operation:

"The pelt, marked 'P' on said drawings, is fastened to an apron, and is intermittently fed by mechanism, not shown, over the edge of a flat stretcher bar, marked 'B,' which has a rounded edge. On the upper side of the stretcher bar, and very close to the edge thereof, are arranged two rollers, marked 'E' and 'E', the roller being covered with emery cloth, and being fastened so as to bear firmly against the pelt, and thereby produce a tension upon the pelt, and also causes both the hair and the fur to lie down closely thereon, and holds them in that position, so that they cannot escape until the pelt is fed forward. Arranged $\frac{9}{4}$ inches from the edge of the stretcher bar is a rotating shaft, marked 'D,' having arms, d, thereon, to which is fastened a carding brush marked 'D₁.' This carding brush is segmental, and is provided with seven narrow brushes, each comprising four rows of stiff bristles very close together at their outer edges. A pair of plucking jaws, K and K', reciprocating in fixed guides, X, passes the edge of the stretcher bar. The lower jaw is hinged at H to the rear of the upper jaw, and is automatically opened by a cam device, not shown in the drawings, and is closed by the action of a strong spring, S, which causes the lower jaw to swing on its pivot in the arc of a circle of three and a half inch radius, and close against the upper jaw, with great force. The biting edge of the upper jaw is flat, and the biting edge of the lower jaw is beveled, and is narrower than the upper jaw, so that the outer edge of the lower jaw is about one thirty-second of an inch within the outer

edge of the upper jaw. When the jaws are closed, the jaws are reciprocated by a rod, R, actuated by an eccentric, not shown in the drawings, which causes the biting edge of the upper jaw to pass about one-eighth of an inch below the stretcher bar. The guides, X, X, in which the jaws reciprocate, are arranged at an off angle, w, to the stretcher bar, as illustrated by the dotted lines, a, b, so that the jaws not only descend below the stretcher bar but approach a vertical plane, passing through the edge of the stretcher bar as they reach their lowermost and operative position. The operation of this machine is as follows: The pelt having been fixed to the apron which passes over a stretcher bar, the rollers E and E' are put in place, and the pelt is fed forward by the automatic feeding mechanism. The rotation of the carding brush causes the same to engage with the hair and fur, which has been released from the roller, E, by the feeding forward of the pelt, and card or straighten out the hair and fur simultaneously, as clearly shown in defendant's machine Exhibit No. 1. The brush then passes out of contact with both the hair and fur, which have been carded, and thereupon permits the hairs to spring out from the fur by reason of the great resiliency of the hair, and by the further reason that the skin is held under tension by the roller, E, it being a well-known fact that the water hairs are much stiffer and more resilient than the fur, and are deeper rooted in the pelt than the fur, so that the hairs tend to spring out more rapidly, more quickly, than the fur. Meanwhile, as the hairs are springing out from the fur by reason of their greater resiliency, the jaws are descending, and, by reason of the angle at which the guides are placed, are approaching closer to the pelt. When the jaws have reached the position shown in defendant's machine Exhibit 3, the lower jaw is automatically released, and because of the curvilinear motion of the lower jaw in closing it gathers up the projecting water hairs and carries them against the upper jaw, which is below the plane of the stretcher bar, and thereby snaps them in two. The jaws are then carried away from and above the stretcher bar, and the pelt is thereupon automatically fed forward one sixty-fourth of an inch by the feeding mechanism, and releases more hair and fur from the rollers, E, and E'. This released hair and fur is thereupon engaged and carded out by the carding brush, D², as heretofore described, and the cutting operation is repeated, and so on until the pelt is unhaired. * * * Exhibit No. 1, defendant's machine, shows the position of the hair and fur at the time the brush is operating thereon with absolute accuracy. No hair or fur whatever at any time stands out until after the last of the small brushes comprising the carding brush has passed out of operative contact with the pelt, and has passed a considerable distance beyond the same. The distance between the rows of bristles in defendant's brush is so slight that its action is, so far as the hair and fur are concerned, precisely as it would be were the brush solid,—that is to say, the bristles continuous. The only object in making this carding brush of independent small brushes with intervals is to enable same to be kept free from the hair and fur more readily than would be possible if the brush were made solid."

It is urged by the defendant that the rollers above the stretcher bar and the brush below the stretcher bar press down the fur and long hairs alike, and that under the complainants' patent the card, E, and the brush, F, compress the fur alone, allowing the long hair to spring up or remain standing, while the card or brush is in contact with the skin, and also that the under brush, F, remains longer in contact with the fur, holding it down during the operation of cutting. The roller otherwise performs the same office as does the card, E, acting not only to maintain the tension of the skin, but also for the purpose of pressing down the fur. Upon the argument the court, in answer to its inquiries, did not discover that any different result was obtained from the failure of the complainants' device to press the long hairs down with the fur, or that the

defendant added anything to the utility of its machine by pressing down the fur and the long hair alike. The use of the roller, therefore, is a simple equivalent for the card used by the complainants, and obviously the segmental brush in this regard performs the same office as does the rotary brush, F, used by the complainants. But it is contended that the complainants' brush remains longer in contact with the fur, holding it down, while the longer hairs have sprung forward and have been removed by the cutting knife. Nothing in claim 8 indicates such action, nor does a reference to the specifications bear out the defendant's contention in this regard. The specifications show that an oscillating guard may be used "that follows the brush and carries the fur still further back and holds it in position." But this guard is no part of claim 8. In any case, even though the defendant's brush comes simply in contact with the edge of the stretcher bar, while the complainants' brush comes not only in contact with the edge, but continues for some distance on the underside, this is but a difference in the degree of action, the defendant's brush performing by its contact, however abbreviated, the same office performed by that of the complainants, namely, for an interval of time sufficient to allow the knife to act separating the fur from the long hairs. The fur in the operation of the defendant's machine may come back to its normal position earlier than in the complainants' device, but a separation of the fur and water hairs is maintained sufficiently long to allow the biting jaws, peculiar to the defendant's device, to cut the long hairs, and this parting of the fur from the long hairs is effected by pressing down the fur. The single duty done by the card and brush in one case, and the roller and brush in the other, is to compress the fur for such space of time that the knife used, whatever its shape, action, or relation to the stretcher bar may be, may eliminate the long hairs, which by their greater resiliency spring back more quickly into place, or, it may be, by greater stiffness remain in place. The length of time that the fur remains compressed is not important, provided there be time sufficient to do the work. The desideratum is to move the fur from the action of the cutting device. This each machine does. The defendant's cutting arrangement may permit the restoration of the fur at the instant of cutting. Nevertheless, the fur is held aside, and away from the biting jaws, so long as is necessary to permit its removal of the long hairs, and this is effected by parts that are practical equivalents of the complainants' machine. The fact that the long hairs are not kept pressed down in the complainants' machine, if such be the case, is not shown to be important. Whether they remain in place awaiting the knife, or spring into place to meet the knife, is nonessential; but that the fur shall be pressed down sufficiently long to allow the knife to meet the long hairs and escape the fur is all essential, and this is effected by the brush. A cutting device like that of the defendant may be so fashioned, nicely adjusted, and operated as to permit the fur to return to its position at such instant of time relative to that when the long hairs come in contact with the cutting apparatus that it may be said that the result of the compress-

sion has passed when the long hairs are removed. Another form of cutting knife may require that the restoration of the fur shall be longer delayed. In each case the fur is pressed down by a method covered by claim 8. Mere peculiarity of mechanism for cutting is not involved in claim 8. Therefore, unless it shall appear that the defendant's machine, by pressing down the long hairs, performs some useful function that is absent in the complainants' device, it is impossible to differentiate the defendant's mechanism from that described in the claim. As has been stated, it does not appear that it is of consequence whether the long hairs are compressed and then escape to meet the knife, or whether they escape altogether the card and brush.

The defendant's machine appears clearly to fall within claim 8, as construed by Judge Townsend, and the motion for the injunction must prevail.

HENDEY MACH. CO. et al. v. PRENTISS TOOL & SUPPLY CO.

(Circuit Court, S. D. New York. October 14, 1901.)

PATENTS—INFRINGEMENT—FEED MECHANISM FOR SCREW-CUTTING LATHES.

The Norton patent, No. 470,591, for an improved feed for screw-cutting engine lathes, construed, and held limited to the particular combination shown in the claims, and, as so limited, not infringed.

In Equity. This is a suit brought for the alleged infringement of United States letters patent No. 470,591, granted to Wendell P. Norton March 8, 1892.

Worth Osgood, for plaintiffs.

Wood & Boyd, for defendant.

LACOMBE, Circuit Judge. The object of the invention, as stated in the specification, is to "provide a new and improved feed especially designed for use on screw-cutting engine lathes, to conveniently and rapidly change the speed of the feed screw according to the requirements of the screw to be cut. The invention consists of certain parts and details, and combinations of the same, as will be fully described hereinafter, and then pointed out in the claims." There are two sets of devices availed of in the patent to effect changes of speed. The one consists of a series of 3 interchangeable gear wheels, of varying diameters, arranged at one end of the machine; speed variation being secured by changing their relations to each other, which can only be done when the machine is at rest, since nuts have to be unscrewed, the wheels removed, and replaced on different spindles. By such changes 3 different speeds may be imparted to the feed screw. The other set of devices consists of a series of gear wheels, of varying diameters, arranged step-like. As shown in the patent, there are 12 of these. By means of a hand lever and connecting mechanism, one or other of these may be brought into engagement while the machine is in motion, and thus 12 varying speeds be imparted to the screw feed. A combination of both sets

of devices secures 3 times 12 changes,—36 in all. The claims declared on are as follows:

"(1) In a device of the class described, the combination, with a series of interchangeable gear wheels, of a shaft driven from the said series of interchangeable gear wheels; a pinion mounted to turn with and to slide on the said shaft; a driving gear wheel in mesh with the said pinion; and a second series of gear wheels, of various diameters, arranged step-like on the feed shaft, and adapted to be engaged by the said driving gear wheel,—substantially as described and shown.

"(2) In a device of the class described, the combination, with a series of interchangeable gear wheels, of a shaft driven from the said series of interchangeable gear wheels; a pinion mounted to turn with and to slide on the said shaft; a driving gear wheel in mesh with the said pinion; a second series of gear wheels, of various diameters, arranged step-like on the feed shaft, and adapted to be engaged by the said driving gear wheel; and a lever carrying the driving gear wheel, and arranged for shifting the said pinion on the said shaft, and moving the driving gear wheel in and out of mesh with the feed-shaft gear wheels,—substantially as shown and described.

"(3) In a device of the class described, the combination, with a series of interchangeable gear wheels, of a shaft driven from the said series of interchangeable gear wheels; a pinion mounted to turn with and slide on the said shaft; a driving gear wheel in mesh with the said pinion; a second series of gear wheels, of various diameters, arranged step-like on the feed shaft, and adapted to be engaged by the said driving gear wheel; a lever carrying the driving gear wheel, and arranged for shifting the said pinion on the said shaft, and moving the driving gear wheel in and out of mesh with the feed-shaft gear wheels; and a locking mechanism for the said lever,—substantially as shown and described.

"(4) In a device of the class described, the combination, with a series of interchangeable gear wheels, of a shaft driven from the said series of interchangeable gear wheels; a pinion mounted to turn with and to slide on the said shaft; a driving gear wheel in mesh with the said pinion; a second series of gear wheels, of various diameters, arranged step-like on the feed shaft, and adapted to be engaged by the said driving gear wheel; a lever carrying the driving gear wheel, and arranged for shifting the said pinion on the said shaft, and moving the driving gear wheel in and out of mesh with the feed-shaft gear wheels; and a plate having a curved slot forming a guide for the said lever,—substantially as shown and described.

"(5) In a device of the class described, the combination, with a series of interchangeable gear wheels, of a shaft driven from the said series of interchangeable gear wheels; a pinion mounted to turn with and to slide on the said shaft; a driving gear wheel in mesh with the said pinion; a second series of gear wheels, of various diameters, arranged step-like on the feed shaft, and adapted to be engaged by the said driving gear wheel; a lever carrying the driving gear wheel, and arranged for shifting the said pinion on the said shaft, and moving the driving gear wheel in and out of mesh with the feed-shaft gear wheels; a plate having a curved slot forming a guide for the said lever; and a mechanism for locking the said lever to the said plate,—substantially as shown and described."

"(7) In a device of the class described, the combination, with a series of interchangeable gear wheels, of a shaft driven from the said series of interchangeable gear wheels; a pinion mounted to slide on and to turn with the said shaft; a lever fulcrumed loosely on the said shaft, and adapted to carry along the said pinion a driving gear wheel in mesh with the said pinion, and mounted to turn on the said lever; a series of gear wheels, of varying diameters, and arranged in step form, on the feed shaft, each of the said series of gear wheels being adapted to be engaged by the driving gear wheel; a hand lever pivoted on the said lever, and formed with a pin and a plate formed with a slot, and a series of openings adapted to be engaged by the said pin,—substantially as shown and described.

"(8) In a device of the class described, the combination, with a series of

gear wheels arranged in step form on the feed shaft, of a driving gear wheel adapted to engage each of the said gear wheels in the series of gear wheels; a lever carrying the said driving gear wheel; a plate formed with a curved slot, through which passes the said lever for guiding the same,—substantially as shown and described.

"(9) In a device of the class described, the combination, with a series of gear wheels arranged in step form on the feed shaft, of a driving gear wheel adapted to engage each of the said gear wheels in the series of gear wheels; a lever carrying the said driving gear wheel; a plate formed with a curved slot, through which passes the said lever, for guiding the same; and a locking mechanism for locking the said lever on the said plate,—substantially as shown and described."

An examination of the prior state of the art, as disclosed in the proofs, shows that the patentee was not a pioneer. Indeed, it is not contended that he was. He has used old devices in a new combination (for there is no actual anticipation shown) to accomplish a particular result (rapidity of speed change), and a like result may be obtained by other combinations. The case is one, therefore, where the particular combination of parts and details which the patent secures to him is to be conformed to the self-imposed limitations which the patentee has inserted in the claims, and "nothing can be an infringement which does not fall within the terms the patentee has chosen to express his invention." *McClain v. Ort-mayer*, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; *Groth v. Supply Co.*, 9 C. C. A. 507, 61 Fed. 284. It will be noted that in every one of the claims above recited the series of gear wheels, of varying diameters, arranged step-like or in cone shape, is explicitly described as being located "on the feed shaft." In the combination of defendant's lathe a similar step-like or cone-shape series of gears is found, but it is not located on the feed shaft; but upon a counter shaft arranged adjacent to, and parallel with, the feed shaft. The result of this change of location is that defendant is able to introduce a second set of interchangeable or relatively shifting gear wheels between these step-like gears and the feed shaft. Defendant contends that this is an important improvement,—a contention which complainant disputes, and which need not be decided. It would seem to be sufficient, under the authorities cited supra, that the step-like gears are not located where in eight separate claims the patentee distinctly asserted that they should be, to embody his invention.

The bill is dismissed.

WESTINGHOUSE AIR BRAKE CO. v. OHRISTENSEN ENGINEERING CO.

(Circuit Court, S. D. New York. September 25, 1901.)

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where a patent which was invoked as a defense in a suit for infringement of another patent was considered by the supreme court, and its validity clearly and unequivocally sustained, such decision affords sufficient ground for the granting of a preliminary injunction against its infringement.

2. SAME—INFRINGEMENT—AIR BRAKE VALVE.

The Boyden patent, No. 481,134, for a valve for air brakes, claim 2, held infringed on a motion for a preliminary injunction.

In Equity. Motion for preliminary injunction on claims 2, 4, and 11 of United States patent 481,134 to G. A. Boyden, August 16, 1892, for valve for air brakes.

Frederic H. Betts and J. Snowden Bell, for the motion.
William A. Jenner, opposed.

LACOMBE, Circuit Judge. This patent does not stand here with such presumption of validity only as arises from its issue by the patent office. It was before the United States supreme court in *Westinghouse v. Power-Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136,—a litigation most hotly contested, and which involved a most careful examination of the state of the art. It is true that in that case the patent now in suit was not the one sued upon, but was the shield availed of by defendant therein to protect itself. Nevertheless, the decision of the supreme court, expressed with no uncertain sound, must be accepted here as establishing the proposition that Boyden was an independent and meritorious inventor, who solved with great ingenuity and in the simplest manner the problem of quick action. Nothing in the affidavits or prior patents shown here calls for any qualification of this proposition. The second claim reads:

"(2) In valve mechanism for automatic air brakes, the combination of a communication with the brake cylinder from both the auxiliary reservoir and train pipe, a single valve controlling said communication, and means to retard or restrict the flow thereto of the auxiliary-reservoir air when applying the brakes in comparison with the flow thereto of train-pipe air, whereby train-pipe air at lower pressure than said auxiliary-reservoir air will pass said valve when making an emergency application of the brakes."

It seems quite plain that the three elements of this claim—the "communication," "the single valve," and the "means to retard or restrict"—are all present in defendant's valve. In view of the statement of variety of form of structure which is found near the close of the specification, and of the history of application in the patent office, it would seem that additional elements are not to be read into this claim, restricting it to the precise form shown in the drawings, but that the patentee should be entitled to a fair application of the doctrine of equivalents. As defendant's experts demonstrated when it was sought to enjoin this same valve under United States patent 360,070, it is modeled upon and belongs to the group of which the valve now in suit is the exemplar. Doubtless it contains improvements, but it operates by reason of its possession of the three elements above referred to. It does not present the differences in form and principle which will distinguish it from the Boyden valve, as that was distinguished from 360,070.

There are some questions as to claims 4 and 11 which may better be reserved for final hearing, but complainants may take preliminary injunction as to claim 2.

CITIZENS' TRUST & SURETY CO. v. ZANE et al.
(Circuit Court, E. D. Pennsylvania. February 5, 1902.)

No. 27.

1. CONTRACTOR'S BOND—NOTICE TO PERFORM.

The surety on the bond of a contractor is bound for necessary expenditures by the obligee in completing the work; opportunity having been given it to do the work, which it refused.

2. NOTICE TO AGENT.

The agency of one having the same general control of the business as a general manager is such that notice to him is notice to the principal.

3. BOND—RIGHT OF RECOVERY—ASSIGNS—SUBSTITUTION.

The defendants gave bond to the plaintiffs (but not to their assigns) for the completion of a building contract by one Z.; the plaintiffs being surety in turn on another bond of like character. The contractor having defaulted, the plaintiffs, after notice, undertook the completion of the work, but during the course of it, by an arrangement with a third company, transferred the bond, with their other assets, to that company, which went on and finished the operation. *Held*, that if the plaintiffs dropped the work, and had nothing further to do with it, and the company to whom they had transferred it finished it on their own account, there could be no recovery; but, the jury having found that the latter acted, not independently, but as representing the plaintiffs, whose place they took, a verdict for the plaintiffs was proper.

Sur Rule for New Trial on Verdict for Plaintiff.

Action on bond given by Frank S. Zane to the Citizens' Trust & Surety Company, in the sum of \$0,400, on which the National Surety Company of New York was surety, conditioned that the said Zane should fully complete, free and clear of mechanics' liens, a certain building operation, wherein he had undertaken to build 64 houses on land conveyed to him by one John Meighan. Meighan sold the land to Zane for \$31,300, and agreed to advance \$56,000 to put up the buildings, taking a mortgage on the premises for \$87,300. To secure himself, Meighan took a bond from the Citizens' Trust & Surety Company, and they in turn obtained the bond in suit from Zane, with the National Surety Company as surety; the interest of Meighan and the obligation of the Citizens' Surety & Trust Company to him being fully set forth therein. The jury found a verdict for the plaintiff for the full amount of the bond, with interest.

David J. Myers, for plaintiff.

S. Davis Page, for defendant National Surety Co.

ARCHBALD, District Judge.¹ That there was a breach of the bond in suit is beyond question, and with that established there was little left for controversy. The undertaking of the defendant company substantially was that Zane, the party for whom it became surety, should complete, free and clear of mechanics' liens, the 64 buildings which he was to build on the property conveyed to him by Meighan, according to the building operation which had been arranged between them. When the work was far from done, in March, 1899, he failed financially, and made an assignment for the benefit of creditors; and not only had the buildings to be completed for him, but mechanics' liens to the amount of \$7,700 entered

¹Specially assigned.

against them for work and materials, which he had not taken care of, had to be paid off in order to protect the property. The Citizens' Trust Company were interested, because they had agreed to indemnify Meighan, who had sold the land to Zane for \$31,300, and had advanced \$56,000 more to carry on the operation, taking a mortgage of \$87,300 to secure him. All this was set out in the bond which the surety executed, and entered into the question of its liability. When Zane failed, his assignee promptly gave notice to the Citizens' Trust Company to complete the job, and they fell back upon the National Surety Company. That this company was notified of the failure, and called upon by the Citizens' Trust Company to take up the work and go on with it, cannot be successfully controverted. Not only is this established by letters which passed between the two companies, but Mr. Smith, who had general control in Philadelphia of the affairs of the National Surety Company, a New York corporation, admits that in March, 1899, about the time of Zane's default, he was called up by telephone by Mr. Cushing, who had charge for the Citizens' Trust Company, and notified that the National Surety Company would be expected to complete the work, to which he replied that they would not do it; and upon being informed that if they did not the Citizens' Trust Company would go ahead and charge it to them, he said that his company was indifferent. This was clearly sufficient to hold the National Surety Company for the expenditures made necessary by reason of Zane's default. All they could ask was an opportunity to act in the matter for themselves, if they so desired; and, this having been distinctly given them, they were bound by whatever the Citizens' Trust Company was called upon to do to protect themselves on their undertaking to indemnify Meighan. *Trust Co. v. Campbell*, 184 Pa. 541, 39 Atl. 291. It may be that Mr. Smith was not authorized to say what the company which he represented would do or would not do in the premises, but his agency was such that in the matter of notice he certainly stood for the company. It is undisputed that he had succeeded Mr. Taylor, the general manager of the business in Philadelphia; and, while he may not have taken the same official title, he admittedly had the same general control, and that is all that was necessary. *Anderson v. Surety Co.*, 196 Pa. 288, 46 Atl. 306. So far the steps necessary to make out a complete case for the plaintiffs were established, and the court was warranted in instructing the jury to that effect, as it did.

As to the defenses sought to be set up to the case so made out, there is but one that needs to be seriously considered. The bond in suit was to the Citizens' Trust Company, and not to their assignees; and it was only as they themselves were damaged, and became thereby entitled to indemnity, that they could have recourse to the defendants. It is contended that, after the agreement between the Citizens' Trust Company and the Union Surety Company for the transfer of its affairs by the former to the latter, the Citizens' Trust Company completely dropped out, and was supplanted by the Union Surety Company, which did everything that was subsequently done on its own account solely, and not for the

Citizens' Trust Company, which had no further interest to subservise. This, if true, was a valid defense, but it depended upon the facts produced to sustain it. The defendants largely relied on the resolutions set forth in the minutes of the two companies, but I do not find anything in them inconsistent with the idea that the one company, in taking the place of the other, intended to do more than step into its shoes. It did not break away from existing contracts. It assumed them, in terms. The contracts turned over were to be carried out. This required the Union Surety Company to take up and complete such an uncompleted operation as that of Zane's, and to do so it had not only nominally, but actually, to act for and under the company for whom it stood substituted. The two companies were by no means merged, nor was the Citizens' Trust Company obliterated. However intimate its subsequent relations with the Union Surety Company, it continued to preserve its separate corporate existence, as, indeed, it was bound to do, on account of the outstanding nonassenting minority stockholders. That these were concluded by the action of the majority in due meeting assembled may be conceded, but that is not the point. So long as they stood out, the corporate affairs had to be kept intact; and, until it is shown otherwise by competent evidence, we have the right to assume that they were.

Aside from the resolutions to which we have referred, the defendants relied argumentatively on the way the business relating to this operation was carried on after the transfer, but I fail to see anything that is not capable of the oral explanation given it. The failure of Zane was on March 2, 1899, and the transfer from the Citizens' Trust Company to the Union Surety Company was not till April 11th following. In the meantime the defendants had been notified, and declined, or at least neglected, to complete the work from where Zane had left it. The breach of the bond, and the obligation of the defendants to meet it, had, therefore, accrued before the Union Surety Company came in. At that time the special fund of \$56,000 was nearly exhausted; the amount to the credit of the operation on April 17, 1899, being but \$3,449.75. As the Union Surety Company from then on actually did the work, it was naturally and properly conducted and vouched for in its name; and that the accounts appear in that shape is of little moment, and is, at least, capable of explanation. By the time of the sheriff's sale, in June, some \$1,500 or \$1,600 additional had been expended; and this, according to the undisputed evidence, was advanced by the Union Surety Company for the Citizens' Trust Company; the latter having absolutely no money whatever of their own. The same is true with regard to the \$7,700 paid into the court to satisfy the mechanics' liens which had priority over the Meighan mortgage. These liens had to be taken care of, and the Citizens' Trust Company was compelled to rely on the Union Surety Company to make the necessary advances, as it did. The officers of the former company testify that an arrangement to that effect was made, and no one contradicts them. It was for the jury, then, to pass upon this evidence, and deduce from it the true construction to be given to

the whole transaction. They were distinctly instructed that if the Citizens' Trust Company actually dropped it, and had nothing further to do with the case, and the Union Surety Company took their place and finished the operation on its own account, there could be no recovery. They have found for the plaintiffs, and that shows they did not take that view. As I have endeavored to point out, there was sufficient evidence to warrant them in such a conclusion, and the defendants must therefore abide by the result. The verdict establishes that the Union Surety Company acted not independently of, but as representing, the Citizens' Trust Company, whose place it took, and this made out a complete case on which the plaintiffs were entitled to recover.

Several minor matters were urged at the argument, but I see no occasion to specially consider them. The real question is the one which I have discussed, and, finding nothing that calls upon me to disturb the verdict, the rule for a new trial is discharged.

HENRY HUBER CO. v. J. L. MOTT IRON WORKS.

(Circuit Court, S. D. New York. February 5, 1902.)

1. PATENTS—INFRINGEMENT—CONSTRUCTION OF CLAIMS.

A construction of the claims of a patent is not permissible which holds as an infringement a device which omits one of the elements of the combination, even if the remaining members accomplish a somewhat similar result.

2. SAME—BATH WATER HEATERS.

The Beaumont patent, No. 555,033, for an improvement in hot water bath fixtures, is not entitled to a broad construction of its claims or to a wide range of equivalents, in view of the prior art, and cannot be so construed as to cover every device having such an arrangement of valves that steam cannot be turned on without also turning on a stream of water to be heated. Claims 1, 2, and 6 construed, and *held* not infringed.

In Equity. Suit for infringement of patent. On final hearing.

Donald McLean and Walter S. Logan, for complainant.

W. P. Preble, Jr., for defendant.

COXE, District Judge. This is an equity suit, based upon letters patent No. 555,033, granted February 18, 1896, to the complainant as assignee of Thomas C. Beaumont, for improvements in hot water bath fixtures. The application was filed March 10, 1894.

The specification says:

"This invention relates to means for heating water for baths, showers, and other purposes where water is occasionally required to be heated, the invention being especially designed for those occasions where it is desirable to draw at will either hot or cold water through the same pipe. The water, in flowing to the faucet, shower or other outlet, passes through a water heating passage or pipe where it is exposed to the heat of steam contained in small pipes extended through said water pipes and constituting a steam passage, the steam being condensed by giving up its heat to the water in its flow through said passage. Hence if the steam is turned on along with the water the water issues hot, but if the steam is not turned on the water

flows cold. In such heating device it is important to provide means for preventing turning on steam without also turning on water, as by so doing steam would blow into the waste pipes and might scald the occupants of the building and have other disastrous results. The object of the present invention is to provide means for controlling the admission of water and steam, to the end that the steam cannot be turned on without also turning on water, while the flow of steam may be regulated independently of the flow of water to a greater or less extent and in order also that water may be turned on to draw cold water when desired."

In other words, the patentee has endeavored to prevent accidents to the bather by providing mechanism which permits the cold water to be turned on independently of hot water or steam, and prevents the steam from being turned on except in conjunction with the cold water. Neither live steam nor scalding water can, in ordinary circumstances, escape from the outlets.

The specification says, further:

"To these ends the improved apparatus has a compound valve for controlling the admission of water or steam to the water-heating and steam passages, consisting of a shell having steam and water passages through it, a pair of compression valves connected together and adapted to close the steam and water passages, respectively, and an independent compression valve adapted to close the steam passage only, so that steam can flow only when both valves are open, and cannot be turned on without thereby opening the water valve."

The claims which are said to be infringed are the first, second and sixth. They are as follows:

"(1) The combination with a water-outlet passage, of a compound valve for controlling the admission of water and steam thereto, consisting of a shell having two distinct inlet passages for water and steam, a pair of valves connected for simultaneous operation and adapted to close respectively the steam and water passages, and an independent valve adapted to close the steam passage, whereby steam can flow only when both valves are open, and cannot be turned on without also turning on a stream of water to be heated.

"(2) The combination with a water-outlet passage of a compound valve for controlling the admission of water and steam, consisting of a shell having two distinct steam and water inlet chambers and outlet seats therefrom, a valve stem and two valves carried thereby, the one closing the steam-outlet seat and the other the water-outlet seat, and an independent stem carrying a valve closing the steam-outlet seat, whereby the former stem controls the flow of water, and both control the flow of steam, so that the steam cannot be turned on without also turning on a stream of water to be heated."

"(6) The combination of a valve shell B formed with steam and water inlet chambers c and d, and outlet seats h and o therefrom, valves l and p closing against said seats respectively, a valve stem J carrying both said valves, and formed in two sections screwed together, with a valve p between them, and a valve l swiveled on the section q' by means of a coupling nut t' engaging the head t of this stem section."

The defenses are lack of utility and patentability and noninfringement.

The first claim is for a combination having the following elements: First. A water outlet passage. Second. A compound valve for controlling the admission of water and steam to the outlet. Third. The shell for the compound valve having two distinct inlet passages for water and steam. Fourth. The shell having also a pair of valves

connected for simultaneous operation and adapted to close the steam and water passages, respectively. Fifth. An independent valve adapted to close the steam passage.

The second claim is for substantially the same combination.

The sixth claim is restricted by the introduction of reference letters and is for a combination having the following elements: First. A valve shell B having steam and water inlet chambers c and d and outlet seats h and o therefrom, valves i and p closing against said seats, respectively. Second. A valve stem j carrying both said valves, and formed in two sections screwed together with a valve p between them. Third. A valve i swiveled on the section q' by means of a coupling-nut t' engaging the head t of this steam section.

It is doubtful if the sixth claim which omits the independent steam valve describes an operative combination for practical use. Without this valve there would be no adequate method of regulating the temperature. The outlet would always run hot or warm water. It would be impossible for the bather to take a cold bath as he could not turn on the cold water without turning on the steam at the same time.

But aside from this consideration it is obvious that the first two claims were intended to cover the invention as broadly as possible, the remaining claims being for subsidiary combinations and the precise mechanism described and shown. It would be an anomaly in patent law to construe the limited sixth claim as covering structures not embraced within the broad first claim.

The language of all of these claims is involved and obscure; they are difficult to comprehend and no effort has been made by the experts on either side to analyze or explain them. It is thought, however, that the foregoing analysis is substantially correct and that in order to infringe the respective claims the defendant's apparatus must contain the elements as stated or clearly defined equivalents therefor.

The theory of the complainant, apparently, is that the claims are infringed by any apparatus "whereby," to use the language of the claims, "steam can flow only when both valves are open, and cannot be turned on without also turning on a stream of water to be heated."

A sketch of the defendant's device is found at the end of complainant's proofs and a description of the apparatus is given by the patentee and by the defendant's expert, generally, in his direct, but more specifically in his cross-examination. The device contains two valves only, one a compression valve and the other a spring valve. The water is turned on before the steam is admitted. There is a prolongation of the stem of the water valve, which is about a quarter of an inch from a projection on the steam valve when the valves are closed. The water valve is, therefore, opened a quarter of an inch before the spring seated steam valve commences to open. When the closing action takes place the handle of the lever is turned and the steam valve is closed by the spring. By turning the handle still further the water can be shut off or it can be left to run after the steam has been shut off. The device is operated by a single

lever which controls the valves and induces them to open and close, but not synchronously. The valve spindle is made to swivel in two parts and passes through the partition in the valve shell separating the steam and water chambers. After opening the water valve the protruding stem pushes against the part connected with the steam valve and opens that.

As in the preferred form of the patented device the steam never comes in actual contact with the water. The steam is confined in small tubes inside a water column and thus communicates its heat to the water. There is no method by which the steam valve can be opened or closed independently of the water valve and as the latter is opened before the former the water flows through the system in advance of the steam. In a similar manner, when the lever is turned for closing, the steam ceases while the water continues to flow.

The defendant's apparatus has no independent valve adapted to close the steam passage, when it is desired to draw cold water only or vary the temperature of the water. This is admitted. Neither does it have the minutely described features of the sixth claim. There is no valve stem J made in two sections with the valve p between them, and several other parts therein described and claimed are also absent.

One of the defendant's witnesses testifies as follows:

"I do not know of the Beaumont apparatus ever having been used, made, offered for sale or illustrated; and I am conversant with the requirements of the trade and would be in a position to know if an article of this kind had been put on the market."

The complainant's expert testifies that the Beaumont apparatus is, in his judgment, "a practically successful machine," but the court has been unable to discover any testimony contradicting the above statement of defendant's witness, or tending to show that the patented structure was ever in practical use or achieved any commercial success. Assuming the presence of the inventive faculty, infringement must depend upon the scope given to the claims. "The range of equivalents depends upon the extent and nature of the invention." *Miller v. Manufacturing Co.*, 151 U. S. 207, 14 Sup. Ct. 318, 38 L. Ed. 131.

The complainant insists that Beaumont is entitled to an exceedingly broad construction which will enable him to hold as infringers all who use devices which keep the cold water and steam separate and prevent the turning on of the latter without at the same time turning on the former to cool it. "Inventors," says the brief, "for decades had been leading up to this point. Many men had reached out towards it. Some, perhaps, had caught glimpses of the promised land, but it was left to Beaumont to be the first to enter it and to give to the world what it had been so long waiting for."

In order to ascertain how far this claim is justified it will be necessary to examine very briefly the prior art. Although many prior patents have been introduced in evidence by the defendant it will be necessary to examine two only, as it is conceded on all hands that they approach nearer to the Beaumont device than any of the

others. These are the patents to Tobey and Schaffstadt, dated respectively November 23, 1886, and April 15, 1890.

The Tobey patent is for a water heater, but it can be and actually has been used for bathing purposes. Indeed, the specification, after describing the defects of the prior structure, says:

"Thus, as often occurs, all the water in the cold-water tank may become heated and accidents happen by scalding, hot water being discharged from a supposed cold-water faucet. * * * The object of my invention is to overcome these objections. * * * My improved heater has the least possible amount of surface from which heat can radiate, and may be made to discharge either warm or hot water always at uniform temperature, and when the valve is properly set by lock nuts the receiver can never fill with steam."

The cold water is heated by contact with pipes filled with steam, the water and steam do not mingle and the steam cannot in ordinary conditions be turned on unless there is cold water in the chamber to be heated. The apparatus is so arranged that no matter how hot the steam may be the water as it comes from the faucet cannot exceed the desired temperature. It is true that Tobey accomplishes the desired result by different mechanism from that shown in the patent in suit. The steam and water valves are not connected together so as to be operated by the same handle, and there are, of course, many other differences of construction, but, on the other hand, the Tobey device has actually stood the test of use and seems to be a practical machine for heating water by steam pipes and conveying it to the bath at the desired temperature without danger to the bather, provided the machine is used with ordinary prudence.

The Schaffstadt patent is for an improved bath fixture "whereby the water is heated to any desired temperature by steam traveling through the pipes in an opposite direction to that in which the water is flowing without coming in contact with the water." The arrangement of the steam pipes is very similar to the arrangement in the Beaumont structure, the material differences being confined to the valve mechanism, the Schaffstadt apparatus having two independent valves for steam and water and Beaumont having the three valves heretofore described. In short, the Schaffstadt structure has all the features of the patented structure, except one, viz., the impossibility of the steam coming on before the water. If the drawing shows interfering handles there can be no doubt that means to prevent the primary flow of steam is mechanically provided, but whether this be so or not such handles were well known in the art and could easily be applied to the Schaffstadt valves. Certainly the natural way to operate these valves would be to turn on the water first. It would be a difficult task to turn on the steam first as the handles are so arranged that if the lever of the steam valve be first manipulated the action will almost inevitably push open the water lever also and the water lever will act in a similar manner if, in closing, it be first turned to the right. Other patents and exhibits show an endless variety of heaters, valves, faucets and cocks all designed to accomplish the same general object.

Ever since the bath tub has been an indispensable adjunct of civilized life the effort has been to enable the bather to take a cold or

warm bath, as he desired, and to do so with safety. The necessity of preventing steam or scalding water from escaping into the tub was manifest from the beginning and many devices have been adopted for this purpose. When it is realized that the tastes of bathers differ as to the temperature of the water and that the same person may desire a cold bath one day and a hot bath the next it will be seen how impossible it is to provide an absolutely automatic device under these changing conditions. Accordingly it appears that in all the structures shown in the record, including those of the complainant and defendant, something is left to the discretion and common sense of the bather. Unless he exercises ordinary prudence he may be chilled or scalded and this may happen with the complainant's apparatus and is much more likely to happen than with the defendant's apparatus. All of these devices proceed upon the theory that a person who knows enough to wash himself, even though a child, will also know enough not to plunge into boiling water or into ice water.

The court is unable to accept the complainant's theory that "Beaumont being first in the field is entitled to a broad construction of this patent." He was not the first. An army of inventors had preceded him and, assuming his apparatus to be an improvement upon the "Gegenstrom Bath" of Schaffstadt, it was only an improvement and nothing more.

It follows that the complainant is not entitled to a broad construction of the claims or a wide range of equivalents.

A construction is not permissible which holds as an infringement a device which omits one of the members of the combination, even if it be admitted that the remaining members accomplish a somewhat similar result. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344; *Sharp v. Riessner*, 119 U. S. 631, 7 Sup. Ct. 417, 30 L. Ed. 507; *Walk. Pat. § 349*.

As before stated no attempt has been made upon the part of the complainant to analyze the claims or read them upon the defendant's apparatus. The charge of infringement is asserted generally and the expert is not asked to compare the defendant's device with the claims, but to "compare the valve system in the patent in suit with the valve system in the Mott apparatus."

The complainant's contention as to one of the elements, which is admittedly missing, may be fairly stated in the language of the brief as follows:

"We find in function and effect, if not in form, the independent valve mentioned in the first two claims. We find a valve doing the same thing in substantially the same way, though with a different form and of a different mechanical construction."

Comparing the defendant's apparatus with the first claim it will be found that it does not contain the compound valve described in the patent and the independent steam valve is entirely omitted. If it be urged that the spring-seated steam valve is the independent valve of the claim then the second (fourth) element is wanting, for there is then no "pair of valves connected for simultaneous operation." The two valves of the Mott device cannot be at the same time the

equivalent of the two connected valves of the claim and one of them be also the equivalent of the disconnected valve of the claim. In other words, a structure built in exact conformity with the patented device, except that the independent steam valve is omitted, cannot be held to have an equivalent for that valve.

But the defendant's apparatus does not have the compound valve of the claim. It has but two valves and these do not either open or close simultaneously. The steam valve is so located that it is impossible to operate it independently. The water valve must be opened before the steam valve and the steam valve must close before the water valve.

The same reasoning applies to the second claim and, assuming the sixth claim to be valid, to that claim also.

The court is constrained to hold that the defendant does not infringe. The bill is dismissed.

THE LIDA FOWLER.

(District Court, E. D. Pennsylvania. February 7, 1902.)

No. 41.

1. MARITIME LIENS—CREATION BY STATE STATUTE—ENFORCEMENT IN COURT OF ADMIRALTY.

The provisions of Act Pa. March 24, 1851 (P. L. 230), requiring vessels to take pilots when arriving at or leaving the port of Philadelphia, subjecting them to penalties for a failure to do so, to be recovered for the benefit of "the Society for the Relief of Distressed and Decayed Pilots, Their Widows and Children," and making all sums due for pilotage and the penalties so imposed a lien upon the vessel chargeable therewith, relate to a subject which is maritime in its nature, and therefore the liens thereby created are valid, and may be enforced in the admiralty courts of the United States, as authorized by the act.¹

2. ADMIRALTY JURISDICTION—SUIT FOR STATUTORY PENALTY—ENFORCEMENT OF MARITIME LIEN.

Rev. St. § 563, cl. 8, which confers upon the district courts of the United States jurisdiction "of all civil causes of admiralty and maritime jurisdiction," gives such courts jurisdiction of a suit to enforce a maritime lien created by a state statute for pilotage fees, or for a penalty imposed by such statute for the failure to take a pilot as therein required.

In Admiralty. Suit in rem to enforce a lien for a statutory penalty.

Howard M. Long, for libellant.

John F. Lewis and Horace L. Cheyney, for respondent.

J. B. McPHERSON, District Judge. The facts in this case, which are undisputed, may be thus stated, substantially in the words of libellant's counsel:

This is a proceeding in rem by the Society for the Relief of Distressed and Decayed Pilots, Their Widows and Children, incorporated under the Pennsylvania statute of September 29, 1789, against

¹ Maritime liens created by state laws, see note to *The Electron*, 21 C. C. A. 21.

the schooner *Lida Fowler*, for the sum of \$48, with interest, a sum equal to the outward pilotage of the schooner from the port of Philadelphia. On or about March 12, 1901, the *Lida Fowler*, a registered American vessel of more than 100 tons burden, drawing 12 feet or more of water, engaged in general trading, not solely coal laden, nor engaged in the coal trade, and not licensed as a coasting vessel, was in the port of Philadelphia, about to sail to Central America or the West Indies, and back to the United States. Under the Pennsylvania statute of March 24, 1851 (P. L. 229), she was bound to take a duly licensed pilot of the port; but, notwithstanding that duty, she was towed away without having made an effort to obtain such a pilot, thus neglecting or refusing the statutory duty.

On March 12th, and for a long time prior thereto, the licensed pilots of the port of Philadelphia maintained an office at 319 Walnut street, in this city, for the purpose of supplying pilots to all vessels which under the law were bound to take a pilot; and this fact the captain of the *Lida Fowler* knew. It is an established custom of the port that the captains or agents of all vessels outward bound shall make application for pilots at that office. On the day the schooner sailed, and for more than 24 hours before and after that time, there were several licensed pilots in attendance at the office, any one of whom could have been employed to take her to sea; but her master made no effort to engage their services, and left the port without a pilot on board. The libellant, being entitled in such case under the act of 1851 to receive a sum equal to the pilotage fee (*Collins v. Society*, 73 Pa. 194), demanded payment from the agents of the schooner, and, upon their refusal, attached the vessel.

Sections 5 and 6 of the act of March 24, 1851 (P. L. 230), are as follows:

"Sec. 5. Every vessel arriving from or bound to any foreign port or place, and every other vessel of the burthen of one hundred tons or upwards, sailing from or bound to any port not within the river Delaware (except licensed coasting vessels sailing from this port), shall be obliged to take a pilot; and it shall be the duty of the master of every such vessel, within thirty-six hours next after his arrival at said port of Philadelphia, to make a report to the master warden of the name of such vessel, her draught of water and the name of the pilot who shall have conducted her to this port, and when any such vessel shall be outward bound, and not duly licensed to coast, the master of such vessel, and the pilot who is to conduct her to the Capes, and the draught of water at that time; and it shall be the duty of the wardens to enter every such vessel (reported as aforesaid) in a book to be kept by them for that purpose, and if the master of any such vessel shall neglect or refuse to make such report he shall forfeit and pay the sum of ten dollars, and no more. And if the master of any such vessel, being licensed as a coasting vessel, and of the burthen of one hundred tons, or more, shall refuse or neglect to take a pilot, the master, or owner or consignee of such vessel shall forfeit and pay the sum equal to half pilotage of such vessel; and if such vessel be not licensed as aforesaid, then and in such case, the master, owner or consignee thereof, shall forfeit and pay the full pilotage thereof: Provided, always, that wherever it shall appear to the wardens, that in the case of an inward-bound vessel, should a pilot not offer before such vessel reached the Brandywine lighthouse, bearing east, or in case of an outward-bound vessel, that a pilot could not be obtained for twenty-four hours after such vessel was ready to depart, the penalty aforesaid for not having a pilot shall not be incurred.

"Sec. 6. All sums due for pilotage, half-pilotage, and all other claims and

penalties in the nature or in lieu thereof, shall, as they accrue, become and remain a lien upon the vessel chargeable therewith, her tackle, apparel and furniture, until they are paid; and for the recovery thereof, in addition to the remedies now provided (and which shall remain as heretofore), such process and proceedings shall issue and be had in the court of common pleas of Philadelphia county, or in any court possessing admiralty jurisdiction, as are usually had in courts of admiralty for the recovery of seamen's wages. And all half-pilotage forfeitures and penalties in the nature thereof, accruing by virtue of this act, and all other debts, claims and demands, to which 'The Society for the Relief of Distressed and Decayed Pilots, Their Widows and Children,' are legally or equitably entitled to, under any law whatever, shall be recovered in the name and for the use of the said society, to whom, or to whose agent, duly constituted, the same shall be paid: Provided, that in all suits and proceedings, to which 'The Society for the Relief of Distressed and Decayed Pilots, Their Widows and Children,' shall be a party, no person shall be incompetent to testify as a witness, because of his being a member thereof."

The defenses set up by the schooner are thus stated in the brief of its counsel:

"(1) That the provision of the act of 1851, providing that the amount of the penalty for the failure to take a pilot should be a lien upon the vessel, is invalid, because the legislature of this state lacked authority to provide that the penalty should be a maritime lien upon a vessel.

"(2) That this court has no jurisdiction of this action in rem, because the provision of the Pennsylvania act for a lien for the amount of the penalty is absolutely invalid.

"(3) That this court has no jurisdiction of an action to recover a penalty provided for by the laws of the state of Pennsylvania."

The first and second grounds of defense are practically one, and neither, I think, is well taken. The supreme court of the United States has distinctly decided that, where the subject of state legislation is maritime in its character, the legislature may give a lien upon the vessel, and the enforcement of such lien may be committed to the courts of admiralty. It is enough to quote the following paragraphs from *The Corsair*, 145 U. S. 347, 12 Sup. Ct. 952, 36 L. Ed. 731, and *The J. E. Rumbell*, 148 U. S. 11, 12, 13 Sup. Ct. 500, 37 L. Ed. 347:

The Corsair: "A maritime lien is said by writers upon maritime law to be the foundation of every proceeding in rem in the admiralty. In much the larger class of cases, the lien is given by the general admiralty law; but in other instances, such, for example, as insurance, pilotage, wharfage, and materials furnished in the home port of the vessel, the lien is given, if at all, by the local law. As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a lien upon the offending thing. If it merely gives a right of action in personam for a cause of action of a maritime nature, the district court may administer the law by proceedings in personam, as was done with a claim for half pilotage dues under the law of New York, in the case of *Ex parte McNiel*, 13 Wall. 236; but, unless a lien be given by the local law, there is no lien to enforce by proceedings in rem in the court of admiralty."

The J. E. Rumbell: "In the admiralty and maritime law of the United States, as declared and established by the decisions of this court, the following propositions are no longer doubtful:

"(1) For necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty.

"(2) For repairs or supplies in the home port of the vessel, no lien exists, or can be enforced in admiralty, under the general law, independently of local statute.

"(3) Wherever the statute of a state gives a lien, to be enforced by process in rem against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States.

"(4) This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States, sitting in admiralty.

"The fundamental reasons on which these propositions rest may be summed up thus: The admiralty and maritime jurisdiction is conferred on the courts of the United States by the constitution, and cannot be enlarged or restricted by the legislation of a state. No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a state, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own rules of procedure."

See, also, note to *The Electron*, 21 C. C. A. 21.

The third defense is supported by the argument that section 563, cl. 3, of the Revised Statutes confers jurisdiction upon the district court of suits for "penalties and forfeitures incurred under any law of the United States," and gives no authority to entertain a suit for a penalty imposed by a state statute. This argument overlooks the grant of jurisdiction, in clause 8, "of all civil causes of admiralty and maritime jurisdiction," in which such an action as the pending libel seems to me to be certainly included: *The Electron*, 21 C. C. A. 30. I can see no difference in principle between *The Glendale v. Evich*, 26 C. C. A. 500, 81 Fed. 633, in which the validity of a lien given by a state statute for a maritime tort was sustained, and the present action, even if it be regarded as a suit to recover a penalty. Damages for a tort are intended to be compensation for a wrong; and a penalty imposed for the violation of a duty, while it may sometimes operate to punish the wrongdoer, as well as to compensate the person injured, is essentially of the same character. In the present case, the sum which the schooner is required to pay for neglect or refusal to employ a pilot does not go beyond compensation; for the amount is no more than the charge for pilotage, and the money is to be applied to the benefit of the associated pilots, their widows and children. I see no difficulty whatever, under the authorities above referred to, in holding that the act of 1851 is valid, so far as it gives authority to the courts of admiralty to enforce the lien against the vessel. The subject is maritime, and this is the test to be applied. Whether the suit is to recover pilotage for services rendered or offered, or for a penalty because the vessel refused and neglected to employ a pilot, seems to me to be immaterial. The essence of the matter is the same in each of these three cases.

As part of the history of the statute, I may add that the court of common pleas of Philadelphia county has decided that the act of 1851 is invalid, so far as it attempts to give jurisdiction to the courts of the state: *Rutherford v. The Ornen*, 2 Wkly. Notes Cas. 122.

A decree may be entered in favor of the libellant, with costs.

SHERMAN v. AMERICAN CONGREGATIONAL ASS'N et al.

(Circuit Court of Appeals, First Circuit. January 24, 1902.)

No. 382.

1. EXECUTORS—PRESUMPTION—PLEADING.

Where the bill, in a suit by an heir to recover a sum given as a legacy and alleged to have been wrongfully paid to defendant as legatee, fails to allege that the payment was not made at the time required by the will, or that an annuity on which such legacy was conditioned was not duly paid, there is a presumption that such payment was properly made.

2. WILLS—LEGACIES—PLEADING—CONSTRUCTION.

Where the bill, in a suit involving the construction of a will giving certain property to a beneficiary on condition that the beneficiary should agree to pay an annuity to testator's wife, contains no allegation showing that the annuity is the principal object of the bequest, it will not be held to be either superior or inferior to the other purpose of the legacy.

3. SAME—COURTS—JURISDICTION.

Where the bill, in a suit which involves the construction of a will which was probated in Massachusetts, contains an indirect allegation that all the proceedings referred to have been approved by a Massachusetts probate court, but does not allege that the probate court on its equity side construed the will, it does not show an adjudication which will defeat the jurisdiction of a federal court to construe the will, as a distinction is preserved in Massachusetts between the jurisdiction of the probate court, acting strictly as such, and having no power to construe wills, and its special equity jurisdiction, conferred by statute, to construe such instruments.

4. CHARITABLE CORPORATION—POWERS.

The fact that a religious association has by its charter certain enumerated powers does not bar it from complying with the terms of a legacy requiring it to pay an annuity, when such compliance is only incidental, and tends to the accomplishment of the substantial purposes of its incorporation.

5. WILLS—CONDITION SUBSEQUENT.

Where a will directs the payment of a certain sum to an association on the death of the testator, on condition that the association agrees to pay an annuity, the estate vests in the beneficiary on the death of the testator, when the condition imposed on the beneficiary is a condition subsequent.

6. SAME—CONSTRUCTION OF BEQUEST—CONDITIONS.

A condition in a bequest, requiring the legatee to pay an annuity to the wife of the testator during her life, is shown to be a condition subsequent.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For decision of the circuit court, see 98 Fed. 495.

Roger M. Sherman, for appellant.

Walter Bates Farr (M. F. Dickinson, on the brief), for appellee the American Congregational Ass'n.

Dudley P. Bailey (Ralph W. Foster, on the brief), for appellees Tenney and Cheever.

W. Frederick Kimball (Walter Bates Farr, on the brief), for appellee Burwell.

Before PUTNAM, Circuit Judge, and ALDRICH and LOWELL, District Judges.

PUTNAM, Circuit Judge. This case will be found to concern no question except the construction of the will of Isaac P. Langworthy. It is presented on a demurrer to the bill, which was dismissed in the circuit court. Mr. Langworthy died on January 5, 1888, leaving a widow, Sarah W. Langworthy. She died on April 22, 1893, also leaving a will. The parties made defendants, besides the American Congregational Association, are the executor of the will of Mr. Langworthy and the executors of his widow's will. The complainant claims to hold title under Mrs. Langworthy.

A question is made whether all the parties in interest have been brought into the case; and it is also maintained that the bill should have been brought by the executors of Mrs. Langworthy's will. The first question, if a substantial one, could probably be met by reframing the bill, for which leave would, of course, be granted. Therefore, in view of the conclusion which we have reached, it does not require our attention. As to the second, inasmuch as the bill charges that the executors of the will of Mrs. Langworthy are in collusion with the executor of the will of her husband, so that the case may fall within the usual class entitling a party in interest to proceed without the joinder as a coplaintiff of the person in whom the nominal title vests, it may, perhaps, by amendment, be put in proper form in this respect also, if it is not already.

Mr. Langworthy's will, omitting the formal parts, was as follows :

"First. I direct my executors hereinafter named to pay all my just debts and funeral expenses.

"Second. I devise and bequeath to my dearly beloved wife, Sarah W. Langworthy, all of my real and personal estate, wherever the same may be situated, of whatever the same may consist, except as hereinafter provided.

"Third. I direct my executors to pay over to the American Congregational Association, as soon as may be convenient after my decease, the sum of ten thousand dollars (unless previous to my death I shall have deposited said sum with said association), upon condition that said association agrees to pay to my wife, in quarterly payments during her life, the sum of \$400, and upon the death of my said wife to pay over semiannually the net income of said \$10,000, and any increase thereof, to the library committee of said association; the same to be expended by said committee in the purchase of local histories, genealogies, commentaries of the Bible, and ecclesiastical histories for said library.

"Fourth. I hereby nominate, as executors of this my will, my said wife, Sarah W. Langworthy, and my friends Charles H. Trist and Edward L. Burwell, both of said Chelsea, and request that they, and each of them, may be excused from giving any sureties on their official bonds as such executors."

Although Mr. Langworthy died in January, 1888, and Mrs. Langworthy in April, 1893, the legacy to the American Congregational Association was not paid until April 1, 1898. The bill gives no explanation of the delay, and it charges no one with laches in that connection. It does not even allege when the association was advised of the fact of the legacy, or that it was ever so advised until payment was made to it. It is to be observed that the third clause of the will directed that payment be made as soon as might be convenient. The bill fails to show what was the condition of the estate, and whether, with reasonable efforts on the

part of the executor, it was convenient to make earlier payment. The ordinary presumption is that the executor properly performed his duty, and, in view of the absence of any allegation to the contrary, the presumption accordingly is conclusive on this record.

Neither does the bill state whether Mr. Langworthy's executor paid Mrs. Langworthy during her lifetime the annuity contemplated by the third paragraph of his will, but, as it was his duty to do so, the presumption is that the payments were made. Moreover, the failure of the bill to allege to the contrary requires us to so assume.

Neither does the bill contain any allegations from which we can ascertain whether the annuity to Mrs. Langworthy was the principal purpose of its third paragraph. As the matter stands, we must refrain from any construction based, in whole or in part, on any hypothesis subordinating either object to the other. Neither can we give a construction which would make the annual payment of \$400 a mere charge on the legacy in the third paragraph. The purpose was to support the annuity by a valid agreement by the association for its payment, made either formally, informally, or by implication, so that it would be received by Mrs. Langworthy whether it exhausted the principal sum, or though the principal sum were lost.

The allegations of the bill fail to set out with proper details, or in the exact language known to the law, or in orderly sequence, the facts of the case. It is not easy to ascertain from the pleadings the grounds of the complaint, or what relief is intended to be asked. The bill shows enough to make it plain that it is claimed that the legacy to the American Congregational Association failed, because—First, it made no formal agreement to pay the annuity; and, second, because it had no power under its charter to give such an agreement. Making so much clear, it then alleges that the executor of Mr. Langworthy's will "assumed to sell the estate, real and personal," "in accordance with a pretended trust to apply the proceeds to pay" the legacy to the association. Inasmuch as the will establishes no trust, and gives the executor no authority to dispose of Mr. Langworthy's real estate in order to effectuate its purposes, and inasmuch as the bill fails to allege in a proper way that Mr. Langworthy left real estate, or left personal property, or how much he left of each, this portion of the bill is not intelligible, and must be disregarded.

It next alleges that the executor "sold property of great value, being personalty and land, which descended and passed under the will of Mr. Langworthy to Mrs. Langworthy, and other property, at a price far below its real value." Here, again, comes the same want of sufficient allegations. So far as realty is concerned, for aught the bill properly shows the title passed to Mrs. Langworthy, and remains in her devisees or heirs, whichever the case may be; and the complainant, together with those, if any, interested with him in the estate of Mrs. Langworthy, have a full remedy at law by writ of entry, thus barring any jurisdiction in equity.

The bill next alleges that the executor "wasted said estate," with-

out further explanation thereof, and without any details whatever; so that here, again, it is insufficient to call on any chancery court to exercise its jurisdiction. Again, it alleges that the executor "placed a cloud upon the title thereto"; meaning, probably, the real estate. If this expression were accompanied with sufficient details to enable a chancellor to perceive what was the nature of the cloud, and how it was placed on the estate, and, indeed, how an executor, without some colorable authority given him by the will, or without some alleged action of a probate court, could have accomplished this, it would, perhaps, have afforded a basis for jurisdiction in equity; but the bare statement here found fails to do so.

Consequently, all the allegations of the bill to which we have referred are useless for the purposes of this suit; and we are left to the remaining allegation, in connection with what we have already said, as to the claim that the American Congregational Association never agreed to the payment of the annuity, and had no power to make such an agreement. This allegation is as follows: "And paid over to said defendant the American Congregational Association the proceeds, to the amount of ten thousand dollars and upward." The effect is to limit the complainant's relief to the reclamation of this sum.

The bill contains an indirect allegation that all the proceedings referred to had been approved by the probate court for the county of Suffolk. If it had properly shown that the real estate of Mr. Langworthy had been sold by his executor under a license from the probate court, or that any personal property had been disposed of wrongfully, for an inadequate value, and if, also, it admitted that the proceedings of the executor in those respects had been approved by the probate court, it would follow that, as that court has normal jurisdiction over such proceedings, and over the executor's accounts growing out of the same, its action would have been *res adjudicata*. It would, therefore, be clear, whatever might be the jurisdiction of a federal court in the event there had been no action by the probate court, that such action having been taken, and the probate court having jurisdiction, its proceedings would have resulted in a full bar to the present bill, so far as such matters are concerned. The respondents, however, maintain that inasmuch as the bill alleges, although incidentally, that all the transactions to which it relates have been approved by the probate court, the questions of the construction of Mr. Langworthy's will, and of the validity of the payment of the legacy to the American Congregational Association, are likewise *res adjudicata*. It is, however, true that questions of the construction and effect of a will, or of any particular clause therein, stand, so far as the probate courts of Massachusetts are concerned, on an entirely peculiar basis. Under late statutes, on a special proceeding, the probate court, acting as an equity court, has jurisdiction to determine them; but the distinction between probate courts proceeding as such, and the same courts when exercising the statutory jurisdiction in equity, is a broad one, and is carefully preserved. *Bennett v. Kimball*, 175 Mass. 199, 200, 55 N. E. 893; *Green v. Gaskill*, 175 Mass. 265, 56 N. E. 560. It

is the undoubted law of Massachusetts that any action of a probate court, in the exercise of its normal jurisdiction, with reference to the construction of Mr. Langworthy's will, would have been void. *Cowdin v. Perry*, 11 Pick. 503; *Granger v. Bassett*, 98 Mass. 462. In this particular, the normal jurisdiction of the probate courts of Massachusetts remains as it does everywhere in the absence of special legislation, and it leaves to the courts of common law and the chancellor all questions of the construction and effect of devises and legacies. Therefore, notwithstanding the statute referred to in *Bennett v. Kimball* and *Green v. Gaskill*, in the absence of any showing that the probate court, on its equity side, passed on the question which, as we have said, is the only one necessary for us to consider, there is no doubt about our jurisdiction. The same result, under legislation in Maryland similar to that in Massachusetts, is reached by a decision of the circuit court of appeals for the District of Columbia, cited as approved in *Kenaday v. Sinnott*, 179 U. S. 606, 615, 21 Sup. Ct. 233, 45 L. Ed. 339.

Act Mass. 1895, c. 134, which is the only statute enlarging the jurisdiction of the probate courts brought to our attention later than the act of 1891, which was under consideration in *Bennett v. Kimball*, need be referred to merely for the purpose of stating that it is aside from any of the topics which we have before us.

The question remains whether or not the allegations referred to, stating that certain proceedings have been approved by the probate court, can be accepted as intending the exercise by it of its statutory equitable jurisdiction. In the absence of any allegation otherwise, we are justified in assuming that the reference to it is merely as a court of probate, and the positions taken by the parties at the hearing sustain that assumption. Therefore we hold that we have jurisdiction on this appeal as to the validity and effect of Mr. Langworthy's will, and over no other question.

The issue as to the power of the American Congregational Association to comply with the terms of the legacy is one easily disposed of on various theories. The fact that the association has, by its charter, certain enumerated powers, does not bar it from the exercise of incidental functions which relate to the accomplishment of the substantial purposes of its incorporation (*Association v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. —); and all occasion for any securing of the annuity by the association had gone by before the legacy was paid to it, and before, so far as the case shows, the estate was in condition to pay it conveniently, so that this topic is only a moot one.

Coming to the only other proposition which we have to consider: With two or three peculiar exceptions, as to which the law has necessarily established rigid rules, relating almost entirely to the descent of real estate, wills receive reasonable and fair construction, for the purpose of ascertaining the real intent of testators. Courts make use of various incidental rules to assist them in thus construing wills: but none, with the rare exceptions to which we have referred, are permitted to obstruct the effectuating the substantial purpose of the instrument in question. Having in view the facts that, so far

as this case shows, the legacy was paid to the association as soon as the progress of the estate would conveniently permit of its being done; that the will gave directions that it should be paid accordingly; that, when it was so paid, Mrs. Langworthy had deceased; that the presumption is that her annuity had been received by her from the executor during her lifetime; and that, therefore, the provision with reference to any agreement as to an annuity had become of no further use,—it requires a strong stretch of any method of reasoning to lead the mind to conclude, fairly and reasonably, that under such circumstances, or under the circumstance of his wife having deceased before him, Mr. Langworthy intended to annul this legacy. There is no reasonable ground for sustaining such an hypothesis; and, looking at the will fairly and reasonably, it cannot be questioned that it was the desire of Mr. Langworthy, under the circumstance of his wife deceasing before him, or, likewise, of his wife deceasing after him but before the legacy was paid, that it should vest absolutely in the association.

To come more closely to the matter, the condition named, according to all the rules of construction, was not precedent, but subsequent. The law leans strongly against construing a legacy or devise so that it does not vest on the decease of the testator. This rule was fittingly expressed for this case by Mr. Justice Swayne, speaking in behalf of the court, in *Cropley v. Cooper*, 19 Wall. 167, 174, 22 L. Ed. 109, 113, where he said "that a bequest, in the form of a direction to pay at a future time, vests in interest immediately if the payment be postponed for the convenience of the estate, or to let in some other interest." By the express terms of the legacy, the postponement of payment in this case was purely "for the convenience of the estate." This rule favoring the vesting of estates is so well known that it is not necessary to accumulate authorities, and, applying it as it is usually applied, there can be no question that the legacy in issue vested at the death of Mr. Langworthy, although not payable until later. Vesting at that time, everything in it in the form of a condition must, from the necessity of things, be regarded as subsequent. We think we may safely say that this is the rule laid down by all the text writers of authority, and also it is so stated by Chief Justice Marshall in *Finlay v. King*, 3 Pet. 346, 376, 377, 7 L. Ed. 701, 712. The case at bar seems to be precisely covered by that paragraph of the syllabus which was prepared by the court itself, where it is stated that the court had found no case in which a general devise, importing a present interest, in a will making no other disposition of the property, on a condition which may be performed at any time, had been construed, from the mere circumstance that the estate was given on condition, to require that it must be performed before the estate could vest.

The condition being subsequent, and its performance having been rendered impossible by the death of Mrs. Langworthy, it became void, and the legacy became absolutely effective. This was directly ruled by Lord Romilly, in 1866, in *Collett v. Collett*, 35 Beav. 312. Although this decision was by the master of the rolls, yet it has never been questioned in England. In *Dawson v. Oliver-Massey*, 2 Ch.

Div. 753, while the application of *Collett v. Collett* was doubted, both the then master of the rolls and the court of appeal accepted it as law. It is accepted by *Jarm. Wills* (6th Am. Ed.) from the 5th Eng. Ed. *851, where, also, at page *853, is laid down the well-known rule that conditions subsequent are to be construed strictly; that is to say, they are not to be so construed as to unnecessarily defeat the devise or legacy. Indeed, if it were necessary, in order to sustain this legacy, and thus to give effect to the intent of the testator, no weight would be given to the conditional form of expression as to the agreement to be given by the association. This well-known rule is stated in 2 *Williams, Ex'rs* (7th Am. Ed.) 567, to the effect that a bequest on condition may be considered as merely imposing a trust. We have already shown that this annuity could not be regarded merely as a charge raised on the legacy in the way of a trust; but the case is met in that particular by *Stanley v. Colt*, 5 Wall. 119, 166, 18 L. Ed. 502, 510, to the effect that a proviso in a will "gives way to the intent of the parties, as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust." In other words, in this case, if necessary, the words "on condition," and so forth, could properly be read, "subject to a covenant or agreement by the association to pay an annuity," and so on.

On the whole, we sum up that there are no allegations charging the association with any express or implied renunciation of the legacy in issue; that, as the legacy vested on Mr. Langworthy's decease, the condition, even if it were strictly such, was, from the necessity of things, a condition subsequent; that according to the authorities, and the reasonable construction to be given as to the intent of the testator, the condition, whether it be regarded as such or as a mere covenant or agreement, had been rendered futile by the decease of Mrs. Langworthy, and the legacy thereupon vested absolutely in the association; and that, therefore, the bill was properly dismissed by the circuit court.

The decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellees.

LOWELL, District Judge, concurs in the result.

HOBBS MFG. CO. v. GOODING et al.

(Circuit Court of Appeals, First Circuit. January 24, 1902.)

No. 366.

INJUNCTION—SUIT FOR INFRINGEMENT OF PATENT—MISUSE OF COURT'S OPINION.

The mere fact that a complainant in a suit for infringement of a patent, in whose favor a decision has been rendered by the circuit court of appeals, before the sending down of the mandate publishes circulars in which he makes extravagant claims as to the scope of the decision, based upon his interpretation of the court's opinion, is ordinarily not

such a case of wrongdoing as calls for the court's interference by injunction, though it may probably exercise such power in an extreme case.

On Petition for an Order Restraining Complainant, and for Other Relief.

Edward S. Beach, for complainant.

William A. Macleod, for petitioners.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. Upon this petition for relief against what is claimed to be an unwarrantable use of the opinion of this court, after decision and before mandate was handed down, we need not examine or discuss the question of jurisdiction. Neither need we discuss the question of the power, nor the extent of the power, of this court in respect to punishment for contempt in misuse or abuse of its process. Nor is the power of the court over its own process, as between the parties, necessarily controlled by the rule of noninterference with press publications as to disputed rights and claims of different parties as to the scope of its decisions. It is probably true that, in a case of honest disagreement or misunderstanding as to the true import of a decision, or in an extreme case of abuse or misuse of process for the purpose of impairing or destroying rights sought to be established by the court through its decision, the court may proceed summarily in reference thereto. Such power, however, would be exercised with reluctance, and ordinarily only in an extreme or clear case.

The circular letter complained of sets out more than the court decided, but an examination of the opinion discloses no ambiguity or uncertainty as to what was decided; and, on the whole, we do not think the facts set out in the petition constitute a case of such wrongdoing as calls for our interference. At the most, it was an extravagant claim by a party as to the scope of the decision, based upon his interpretation of the opinion which this court had handed down.

Petition denied.

ARBUCKLE et al. v. BLACKBURN, Dairy and Food Com'r of Ohio.

(Circuit Court of Appeals. Sixth Circuit. January 7, 1902.)

No. 973.

1. EQUITY JURISDICTION—ENJOINING CRIMINAL PROSECUTIONS.

A court of equity is without jurisdiction to entertain a bill by which it is sought to have it determine the question whether the complainant has been guilty of the violation of a criminal or penal statute, and, if it is found that the statute has not been violated, to enjoin threatened prosecutions thereunder; nor is such jurisdiction given by the fact that the prosecutions, though unsuccessful, will injuriously affect complainant's property rights.

2. JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE.

A suit against an officer of a state, to enjoin him from instituting prosecutions under a statute of the state which is conceded to be valid if properly construed, and with the enforcement of which he is

charged by law, on the ground that he is proceeding under an erroneous construction of the law, which would render it invalid as in violation of the constitution of the United States, is one, in effect, against the state, of which a federal court is denied jurisdiction by the eleventh constitutional amendment.¹

2. PURE-FOOD LAWS—CONSTITUTIONALITY—POLICE POWERS OF STATE.

The pure-food law of Ohio (2 Bates' Ann. St. §§ 4200-4 to 4200-8) which makes it an offense to manufacture for sale, sell, or offer to sell, within the state, any article of food or drink which is adulterated, within the meaning of the act, and provides that food shall be deemed to be adulterated, among other things, "if it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if, by any means, it is made to appear better or of greater value than it really is," but that the act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, "if each and every article sold or offered for sale be distinctly labeled as a mixture or compound, with the name and per cent. of each ingredient therein, and are not injurious to health," is one which if it is within the police powers of the state to pass and enforce, and is not unconstitutional, as an interference with the right of congress to regulate interstate commerce, as applied to articles, mixtures, or compounds brought into Ohio from other states, and sold in the original packages.

4. SAME.

A law of a state, intended to prevent the sale of adulterated food products, which is constitutional and valid in its language and purpose, is not rendered unconstitutional, so as to authorize a federal court to entertain a suit to enjoin prosecutions thereunder, because the state food commissioner, charged with the duty of enforcing it by instituting criminal prosecutions against those who, in his judgment, have been guilty of violating its provisions, may give it an erroneous construction.

5. INJUNCTION—GROUNDS—THREATS OF PROSECUTION BY PUBLIC OFFICER.

It is not ground for an injunction that a state food commissioner, charged by law with the duty of determining such matter in the first instance, is publishing statements that an article of food or drink made by complainant is adulterated, and its sale is in violation of the laws of the state, and threatening prosecutions against those who sell it, whether such statements are correct or erroneous.

6. PURE-FOOD LAWS—OPERATION—ARTICLES MADE BY PATENTED PROCESS.

That an article of food or drink is prepared by a process which is or has been protected by letters patent of the United States does not prevent it from coming within the operation of laws passed by a state in the exercise of its police powers.

7. INJUNCTION—CRIMINAL PROSECUTIONS.

The fact that a food product, the sale of which is claimed to be in violation of the laws of a state, is widely sold therein, and that many persons may be subject to prosecution, does not give a court of equity jurisdiction to enjoin such prosecutions.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

This case was brought by Arbuckle Bros. to restrain Joseph E. Blackburn, dairy and food commissioner of Ohio, from prosecuting the vendors of Aricesa, an article sold by the complainants to many dealers in Ohio, because of alleged violation of pure-food laws of the state. The substance of the bill and an amendment thereof is as follows:

The general assembly of the state of Ohio passed in the year 1884 an act entitled "An act to provide against the adulteration of food and drugs" (81 Ohio Laws, p. 67), the substance of which is recited. For more than thirty years the complainants and their predecessors had been engaged,

¹ Federal jurisdiction of suits against state, see note to *Tindall v. Wesley*, 13 C. C. A. 165.

and still are engaged, in the manufacture and sale throughout the United States, including the state of Ohio, of a certain compound or mixture known as "Ariosa," composed of roasted coffee, compounded and mixed with eggs and sugar, packed in sealed packages, ready for use by the consumer. In order to preserve said product from deterioration, and to retain the original strength and aroma in the coffee, the complainant Arbuckle more than 30 years ago invented, and thereafter patented, adopted, and used, and complainants still use, a certain process whereby the compound or mixture known as "Ariosa" was, and still is, mixed and compounded, and the separate beans thereof coated, and to a large extent hermetically sealed, after roasting, with a compound of sugar and eggs, at first in composition with a quantity of Irish moss, also a wholesome article of food, and for 20 years without such Irish moss. That said letters patent were issued in the year 1868, and, after the expiration of the said patent, trade therein was greatly increased, and still continues to increase, by reason of the increased sale and reputation of said Ariosa. That the good will of said business of making and vending said Ariosa has become, and now is, wholly dependent upon the reputation and sale of Ariosa, and the good will aforesaid. That for many years the complainants, at great expense, widely advertised the use of the aforesaid process, that the purchasers might be informed of the good qualities of coffee so mixed, compounded, and coated. That for many years prior to 1894 every package of Ariosa was labeled in conspicuous type in the words and figures following:

"Ariosa is a compound made from coffee, sugar, and eggs. The coffees are selected especially for their strength, flavor, and superior drinking qualities, are pure, sound coffees, and absolutely free from all the poisonous coloring substances which are now so largely used to improve the appearance of coffee. Coffee, when roasted, is porous, and, unless prevented, loses its best qualities, and absorbs others which are inferior to it. By our process of hermetically sealing the pores of roasted coffee, we secure a three-fold object: (1) The retention of the full strength and aroma for any length of time; (2) the prevention, through absorption, of any injurious flavors; (3) the saving to the consumer of the additional expense of eggs incurred when any other coffee is used. Ariosa is self-settling. Choice eggs and pure granulated sugar are the only articles used in hermetically sealing Arbuckle's Ariosa Coffee.

"Formula.

Coffee	99278
Eggs	00361
Sugar	00361

"Four pounds roasted coffee go as far as five pounds green, as coffee loses 20 per cent. in roasting."

That being advised of the character of the preparation known as "Ariosa," and as a result of experience in the use thereof, great numbers of people have preferred and do prefer the use of Ariosa to other brands, mixtures, or compounds of coffee so treated, and the same is sold and purchased in large quantities throughout the United States, and has been so sold and purchased for more than 30 years last past. That the extent and profit of the complainants' business depends upon the good will thereof, and the confidence of consumers that, so long as the same is manufactured and sold by the complainants, it shall be identical in quality and composition with that which, under the same brand and appearance, consumers have theretofore purchased. Certain inferior compounds and mixtures are described and sold in competition with the said Ariosa; said compounds and mixtures being so treated as to conceal defects, or misrepresent the real condition thereof, so as to retain water which would otherwise be eliminated from the coffee in process of roasting, so treated as to increase the weight of roasted coffee, while decreasing its worth for use; mixed and compounded with unhealthy ingredients; none of which processes or methods are used by the complainants, but the process adopted by them is for the purpose of retaining in the coffee the full strength and aroma thereof; preventing the absorption of any injurious or noxious gases or flavors; settling the same when pre-

pared for use. There is nothing in said process which conceals damage or inferiority in coffee, or makes it appear better or of greater value than it really is. On the contrary, the coffee used in said compound or mixture is of a good quality and undamaged. The articles of food used in the coating thereof are in themselves pure, wholesome, and healthful. Said coating is colorless and transparent. Said process was adopted and used, and still is used, at great expense, for the benefit of the consumer. Complainants have on hand at various points throughout the United States large stocks of the compound and mixture known as "Ariosa,"—in Ohio, about 1,000,000 pounds, more or less, of the value of \$100,000; in the United States, 10,000,000 pounds, more or less, of the value of about \$1,000,000. Complainants have a large number of agents in Ohio and elsewhere engaged in the sale of Ariosa, and a great number of dealers, to wit, more than 10,000, in Ohio, have in their possession large quantities of Ariosa for sale, and will continue to sell the same in preference to other brands of coffee not similarly prepared, to the profit of complainants, and the increase of their aforesaid business, and of the good will thereof.

The respondent herein, Joseph E. Blackburn, dairy and food commissioner as aforesaid, without authority of law, and falsely and erroneously construing the provisions of said statutes above set forth, notwithstanding the fact that the process used in the manufacture of the said compound or mixture known as "Ariosa" is not in violation of the said statute, and that the said statute is not applicable to the premises, and that there is no law of the state of Ohio warranting his acts, and notwithstanding the healthful character of said Ariosa, and that the same is composed of healthful ingredients, each package plainly marked as aforesaid, personally and through his agents has heretofore, and does now, and will, unless restrained by the order of the court, continue to, widely advertise throughout the state that said process used in the manufacture of Ariosa is within the prohibition of, and in violation of, the aforesaid statute. Said Blackburn falsely claims and pretends that the sixth clause of said statute wholly forbids the glazing of the coffee used in the manufacture of Ariosa. Yet in fact said process does not conceal damage or inferiority, or make said coffee appear to be better or of greater value than it really is. That said coating is for the uses and purposes above set forth, and is not used to affect or change the appearance of said coffee; any change in the appearance thereof due to said glazing being incidental and immaterial in the use thereof, and not such as to assimilate said coffee in appearance to other or better grades. Respondent has menaced and threatened with prosecution, and still menaces and threatens to prosecute, dealers in and vendors of Ariosa in the state of Ohio, for a violation of the aforesaid statute, and will, unless restrained by the order of the court, institute a large number of prosecutions upon the wrongful and erroneous charge that the treatment of said Ariosa by the process aforesaid is a violation of the statute aforesaid, and that the same is an adulterated food product, within the said statute. That by reason of the official capacity of the respondent, and the fact that he claims to act under said statute intended to prevent the adulteration of food products, said respondent's statements and threats of prosecution have led and do lead and will hereafter continue to lead dealers in and consumers of said Ariosa throughout the United States, and more particularly in Ohio, to doubt the healthful character and proper preparation of the same, and will deter wholesale and retail dealers and consumers from purchasing, vending, or using the same, greatly decreasing the repute and sale thereof, to the great and irreparable damage of complainants.

That on or about the 5th day of February, 1901, said respondent issued a certain circular to dealers and vendors of Ariosa within the state of Ohio, of which the following is a copy:

"State of Ohio.

"Office of Dairy and Food Commissioner.

"Dear Sirs: Replying to your inquiry about the coffee situation, would say that this matter is now under consideration and investigation by the chemists of this department. As soon as conclusions are reached, a circu-

lar notice will be sent to all the jobbers in Ohio, and a sufficient number will be furnished to supply all their salesmen. I might say that the following firms have agreed to accept the law as construed by this department: Andrus, Scofield & Co., Columbus; Dayton Spice Mills, Dayton; Woolson Spice Company, Toledo. W. F. McLaughlin & Co., of Chicago, have agreed to comply with the laws as soon as construed by the court. The only firm that has refused and still refuses to accept the ruling of this department, or abide by the laws of the state as construed by our supreme court, is Arbuckle Bros., of New York.

"Very truly yours, J. E. Blackburn,

"Dairy and Food Commissioner.

"Columbus, Ohio, February 5, 1901."

Said circular letter is wholly false, in this, to wit: That complainants have not at any time refused to accept the construction of the law of Ohio as construed by the supreme court of the state; and the complainants are informed and believe that the Woolson Spice Company has not agreed to accept the said law as construed by respondent, but, on the contrary, refused, and still refuses, to accept said construction of said law, and still continues to sell coffee prepared and glazed by the processes used by it. That said circular was sent generally to jobbers and dealers in food products in the state of Ohio. That few, if any, of them had inquired of the respondent as therein stated, but said circular was sent to dealers without any such inquiry. That said circular, by falsely and wrongfully singling out complainants as alone refusing to accept the ruling of respondent to abide by the laws of Ohio as construed by the supreme court thereof, necessarily implied that, of the food products manufactured and sold by manufacturers, those made by complainants (particularly the product Arlosa) alone fell short of the standard of purity imposed by said statute; thus wrongfully and falsely implying that Arlosa is inferior in quality, grade, purity, and wholesomeness to the products of other manufacturers, whereas the standard of said Arlosa in the respects stated is at least as high as that of any like product manufactured and sold by like manufacturers. And, unless restrained by order of court, said respondent will issue other and further circulars to dealers of food products in Ohio, in large quantities, cause the same to be widely published and distributed throughout the state and elsewhere, and said subsequent circulars will be directed against the complainants alone, with intent, purpose, and effect of discriminating against complainants and their said product, and to the irreparable injury of the sale thereof, and the trade of complainants, and the good will of their business. By said circular the respondent threatens to accuse complainants and dealers in Ohio in complainants' product of a crime, and to do an injury to the property of complainants, with intent to compel complainants and the dealers in said product to cease from selling and offering for sale the same within the state of Ohio. Such prosecution is threatened by said respondent under his false and erroneous construction of said statute, is without authority of law, and will deprive complainants of their property, of the value of the product already manufactured, and the trade and good will of their business of vending said product within the state of Ohio, without due process of law. That said acts and the menaces and threats have worked, and will continue to work, irreparable injury to the property rights of complainants, and if respondent be permitted to institute or conduct proceedings or prosecutions against the vendors of said product, or be permitted to institute or conduct proceedings or prosecutions against them, will work further irreparable injury to said property rights. Said statute, construed as respondent claims it should be, is in conflict with the fourteenth amendment to the constitution of the United States, in that it would deprive complainants of their property, by prohibiting them from selling in Ohio, and dealers in and vendors of food products from purchasing from the complainants, pure food products which are not injurious to health, and will destroy the value of said product as an article of commerce, by prohibiting the sale thereof in the state of Ohio, and would deprive complainants of the just and lawful benefits accruing to them by reason of their property rights in said food product, and largely destroy the mar-

ket value of existing stocks of Arlosa in possession of complainants in Ohio and elsewhere, and will deny to complainants and to dealers in said product in the jurisdiction of the state of Ohio the equal protection of the law. Arlosa is manufactured and treated according to the aforesaid process at complainants' factories in New York and Pennsylvania, and not in Ohio. After being so manufactured and treated, it is at said factory packed in said packages, and in said original packages shipped by complainants to Ohio, and sold in said original packages; and said statute, if construed as respondent claims it should be, is a regulation by the state of Ohio of interstate commerce, and is therefore repugnant to and in violation of the third clause of section 8 of article 1 of the constitution of the United States. Owing to the large number of dealers in Arlosa in Ohio who will be prosecuted if said respondent be permitted to carry out his said threats and menaces, a multiplicity of suits will arise, and thereby complainants' property rights will be determined in litigation to which complainants will not be, and could not be, parties. The interests of such dealers are in many cases not in common with, nor representative of, the interests of complainants. Therefore they are in great and imminent danger that in many such suits and prosecutions no defense will be made, either through lack of interest, or in wrongful collusion and conspiracy with respondent, to the great and lasting injury and prejudice of complainants for which they have no adequate remedy at law. Although such prosecutions shall uniformly result in the acquittal of the person charged, yet, by reason of the multiplicity thereof, said prosecutions will result in deterring many, if not all, dealers in food products in Ohio from dealing in Arlosa.

The bill prays relief as follows: "(1) From stating or charging that complainants' said food product, Arlosa, being a compound of pure, roasted coffee, mixed, treated, coated, and glazed with a preparation of sugar and eggs according to the formula and by the process hereinbefore set forth, is an article of food adulterated within the meaning of said statute, and that the use of complainants' said process of coating and glazing the coffee, constituting the chief ingredient of Arlosa, with a preparation of sugar and eggs, as hereinbefore more particularly described, constitutes a violation of said statute, and that the importation of said Arlosa into Ohio, or the selling of or offering for sale the same, constitutes a violation of said statute; (2) from charging the complainants herein, or any of them, or said firm of Arbuckle Bros., or any dealers in Arlosa, with violating said statute by selling or offering for sale Arlosa, or with adulterating food, in violation of said statute, by reason of the aforesaid treatment and coating of the coffee forming an ingredient of Arlosa with a preparation aforesaid; (3) from charging the complainants, or any of them, or said firm of Arbuckle Bros., with violating the said statute by adopting and using said process of coating above described, or by selling or offering for sale Arlosa so glazed; (4) from charging any dealer in Arlosa with the possession, offering for sale, or sale of an adulterated food product, within the meaning of said statute, in having in their possession, offering for sale, or selling Arlosa so glazed; (5) from menacing and threatening any dealer in Arlosa so glazed with prosecution for having in his possession, offering for sale, or selling such Arlosa; (6) from instituting or commencing against any person, partnership, or corporation having in his, their, or its possession, offering for sale, or selling, Arlosa, any action, suit, proceeding, or prosecution based upon the treatment and coating of the coffee forming an ingredient of said Arlosa with a preparation of sugar and eggs, according to the formula and by the process more particularly above described; and (7) that your orator may have such further relief as to the court shall seem equitable and proper in the premises."

The complainants filed an amendment to the bill as follows: "(20) The wrongful acts which said respondent threatens to do, and, unless restrained, will do, as in complainants' said bill of complaint alleged, will make unmarketable in Ohio, and to a very large extent impair and destroy the market value of, the large stocks of Arlosa which complainants now have on hand in Ohio, and will, to a large extent, deprive them of their said business, and the good will thereof, in Ohio, and greatly injure, if not wholly destroy, the value of the same, and enable complainants' competitors, selling in Ohio

coffees treated by processes similar to, but not identical with, complainants' said process, to obtain complainants' said business, which can only be regained after long time and at great expense; and complainants will be put to other great expense in defending their said property rights in Ohio. And if, pending the final determination of this cause, said respondent shall be permitted to commit the threatened wrongs, the same will, as complainants are informed and believe, damage complainants to the extent of more than one hundred thousand dollars,—an amount largely in excess of respondent's ability to respond in judgment,—and thereby complainants will suffer irreparable injury unless a preliminary injunction shall be granted herein."

John De Witt Warner and Clarence Brown, for appellants.

Walter F. Brown and E. B. Dillon, for appellee.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

DAY, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

As the circuit court dismissed the bill, it is unnecessary to consider the testimony offered in support of the application for a temporary injunction. The matter to be reviewed is the sufficiency of the bill and amendment to warrant the intervention of a court of equity to restrain the defendant as prayed. An analysis of the bill shows the claim to be that respondent, the dairy and food commissioner of the state of Ohio, is proceeding, upon an alleged false and erroneous construction of the statutes of Ohio, to prosecute persons in Ohio dealing in the complainants' product known as "Ariosa," and is giving out the statement that this product is sold in violation of the laws of the state. The act passed March 20, 1884 (2 Bates' Ann. St. Ohio, §§ 4200-4 to 4200-8), provides against the adulteration of foods and drugs, makes it an offense within said state to manufacture for sale, offer for sale, or sell any article of food which is adulterated, within the meaning of the act; and the term "food," used therein, includes all articles used as food or drink by man, whether simple, mixed, or compound. It is further provided in the act that food shall be deemed to be adulterated, among other things, "if it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if, by any means, it is made to appear better or of greater value than it really is." It appears that the coffee of the complainants is coated, after roasting, with a compound of sugar and eggs, for the purpose, as alleged in the bill, of retaining the full strength of the coffee, "preventing the absorption of any injurious or noxious gases or flavors, and settling the same when prepared for consumption"; thus bringing Ariosa within the terms of the Ohio law, which provides that the act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food "if each and every article sold or offered for sale be distinctly labeled as a mixture or compound with the name and per cent. of each ingredient therein, and are not injurious to health." It is claimed that notwithstanding Ariosa is thus labeled with a statement of the elements of the compound, and is not injurious to health, the food commissioner is threatening proceedings, and is claiming that the same is within the prohibition of the sixth clause of the statute above quoted, making it an offense to coat an article of food, whereby damage or inferiority is concealed, and the same made to appear better

or of greater value than it really is. It is urged that this statute, "construed as respondent claims it should be," is in conflict with the fourteenth amendment of the constitution, as it deprives the complainants of their property, by prohibiting them from selling it in Ohio, and dealers from selling the same in that state, notwithstanding the same are ordinary articles of food and not injurious to health, and will destroy the market value of the product, and deny to the complainants within the jurisdiction of Ohio the equal protection of the laws. The argument is that conceding, for this purpose, that the statute is constitutional when properly construed and enforced, the respondent's wrongful construction thereof results in an infraction of the constitutional rights of the complainants. This alleged wrong construction, when analyzed, amounts to this: The complainants claim that their compound is not within the terms of the statute. The food commissioner wrongfully claims that it is. Upon this branch of the case the question is, may a court of equity entertain a bill to inquire into this matter, and, if it finds that the complainant is right in its contention, enjoin the food commissioner from instituting proceedings under the laws of Ohio? The jurisdiction of courts of equity has never been carried to this extent in authoritative decisions. On the contrary, the supreme court, in more than one instance, has denied such jurisdiction to a court of equity. The rule is thus stated by Mr. Justice Gray in *Re Sawyer*, 124 U. S. 200-211, 8 Sup. Ct. 482, 488, 31 L. Ed. 402, 406:

"The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. *Attorney General v. Cleaver*, 18 Ves. 211, 220; *Turner v. Turner*, 15 Jur. 218; *Saull v. Browne*, 10 Ch. App. 64; *Kerr v. Corporation of Preston*, 6 Ch. Div. 463. Mr. Justice Story, in his *Commentaries on Equity Jurisprudence*, affirms the same doctrine. Story, *Eq. Jur.* § 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under the statutes of the state or under municipal ordinances. *West v. Mayor, etc.*, 10 Paige, 539; *Davis v. Society*, 75 N. Y. 362; *Tyler v. Hamersley*, 44 Conn. 419, 422, 26 Am. Rep. 479; *Stuart v. Board*, 83 Ill. 341, 25 Am. Rep. 397; *Devron v. First Municipality*, 4 La. Ann. 11; *Levy v. City of Shreveport*, 27 La. Ann. 620; *Moses v. Mayor, etc.*, 52 Ala. 198; *Gault v. Wallis*, 53 Ga. 675; *Phillips v. Mayor, etc.*, 61 Ga. 386; *Cohen v. Commissioners*, 77 N. O. 2; *Waters-Peirce Oil Co. v. City of Little Rock*, 39 Ark. 412; *Spink v. Francis (O. C.)* 19 Fed. 670, and 20 Fed. 587; *Suess v. Noble (O. C.)* 81 Fed. 855."

In the later case of *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399, the same rule is recognized and enforced. Mr. Justice Shiras, at page 169, 172 U. S., page 127, 19 Sup. Ct., and page 399, 43 L. Ed., speaking for the court, says:

"No case can be found where an injunction against a state officer has been upheld where it was conceded that such officer was proceeding under a valid state statute. In the present case the commonwealth's attorney, in the prosecution of an indictment found under a law admittedly valid, represented the state of Virginia; and the injunctions were therefore, in substance injunctions against the state. In proceeding by indictment to enforce a criminal statute, the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state. As was said in *Re Ayers*, 123 U.

S. 443, 497, 8 Sup. Ct. 179, 31 L. Ed. 216: 'How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court, as an actual and real defendant?'

Upon the authority of this case and others decided in the supreme court, it seems clear that this action cannot be maintained consistently with the eleventh amendment to the constitution, withholding the judicial power of the United States from suits in law or equity commenced or prosecuted against one of the United States by citizens of another state, or citizens or subjects of any foreign state. In *Poindexter v. Greenhow*, 114 U. S. 270-287, 5 Sup. Ct. 903, 29 L. Ed. 185, quoted with approval in *Re Ayers*, supra, it was said "that the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties to the record." In the *Ayers Case* the suit for injunction, which the court held could not be entertained, was brought against the attorney general and treasurers of counties, cities, and towns in Virginia, just as the present case is brought against Joseph E. Blackburn, dairy and food commissioner of Ohio. The injunction sought is against the prosecution of suits in the Ohio courts which are about to be instituted by Blackburn, not in his individual capacity, but as an officer of the state. By the terms of the statute the dairy and food commissioner is an officer of the state expressly charged with the enforcement of all laws against frauds and adulterations or impurities in foods, drink, or drugs, and unlawful labeling in the state of Ohio. It is made his duty by statute to prosecute, or cause to be prosecuted, any person or persons, firm or firms, corporation or corporations, engaged in the manufacture or sale of any adulterated article or articles of food or drink, or adulterated in violation of or contrary to any laws of the state of Ohio. 1 Bates' Ann. St. Ohio, §§ 409-7, 409-8. It is also provided that food so coated as to conceal damage or inferiority shall be deemed to be adulterated. Paragraph 6 of section 4200-6, 2 Bates' Ann. St. Ohio. What, then, is the object of the injunction sought in this case? It is no more or less than to restrain the officer of the state from bringing prosecutions for violations of an act which such officer is expressly charged to enforce in the only way he is authorized to proceed,—by bringing criminal prosecutions in the name of the state. This is virtually to enjoin the state from proceeding through its duly qualified and acting officers. If the food commissioner may be enjoined from instituting such prosecutions, why may not the prosecuting attorney, or any officer of the state charged with the execution of the criminal laws of the state? While the state may not be sued, if the bill can be sustained against its officers it is as effectually prevented from proceeding to enforce its laws as it would be by an action directly against the state. This view of the case, in our judgment, is amply sustained by the cases above cited, and by the later case of *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, in which the subject is fully discussed by Mr. Justice Harlan. In so far as this action seeks an injunction against the respondent from proceeding to

enforce by prosecution the provisions of the statutes of Ohio above cited, the courts of the United States are deprived of jurisdiction by the eleventh amendment to the constitution.

We are now dealing with an officer of a state proceeding under a valid law of the state, and whose error lies in wrongfully construing the statute so as to include the complainant's product. To entertain the bill in this aspect would be to subvert the administration of the criminal law, and deny the right of trial by jury, by substituting a court of equity to inquire into the commission of offenses where it would have no jurisdiction to punish the parties if found guilty. It would be the extension of equity jurisdiction to cases where prosecutions in state courts by the state officers are sought to be enjoined, with a view to determining whether they shall be allowed to proceed under valid statutes in the courts of law. We think this an enlargement of the jurisdiction opposed to reason and authority. It is claimed, however, that conceding that a court of equity cannot enjoin the prosecution of criminal offenses, as a general thing, the rule is different when property rights are involved; and we are cited to cases holding that equity has jurisdiction to enjoin acts likely to be destructive of property rights, although the acts complained of constitute infractions of the criminal law. This is quite a different proposition from enjoining criminal proceedings alleged to be indirectly destructive of property rights. Many criminal prosecutions may affect the property of the person accused. A property may be greatly injured by the wrongful and unfounded charge that it is used for immoral purposes. Such prosecution may destroy its rental value and prevent its sale, yet a court of equity could not usurp the right of trial which both the state and the accused have in a common-law court before a jury. Every citizen must submit to such accusations, if lawfully made, looking to the vindication of an acquittal and such remedies as the law affords for the recovery of damages. It is often a great hardship to be wrongfully accused of crime, but it is one of the hardships which may result in the execution of the law, against which courts of equity are powerless to relieve. *Suess v. Noble* (C. C.) 31 Fed. 855; *Hemsley v. Myers* (C. C.) 45 Fed. 283; *Kramer v. Board*, 53 N. Y. Super. Ct. 492; *Food Co. v. McNeal*, 1 Ohio N. P. 266.

It is further claimed that the act is unconstitutional as an interference with the right of congress to regulate interstate commerce; and we are cited to *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, in which a law of that state was held invalid to the extent that it prohibited the introduction of oleomargarine into the state from another state in original packages. The case was distinguished from the prior case of *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, in which the supreme court upheld a statute punishing the sale of oleomargarine when colored in imitation of butter. In other words, the supreme court held it to be within the power of the state to require an article of food to be sold for what it really is, and to protect the public from imposition in buying one article of food in the belief that it is another, but beyond the power of the state to prohibit the introduction and sale in original packages of a pure article sold upon its merits. As we read the Ohio Stat-

ute, it does not undertake to prohibit the introduction and sale of a pure article of food, sold for what it really is, but the coloring, coating, or polishing of an article, whereby damage or inferiority is concealed; the act providing in this connection that it shall not apply to mixtures or compounds recognized as ordinary articles of food, if every package sold or offered for sale be distinctly labeled as a mixture or compound, with the name and per cent. of each ingredient therein, and is not injurious to health. The enactment of such a law is clearly within the police powers of the state, upon the principles enunciated in the case of *Plumley v. Massachusetts*, supra, for the protection of purchasers of food from imposition by the concealment of damage or inferiority in food. As in the *Oleomargarine Case*, the article is thus required to be sold for what it really is, without misleading the purchaser to buy it for what it is not. In the *Plumley Case*, Mr. Justice Harlan, speaking for the court, said:

"If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate, which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one state to another state. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of congress to regulate commerce among the states."

But it is argued that coffee treated so as to make *Ariosa* is a pure article of food, and a compound labeled as required by the statute. Again, the act is argued to be unconstitutional because of the construction put upon it by the food commissioner, and this "construction" is his contention that *Ariosa* is coffee so coated as to conceal damage or inferiority, and that it is not a compound or mixture within the meaning of the statute. These are the very questions the decision of which the statute vests in the discretion of the commissioner, as a preliminary matter, in determining to institute prosecutions in the enforcement of the law which he is charged to execute, leaving the guilt or innocence of the party charged to be decided by the proper tribunals when prosecutions are instituted under the law. The constitutionality of the act is to be determined by its language and purpose, and not by the alleged wrongful institution of prosecutions thereunder against those guiltless of a violation of its provisions. There are cases, as insisted by the learned counsel for the complainant, where the operation of a statute constitutional in itself, as administered by the state authorities, may deprive the citizens of rights secured by the constitution of the United States, where a federal court will interfere by injunction to secure to persons aggrieved the benefits of the federal constitution; but they are not cases where a court of equity must draw to itself the administration of the criminal law of a state, sought to be enforced by the officers of the state, and thus determine whether crimes may be prosecuted under valid enactments, because a party may be able to satisfy the court that he is in fact innocent of the charge. Such a construction of the powers of a court of equity would result in a confusion of jurisdiction, and an embarrassment of the ordinary processes of the law without precedent. If this bill can be entertained, it remits to the federal courts the supervision of the pure-food laws of the states, and

their dockets will be crowded with cases of those claiming that their particular articles of food and drink are not within the terms of the law.

Nor do we think that there is ground for injunction in the allegations of the bill that the food commissioner is publishing the fact that the product of the complainant is within the prohibition of the law. If this publication is made to those dealing in the article, it would be within the duty of the commissioner, in advising of contemplated prosecutions. If such publications are libelous, the law affords other means of redress. *Francis v. Flinn*, 118 U. S. 385, 6 Sup. Ct. 1148, 30 L. Ed. 165.

The fact that complainants produced Ariosa under a process protected by letters patent of the United States does not prevent it from coming within the operation of laws passed in the exercise of the police power of the state. The enactment of laws for the protection of health and to prevent imposition in the sale of food products is within this power, and the fact that the process by which it is made is protected by a patent, while it may prevent others from using it during the life of the patent, does not deprive the state of this power of regulation for the general good. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *Palmer v. State*, 39 Ohio St. 236, 48 Am. Rep. 429.

The fact that complainants' product is widely sold in Ohio, and many persons may be subject to prosecution, does not enlarge the jurisdiction of a court of equity to interfere by injunction to control prosecutions for alleged violation of the laws of the state.

We think this case comes within the principles settled by the supreme court in the cases above cited, and the circuit court did not err in dismissing the bill.

LEPPER et al. v. RANDALL

(Circuit Court of Appeals, Third Circuit. February 3, 1902.)

No. 12, Sept. Term, 1901.

1. PATENTS—INFRINGEMENT—DOCTRINE OF EQUIVALENTS.

A patentee is not to be denied protection commensurate with the scope of his actual and distinctly described invention by wholly excluding him from the benefit of the doctrine of equivalents, even as against one who has made only such changes as are palpably colorable and of such character as to show that they were studied evasions of the particular devices described in the patent.

2. SAME—HAM BOILING WRAPPERS.

The Merrill & Lepper patent, No. 624,839, for a wrapper for hams, claim 3, which claims a wrapper "and lacing devices on the back thereof," is infringed by a wrapper which is in all respects identical with the patented article, except that the fastenings are straps and buckles, instead of a lacing cord engaged with hooks, studs, or eyelets.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

E. Hayward Fairbanks, for appellants.

William Morris, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal from a decree dismissing a bill which charges infringement of letters patent No. 624,839, dated May 9, 1899, for "wrappers for hams." 105 Fed. 975. The specification states that:

The "invention consists of a wrapper for bolting a ham therein, more particularly a boneless ham, the same being formed of a piece of canvas or other suitable fabric adapted to envelop a ham, and means for tightly compressing the wrapper thereon and preventing opening thereof, whereby the ham is guarded against disintegration and its juices are retained within the wrapper, thus producing superior results in the flavor, compactness, and appearance of the ham."

The drawings accompanying the specification exhibit a mat or piece of fabric upon which there are four rows of hooks, arranged at right angles, so as to form a quadrilateral figure within the ends of the wrapper. For engagement with these hooks, a cord is provided, and together they constitute a lacing device, by means whereof the ham is tightly and closely secured within the mat. The only claim in question is as follows:

"(3) A wrapper of the character named, formed of a mat and lacing devices on the back thereof, between the corners and center thereof, in series at an angle to each other and to the sides of the mat."

As was said by the court below:

"This invention met with a good deal of success, between 10,000 and 15,000 wrappers being sold during one year. Not long after its introduction to the public, the defendant began to make and sell a wrapper which is in all respects identical with the patented article, except that the fastenings are straps and buckles, instead of a lacing cord, engaged with hooks, studs, or eyelets."

The learned judge who decided the case below had no doubt "that the defendant's straps and buckles are an equivalent of the complainants' cords and hooks," and in this we agree with him; but he held that the complainants were not entitled to invoke the doctrine of equivalency, and this ruling we think was erroneous. By the changes in phraseology which were made pending the application, nothing can fairly be said to have been surrendered or disallowed which the third claim as finally approved plainly included. That claim, as broadly expressed, is for "lacing devices"; and it is not to be implied that either the patent office on the one side or the applicant on the other contemplated any limitation of it which would admit of its evasion by means so palpably colorable as the substitution of straps for cords and buckles for hooks. We cannot impute to either of them an intention to render it practically valueless and its inclusion in the patent a vain thing. *Hillborn v. Manufacturing Co.*, 16 C. C. A. 569, 69 Fed. 958, 28 U. S. App. 525; *Société Anonyme Usine J. Cleret v. Rehfuß* (C. C.) 75 Fed. 657, 661. It may be conceded that the contrivance claimed, though unquestionably new and useful, was comparatively trivial in character, and it is not necessary to decide whether or not its conception was a primary one; for in no case is a patentee to be denied protection commensurate with the scope of his actual and distinctly described and claimed invention by wholly excluding him from the benefit of the doctrine of equivalents. That doctrine, therefore, should have been applied in this case; for it is plainly obvious

that the departures made by the defendant from the patent in suit are merely formal, "and of such character as to suggest that they are studied evasions of those described in the claim in issue." *Bundy Mfg. Co. v. Detroit Time-Register Co.*, 36 C. C. A. 375, 391, 94 Fed. 524; *Boston & R. Electric St. Ry. Co. v. Bemis Car-Box Co.*, 25 C. C. A. 420, 424, 80 Fed. 287.

The decree of the circuit court is reversed, and the cause will be remanded to that court, with direction to enter a decree in the usual form for the complainants.

AMERICAN COAT PAD CO. OF BALTIMORE CITY v. PHOENIX PAD CO.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 422.

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where a patent sued on is unadjudicated, and its validity and infringement are denied by defendant, who sets up valid defenses, there should be strong proof of acquiescence to warrant the granting of a preliminary injunction.

2. SAME—UNADJUDICATED PATENT—ESTOPPEL TO CONTEST VALIDITY.

A corporation, owner of a patent, brought suit against another corporation for infringement. Defendant denied validity, and pleaded prior use and anticipation, but before trial purchased the stock of complainant, and took an assignment of the patent. A person who had owned one share of stock in complainant corporation, and who was at the time of the institution of the suit employed by it as superintendent, after the sale of the stock obtained a patent for a similar article, and a new corporation was formed to manufacture thereunder, in which he became a stockholder and officer. The assignee of the earlier patent commenced a suit against him and the new corporation for infringement. *Held* that, the patent never having been adjudicated, the former suit afforded no ground warranting the issuance of a preliminary injunction against either defendant, who pleaded substantially the same defenses as were set up therein, since such suit did not establish a public acquiescence in the patent, nor create an estoppel against the individual defendant, who was not a party to the record, and whose position in the two suits, even if considered a party to the former suit in fact, was no more inconsistent than that of complainant.

3. SAME—SUIT AGAINST CORPORATION—ESTOPPEL OF STOCKHOLDER.

In a suit for infringement of a patent against a corporation and a person who is a stockholder and officer therein, the fact that the latter, as an individual, may be precluded from denying the validity of the patent, cannot affect the rights of his codefendant.

4. SAME—GROUNDS FOR INJUNCTION—UNFAIR COMPETITION.

The fact that one employed by the owner of a patent in manufacturing the patented article subsequently obtains a patent for a similar article which he claims to be an improvement, and engages in the manufacture and sale of such article under his own patent, affords no basis for an injunction on the ground of unfair competition.

Appeal from the Circuit Court of the United States for the District of Maryland.

Richard S. Culbreth (Frederick M. Feldner, on the brief), for appellants.

Arthur Stuart, for appellee.

Before SIMONTON, Circuit Judge, and PURNELL and WADDILL, District Judges.

PURNELL, District Judge. The appeal is from a decree of the circuit court of Maryland in a patent case, granting a preliminary injunction restraining appellants, defendants below, until the further order of the court, from infringing the patent rights to which the appellee, plaintiff below, claims to be entitled under letters patent No. 359,441, issued to Edward Goldman, dated March 13, 1887. The title of appellee to the letters patent is set out in the verified bill, supported by the affidavits of Gustav Goldman, president of the appellee company, and others. Assuming title to the letters patent to be as stated, it is as follows: From Edward Goldman, patentee by assignment September 29, 1890, to the Eureka Coat Pad Company, and by assignment from the Eureka Coat Pad Company March 16, 1901, to the Phoenix Pad Company, appellee. The assignments are not controverted or questioned. This title is not denied. An answer under oath was waived in the usual form, but defendants below, appellants here, verified the answer, and filed therewith affidavits and exhibits consisting of certified copies of letters patent referred to in the answer. Several issues of fact are raised by the pleadings, a consideration of which at this time would tend to embarrass the trial court in the consideration of the case on the final hearing, and this court, should the case be again brought here by appeal. *Loew Filter Co. v. German-American Filter Co.*, 47 C. C. A. 94, 107 Fed. 950. The cause is not in a condition to be heard as to these matters now, and it must be understood what is said is upon the record as now before the court, and not as to the merits as they may be hereafter presented.

It is stated in the brief of counsel for appellee and in the opinion of the court, which it is said the trial judge delivered before leaving the bench, that the validity of the plaintiff's patent and infringement by defendants are not denied. This statement must refer to something said on the hearing, of which this court knows nothing. An examination of the pleadings discloses the fact that defendant corporation, in the first allegation of its answer, sets out in full the answer of the Phoenix Coat Pad Company (to which it alleges the Phoenix Pad Company is to all intents and purposes successor) in 1889 to a bill filed by the Eureka Pad Company, denying the Goldman patent, alleging two prior patents, No. 41,073, January 5, 1864, to Moses A. Thompson, and No. 236,267, January 4, 1881, to Daniel T. Smith, and that Edward Goldman was not the inventor of the coat pad described, but the same was used many years before by parties in Cincinnati, Baltimore, and New York, naming them. The paragraph is adopted by defendants as part of their answer. Another suit (*The Eureka Coat Pad Company v. H. M. Marcus & Bro.*; 1890) is referred to as involving the Goldman letters patent, and it is conceded that neither of these cases came to a final hearing. There has been no adjudication as to the validity of said letters patent. The validity of the Goldman letters patent is therefore denied in the pleadings.

The infringement of plaintiff's letters patent is set out in paragraph 8 of the bill, and in the eighth paragraph of the defendants' answer

are these words: "The defendants deny the allegations of paragraph 8 of the bill." In the following two paragraphs of the answer defendants admit they have manufactured coat pads, but explain at some length this was done under letters patent No. 673,331, issued to Louis Bouchat, January 10, 1901, and setting out the difference between the coat pad thus manufactured and the coat pad for which the Goldman letters patent provide, and an improvement claimed in such coat pads so manufactured over the Goldman patent. The validity and infringement are thus denied, and clear-cut issues raised. An examination of the record discloses several defenses set up,—no patentable subject of invention, prior use, no adjudication, no infringement, and ability to respond in damages. This is allowable by statutory provision. 29 Stat. c. 391; Bates, Fed. Eq. Proc. 331.

The ground upon which a preliminary injunction was granted is thus set out in the opinion of the court, which counsel say was delivered by the trial judge before he left the bench:

"This is a motion for a preliminary injunction by the Phoenix Pad Company against the American Coat Pad Company and Louis Bouchat for the infringement of letters patent No. 359,441. There has been no adjudication of the patent, but the motion is based upon public acquiescence and estoppel against the defendants. There are many circumstances which show acquiescence. The patent is one that has been in use now since 1887, and under its protection its various owners have established and maintained a business that has been acquiesced in by the competitors of the owner of the patent. There were two suits on the patent begun, but neither was brought to a final hearing. It is said the validity of the patent has been denied by the same persons who are now asserting it. They have been defendants in the previous suits; but I take it that those were the formal defenses; that the real defense in the Marcus case and the case brought against the Phoenix Coat Pad Company by the Eureka Coat Pad Company was noninfringement. Of course, counsel advised that other defenses should be made, and no doubt thought there was ground for them. But that was the answer made under advice of counsel, who made all the defenses that could reasonably be made. The circumstances of these cases tend to show an acquiescence. It is true there has been no adjudication, which is required in many cases, but that which appeals most strongly to the conscience of the court is the circumstance which tended to show that Louis Bouchat, one of the defendants here, was a stockholder of the Eureka Company, which owned this patent; and I understand it to have been admitted at the hearing that he was the superintendent or general manager of the company at the time that it was making and selling coat pads under this patent and asserting it as valid, and at the time at which the Eureka Company sued the Phoenix Coat Pad Company, charging infringement of it. It is shown that he is the principal stockholder and manager of this new company. He was an important officer of some sort in the Eureka Company, which brought the former suit. It was settled by the defendant company, the predecessors of the present complainant, by buying all the stock. The patent was a valuable asset, and Bouchat received four times the original cost of the par value of the stock for his share of this patent. Now that he should immediately start up a competing business and an infringing business (and the infringement is not denied), I think, makes out a very strong case of estoppel and of unfair competition in business. I therefore grant the application."

From the order granting the temporary injunction defendants below appealed, and there are in the record 15 assignments of error. Many of these it would not now be proper to consider. In the suits referred to, both the counsel, the plaintiff below, and Bouchat, defend-

ant below, it seems, occupied reverse positions as to the Goldman letters patent from those now occupied by them. The suits were settled. How is not disclosed. There was no adjudication in either; hence these suits can have no bearing on the case at bar, unless there is something in the pleadings to act as an estoppel or acquiescence.

The defendant corporation was created in 1901. It was not a party to either suit,—was not in existence. Hence it cannot be estopped by either suit or the pleadings therein. It is a legal entity. Nor could it have acquiesced in what occurred before it came into existence. The other defendant below, Bouchat, owned one share of stock in the Eureka Company, and it is said it was admitted at the hearing was the superintendent of the company at the time it asserted the validity of the patent. It does not appear what his duties were or that he had any control of the corporate entity. He was not a party of record. A mere stockholder is not bound by the acts of a corporate body or for which he labors as an employé. *Machine Co. v. Woodward*, 27 C. C. A. 69, 82 Fed. 97. If he were a party, then counsel and the assignor of plaintiff below occupied different relations to the patent from those which they now occupy. Those now asserting its validity then denied it, and vice versa. If the pleadings in those suits, in which nothing was decided, nothing settled, as bearing on the validity of the patent or the present controversy, can act as an estoppel on the one, they are equally an estoppel on the other. On this score the parties would be left on equal footing,—like the soldiers of Franklin, each dead on the other's spear. Bouchat was not a party to either suit. That he was an employé and stockholder in the corporation which asserted the validity of the patent cannot act as an estoppel against him. Suits instituted, but not decided, can have no more effect as an estoppel and acquiescence than the allegation that counsel have represented different parties in such futile litigation. Neither decides principles, affects facts, nor acts as an estoppel. Counsel change their views upon further investigation of a subject. Others may do the same. Even if Bouchat had been a party, formal admissions or allegations in pleadings made by one party to a litigation are not sufficient to bind him in another suit between different parties, involving the same subject-matter. *United States Gramophone Co. v. National Gramophone Co. (C. C.)* 107 Fed. 129. Bouchat was not even a formal party to the suits set up as an estoppel. He was only an employé of one of the party litigants, an owner of one share of stock. He sold his stock and lost his job. In the case above cited, the facts were very similar to the one at bar. Complainant's patents were unadjudicated. No public acquiescence was sufficiently proven, and the motion for an injunction was based upon admissions made by the defendant, under oath, as to the validity of the patents. Circuit Judge Gray refused a preliminary injunction. Where the validity of the patent and the infringement are denied, and defendant sets up valid defenses, there should be strong proof of acquiescence to warrant the issuing of an injunction. *Smith v. Britannia Co. (C. C.)* 92 Fed. 1003; *Consolidated Fastener Co. v. American Fastener Co. (C. C.)* 94 Fed. 523. That plaintiff below alleged, under oath, the patent had been in use by it and its assignors for several years, is not sufficient to prove

public acquiescence. This is denied under oath; it is an issue of fact; to decide it, there must be proof. Nor is it sufficient that one of the defendants below knew the patent had been used,—had been an employé of a company using it, though he is now a stockholder in, and an officer of, the other defendant.

That other defendant has rights. If Bouchat had permitted a decree pro confesso to have been entered against him, and this corporation, which was the original defendant, had answered, and had set up an available defense, such defense would inure to the benefit of both defendants. *Frow v. De La Vega*, 15 Wall. 552-554, 21 L. Ed. 60; *Andres v. Lee*, 21 N. C. 319; *Bates*, Fed. Eq. Proc. § 327, and authorities cited.

But the trial judge seems to put his conclusion on another ground, unnoticed by counsel in the argument or brief,—unfair competition in trade. What is above said applies to this point in the opinion. Defendants seem to be acting in good faith, and allege their ability to respond in damages, which is not questioned. Louis Bouchat believes he has made an improvement in coat pads entitling him to a patent. He has obtained letters patent therefor. This cost something, and a company has been organized to manufacture coat pads under these letters patent. Is this unfair competition in trade? If so, no improvement in a patented article could ever be made by one versed in the art. Louis Bouchat had worked at the trade of making coat pads, became familiar with the art, experienced in the business, and knew the demands of the trade. True, this was when he was a stockholder, owner of one share, and an employé of a corporation using the Gold-man patent, when he probably saw the defects in the coat pads manufactured under that patent, and devised what he conceived to be an improvement in coat pads. He applied for and obtained letters patent for such improvement. Is the fact he was such stockholder and employé of a corporation using a patent to deprive him of the benefit of a supposed inventive genius? If so, no one would probably ever make any improvements on patented articles. The purposes of the patent laws would fail. Persons not familiar with the manufacture of patented articles do not and cannot make improvements. It must be done by an artisan. This is reason, and *ratio legis vitæ est* is as true now as when first written in *Coke on Littleton*. To entertain a suit for infringement of a patent, the plaintiff must not only allege, but prove, he is the inventor or owner of the patent, and that it has been infringed. *Bates*, Fed. Eq. Proc. § 331. The allegations are made; they are denied. The relief depends on the proof.

It seems then the preliminary injunction was improvidently granted by the circuit court, the defendants below being able to respond in damages, there being no threatened irreparable injury, no estoppel, no sufficient acquiescence, and no unfair competition in trade. Defendants should have been required to give bond for an accounting, and the temporary injunction refused.

There is error. Reversed

LARNED v. JENKINS.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1902.)

No. 1,411.

1. MINING CLAIM—LOCATOR ABANDONS RIGHTS BEYOND LOCATION.

One who discovers and locates a lode mining claim under the act of 1866 thereby renounces and abandons all rights and privileges to follow his lode on its course beyond the exterior lines of his patented claim, when he locates it upon the surface of the ground, enters it, and accepts a patent for it under the law.

2. SAME—LOCATOR CANNOT FOLLOW VEIN BEYOND HIS BOUNDARIES ON ITS STRIKE.

The act of July 26, 1866, does not grant to the patentee of a lode mining claim the right to follow on its strike his vein, with its dips, angles, and variations, beyond the boundaries of his location. It permits him to follow it beyond those boundaries on its dip or descending course only.

3. PATENT—TOWN SITE—EXCEPTION OF MINE.

It is mines known to exist at the time a town-site patent is issued, and those only, that are excepted from its grant by section 2392 of the Revised Statutes.

4. TOWN SITE—DEED OF CITY AUTHORITIES IMPERVIOUS TO COLLATERAL ATTACK.

The deed of the city authorities authorized to convey lots in a town site is presumptively valid, and it cannot be collaterally assailed in an action at law for a failure of the authorities to require the preliminaries or perform the requirements antecedent to its execution.

5. ESTOPPEL—ADVERSE CLAIM CREATES NONE AGAINST EJECTMENT BASED ON PRIOR TITLE.

An action of ejectment based upon a patent issued prior to the initiation by the defendant of a mining claim for which he has applied for a patent is not inconsistent with a claim adverse to that application, under section 2326 of the Revised Statutes, and such adverse claim does not estop the plaintiff from maintaining his action.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

See 109 Fed. 100.

This is an action of ejectment. The court below rendered a judgment for the plaintiff on a demurrer to the answer of the defendant. The writ of error challenges this judgment. The property in controversy is an irregular tract of land adjoining the Cook lode mining claim on the north, and it has a length of 357 feet on one side and 283 feet on the other, and a width of 25 feet on one end and 101 feet on the other, measured upon the diagonal lines which form its ends. This tract of land was patented to the city of Central on July 10, 1876, as a part of its town site, was subsequently vested in its successor, the city of Blackhawk, and that city on September 9, 1897, conveyed it to the plaintiff, John C. Jenkins. He set forth this chain of title in his complaint, alleged that the defendant had wrongfully entered upon the premises; that this action was brought in support of an adverse claim filed in the land office against the entry of this land by the defendant, William Larned; that he had disbursed \$30 for plats, abstracts, and copies of papers, and \$50 for a counsel fee, in preparing his adverse claim; and he demanded judgment for the possession of the premises, \$1,000 damages, and \$80 expended in support of the adverse claim. The answer of the defendant is voluminous, but, so far as it relates to any errors assigned in the action of the court below, this is the state of facts which it presents: The patent to the town site and the conveyance under which the plaintiff claims were made as he alleges. On October 8, 1870, a patent was issued to the Cook

lode, which grants a territory 790 feet in length by 50 feet in width, adjoining the tract here in dispute on the south. The Cook vein for the distance of about 120 feet deflects on its strike from the north side line of the Cook mining claim into the tract of land here in controversy, but the deflection of the apex from the north line of the Cook claim does not exceed 7 or 8 feet, and the dip of the vein is at all points slightly to the south, so that where it is deflected from the Cook claim it enters it on its dip 15 or 20 feet below the surface of the ground. Six shafts were sunk, which exposed this vein within the patented territory of the Cook mining claim, and there was a well-known mine thereon before the patent of the disputed territory to the city of Central was issued. This disputed territory was mineral land of great value, and known to be of great value, and there was in fact a mine of gold-bearing quartz, whose top or apex was partly within and partly without this tract, when the patent to the city of Central was issued. In the year 1871 the patentee of the Cook lode mining claim conveyed it to the defendant. On June 7, 1897, one William Rogers discovered a vein of gold on the tract of land in controversy, located a mining claim thereon, called the "Cook No. 2 Lode," applied to the city of Blackhawk to be allowed to purchase the land before the deed therefor was issued to the plaintiff, and on July 14, 1897, conveyed this mining claim to the defendant. The defendant thus holds a deed from the grantee of the Cook lode mining claim, patented in 1870, and another from the locator of the Cook No. 2 lode mining claim, which was located in June, 1897. The court below held that the town-site patent and the deed under it to the plaintiff must prevail over the title which the defendant pleaded, and this is the ruling which is challenged as error.

Willard Teller and Harper M. Orahoad, for plaintiff in error.
Jacob Fillius and R. S. Morrison, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The title of the defendant in error Jenkins consists of a patent to the city of Central, and a regular conveyance from its successor, the city of Blackhawk, to himself. On its face this title is regular and sufficient. Counsel for the plaintiff in error assail it on the grounds (1) that the patent to the city of Central was void and ineffectual to convey this property, because it was reserved from conveyance as a part of a town site, under sections 2386, 2392, Rev. St.; and (2) because the conveyance from the city of Blackhawk was made to Jenkins while Rogers, the grantor of the plaintiff in error, was in possession of the property, and entitled to the deed from the city.

The provisions of sections 2386 and 2392 relevant to this issue are that "where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof," and that "no title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar or copper; or to any valid mining claim or possession held under existing laws."

Prior to the issue of the patent to the town site the grantor of the plaintiff in error had located his claim to the Cook lode upon a tract of land 790 feet long and 50 feet wide, had marked the exterior boundaries of this claim, had entered it and received a patent for it. These acts constituted a notice to the government and to the public

that he was the owner of all the exclusive rights and privileges in this tract of land, and in the lode or vein therein, granted by the act of July 26, 1866, under which he located and entered the land. But it was also a notice, and a legal notice, to the government and to the public that he renounced and abandoned all other rights and privileges pertaining to the discovery of his lode which he did not secure by his patent. When he had discovered his vein, he had the right to locate it, in conformity with the local laws, customs, and rules of miners, upon that portion of this vein which is within the tract conveyed to the city of Central. Until he made his location he was entitled to follow the course of the vein. He chose to locate his claim and to take his patent upon a tract which excluded that portion of the lode within the territory now in dispute. His grantee now asks to renounce this location, and the limitations of the law and of the patent upon which it is based, and to follow the lode wherever it leads, as the discoverer might have done before he located and marked the boundaries of his claim. The action of his grantor has forever estopped him from pursuing this course. A discoverer of a vein cannot be permitted to locate his claim, present his diagram, and obtain a grant for the lode and the land he claims, and then disregard the limitations of the grant and follow the lode without his location wherever it happens to lead. One who discovers and locates a lode mining claim under the act of 1866 thereby renounces and abandons all rights and privileges to follow his lode on its course beyond the exterior lines of his patented claim, when he locates it upon the surface of the ground, enters it, and accepts a patent for it under the law. *Mining Co. v. Old*, 79 Fed. 598, 606, 25 C. C. A. 116, 124, 49 U. S. App. 201, 213, 214; *Wolfley v. Mining Co.*, 4 Colo. 112, 116; *Mining Co. v. Rogers*, 8 Colo. 34, 38, 5 Pac. 661.

The position of counsel for plaintiff in error, that because the act of 1866 permits the discoverer of a lode to receive a patent therefor, "granting such mine together with the right to follow such vein or lode with its dips, angles and variations to any depth although it may enter the land adjoining," the locator has the right to follow the lode on its strike beyond the boundaries of his location, is not tenable. It is only in its descending course that he may follow its dips, angles, and variations. He cannot follow these dips, angles, and variations "to any depth" on the strike of the vein, or on its ascending course. The words "to any depth," as well as the other provisions of the statute which require the locator to file a diagram of the tract he claims, and permit him to receive a patent of this limited area, demonstrate the fact that it was not the intention of congress to grant to the patentee of a lode mining claim under the act of 1866 the right to follow it on its strike beyond the boundaries of the location he selects and secures. The act of July 26, 1866, does not grant to the patentee of a lode mining claim the right to follow his vein on its strike, with its dips, angles and variations, beyond the boundaries of his location. It permits him to follow it beyond those boundaries on its dip or descending course only. The result is that Lyman Cook, the patentee of the Cook lode, derived no title or interest in the land here in dispute by his patent, and the plaintiff in error has taken none through Cook's deed.

It is insisted, however, that, if this be true, the patent to the city of Central conveyed no title to this property, because it was reserved from conveyance by the patent as a mine by the sections of the statute to which reference has been made. But it is only mines of gold, silver, cinnabar, or copper which are known to exist at the time of the issue of the town-site patent and mining claims and possessions then lawfully existing that are reserved from patent by section 2392. *Davis v. Wiebbold*, 139 U. S. 507, 518, 526, 527, 11 Sup. Ct. 628, 35 L. Ed. 238; *Dower v. Richards*, 151 U. S. 658, 663, 14 Sup. Ct. 452, 38 L. Ed. 305; *Smith v. Hill*, 89 Cal. 122, 125, 26 Pac. 644; *Lindl. Mines*, § 175B, p. 216. There is no allegation in the answer in this case that there was any known mine upon the tract here in dispute at the time when the patent to the city of Central was issued. On the other hand, the fact that Lyman Cook, the discoverer of the Cook lode, renounced all claim to this property, and had excluded it from his location and patent, before the grant to the city was made, and the fact that there was no mining claim or possession of this disputed tract in existence at the time the town-site patent was issued, clearly indicate that no mine was then known to exist upon it. The argument of counsel that, because there was a discovery and possession of the Cook lode at places within the limits of the Cook location, that lode and mine were known to exist outside of that location and in this disputed territory, is not persuasive. Indeed, the diagram of his location which Cook made, and the patent which he received, conclusively show that Cook's lode and mine were not known or believed to pass without the north line of the tract he patented, on its strike into this land which he abandoned. Nor was there any possession of this mineral vein within the tract here in controversy which could limit the grant of the patent under the provisions of section 2386. It is only a possession of mineral veins recognized by local authorities, and only to the extent so possessed and recognized, that the title to town lots is subject to under that section. And the answer, the location and patent of Cook, conclusively show that the extent of the possession of this vein recognized by local authorities and by Cook himself was the possession of it within the limits of his patented claim. There was neither possession, nor recognition of possession of it without those limits. There was therefore no exception or limitation of the grant of this land under the patent of the town site by any of the provisions of sections 2386 and 2392.

But it is said that even if the patent conveyed the title to this property to the city of Central and its successor, the city of Blackhawk, the conveyance of the latter to the defendant in error was void, because the property was not appraised and sold at public auction, as required by sections 4339 and 4342 of *Mills' Annotated Statutes of Colorado*, and because the grantor of the plaintiff in error, William Rogers, who took possession on June 7, 1897, and applied for a deed to himself, was entitled to the conveyance from the city of Blackhawk, while the defendant in error had no right to it. The power and duty of the city of Blackhawk to dispose of this land, however, are not governed by the sections of the statute to which reference has been made, which were first enacted in 1881. They were controlled, on the other hand,

by a special act of the legislature of the state of Colorado, approved February 1, 1876, which may be found in the Laws of Colorado for that year, at page 175. This act empowered the mayor of the city of Central, with the consent of its council, to sell any unsold lots in the town site at private sale, under certain circumstances, and nowhere required the city authorities to give a preference in the purchase to those who entered upon the possession of the property subsequent to the issue of the patent. No violation or disregard of the terms or limitations of the trust imposed upon the city is therefore disclosed by the pleadings, and the deed to the defendant in error is not invalid.

Moreover, the questions whether or not the city authorities complied with the terms of the statutes prescribing the preliminaries, and declaring the method for a conveyance of the lots in the town site, and whether or not on that account its deed may be avoided, cannot be considered in this action of ejectment. Whether the deed was executed after compliance with the required preliminaries, and in strict accordance with the requirements of the statutes, or not, it conveyed the legal title to this property to the defendant in error. The statutes of Colorado intrusted to the authorities of the city the power to hear and determine the questions whether or not these preliminaries had been performed and these requirements had been fulfilled, and authorized them, upon that determination, to make the conveyance. The legal presumption is that they discharged these duties honestly and in accordance with the provisions of the law. That presumption might undoubtedly be overcome in a suit in equity by pleading and proof of gross mistake, fraud, or error in law. No such proceeding has been instituted. No suit to attack or avoid this deed has been brought. This is an action at law, and in this action the defendant in error had a right to rely upon his conveyance. It cannot be collaterally attacked in this action of ejectment. The deed of the city authorities authorized to convey lots in a town site is presumptively valid, and it cannot be collaterally assailed in an action at law for a failure of the authorities to require the preliminaries or perform the requirements antecedent to its execution. *Chever v. Horner*, 11 Colo. 68, 71, 79, 17 Pac. 21, 7 Am. St. Rep. 202; *Smith v. Pipe*, 3 Colo. 187, 199; *Anderson v. Bartels*, 7 Colo. 256, 263, 266, 267, 3 Pac. 225.

Finally it is contended that the defendant in error is estopped from claiming that he is the owner of this land under the patent of the town site, and that it was not subject to entry as a mining claim on June 7, 1897, because he has pleaded in his complaint that this suit is brought in support of an adverse claim filed in the land office against the entry of this land for patent by the plaintiff in error under section 2386 of the Revised Statutes. But there is nothing inconsistent in the adverse claim of Jenkins and this action of ejectment. The statutes permit any one to file an adverse claim whenever application is made to enter a mining claim upon the public lands for patent. If an attempt is made to secure a patent to land which has already been conveyed by the government, the land department has no jurisdiction to consider or determine the questions it presents. An adverse claim presented to that department which discloses the fact that the adverse claimant holds it under a patent already issued is entirely con-

sistent with an action of ejectment, based upon that patent, to turn the trespassing claimant out of possession. Not only this, but section 2326 of the Revised Statutes, under which the adverse claim is prosecuted, requires the claimant to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and to prosecute the same with reasonable diligence to final judgment. The averments of the complaint base the claim of the defendant in error upon the patent of the town site issued in 1876. That pleading contains no averment or intimation of any concession or claim that the disputed property was a portion of the public domain, and subject to the disposition of the land department, after the issue of the patent to the city of Central. The only unwarranted averment in that pleading is the allegation of the expenses of preparing and presenting the adverse claim, and the most that can be said of this is that it is immaterial. No relief was granted on account of it, and there is nothing in the pleadings, the proceedings, or the judgment inconsistent with the claim and recovery of possession by the defendant in error upon the patent of the town site in 1876. An action of ejectment based upon a patent issued prior to the initiation by the defendant of a mining claim for which he has applied for a patent is not inconsistent with a claim adverse to that application, under section 2326 of the Revised Statutes, and such adverse claim does not estop the plaintiff from maintaining his action.

The result is that the patent of the town site conveyed the title to this land to the city of Central and its successor, the city of Blackhawk, and the conveyance of the latter vested it in the defendant in error. The deed of Lyman Cook conveyed no title or interest in this property, because he had none. The attempt of William Rogers to initiate a mining claim upon it in 1897 was futile, because all right, title, and interest in it had passed out of the government in 1876. His conveyance to the plaintiff in error, therefore, was ineffectual, and the judgment below must be affirmed. It is so ordered.

DEMING v. McCLAUGHRY, Warden of U. S. Penitentiary. Ft. Leavenworth.
Kan.

(Circuit Court of Appeals, Eighth Circuit. February 10, 1902.)

No. 1,656.)

1. COURT-MARTIAL—REGULAR OFFICERS INCOMPETENT TO TRY VOLUNTEERS.

Officers of the regular army are incompetent, under the seventy-seventh article of war, to try the officers or soldiers of the volunteer forces raised under the acts of April 22, 1898, and March 2, 1899 (30 Stat. 361, c. 187; *Id.* 977, c. 352).

2. WRIT OF HABEAS CORPUS—FUNCTION.

The writ of habeas corpus is not available to review an erroneous judgment of a court having jurisdiction. But it is effective to challenge a judgment rendered by a court without jurisdiction, and to relieve the defendant from its effect.

3. COURT-MARTIAL—JURISDICTION—INDISPENSABLE CONDITIONS.

A court-martial is a court of inferior and limited jurisdiction. Proof (1) that it was convened by an officer empowered by the statutes to call

it; (2) that the officers whom he commanded to sit upon it were of those whom he was authorized to detail for that purpose; (3) that the court thus constituted was vested with power to try the person and the offense charged; and (4) that its sentence was in conformity to the statutes,—is indispensable to its jurisdiction and to the validity of its judgment or sentence.

4. SAME—JUDGMENT AGAINST A VOLUNTEER BY A COURT-MARTIAL OF REGULAR OFFICERS WITHOUT JURISDICTION AND VOID.

No officer is authorized, but every officer is forbidden, to constitute of officers of the regular army a court-martial to try a volunteer, and the judgment of such a court-martial against a volunteer is without jurisdiction and void.

5. CONSTRUCTION OF STATUTES—OPINIONS OF OFFICERS OF OTHER DEPARTMENTS.

The opinions of officers of other departments of the government relative to the construction and effect of statutes intrusted to them to enforce deserve serious consideration, and may well lead the way to decisions where the statutes are ambiguous and their meaning doubtful. But it is a duty of the courts, which they may not renounce, to interpret legislation by their own judgments; and where the words of a statute are clear, and its meaning plain, these must prevail, notwithstanding the opposing opinions of officers of other departments of the government.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Kansas.

This is an appeal from an order of the circuit court, which denied the petition of Peter C. Deming for a writ of habeas corpus upon this state of facts: Deming was, on March 29, 1900, a captain in the subsistence department in the volunteer army of the United States. On that day William R. Shafter, a major general of the volunteer army, and a retired brigadier general of the regular army of the United States, ordered that a general court-martial, composed entirely of officers of the regular army, should convene "for the trial of Captain Peter C. Deming, assistant commissary of subsistence, U. S. volunteers." The court thus called sat, tried the appellant upon some charge, and sentenced him to dismissal from the service of the United States, and to confinement in the penitentiary for three years, and this sentence was approved by the secretary of war, and confirmed by the president of the United States. Deming is confined in the penitentiary at Leavenworth, Kan., under a mittimus based on this judgment. He avers that the sentence upon him is void, and that he is illegally deprived of his liberty, because Gen. Shafter, a retired officer of the regular army, had no authority to convene the court, and because the court-martial which condemned him was not regularly constituted or organized, in that it was composed entirely of officers of the regular army, who were expressly prohibited to hear or determine any charge against him, an officer of the volunteer army, under the seventy-seventh article of war (Rev. St. § 1342), which reads: "Officers of the regular army shall not be competent to sit on courts-martial to try the officers and soldiers of other forces except as provided in article seventy-eight."

John H. Atwood (William W. Hooper, on the brief), for appellant.

E. H. Crowder and Edward A. Rozier (George C. Hitchcock, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The petitioner, Deming, was an officer of the volunteer force raised under the act of congress of March 2, 1899 (30 Stat. 977, c. 352). He was tried and convicted by a court-martial composed of officers of the

regular army. The seventy-seventh article of war declares that officers of the regular army are not competent to sit on courts-martial to try the officers and soldiers of other forces. The crucial question in this case is, was this volunteer army the same army as the regular army, or was it a different and supplemental army? Was this volunteer force raised under the act of 1899 the same force as the regular army, or was it one of the "other forces" of the United States within the intent and meaning of article 77? On a cursory reading of the article the question does not seem to be difficult, nor the true answer to it doubtful. And, were it not for the earnest and forceful presentation of their view by the learned counsel for the government, and for the fact that the general commanding the army under the advice of the judge advocate general has held that under the act of April 22, 1898 (30 Stat. 361, c. 187), and of March 2, 1899 (30 Stat. 977, c. 352), the volunteer force is the same force as the regular army, and that the officers of the latter may lawfully try the officers of the former (Circular 21, H. Q. A., June 30, 1898), that contention might not seem forceful. But the opinions of the officers of the executive department of a government relative to the construction of a statute whose execution has been intrusted to them justly command and should receive the careful consideration of the courts, and in doubtful cases they should be permitted to lead the way to their decisions. Their opinions ought not to be overruled or disregarded unless upon a deliberate and careful review of the decisions which they render it clearly appears that they are tainted with error. On the other hand, the decisions of these officers are not controlling or conclusive upon the courts. It is the function and duty of the judicial department of the government to construe its statutes and to declare their meaning. That duty the courts may not renounce or abandon to others, and in its discharge they must exercise their own independent judgments, guided only by the established principles of the law and the recognized canons of interpretation. While the opinions of the officers of the executive department of the government may be permitted to lead the way to the proper construction of ambiguous statutes intrusted to them to enforce, yet where the words of the acts are plain, and their meaning is clear, these must prevail. *Hartman v. Warren*, 76 Fed. 157, 162, 22 C. C. A. 30, 36, 40 U. S. App. 245, 254; *Webster v. Luther*, 163 U. S. 331, 342, 16 Sup. Ct. 963, 41 L. Ed. 179; *U. S. v. Tanner*, 147 U. S. 661, 663, 13 Sup. Ct. 436, 37 L. Ed. 321; *Merritt v. Cameron*, 137 U. S. 542, 11 Sup. Ct. 174, 34 L. Ed. 772; *U. S. v. Graham*, 110 U. S. 219, 3 Sup. Ct. 582, 28 L. Ed. 126; *Swift, C. & B. Mfg. Co. v. U. S.*, 105 U. S. 691, 26 L. Ed. 1108.

Guided by these familiar and indisputable rules of law, the question whether the volunteer force raised under the act of 1899 was the same force as the regular army, or one of the "other forces" of the United States, within the meaning of article 77, will be considered. That article reads:

"Officers of the regular army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces except as provided in article 78."

The exception in article 78 relates to the officers of the marine corps, and does not withdraw the appellant or the officers who tried him

from the prohibition of the general rule announced in article 77. The provisions of the act of March 2, 1899, pertinent to the issue under consideration are these:

"That from and after the date of the approval of this act the army of the United States shall consist of * * * ten regiments of cavalry, seven regiments of artillery, twenty-five regiments of infantry," and appropriate officers, departments and corps. 30 Stat. 977, c. 852, § 1.

"That to meet the present exigencies of the military service, the president is hereby authorized to maintain the regular army at a strength of not exceeding sixty-five thousand enlisted men to be distributed amongst the various branches of the service, including the signal corps, according to the needs of each, and raise a force of not more than thirty-five thousand volunteers to be recruited as he may determine from the country at large, or from the localities where their services are needed, without restriction as to citizenship or educational qualifications, and to organize the same into no more than twenty-seven regiments organized as are infantry regiments of war strength in the regular army and three regiments to be composed of men of special qualifications in horsemanship and marksmanship to be organized as cavalry for service mounted or dismounted, * * * provided, further, that such increased regular and volunteer force shall continue in service only during the necessity therefor and not later than July 1st, 1901. All enlistments for the volunteer force herein authorized shall be for the term of two years and four months unless sooner discharged." 30 Stat. 977, § 12.

That the president shall have power to continue in service or to appoint by and with the advice and consent of the senate certain brigadier generals of volunteers and major generals of volunteers: "provided, that regular army officers continued or appointed as general officers or as field or staff officers of volunteers under the provisions of this act shall not vacate their regular army commissions." 30 Stat. 977, § 13.

That the president is authorized to appoint, with the advice and consent of the senate, officers of the volunteer staff, including 12 assistant commissaries of subsistence with the rank of captain. 30 Stat. 977, § 14.

That the officers and enlisted men of the volunteer army shall be mustered out of the military service of the United States and discharged as provided in the act of April 22, 1898, provided that enlisted men of volunteers who desire to remain in the military service may be transferred to and enlisted in the regular army. 30 Stat. 977, § 15.

It will not be unprofitable to briefly call to mind the course of the legislation, decision, and practice of the nation relative to the matter in hand prior to 1899 before entering upon the discussion of the question which that act and the seventy-seventh article of war present. The American articles of war of 1776 provided that "the officers and soldiers of any troops, whether minute men, militia, or others," should, when joined with the regular forces, be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, "save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender." Davis, Military Law, p. 617. Section 6 of the act of May 2, 1792, reads in this way: "And be it further enacted, that courts-martial for the trial of militia shall be composed of militia officers only." 1 Stat. 264, c. 28. This provision was re-enacted in the act of Febru-

ary 28, 1795 (1 Stat. 424, c. 36), in the act of April 18, 1814 (3 Stat. 134, c. 82), and in the act of July 29, 1861 (12 Stat. 282, c. 25, § 5). From these acts it will be seen how uniformly the legislation and practice of the nation excluded the officers of the regular army from courts-martial to try the officers and soldiers of the militia. Not only this, but the act of April 10, 1806, which established the rules for the government of the armies of the United States, contained this article: "Art. 97. The officers and soldiers of any troops, whether militia or others, being mustered and in the pay of the United States, shall, at all times and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war and shall be subject to be tried by courts martial in like manner with the officers and soldiers of the regular forces, save only that such courts martial shall be composed entirely of militia officers only." 2 Stat. 371. The fact will not be overlooked that under this article the officers of the regular forces were disqualified from trying the officers and soldiers of troops joined or acting in conjunction with the regular army, whether such troops were militia, volunteers, or others. This enactment remained unchanged until in 1874 the present article 77 took its place. Rev. St. p. 237; 18 Stat. 113, c. 333. During all this time the nation maintained a regular army, and from time to time the president was empowered by congress to raise volunteer forces to augment the strength of the regular force. Congress provided for the enlistment of volunteers in 1812 for the war with Great Britain (2 Stat. 676, c. 21), in 1836 for the Seminole war (5 Stat. 32, c. 80), in 1839 to protect the Maine boundary (5 Stat. 355, c. 89), in 1846 for the war with Mexico (9 Stat. 9, c. 16), and in 1861 for the war of the Rebellion (12 Stat. 268, c. 9; Id. 274, c. 17). No opinion of any court, or of any officer of the war department, rendered prior to June 27, 1898, to the effect that any of these volunteer forces was the same force as the regular army, or to the effect that the officers of the latter were competent to sit on courts-martial to try the officers of the former, either under the old article 97 or the present article 77, has been called to our attention. On November 19, 1863, Judge Advocate General Holt declared that "the words 'militia officers,' as employed in the ninety-seventh article of war, have been interpreted since the commencement of the Rebellion as synonymous, so far as the organization of courts-martial is concerned, with 'volunteer officers.' This construction undoubtedly accords with the spirit of the article, and in its practical enforcement the object of the rule is accomplished." In the practice of the department the officers of the regular army were not permitted to sit on courts-martial to try the officers or soldiers of the volunteer force. G. O. 53, Dept. East, 1864; G. O. 16, Dept. Missouri, 1864; C. C. M. O. 11, 13, 16, Dept. Kentucky, 1865. The unanimous opinion of the writers upon military law was that the volunteer army was one of the "other forces" than the regular army, and that the officers of the latter were prohibited from sitting on courts-martial to try the officers or soldiers of the former. Béné, *Military Law* (Ed. 1866) p. 25; Winthrop, *Abridgment of Military Law*, 29; Winthrop, *Military Law and Precedents* (2d Ed.) 92; Da-

vis, *Military Law*, pp. 27, 496. The decisions of the courts had recognized the two forces as different,—the one as temporary, called forth by the exigency of the time, to serve during war or its imminence, and then to be dissolved into its original elements; the other as permanent and perpetual, to be maintained in peace and in war. *U. S. v. Sweeny*, 157 U. S. 281, 15 Sup. Ct. 608, 39 L. Ed. 702; *U. S. v. Merrill*, 9 Wall. 614, 19 L. Ed. 664; *Kerr v. Jones*, 19 Ind. 351; *Wantlan v. White*, Id. 470. The laws and the long-continued practice of a people evidence its public policy. *Vidal v. Girard's Ex'rs*, 2 How. 127, 197, 11 L. Ed. 205; *U. S. v. Association*, 58 Fed. 58, 69, 7 C. C. A. 15, 73, 19 U. S. App. 36, 54, 24 L. R. A. 73. The uniform course of legislation, decision, and practice upon the subject under consideration for more than a century establish the fact that it had become the public policy of the United States to prohibit the trial of the officers and soldiers of the volunteer force and of the militia by the officers of the regular army.

Nor is the reason for this legislation and action far to seek or difficult to discern. It was not, as suggested by counsel for the government, that the volunteers and militia were citizens of the states, and that their officers were generally commissioned by the governors. It lies deeper, and is more fundamental and potential. It is grounded in that cardinal principle of Anglo-Saxon jurisprudence that no man shall be tried or condemned save by the hearing and judgment of his peers; in that principle which inspired the rule that deprives judges of the power to try persons accused of heinous crimes in civil life, and remits their trial to the forum of their peers, the jury. The officers of the regular army are generally taught in their youth the laws that govern the regular force, that high regard for truth and honor and that prompt and exact obedience to orders which condition its high efficiency. The officers of the volunteers spend their earlier days without knowledge of military law, preparing for agricultural, mechanical, mercantile, or professional pursuits, unaccustomed to military discipline, and exempt from the controlling commands of superiors. The officers of the regular army make the discipline of that army, the preparation for war, and war itself the work of their lives. Their hopes and their aspirations are to excel in this, their chosen profession, and upon it they rely for their livelihood. The officers of the volunteers look to civil pursuits for their ultimate success and sustenance. They leave these pursuits for a few short months at the call of their country to subdue a rebellion against or to defeat an enemy of their nation. They seek not so much to discipline the army they join, and to prepare it for war, as to speedily conclude the war, restore peace, and return to their chosen pursuits. Their hopes and aspirations center, not in their temporary occupation, but in the pursuits they have left, and to which they are soon to return. More than all this, the officers of the regular army know the unwritten code of military thought and action, and the habit of the trained soldier's life, and know them so well that their practice is involuntary, while a neglect of them seems inexcusable. The officers of the volunteer force come to the army in ignorance of this code and custom. They have short time to learn or to practice them. Their invariable practice does

not always seem to them essential to the defeat of the enemy and a speedy peace, and the heinousness of a disregard of some of their requirements does not always impress them. So it is that the thoughts, actions, habits, and ambitions of the officers of the regular army differ widely from those of the volunteers. Many things in the life of the soldier seem vital to the former that have small importance in the eyes of the latter. Many military offenses seem heinous to the former that appear venal to the latter. Congressmen have not been ignorant of these facts. They have associated with, known, and honored the officers of the regular army. They have known their pride in their profession, in the efficiency of the regular force, and the abhorrence with which they have looked upon any breach of either the moral or the military law. They have known the volunteers. These have been their constituents and their friends. Many of the members of congress have been volunteers themselves. In the light of these facts, and with this knowledge, they have thought that the officers and soldiers of the volunteer force ought not to be tried by the officers of the regular army; and they have made and maintained for more than a century the legislation which has been quoted to carry that thought into effect.

This, then, was the situation when the act of April 22, 1898, under which a judge advocate general first held that officers of the regular army could lawfully sit on courts-martial to try the officers and soldiers of the volunteer force, was passed. The acts of congress had prohibited for nearly a century, and still expressly forbade it. The decisions and the practice of the officers of the war department interdicted it. The established policy of the nation inhibited it. In the light of this legislation, decision, and policy the acts of 1898 and 1899 must be read and construed. What was there in these acts to repeal the statutory inhibition and reverse the public policy of a century? The decisions, the policy, and the practice rested on the acts of congress, and certainly nothing less than an express repeal by that body of the plain inhibition of article 77, or such legislation as clearly shows the undoubted intention of congress to strike it down, ought to be permitted to withdraw it, and to reverse the policy and practice of 80 many years.

The first argument in support of the contention of the government that the acts of 1898 and 1899 have had this radical effect is that, while the volunteer army was one of the "other forces" than the regular army under article 77, prior to the act of 1898, that act made it the same force as the regular army, because it provides that the organized and active land forces of the United States shall consist of the army of the United States and of the militia of the several states when called into the service of the nation; that the regular army is the permanent military establishment, which is maintained in peace and war, and that the volunteer army is maintained only during the existence of war, or while war is imminent, and is raised and organized only after congress authorizes the president so to do. 30 Stat. 361, c. 187, §§ 2-4. They insist that this enactment declares that there were but two forces of the United States,—the army and the militia,—and that, as the regular army was one part of the former force and the volunteer army was

another part of the same force, the latter army could not, after this enactment, be one of the "other forces" than the regular army, under article 77. There are several reasons why this argument fails to convince. In the first place, there is no repeal, modification, or reference to the provisions of article 77 in this act or in the act of 1899. There is nothing in either of them to indicate that in considering or enacting this legislation congress intended to modify the terms or the effect of that article, and, as no such intention appears in the legislation, the conclusive presumption is that no such intention existed. Moreover, the care and emphasis with which the difference between the regular army and the volunteer army is maintained throughout the act of 1898 demonstrate the fact that it was the positive intention of congress to maintain the distinction between the two forces. Starting with the declaration that the active land forces shall consist of the army and the militia, that the regular army is the permanent military establishment and the volunteer army is the temporary force in which enlistments shall be for a term of two years, unless sooner terminated, it contains these significant provisions:

"Sec. 5. That when it becomes necessary to raise a volunteer army the president shall issue his proclamation stating the number of men desired.

"Sec. 6. That the volunteer army and the militia of the states when called into the service of the United States shall be organized under, and shall be subject to, the laws, orders and regulations governing the regular army.

"Sec. 7. That all organizations of the volunteer army shall be so recruited from time to time as to maintain them as near to their maximum strength as the president may deem necessary."

Sec. 8. That all returns and muster rolls of the volunteer army "shall be rendered to the adjutant general of the army and filed in the record and pension office of the war department."

"Sec. 9. That in time of war, or when war is imminent, the troops in the service of the United States, whether belonging to the regular or volunteer army or to the militia, shall be organized" into divisions of three brigades.

Section 10 relates to the staff officers.

Sec. 11. That the president is hereby authorized to appoint in the volunteer army "one major general for each army corps or division and one brigadier general for each brigade," and any officer so selected and appointed from the regular army shall be entitled to retain his rank therein.

"Sec. 12. That all officers and enlisted men of the volunteer army and of the militia of the states when in the service of the United States, shall be in all respects on the same footing as to pay, allowances, and pensions as that of officers and enlisted men of corresponding grades in the regular army.

"Sec. 13. That the governor of any state or territory may, with the consent of the president, appoint officers of the regular army in the grades of field officers in organizations of the volunteer army, and officers thus appointed shall be entitled to retain their rank in the regular army.

"Sec. 14. That the general commanding a separate department or a detached army is authorized to appoint from time to time military boards of not less than three nor more than five volunteer officers of the volunteer army to examine into the capacity, qualifications, conduct and efficiency of any commissioned officer of said army within his command."

These various sections are utterly inconsistent with the view that the volunteer army was made the same force as the regular army, and that all distinctions in the treatment and trial of the members of the two forces were stricken down by the casual enumeration of the active land forces of the nation in the first section of the act. If the volunteer army was the regular army, why the declaration in section 6 that

the volunteer army should be subject to the laws, orders, and regulations governing the regular army; in section 12, that the officers and enlisted men of the volunteer army should be on the same footing as men of corresponding grades of the regular army; and in section 13, that officers of the regular army commissioned as officers in the volunteer army should retain their rank in the former? These provisions are pregnant with significance. But section 14 places the purpose and intention of the lawmakers to maintain the established rule that the volunteer army was one of the "other forces" than the regular army within the meaning of article 77 and the law and the policy that their officers and soldiers should not be tried by the officers of the regular army beyond doubt or cavil. It provides for military boards to examine into the capacity, qualifications, conduct, and efficiency of officers of the volunteer army. But, in accordance with the then existing law and policy of the nation, it excludes from these boards all officers of the regular army, and directs that they shall be composed entirely of officers of the volunteer force. When the entire act of 1898 is carefully read and considered, it is found to contain no indication of any intention on the part of congress to modify the terms or the settled construction of article 77. On the other hand, it evidences a plain purpose to maintain the rule and policy which classified the volunteer army among the "other forces" than the regular army, and prohibited the officers of the latter from sitting on courts-martial to try the officers and soldiers of the former.

Another reason why the argument based upon the classification in the first section of this act is not persuasive is that it is fallacious. Stated in syllogistic form, it is: The land forces are composed of the army and the militia. The army is composed of the regular army and the volunteer army. Therefore the volunteer force is the regular force. When thus stated, the fallacy is apparent. The contention is based on the false assumption that every part of a military force is the same part as every other part; that every species of a genus is the same as every other species of that genus; that every class properly described by a generic term is the same class as every other class covered by that term. Illustrations make the fallacy plain. Oranges and apples are fruit, yet oranges are other fruit than apples. The Russians and Americans are people, and yet the white Americans are other people than the black Americans. The cavalry, infantry, and artillery of the regular army is a military force, and yet the cavalry and infantry are other forces than the artillery. So the regular army and the volunteer army, under the classification of 1898, constitute a force, and yet the volunteer army, both in fact and within the meaning of article 77, is another force than the regular army.

Again, even if the contention of counsel for the government were conceded, it would but serve to strengthen the position that the petitioner, who was commissioned under the act of 1899, was a member of other forces than the regular army. The argument rests entirely on the declaration of the act of 1898 that the army of the United States is composed of the regular army and the volunteer army, and that the land forces consist of the army and the militia. The act of 1899 contains no such classification, but, on the other hand, expressly declares

that the "army of the United States shall consist" of the cavalry, infantry, and artillery of the regular army; that the regular army may be temporarily increased to 65,000 men, and that the president may "raise a force of not more than thirty-five thousand volunteers." 30 Stat. 977, 979, c. 352, §§ 1, 12. The petitioner is one of these volunteers, and, if the effect of the classification of 1898 had been all that counsel claims, yet by the literal terms of the act of 1899 Deming was a member of another force than the regular army,—a member of the volunteer force.

Counsel for the government advance another argument in support of the contention that the volunteers, under the acts of 1898 and 1899, were not other forces than the regular army. It is that the law and the practice upon this subject during the war of the Rebellion were established to prevent state troops from being tried by the officers of the regular army; that the volunteers during that war were raised by the states, and officered by their governors; and that their regiments were designated by the names of the states from which they came, while the volunteers called under the acts of 1898 and 1899 were raised under a different system, were not so nearly assimilated to the militia, and that those received under the act of 1899 were not apportioned to or raised by the states, their regiments were not designated by the names of the states, but, like the regulars, they were enlisted from the country at large, their regiments took numbers supplemental to those of the regiments of the regular army, and their officers were appointed, not by the governors, but by the president. This contention, in our opinion, is based on a misconception of the real reason which inspired the legislation and the policy which for so many years has prohibited the trial of volunteers by regulars. That reason was, not that the volunteers were state troops and the regulars national troops, that the volunteers were raised by the states and their officers were appointed by the governors, while the regulars were raised by the nation and their officers were commissioned by the president. It was, as has been shown in an earlier part of this opinion, that the knowledge, training, habits, hopes, and ambitions of the officers of the regular army, who had devoted themselves for life to the discipline and efficiency of that force, necessarily conditioned their opinions of the heinousness of military offenses; and these opinions, this knowledge and training, these hopes and ambitions, differed so widely from those of the officers of the volunteer force, who came from civil life, for a limited time, ignorant of military law and of the customs and practices of a soldier's life, and anxious to speedily return to their civil occupations, that congress established the rule that the former should not be competent to sit on courts-martial for the trial of the latter. The reason of this rule applies to the volunteer force raised under the act of 1899 with as much force as to those raised during the war of the Rebellion.

Finally, it is contended that the provision of section 6 of the act of April 22, 1898, "that the volunteer army and the militia of the states when called into the service of the United States shall be organized under, and shall be subject to, the laws, orders and regulations governing the regular army," indicates that the volunteer army and the

militia are a part of the regular army, and hence the same force as that army, within the meaning of article 77. The enactment appears to us to demonstrate the contrary, and that because, if the volunteers and the militia were a part of the regular army, they were subject to the laws, orders, and regulations governing it, without a special declaration to that effect. A similar provision may be found in the act of July 22, 1861 (12 Stat. 269, c. 9, § 2), under which the volunteer forces for the war of the Rebellion were enlisted, and yet those volunteers were held to be other forces than the regular army.

The result is that when the acts of 1898 and 1899 were passed there was an article of war in force enacted by congress which expressly prohibited the officers of the regular army from sitting on courts-martial to try the officers or soldiers of other forces. Prior to the passage of these acts the volunteer force was in fact, and had been uniformly held to be, one of these other forces, so that in law and in practice this article of war forbade the officers of the regular army to try the officers or soldiers of the volunteers. There is no express repeal or modification of this inhibition in the acts of 1898 and 1899. There is nothing in these acts repugnant to or inconsistent with the prohibition, nothing to show that congress intended thereby to withdraw or to change it, but strong indications, in the marked distinction it studiously maintains between the regular army and the volunteer army, and in the fact that it provided for military boards composed entirely of officers of the volunteer army to examine into the efficiency and qualifications of the volunteer officers, that it intended to preserve and to maintain the inhibition. The reason which inspired this legislation and the policy and practice it evidences apply with all their cogency and force to the officers and soldiers of the volunteer force raised under the act of 1899. These facts and the considerations to which we have adverted have irresistibly forced our minds to the conclusion that the volunteer force raised under the act of 1899 was not the same force as the regular army, but that it was one of the "other forces" specified in article 77, and that the officers of the regular army were forbidden by that article to sit on any court-martial to try the petitioner, who was an officer of the volunteer force raised under the act of 1899.

It is insisted, however, that, if the members of this court-martial were disqualified to try the petitioner, that objection was waived, because not made at the trial, and the judgment was not void, but merely erroneous and voidable, so that it was impregnable to collateral attack by the writ of habeas corpus. A writ of habeas corpus cannot be made to perform the office of a writ of error, but it is the proper process to challenge a void judgment and to relieve the defendant from its baleful effect. It may not be invoked to review and avoid an erroneous judgment of which the court had jurisdiction, but it is always effective to relieve a prisoner from the restraint imposed by a judgment that is absolutely void. *In re Reese*, 47 C. C. A. 87, 107 Fed. 942, 948; *Ex parte Buskirk*, 72 Fed. 14, 21, 18 C. C. A. 410, 417, 25 U. S. App. 613, 615; *Ex parte Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; *Ex parte Fisk*, 113 U. S. 713, 718, 5 Sup. Ct. 724, 28 L. Ed. 1117; *Dynes v. Hoover*, 20 How. 81, 83, 15 L.

Ed. 838; *Ex parte Reed*, 100 U. S. 13, 23, 25 L. Ed. 538; *In re Coy*, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; *U. S. v. Pridgeon*, 153 U. S. 48, 59, 14 Sup. Ct. 746, 38 L. Ed. 631; *Rose v. Roberts*, 99 Fed. 948, 40 C. C. A. 199. A judgment or sentence of a court which had no jurisdiction of the subject-matter or of the person affected by its adjudication is absolutely void. But the judgment or sentence of a court empowered to hear and determine the issues relative to the subject-matter and the person affected by its decision, although it may be wrong and irregular, is simply voidable, and cannot be successfully attacked collaterally. *Foltz v. Railroad Co.*, 60 Fed. 316, 318, 8 C. C. A. 635, 637, 19 U. S. App. 576, 581. Hence the question here presented is, did this court-martial have jurisdiction to hear and try the petitioner for the offense for which he was charged? The legal presumption is that courts of general jurisdiction have the power and the authority to make the adjudications which they render, and that their judgments are valid. But no such presumption accompanies the sentences of courts of inferior or limited jurisdiction. It is indispensable to the maintenance of their judgments that their jurisdiction shall be clearly and unequivocally shown. A court-martial is a court of limited jurisdiction. It is a creature of the statute, a temporary judicial body authorized to exist by acts of congress under specified circumstances for a specific purpose. It has no power or jurisdiction which the statutes do not confer upon it. The articles of war specify the officers who are empowered to convene these courts (articles 72, 73, 74, 81, 82), the officers who may compose them (articles 75, 76, 77, 78, 80), and the persons and charges which they are empowered to try (articles 77, 78, 80, 81, 82, 83). It necessarily follows that the jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned by these indispensable prerequisites: (1) That it was convened by an officer empowered by the statutes to call it; (2) that the officers whom he commanded to sit upon it were of those whom he was authorized by the articles of war to detail for that purpose; (3) that the court thus constituted was invested by the acts of congress with power to try the person and the offense charged; and (4) that its sentence was in accordance with the Revised Statutes. The absence of any of these indispensable conditions renders the judgment and sentence of a court-martial *coram non iudice*, and absolutely void, because such a judgment and sentence is rendered without authority of law and without jurisdiction. *Runkle v. U. S.*, 122 U. S. 543, 546, 7 Sup. Ct. 1141, 30 L. Ed. 1167; *Mills v. Martin*, 19 Johns. 7, 30; *Wise v. Withers*, 3 Cranch, 331, 2 L. Ed. 457; *Ex parte Watkins*, 3 Pet. 193, 207, 7 L. Ed. 650; *Dynes v. Hoover*, 20 How. 65, 80, 15 L. Ed. 838.

Let us now measure the contention that the judgment of this court-martial, which condemned the petitioner to dismissal and imprisonment, was not void, but was merely irregular or erroneous, by these indisputable principles. The eighty-eighth article of war reads:

"Members of a court martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and

validity thereof and shall not receive a challenge to more than one member at a time."

The acts of congress make no provision for a challenge to the array, and point out no method whereby the question of the disqualification of all the members may be determined in the first instance by any one but the members of the court themselves challenged one by one. It is said that a court-martial is like a jury; that the reviewing officer occupies the place of a judge; that the disqualification of a juror, if not suggested at the trial, is waived, and does not render the verdict void (*Kohl v. Lehlback*, 160 U. S. 293, 16 Sup. Ct. 304, 40 L. Ed. 432; *Clark v. Van Vrancken*, 20 Barb. 281; *In re Voorhees*, 6 Op. Atty. Gen. 206); and that the judgment of this court-martial ought not to be held void because all its members were incompetent to sit upon it. But in the essentials of the issue the analogy does not hold. The question of the qualification of triors arises in limine. It is to be determined before the trial commences. In the case of a trial by jury, the judge, not the jury, determines the qualifications of the jurors; while in a trial by a court-martial the members of the court must determine their own qualifications, and, if all the members are incompetent to sit in the court at all, how can they be competent to decide that they are either competent or incompetent to act there? Moreover, a jury decides nothing but questions of fact, while the members of a court-martial determine both the law and the facts. This argument by analogy is not persuasive. Indeed, the analogy between the judgment of a court-martial and the judgments of courts composed of disqualified judges is much closer. All the members of this court-martial were disqualified. It was a court of inferior—of limited—jurisdiction. Why should its judgment have more virtue than those of courts of general jurisdiction some of whose judges are incompetent to sit? Yet the general rule, supported by the great weight of authority, is that the judgments of such courts are void, and that neither waiver nor consent can give them validity. *Case v. Hoffman*, 100 Wis. 314, 356, 75 N. W. 945, 44 L. R. A. 728; *Oakley v. Aspinwall*, 3 N. Y. 547, 552; *Low v. Rice*, 8 Johns. 409; *Clayton v. Per Dun*, 13 Johns. 218; *Edwards v. Russell*, 21 Wend. 63; *People v. Connor*, 142 N. Y. 130, 133, 36 N. E. 807; *Chambers v. Clearwater*, *40 N. Y. 310, 314; *Sigourney v. Sibley*, 21 Pick. 101, 106, 32 Am. Dec. 248; *Gay v. Minot*, 3 Cush. 352; *Hall v. Thayer*, 105 Mass. 219, 224, 7 Am. Rep. 513; *Railway Co. v. Summers*, 113 Ind. 10, 17, 14 N. E. 733, 3 Am. St. Rep. 616; *Ochus v. Sheldon*, 12 Fla. 138; *Chambers v. Hodges*, 23 Tex. 112; *Gains v. Barr*, 60 Tex. 676, 678; *Templeton v. Giddings* (Tex. Sup.) 12 S. W. 851.

The insuperable objection, however, to the jurisdiction of this court-martial and to the validity of its sentence is that the officer who called it was not only unauthorized, but was positively forbidden by act of congress, to constitute it of the officers of the regular army, to detail these officers to sit upon it; and when these officers were so detailed they were in like manner prohibited from responding to the call and from becoming members of the court. The order convening the court-martial declared that the purpose of its call was "for the

trial of Captain Peter C. Deming, assistant commissary of subsistence U. S. volunteers," and it commanded nine officers of the regular army to meet and sit upon the court. The seventy-seventh article of war prohibited Gen. Shafter, who issued this order, from directing these officers to sit upon a court-martial to try this officer of the volunteer force, and forbade them to do so. The court was therefore illegally constituted. It did not have a single member upon it that the commanding officer had the power to direct to participate in the trial of the petitioner, or that could lawfully do so. "It was necessary to show that the court was legally constituted in order to gain jurisdiction of the persons and offenses of those who were to be tried before it." *Mills v. Martin*, 19 Johns. 33. "To give effect to its sentences, it must appear affirmatively and unequivocally that the court was legally constituted, that it had jurisdiction, that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law." *Runkle v. U. S.*, 122 U. S. 556, 7 Sup. Ct. 1141, 30 L. Ed. 1167. In the army of the United States courts-martial derive their power—their jurisdiction—from the acts of congress. Neither the silence, the consent, nor the agreement of the parties can confer it if it is not granted by the statutes. This court-martial derived no power or jurisdiction from the acts of the congress of the United States, because it was constituted in direct violation of, and not in accordance with, them. It was therefore entirely without jurisdiction to try the petitioner, and its judgment against him was absolutely void.

The judgment below must accordingly be reversed, and the case must be remanded to the circuit court, with directions to issue the writ of habeas corpus, and to proceed in accordance with the views expressed in this opinion; and it is so ordered.

KINLOOH TEL. CO. et al. v. WESTERN ELECTRIC CO.

(Circuit Court of Appeals, Eighth Circuit. February 24, 1902.)

No. 1,640.

1. PATENTS—DEVICE NOT CLAIMED ABANDONED.

Where a patentee has made his claim, he has thereby disclaimed and abandoned to the public all other combinations and improvements that are not mere invasions of the device, combination, or improvement which he claims.

2. SAME—CLAIM SECURES MECHANICAL EQUIVALENTS.

But one who claims and secures a patent for a new machine or combination thereby necessarily claims and secures a patent for every mechanical equivalent of that machine or combination, because, in the light of the patent law, every mechanical equivalent of a device is the same thing as the device itself.

3. SAME—MECHANICAL EQUIVALENTS.

Where form is not the essence of the invention, machines or combinations which are constructed upon the same principle, which have the same mode of operation, and which accomplish the same result by the same or by equivalent mechanical means, are mechanical equivalents, within the meaning of the patent law, although they differ in form or in name.

4 SAME—MECHANICAL EQUIVALENTS.

Shot and wax or other fusible material holding them in perforations in the faces of conducting plates until released by the heat of the plates, produced by a persistent arc between them, so that they will then run down between the plates and form a conducting link, are mechanical equivalents of the mass or plug of fusible material described in patent No. 438,788, when they are used in a potential discharger for the same purpose and perform the same function as that plug.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Charles C. Bulkley, for appellants.

George P. Barton and De Witt C. Tanner, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree which enjoined the defendants, the Kinloch Telephone Company and Samuel M. Kennard, from infringing upon the first claim of letters patent No. 438,788, for a potential discharger, issued October 21, 1890, to Anthony C. White. (C. C.) 111 Fed. 175. This is the claim:

"(1) A potential discharging protector or lightning arrester comprising two conducting plates placed with parallel surfaces closely adjacent to each other, adapted to be connected, respectively, with an electric circuit and the earth, and an interposed thin dielectric, one of the said plates having a plug or mass of easily fusible conducting material embedded in its approximate surface, substantially as hereinbefore described, and for the purposes specified."

The device protected by this claim consists of an upper conducting plate, preferably of carbon, electrically connected with the line to be protected, and provided with a perforation in its lower surface filled with a plug of some easily fusible material or alloy, a lower conducting plate of carbon electrically connected with the earth by wire, and a thin dielectric partition, preferably of mica, slotted in the middle opposite the fusible plug, and securely fastened between, and in contact with, the plates. The purpose of this combination is to protect telephone and other apparatus used in connection with electric currents of low intensity from injury by means of currents of electricity of high potential which occasionally intrude upon telephone and telegraph wires when they are accidentally crossed with electric currents conducting heavy electric and power currents developed under high potential, or when, by induction or a stroke of lightning, atmospheric electricity charges them. The patentee stated the object he sought to attain in his specifications very clearly, in the following terms:

"The object of my present invention is to provide an improved form of the second element of this system of protection, namely, the lightning arrester or potential discharger, which can be applied with equal facility to either metallic or earth completed circuits; which shall not involve the normal conductive connection of an earth wire to the circuit; which can readily be adjusted to discharge with any given or desired potential; which shall be equally efficient whether the charge coming on the circuit be a transient and instantaneous impulse, as in the case of lightning, or a sustained and protracted impulse, as in the case of a cross with a dynamo circuit operated under any electro-motive force exceeding the minimum to which the appliance is set, and which in the latter event will rapidly and

certainly establish a short circuit to earth, thereby effecting a discharge which is permanently maintained as long as the charge continues, and preventing the said charge, irrespective of the period of its continuance, from causing injury to cable or apparatus."

The combination which White described and claimed accomplishes the purpose for which he constructed it. The conducting plates are located at such a distance apart that the air dielectric in the slot of the partition prevents the legitimate operating currents of the circuits with which the device is connected from leaving those circuits, and they pass on and perform their appropriate work. If, however, a transient charge of electricity of dangerously high potential, due either to lightning, a momentary dynamo cross, or to any other similar accident, intrudes upon the line, this charge passes to the earth by means of a disruptive discharge across the dielectric of air between the plates. If such a charge persists, the sparks of discharge develop into an arc between the plates through which a current passes to the earth. This current heats the plates and fuses the material composing the plug. As this material melts, it runs down into the slot between the plates and forms a conducting link between them. The current then follows this link, the arc is extinguished, the fused metal cools and forms a solid and permanent conductor between the plates, which safely leads the trespassing current to the earth. In this way the legitimate operating currents of the protected lines are repelled by the thin dielectric, and prevented from short-circuiting to the earth through the potential discharger, while both the transient and persisting charges of dangerous intensity are led off the line and to the earth by it, without injury to the telephone or other apparatus connected with the protected lines.

The novelty, utility, and patentability of this combination are conceded. But the decree of the court below is challenged on the ground that the device used by the appellants does not infringe upon the patent to White. The appellants' device consists of two plates of the same character, electrically connected and used in the same way as the conducting plates of White, a silk dielectric partition between them, and two leaden balls or shot secured by wax, one in a perforation in the inner surface of the upper plate, and the other in a hole in the inner surface of the lower plate. The appellants do not claim to escape liability for infringement on account of the substitution of the silk dielectric for the slotted mica partition, because White describes and claims a thin dielectric of any suitable material, and his slotted partition is only the preferable form of that dielectric. The shot secured in the plates by wax discharge the function of White's fusible plug. A transient charge of dangerous intensity produces a disruptive discharge through the interstices in the silk partition. When this discharge continues, forms an arc, and develops sufficient heat, the silk is burned away, the wax is melted, the shot roll down together and form a conducting link between the plates, through which the dangerous current is led to the earth. The arguments advanced in support of the contention that this device of the appellants does not infringe upon that of White are (1) that the patentee, by the terms of his claim and specification, restricted his monopoly to the

use of a "plug or mass of easily fusible conducting material" to constitute the conducting link between the carbon plates, and the defendants do not use easily fusible material for that purpose, but leaden balls or shot, which cannot be readily fused; and (2) that, when attention is given to the parts which really do the work, the device of the appellants does not perform its function in substantially the same way as the device of White, because the wax, the fusible material of the appellants, is not essential to the operation of their combination, but is a mere means of assembling and holding the parts of the device in its construction, while the fusible material of White is indispensable to the operation of his device.

It is true that the statute requires the inventor to particularly point out and distinctly claim the improvement or discovery which he seeks to secure (Rev. St. § 4888), and that when he has made his claims he has thereby disclaimed and abandoned to the public all other combinations and improvements that are not mere invasions of the device, combination, or improvement which he claims. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344; *Manufacturing Co. v. Sargent*, 117 U. S. 373, 378, 6 Sup. Ct. 931, 29 L. Ed. 950; *McClain v. Ortmayer*, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; *McBride v. Kingman*, 97 Fed. 217, 223, 38 C. C. A. 123, 129-130; *Building Co. v. Eustis*, 65 Fed. 804, 807, 13 C. C. A. 143, 145, 27 U. S. App. 693, 709; *Stirrat v. Manufacturing Co.*, 61 Fed. 980, 984, 10 C. C. A. 216, 220, 27 U. S. App. 13, 47; *Adams Electric R. Co. v. Lindell R. Co.*, 77 Fed. 432, 451, 23 C. C. A. 223, 241, 40 U. S. App. 482, 514. But it is no less true that a copy of the thing described and claimed in a patent, either without variation, or with such variations as are consistent with its being in substance the same thing, is, for all the purposes of the patent law, the same device or combination as that described in the patent. *Burr v. Duryee*, 1 Wall. 531, 573, 17 L. Ed. 650. One who claims and secures a patent for a new machine or combination thereby necessarily claims and secures a patent for every mechanical equivalent for that device or combination, because, within the meaning of the patent law, every mechanical equivalent of a device is the same thing as the device itself. Moreover, in determining what is a mechanical equivalent of a given device, where, as in the case at bar, form is not the essence of the invention, forms and names are of little significance. The similarities and differences of machines and combinations are to be determined by the offices or functions which they perform, by the principles on which they are constructed, and by the modes which are used in their operation. A device which is constructed on the same principle, which has the same mode of operation, and which accomplishes the same result as another by the same or by equivalent mechanical means, is the same device, and a claim in a patent of one such device claims and secures the other. *Machine Co. v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935. Mere changes of the form of a device or of some of the mechanical elements of a combination secured by a patent will not avoid infringement, where the principle or mode of operation is adopted, unless the form of the machine or of the elements changed is the distinguishing characteristic of the invention. *National Hollow Brake Beam Co. v. Interchangeable*

Brake Beam Co., 106 Fed. 693, 711, 45 C. C. A. 544, 562; Watch Co. v. Robbins, 64 Fed. 384, 396, 12 C. C. A. 174, 178, 22 U. S. App. 601, 634; New Departure Bell Co. v. Bevin Bros. Mfg. Co. (C. C.) 64 Fed. 859.

In the light of these principles of law, how can the contention of the appellants be sustained? It is conceded that the wire connections, the plates of the appellants' combination, and their silk dielectric are the mechanical equivalents of the like connections, the plates, and the slotted dielectric of the patented device. It is conceded that the appellants' combination performs the same function discharged by that of the complainant. The only question is whether the means used by the appellants to produce the metallic conducting link between the plates are the mechanical equivalents of the plug of easily-fusible material adopted by White. The principle on which White's device for the production of this conducting link is constructed is to secure the material for it in the face of one of the plates until it is released by the heat of the plate after an arc has been formed between the plates. The device of the appellants is constructed upon the same principle. The shot are held in holes in the faces of the plates until the heat produced by the arc between them melts the wax and releases the leaden balls. The mode of operation whereby White forms the metallic conducting link between the plates is that the heat of the plates, resulting from the continual maintenance of an arc between them, melts his fusible material in the upper plate so that it runs down between the plates and forms the conducting link. The mode of operation of appellants' device is that the heat of the plates, resulting from the continued maintenance of an arc between them, melts the wax which holds the shot in their holes, and they run down between the plates and form the conducting link. Thus it will be seen that the two devices are constructed upon the same principle that they have the same mode of operation, that they accomplish the same result, and that the means whereby they reach it are mere mechanical substitutes for each other. When the fact was discovered and illustrated by the fusible plug in the carbon plate of White, that material held in the face of a plate until the latter was heated by a persistent arc so that it would melt and release the plug, prevented the formation of the metal conducting link between the plates until, and produced it at, the proper time to discharge the function of the patented device, a shot or a piece of insoluble conducting material of any kind held in the face of a plate by wax, or any other fusible material, so that it would be prevented from making the metal conducting link until the proper time, and would then be released and form the link by the melting of the wax or the other material, so that the function of the device would be properly discharged, became the plain mechanical equivalent of White's fusible plug, and was, in legal effect, the same thing as that plug, because it was an evident mechanical substitute for it; used for the same purpose, and accomplishing the same result. The result is that White's claim of his device was, within the meaning of the patent law, a claim of the device of the appellants as much as of his own device, and he did not surrender or abandon to the public that combination, or any similar mechanical equivalent of his invention.

An attempt is made to escape from this conclusion under the rule that, if the element substituted for the one withdrawn has been discovered since the date of the patent, it cannot be said to be its mechanical equivalent. *Gould v. Rees*, 15 Wall. 187, 193, 21 L. Ed. 39. Counsel for the appellants says that the shot and the wax have been discovered since the patent to White, and have been secured by a subsequent patent to Frank B. Cook, No. 658,976, dated October 2, 1900. It is true that such a patent has been issued; but it is too plain for argument or serious consideration that there was neither discovery nor invention in perceiving or applying to the device of the complainant the fact that an insoluble metal secured by wax or other fusible material was the mechanical equivalent of, performed the same function and worked the same result as, the fusible plug of White, and could be effectually used as its substitute. The shot and wax were not, therefore, newly discovered elements, but constituted a mere mechanical substitute for the element which White described and claimed.

The second position of counsel for the appellants is that they do not infringe, because, when attention is paid to the parts which really do the work, their device does not accomplish its result in the same way as does that of the complainant. *Machine Co. v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935, *Cahoon v. Ring*, Fed. Cas. No. 2,292, 1 Cliff. 592. It is contended that in the combination of White the fusible material forms the conducting link between the plates, while in the device of the appellants the fusible material (the wax) does nothing at all, but is simply used to hold the shot in place while the machine is constructed. There is testimony in the record in support of this statement of the purpose and use of the wax, but it is not convincing evidence. The patent to Cook, in practical accord with the description in which the device of the appellants is constructed, shows clearly that the purpose of the wax was not to hold the leaden balls until the combination was made, but to withhold them after its construction so that they would not close the circuit until the wax was melted into a liquid by means of the heat created by the abnormal discharge of the current across the dielectric between the plates, and then to permit them to make the conducting link and close the circuit as in the combination of White. One witness testifies that in practice he thinks the burning away of the silk occurs before the melting of the wax. The court below reached the conclusion that the testimony of this witness was the truth; that the silk dielectric is sometimes burned away at a point which would permit the loose balls to come together, although the heat is not sufficient to melt the wax. In view of the evidence to which reference has been made, this finding of fact ought not to be disturbed. The patent to Cook is of much greater value as evidence of the purpose and operation of the wax than the testimony of interested witnesses after this litigation had commenced. We accordingly adhere to the view of the court below that the purpose and effect of the wax was to hold the conducting material until the heat generated by the arc melted the wax and released the shot, so that they would run down and form the conducting link between the plates. In this state of the case, the only difference in the operation of the two devices to form this conducting link is that in the one the fusible material, when it

melts, not only releases the material which forms the conducting link, but itself becomes that link, while in the other the only function of the fusible material is to hold until it melts, and then to release the shot which become the conducting link between the plates. This, however, is an immaterial difference. It is not of the essence of the invention or of its operation. The essence of that part of this invention which relates to the fusible plug—the mode of operation which distinguishes it from all other devices—is the holding of a conducting material out of the circuit in one of the plates by means of a fusible material until an arc heats the plate and melts the fusible material so that it releases the conductor, and causes it to form the link between the plates. This mode of operation—this distinguishing characteristic of the invention—the appellants have completely appropriated. Their device holds the conducting material out of circuit in the same way that White's does,—by a fusible material. It releases it in the same way that White's device does,—by the melting of the fusible material. And it forms the conducting link between the plates in the same way that the combination of White does,—by permitting the conducting material to run down between the plates and in contact with them at the appropriate time. The two devices were constructed for the same purpose. They have the same mode of operation, and they accomplish the same result in the same way, by equivalent mechanical means. The appellants cannot escape liability for the appropriation of the entire essence of this invention by the slight change they have made in a single element of the combination which embodies it.

This conclusion has not been reached without a careful consideration of all that has been said and written concerning the effect of the silk dielectric, its partial burning, and its carbonization in the operation of the device of the appellants. But inasmuch as the complainant's patent clearly covers a potential discharger using a silk dielectric in the place of the slotted mica partition, our conclusion is that the discussion of the operation and effect of the silk dielectric is not material to the determination of the issue presented in this case, and for that reason it has been pretermitted. This case stands as it would have stood if the device described in the patent had contained a silk dielectric in the place of the slotted mica partition. The appellants can reap no advantage and can escape no liability on account of the peculiarities of the operation of the silk which they have substituted for the mica partition of White.

The decree below is sustained by the evidence, is warranted by the law, is equitable and just, and it is affirmed.

KINLOCH TEL. CO. et al. v. WESTERN ELECTRIC CO.

(Circuit Court of Appeals, Eighth Circuit. February 17, 1902.)

No. 1,637.

1. PATENTS—COMBINATION OF OLD ELEMENTS.

A new combination of old elements, whereby an old result is attained in a more facile, economical, and efficient way, may be protected by a patent.

2. SAME—INVENTION—IMMEDIATE AND GENERAL USE EVIDENCE OF.

Where the question of novelty is fairly open for consideration under the law, the fact that a patented device or combination has displaced others which had previously been used to perform its function, and has gone into immediate and general use, is pregnant and persuasive evidence that it involves invention.

3. SAME—LETTERS PATENT NO. 330,067 VALID.

Letters patent No. 330,067, dated November 10, 1885, to John A. Seely, for an improvement in grouping spring jacks and annunciators for multiple switchboards, are not void for want of novelty in the device, or of invention in its production, and they are infringed by the divisional system of the Kinloch Telephone Company.

4. SAME—INDEPENDENT INVENTIONS PATENTABLE WHERE ADVANCE IN ART GRADUAL.

Where the advance toward the desideratum is gradual, and several inventors form different combinations which accomplish the desired result with varying degrees of operative success, each is entitled to his own combination, so long as it differs from those of his competitors and does not include theirs.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

R. S. Taylor, for appellants.

Frederick P. Fish and George P. Barton, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The circuit court rendered a decree in favor of the Western Electric Company, the complainant in that court, to the effect that the defendants, the Kinloch Telephone Company and Samuel M. Kennard, had infringed the first three claims of letters patent No. 330,067 issued to John A. Seely on November 10, 1885, for an "improvement in grouping spring jacks and annunciators for multiple switchboards," and perpetually enjoined them from using the invention described in those claims. The defendants have appealed from this decree, and they insist that it is erroneous, on the usual grounds, that the combination described in the patent was the product of mechanical skill, and not the result of the exercise of the inventive faculty, and that they have not used the combination. The three claims of the patent involved read in this way:

"(1) In a multiple switchboard system in which the individual annunciators are distributed in groups upon the different boards, switches for all the lines on each of the boards, and, in addition thereto, sets or groups of switches

on the different boards corresponding to the different groups of individual annunciators, each group of annunciators and its corresponding group of switches being placed relatively to each other in the same position on each of the boards, whereby the manner of answering the subscribers is made uniform upon all the boards. (2) In a multiple switchboard system, a spring-jack switch on each board for each line, and additional spring-jack switches, one in each line, for the initial connection, said additional spring-jack switches being distributed on the different boards in uniform groups, and the individual annunciators of the different lines arranged in corresponding groups, substantially as and for the purpose specified. (8) In a multiple switchboard system, a spring-jack switch on each board for each line, and additional spring-jack switches, one in each line, for the initial connection, said additional spring-jack switches being distributed on the different boards in uniform groups arranged in lines across the boards, and the individual annunciators of the different lines arranged in corresponding groups, substantially as and for the purpose specified."

The improvement of Seely described in these claims relates entirely to the placing and grouping of switches and annunciators in a multiple switchboard system. He describes in his claims two classes of switches which in the operation of his combination perform different functions. A switch is any device by which one line may be electrically connected with another. The form in common use on switchboards in the telephone exchanges consists of a socket set in the switchboard containing the terminals of the two sides of the subscribers' circuit, and this is used by means of a plug which contains the terminals of the two wires that are attached to it in a cord. The insertion of the plug in the socket makes the electrical connection between the subscriber's line and the wires attached to the plug, and these wires usually lead to another similar plug or to the telephone of the operator. If they lead to another plug, electrical connection may be made between the lines of two subscribers by inserting these plugs in the respective switches of the subscribers upon the switchboard. These sockets set in the switchboard through which the subscribers communicate with each other are called "switches" in Seely's patent, but they are also called "jacks," "spring-jacks," "spring-jack switches," and "line jacks." In this opinion they will be termed "line jacks." They are the "switches for all the lines on each of the boards" specified in Seely's first claim. The "groups of switches on the different boards corresponding to the different groups of individual annunciators" will be called answering jacks, to distinguish them from the line jacks, and because their function is to enable the operator to answer the calls of the subscribers and to learn their wants by plugging into them instead of into the line jacks, and thus electrically connecting her telephone with the wires of the subscribers when their annunciators announce their calls. When Seely made his invention the annunciator commonly used was a shutter hinged at its lower edge, which dropped and disclosed the subscriber's number when he took his telephone from its hook or otherwise actuated the current so as to release the catch which held the shutter in place. The multiple switchboard upon which Seely made his improvement was the switchboard divided into sections usually by perpendicular lines described in the patent to Firman of January 17, 1882. After Seely had placed his improvement upon it each section of this board contained all the line jacks of all the subscribers served by the entire

board and the annunciators and answering jacks of about 200 of the subscribers. If there were 1,200 to be served by the entire board it might consist of six sections, upon each of which a line jack would be placed connected with the line of each subscriber, while each section would contain the annunciators and answering jacks of only about 200 members of the exchange. For instance, the first section might contain the annunciators and answering jacks of subscribers numbered from 1 to 200, inclusive; the second section those numbered from 201 to 400 inclusive; the third section those numbered from 401 to 600, inclusive. But each section would contain a line jack for every subscriber served by the entire board. The annunciators and answering jacks are divided between the sections in order to enable a single operator to attend to the calls of all the subscribers whose annunciators appear upon a section, and it is impracticable for a single operator to serve more than 200 subscribers. In the combination of Seely the annunciators on each section of the board are formed into a group, and the answering jacks of the subscribers represented by these annunciators are formed into another group by themselves and placed upon the same section. The members of the several groups of annunciators, and their corresponding answering jacks, are placed in the same relative positions to each other on each section, so that the method of finding and plugging into the answering jacks of the subscribers is uniform on all the sections of the board. When a shutter drops the operator plugs into the answering jack of the subscriber who calls, switches her telephone into the circuit, answers the call, learns the number of the subscriber sought, plugs into the line jack of the latter upon her section of the board, calls the subscriber wanted, and then switches her own telephone out of the circuit and leaves the two subscribers electrically connected, so that they may talk with each other. Prior to Seely's invention the line jacks on a multiple switchboard performed the function of Seely's answering jacks. When a shutter dropped the operator was required to find the line jack of the calling subscriber, to plug into that, to answer the call, then to find the line jack of the subscriber called, to plug into this line jack, to call him, and then by means of a cord with plugs at each end to connect the line jack of the caller with that of the called. Seely's invention consisted in the combination with the line jacks and groups of annunciators on the sections of a multiple switchboard of groups of answering jacks in such a way that each group of annunciators should have on the same section with it a group of the answering jacks of the subscribers represented by the annunciators thereon, so that the members of the corresponding groups of annunciators and answering jacks should be placed in uniform relative positions to each other on every section of the board. The essence of his invention was the convenient and uniform grouping of the annunciators and their corresponding answering jacks relatively to each other. Some of the obstacles removed and some of the advantages derived from this combination were these: In the absence of Seely's groups of answering jacks, when a shutter dropped and disclosed the number of a calling subscriber, the operator was obliged to search through all the line jacks on her section, perhaps 1,200 in number,

to find the jack of the subscriber and to plug into that line jack in order to answer the call and to learn what was wanted. The desired line jack might be at some distance from the annunciator, and time and thought would be required to find it and to make the connection with it. Seely placed the groups of answering jacks near to their corresponding groups of annunciators. No group contained more than 200 jacks. When a subscriber called, the operator was relieved from a search for his line jack among a very large number, perhaps 1,200 similar jacks. She was only required to find and connect with his answering jack in order to learn his wants. As the number of these answering jacks was small, not more than 200, and they were uniformly placed and arranged relatively to their corresponding annunciators, a little experience soon enabled her to plug into the right answering jack automatically, without noticing the number described by the annunciator or thinking of or searching for it. This automatic and almost involuntary habit of the operators greatly increased the accuracy, speed, and efficiency of the service. It is sometimes necessary to transfer an operator from the section at which she has been employed to another section of the board. The line jacks corresponding to the group of annunciators on one section of a multiple board are in a different place upon the section from those which correspond to the group of annunciators on any other section of the board. In the absence of Seely's uniformly grouped answering jacks an operator would become accustomed to find the line jacks through which she must answer on a certain part of her section. When she was sent to another section she would be compelled to divest herself of the habit of plugging into that part of the section to answer the calls, and to learn to answer them through another set of jacks on another portion of the section. This condition of things necessarily resulted in delay, mistakes, and confusion. But when the groups of answering jacks were combined with their corresponding groups of annunciators in the way discovered by Seely, an operator who once learned the relative positions of the answering jacks and their corresponding annunciators on one section knew their relation upon all the sections, because their relative grouping was uniform throughout, and she could serve equally well on any section of the board. It is frequently convenient, and sometimes necessary, to change the service of a subscriber from one section of a board to another, because the subscribers represented on a certain section require more service, while those assigned to another require less service, than a single operator can render. The only convenient method to make this transfer without the uniformly grouped answering jacks of Seely was by changing the number of the subscriber, and many subscribers seriously objected to changes in their numbers, because these changes involved a change of thought and habit, and because their numbers came to have value in trade. Seely's groups of answering jacks enabled the telephone companies to transfer the service of a subscriber from one section to another by a simple transfer of his annunciator and answering jack without any change in his number, because the uniform relation of the respective members of the corresponding groups of annunciators and answering jacks renders numbers upon

them unnecessary, and enables the operators to serve the subscribers with equal facility in any section to which they are assigned. Seely's groups of answering jacks diminished the congestion of lines and the matting which resulted from the connection of the line jacks with each other for purposes of communication. Without these answering jacks the line jack of the calling subscriber was first used for answering purposes, and was then connected with that of the subscriber called by a cord attached to a plug at each end. One of these plugs was inserted in the line jack of the calling subscriber, and the other in that of the subscriber called. Every connection made stretched a cord across a portion of a section of the board. In busy times these cords became numerous and matted. When Seely's groups of answering jacks were placed upon the board it became unnecessary to use the line jacks to answer calls, and the electrical connection of the caller with the called could be effected by connecting the answering jack of the former with the line jack of the latter, thus greatly relieving the congestion of the cords upon that portion of the section covered by the line jacks. These, and perhaps other, benefits conferred by this invention, commended it to the trade, and it immediately went into general, perhaps almost universal, use in all the large telephone exchanges of the country. Its utility is not denied. But it is earnestly contended that it was not patentable because any mechanic skilled in the art could have produced it without the exercise of any of the genius of the inventor. In support of this contention it is argued that letters patent No. 246,481, issued on August 30, 1881, to Eldred and Durant for improvements in telephone exchange systems and apparatus, discloses an annunciator, a line jack, and an answering jack for each subscriber, while letters patent No. 258,234, issued on May 23, 1882, to M. G. Kellogg, shows a board containing line jacks and other boards provided with annunciators and their corresponding answering jacks, so that when Seely made his combination there was nothing left for him but the grouping of the answering jacks, and that there could have been no invention in the mere arranging of these jacks to correspond with the annunciators. A careful examination and analysis of the devices described in these patents discloses the fact, however, that neither of them either suggests the improvement of Seely or was designed to or capable of removing the evils which he sought to remedy. His invention was directed to the improvement of the service on a multiple switchboard, to an effort to enable one operator to render more speedily and efficiently all the service required by the subscribers intrusted to her care. Neither of the patents cited contemplates the use of a multiple switchboard with the improvements it describes, and neither of them in any way suggests that separate but uniform grouping relative to each other of corresponding annunciators and answering jacks which constitutes the essence of Seely's invention. The patent to Eldred and Durant shows a signal box and two spring jacks at the exchange for each subscriber. The operator is provided with a telephone connected by two wires with the metal sides of a wedge. The sides of this wedge are insulated from each other by a piece of rubber between them. By the insertion of this wedge under a spring jack

upon the side of the signal box the telephone of the operator is switched into the circuit, so that she may answer a call or notify a subscriber that some one has called him. When the wedge is withdrawn the circuit is completed through another spring jack, and by the insertion of the plugs of a cord circuit under two of these spring jacks the lines of two subscribers may be electrically connected. It is true that this patent shows an annunciator, a spring jack for answering calls, and a second spring jack for connecting with other subscribers for each of the subscribers to the exchange. But the device lacks Seely's uniform grouping, his combination with and improvement on the multiple switchboard, his means of accomplishing his purpose, and it is utterly incapable of performing any of the functions or accomplishing any of the objects of his invention.

Nor is the contrivance of Kellogg much nearer in function, means, or effect to the combination of Seely. It has no multiple switchboard. It consists of one board, on which the line jacks of all the subscribers are placed, and two or more other boards, among which the corresponding annunciators are distributed. In practice each annunciator board is served by one operator, while the board which contains the line jacks is worked by switchmen who connect the line jacks as directed by the operators at the annunciator boards. Each operator at an annunciator board is provided with a telephone which she may switch into the circuit of a subscriber by pressing the plug attached to it upon a connecting bolt near or on his annunciator. Conceding that these connecting bolts are the equivalents of Seely's answering jacks, we have here a single switchboard containing the line jacks of all the lines and several switchboards, each one of which is provided with annunciators and corresponding answering jacks of a part of the lines. But here is no multiple switchboard, no separate and uniform grouping of corresponding annunciators and answering jacks, but an answering jack on each annunciator; no purpose or effort to concentrate all the work of serving each line in the hands of a single operator, but a successful effort to divide it between two or more operators, thereby increasing delay, confusion, and chance of mistake. The combination of this patent does not teach the way to remove the evils which Seely remedied or to reach the desiderata which he sought. The patent describes no means which could perform the function of improving the service of the multiple switchboard which the combination with that board of corresponding annunciators and answering jacks separately but uniformly grouped upon each section of the board effected. Our conclusion is that the patents of Eldred and Durant and of Kellogg do not anticipate or suggest the combination of Seely. The question recurs, did it require any exercise of the inventive faculty to produce his combination, in view of the state of the art which the multiple switchboard of Firman and these patents disclose? No one has yet been able to formulate a test whereby a line of demarkation between the products of the inventor's intuition and the results of the skill of the mechanic may be surely drawn in all cases as they arise. That question is and always must be left for determination by a careful exercise of the judgment, enlightened by a knowledge of the state of the art and of the advance in it which the device in question marks, and guided by the

established rules and principles of the law. The two classes of cases led by *Atlantic Works v. Brady*, 107 U. S. 192, 200, 2 Sup. Ct. 225, 27 L. Ed. 438, and *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177, have been again cited and reviewed for our guidance, and have been carefully considered in reaching our conclusion. A plausible and persuasive argument may be made that this combination falls under either class of cases, that it might have been and was produced by the skill of the trained mechanic or by the intuitive genius of the inventor. The patent which describes it, however, raises a presumption in favor of its novelty and its patentability. It was a new combination. No such separate yet uniform grouping of corresponding annunciators and answering jacks with a multiple switchboard had ever been made or used before Seely conceived and described it. That combination was not a pioneer; perhaps it was not a great invention. But it discharged the functions of the multiple switchboard, its annunciators, and switches more speedily and efficiently than they had ever been performed without it, and a new combination of old elements by which an old result is attained in a more facile, economical, and efficient way may be protected by a patent. *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 106 Fed. 693, 707, 45 C. C. A. 544, 557; *Seymour v. Osborne*, 11 Wall. 516, 542, 20 L. Ed. 33; *Gould v. Rees*, 15 Wall. 187, 189, 21 L. Ed. 39; *Thomson v. Bank*, 53 Fed. 250, 252, 3 C. C. A. 518, 520, 10 U. S. App. 500, 509.

The combination had great utility. It went into immediate and general use. While this fact is insufficient in itself to sustain a patent where the machine or combination is clearly without novelty, yet where the question of novelty is fairly open under the law, the fact that a patented device or combination has displaced others which had previously been used to perform its function and has gone into immediate and general use is pregnant and persuasive evidence that it involved invention. *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 106 Fed. 693, 707, 45 C. C. A. 544, 558; *Smith v. Vulcanite Co.*, 93 U. S. 486, 495, 23 L. Ed. 952; *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177; *Manufacturing Co. v. Adams*, 151 U. S. 139, 143, 14 Sup. Ct. 295, 38 L. Ed. 103; *Magowan v. Packing Co.*, 141 U. S. 332, 342, 12 Sup. Ct. 71, 35 L. Ed. 781; *Graphophone Co. v. Leeds (C. C.)* 87 Fed. 873; *Topliff v. Topliff*, 145 U. S. 156, 164, 12 Sup. Ct. 825, 36 L. Ed. 658. It cannot be truthfully said that it is so clear that there was no invention in Seely's device that the question whether or not it was the product of the inventive genius is not open for consideration under the law.

Again, the court below has considered this question in the light of the state of the art, and of the conflicting testimony of the witnesses, and has decided that Seely's combination was an invention. His conclusion is presumptively correct, and ought not to be reversed unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the facts by the circuit court. *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 106 Fed. 693, 716, 45 C. C. A. 544, 567; *Mann v. Bank*, 86 Fed. 51, 53, 29 C. C. A. 547, 549, 57 U. S. App. 634, 637; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31

L. Ed. 664; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; *Warren v. Burt*, 58 Fed. 101, 106, 7 C. C. A. 105, 110, 12 U. S. App. 591, 600; *Plow Co. v. Carson*, 72 Fed. 387, 388, 18 C. C. A. 606, 607, 36 U. S. App. 448, 456; *Trust Co. v. McClure*, 78 Fed. 209, 210, 24 C. C. A. 64, 65, 49 U. S. App. 43, 46; *Exploration Co. v. Adams*, 104 Fed. 404, 408, 45 C. C. A. 185, 188. There does not appear to have been any such error or mistake in the consideration or decision of this question. Fairly open for debate as the question undoubtedly was under the law and the facts, the novelty of the combination the cleverness of its conception, its obvious utility, the evils it remedied, the advantages it conferred, the presumption accompanying the patent, and the immediate general use of the contrivance furnished ample warrant for the finding that this device was not produced without some exercise of the inventive faculty, and these considerations forbid us to reverse the conclusion. The patent to Seely is not void for want of novelty or invention.

The second objection to this decree is that the combination of the defendants does not infringe that of the complainant. The principle of the multiple switchboard lies at the foundation of both combinations. The defendants, instead of placing all the line jacks of all their subscribers upon the same multiple switchboard, divide their subscribers into four equal parts or divisions, called divisions A, B, C, and D. They place the line jacks of each division on a separate multiple switchboard, consisting of seven sections, but put none of the line jacks of the other three divisions upon this switchboard. On each of the four switchboards they place annunciators and answering jacks for all their subscribers so grouped on the sections of the board that the groups of annunciators have corresponding groups of answering jacks arranged uniformly relatively to each other on all the sections of all the boards. Each subscriber is provided with a directory which shows the members of each of the four divisions. His line has a line jack on one only of the four switchboards, but it has annunciators and answering jacks on all the boards. He is provided with four buttons, one for each of the divisions A, B, C, and D. The directory shows him to what division each subscriber belongs. When he wishes to talk to a member of the A division, he presses his A button, and this actuates his annunciator on the A board, and the operator then proceeds as in Seely's combination to answer through the group of answering jacks, to call the subscriber wanted through the latter's line jack, and to make the electrical connection between the two subscribers. All the annunciators and all the answering jacks of all the lines of the defendants are distributed in corresponding groups upon the sections of each of the four boards, so that each group of annunciators and its corresponding group of answering jacks occupy the same uniform relative position to each other on each section of each of the boards. This uniform grouping relative to each other of the annunciators and their corresponding answering jacks is, however, the principle of Seely's invention. It is the peculiar combination of devices which distinguishes his combination from all other contrivances. *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650. This, with

all the effects which flow from its use, the facile and automatic finding by the operator of the right answering jack, the change of operators from section to section without loss of efficiency, the practical transfer of the service of subscribers from section to section without change in their numbers, and the diminution of cords upon, and use of, those portions of the boards occupied by the line jacks, the defendants have unquestionably appropriated. They seek to escape from the decree which enjoins them from continuing this infringement upon two grounds: They say, in the first place, that the presence of the line jacks of all the subscribers to an exchange on each of the sections of the multiple switchboard is an essential element of Seely's combination, and that this element is not found in their device, because only one-fourth of the line jacks of their subscribers appear on any section of any board in their system. And in the second place, they insist that, while all the annunciators and their corresponding answering jacks, when taken together, are uniformly and relatively grouped as in the combination of Seely, yet this is not true of the annunciators of the lines of any division and their corresponding answering jacks when these are considered apart from the annunciators and answering jacks of the other divisions. The portion of the claim of Seely upon which reliance is placed to support the first objection here reads: "In a multiple switchboard system in which the individual annunciators are distributed in groups upon the different boards, switches for all the lines on each of the boards, and, in addition thereto, sets or groups of switches on the different boards," etc. But the fair interpretation of the words "switches for all the lines on each of the boards" is not that all the line jacks for all the lines in an exchange must necessarily be placed on the same multiple switchboard. "The boards" and "the different boards" in the quotation mean sections of a single switchboard, and not different switchboards, and the true interpretation of Seely's call for "switches for all the lines on each of the boards" is that the line jacks of all the lines served by a single multiple switchboard are to be placed in the usual manner on each of the different sections of that board. And this is exactly what the defendants have done. They have, it is true, divided their subscribers into four divisions; but they have, in effect, installed four multiple switchboards,—one to serve each division of their customers. The line jacks of the A subscribers appear on the A board only. But every line jack served by that board appears upon all the different boards or sections which compose it. This arrangement falls within the plain meaning of Seely's claim, and the fact that the defendants operate three other multiple switchboards arranged in the same way does not lessen their liability for the appropriation.

Nor can they successfully exempt themselves from their just liability for taking the principle and means disclosed in Seely's invention because the grouping of the annunciators and answering jacks pertaining to each of the separate divisions, when these are considered by themselves, may not be uniform upon the various sections of the boards. The essence of Seely's invention is the uniform correspondence in relative position of all, and not of a part of the members of the groups of annunciators and answering jacks, so that, given the

place in a group of answering jacks corresponding to an annunciator in one group of annunciators, and every answering jack corresponding to an annunciator in the same place in the other groups will be found in the same relative position in every corresponding group of answering jacks. This uniform correspondence in the relative positions of the groups and the members of which they are composed, the defendants have taken and preserved. Their combination involves the principle, uses the means, and, by the operation of that principle and the use of those means, performs the function of the improvement patented to the complainant.

The history of this art shows that this is a case in which many men have contributed, not only the skill of mechanics, but the genius of inventors toward reaching the high state of efficiency which it has now attained. The advance has not been made in a single leap, but step by step. Many inventors have formed differing combinations which accomplished the desired result with varying degrees of success. Many of these inventions are limited in their character and their operation. The invention described in the patent to Seely was one of them. It differs from all others, and he is entitled to its use and its protection. Many other combinations are open to free use by the defendants, but that of Seely is not. When the advance toward the desideratum is gradual, and several inventors form different combinations which accomplish the desired result with varying degrees of operative success, each is entitled to his own combination so long as it differs from those of his competitors and does not include theirs. *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 106 Fed. 693, 712, 45 C. C. A. 544, 563; *Railway Co. v. Sayles*, 97 U. S. 554, 556, 24 L. Ed. 1053; *McCormick v. Talcott*, 20 How. 402, 405, 15 L. Ed. 930; *Stirrat v. Manufacturing Co.*, 61 Fed. 980, 981, 10 C. C. A. 216, 217, 27 U. S. App. 13, 42; *Griswold v. Harker*, 62 Fed. 389, 391, 10 C. C. A. 435, 438, 27 U. S. App. 122, 150; *Adams Electric R. Co. v. Lindell R. Co.*, 77 Fed. 432, 440, 23 C. C. A. 223, 231, 40 U. S. App. 482, 498.

The decree below must be affirmed, and it is so ordered.

BURGET v. ROBINSON.

(Circuit Court of Appeals, First Circuit. January 24, 1902.)

No. 404.

CORPORATIONS—SUIT BY RECEIVER TO ENFORCE PERSONAL LIABILITY OF STOCKHOLDERS—SET-OFF.

By well-settled rules, the individual liability of a stockholder in a Minnesota corporation is not to the corporation, but to its creditors; and hence, in a suit against such stockholder to enforce such liability, the defendant cannot set off an indebtedness due from the corporation to him.

In Error to the Circuit Court of the United States for the District of Massachusetts.

John Corcoran and William B. Sullivan (Crosby & Nixon, on the briefs), for plaintiff in error.

Stiles W. Burr (John W. Saxe, on the briefs), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This suit was brought to enforce the liability of the defendant below as a stockholder in a corporation organized under the laws of Minnesota. The judgment of the circuit court was against him, and thereupon he sued out this writ of error. With the exception of a single particular, the case involves questions disposed of by us in *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747, and is determined by it.

It is not necessary to consider the proposition made by the defendant below that certain legislation of Minnesota, subsequent to his acquiring the stock in the corporation in question, is ineffectual, because, independently of that, the principles asserted in *Hale v. Hardon* are sufficient to sustain the judgment, unless the defendant below is entitled to an offset as a general creditor of the corporation. He is admittedly a general creditor for a larger amount than that claimed from him as a stockholder. Nevertheless, in order to lay the foundation of a right of set-off, either at law or in equity, the claims pro and con must be in the same interest. A trustee, enforcing a claim in behalf of his trust, is not subject to set-off of the claims of the debtor of the trust against the trustee individually. In the present case, the plaintiff below stands as the representative of the creditors of the corporation, and not of the corporation itself, so that the cross demands are not in the same interest within the rules applicable to set-offs. The underlying principle which applies in this respect has been so many times, and so thoroughly and broadly, stated by the supreme court, that it is not necessary for us to explain them further.

The judgment of the circuit court is affirmed, with interest, and the costs of appeal are awarded to the defendant in error.

HALE v. CALDER et al.

(Circuit Court, D. Rhode Island. February 8, 1902.)

No. 2,623.

1. CORPORATIONS—SUIT BY RECEIVER TO ENFORCE PERSONAL LIABILITY OF STOCKHOLDERS—SET-OFF.

The individual liability of a stockholder in a corporation created by the statute of Minnesota is not to the corporation, but to its creditors; and hence, in a suit by a special receiver to enforce such liability against a stockholder, the defendant cannot set off an indebtedness due from the corporation to him.

2. SAME—DEFENSES—SUIT IN ANOTHER JURISDICTION.

Gen. St. Minn. § 5911, provides for the calling in by publication of all creditors of a corporation in a suit on behalf of creditors to enforce the statutory liability of the stockholders, and all who become creditors of a Minnesota corporation by their contract submit themselves to such provision. Hence, in an action by a special receiver, appointed in such a suit, to enforce the assessment made therein against a stockholder, a plea alleging that defendant is a creditor of the corporation, and did not receive notice of the suit, nor appear therein to prove his claim, where the declaration alleges that the provision of the statute was complied with, is insufficient; nor does a plea setting up such fact constitute ground why a court of another jurisdiction should not entertain the action upon the principles of comity.

At Law. On plaintiff's demurrer to fourth, fifth, and sixth pleas.

M. H. Boutelle, Robert W. Burbank, and Eben Winthrop Freeman, for plaintiff.

Van Slyck & Mumford, for defendants.

BROWN, District Judge. The fourth plea is a strict plea of set-off, and the demurrer to this plea must be sustained, on the authority of the decision of the circuit court of appeals for this circuit in *Burget v. Robinson*, 113 Fed. 669, rendered January 24, 1902.

I am of the opinion, also, that the fifth plea must be regarded merely as a plea in set-off, and that the main defense of the defendants must be considered solely upon the sixth plea. The demurrer to the fifth plea is therefore sustained, for the same reason applicable to the fourth plea.

By the sixth plea the defendants set up the fact that they were creditors of the corporation to the amount of about \$2,000, with interest; that by reason of this fact they were, at the time of the commencement by Rogers of the suit in behalf of himself and all other creditors of said Northwestern Guaranty Loan Company, entitled to be notified of the pendency of said suit, and to have an opportunity to intervene therein, and to have the said sums of money due them set off against their liability as stockholders. They aver that they did not receive notice of the pendency of said suit, and did not have an opportunity to intervene therein as aforesaid. They contend that, since the equities arising from the dual position of the defendant as creditor and stockholder cannot be adjusted in this suit, the action will not be permitted, and rely on *Mathez v. Neidig*, 72 N. Y. 100. Quoting the opinion of Judge Aldrich in *Hale v. Hardon*, 37 C. C. A. 268, 95 Fed. 775, to the effect that "whether a receiver shall or shall not maintain an action

extraterritorially is not a question of absolute right," the defendants contend that the additional facts pleaded by them take the case at bar out of the reason of the decision in *Hale v. Hardon*, and present to this court grounds which should induce it to deny the exercise of principles of comity in favor of the plaintiff in the present case.

It should be observed, however, that the declaration, not demurred to in this respect, alleges that in the suit by Rogers, "according to and as provided by the laws of said state, such proceedings were had in said cause that an order was therein entered limiting the time within which creditors desiring to participate therein should intervene and present and file complaints in intervention, and due notice of such order given to all parties in interest, all as provided by the laws of said state." Section 5911 of the Minnesota statute, referred to in *Hale v. Hardon*, 37 C. C. A. 243, 257, 271, 272, 95 Fed. 750, 764, 778, 779, and at other places, provides for notice by publication. The plea does not set forth that notice was not given by publication, as provided for in the statute, but merely that the defendants did not receive notice of the pendency of said suit. The question then arises whether, as creditors of the corporation, the defendants submitted themselves to the laws of Minnesota, which provided for notice by publication. On page 257, 37 C. C. A., and page 764, 95 Fed., in the opinion in *Hale v. Hardon*, it was said:

"The Minnesota statute (section 5911) provides for calling in all the creditors, and the creditors have by contract submitted their rights to the operation of such provision of law of the corporate domicile."

In view of this it would seem that this court, despite arguments to the contrary, must apply in this case the rule that these creditors, in dealing with the corporation, have assented to this provision making publication due notice to them. Therefore the plea is insufficient to meet the allegations of the declaration. Although it is true that the declaration avers that by reason of the nonresidence of the defendants they were not and could not have been served with process in said suit, and did not enter an appearance therein, I think we are forced to assume on this record (the declaration alleging the fact that the statute was complied with) that there was statutory notice by publication. It is apparent, however, that the right of which the defendants complain that they have been deprived through lack of actual notice was merely a right as creditors to participate in the distribution of the proceeds realized by this receiver. The declaration avers that creditors filed claims and demands in intervention aggregating upward of \$2,000,000. The right, if any, of these creditors, was to add their \$2,000 claim to the claims for \$2,000,000, and in proper proportion share in the proceeds of a judgment against them upon their liability as stockholders. The contention that they are entitled to offset against their liability as stockholders the entire amount of their claim against the corporation is untenable.

As the plaintiff states a cause of action sustainable upon the principles of *Hale v. Hardon* and *Burget v. Robinson*, and as the defendants' sixth plea does not allege any failure on the part of the plaintiff, or of those through whom the plaintiff derives his rights, to observe the provisions of the Minnesota statute, and as the plea does not disclose

sufficient ground upon which, by the application of the principles of comity, we could deny the plaintiff's right to maintain this suit, even were the legal questions on this point free from doubt, the demurrer to the sixth plea must be sustained.

Demurrers to fourth, fifth, and sixth pleas sustained.

GOW et al. v. WILLIAM W. BRAUER S. S. CO.

(District Court, S. D. New York. January 14, 1902.)

1. ADMIRALTY—WRONGFUL ARREST OF VESSEL—DAMAGES.

While ordinarily the arrest of a vessel in a cause of damage by due process is an inconvenience to which the owner is required to submit, without remedy, upon his success in the action, beyond the recovery of costs, yet when the libellant proceeds without an honest belief that he is using a rightful remedy, and his action is in the nature of a malicious prosecution, he should be held to pay any damages sustained by the owner through his wrongful act.

2. SAME.

The charterer of a ship for two voyages, the hire to be paid by the month, on the completion of the vessel's discharge after the second voyage, and before her actual redelivery, caused her arrest on a libel filed against her asserting a claim against the owner. At the time the charterer was concededly indebted to the owner for hire under the charter in a sum exceeding that claimed in his libel. *Held*, that the arrest was made in bad faith, and by an abuse of the process of the court, and that the charterer would be held to the payment of hire under the charter to the time when the vessel was released from such arrest.

3. SAME—SUIT ON CHARTER—PLEADINGS AND ISSUES.

A libel by a shipowner against a charterer to recover charter hire gives the admiralty court jurisdiction over the entire contract, and it will inquire into all its breaches, and award all the damages suffered thereby, although such breaches were not all specifically alleged in the libel, but some occurred after it was filed. A libel to recover charter hire for a month in advance, where the charterer redelivered the vessel within the month, sufficiently raises the issue as to when such redelivery was made.

4. SHIPPING—CHARTER—CARGO SPACE.

Evidence *held* insufficient to sustain the claim of a charterer to damages because of an alleged warranty or representation that the cargo space of the ship was greater than it in fact was, no complaint or claim on that account having been made at the time of loading, nor until after the completion of the two voyages for which the ship was chartered.

5. SAME—COMMISSION ON ADVANCES BY CHARTERER.

A charterer is entitled to the stipulated commissions on advances made for the disbursements of the vessel upon entering on the charter, although she then had coal in her bunkers of equal or greater value, which the charterer was bound to take and pay for, where the advances were actually required and made before an adjustment could be made of the amount due for coal.

In Admiralty. Suit to recover charter hire.

Convers & Kirlin, for libelants.

Warren, Warren & O'Beirne, for respondent.

ADAMS, District Judge. This is an action brought to recover \$7,493.85, the hire of the steamship Ventnor for the month commencing June 18, 1901, alleged to be due under a charter party

made in the city of New York the 13th day of February, 1901, between the parties hereto, respectively owners and charterer, which provided for a monthly hire of £1,575, payable in advance, of which amount the said sum of \$7,493.85 is the equivalent. The hiring was for two round trips between "U. S. Atlantic port or ports and Europe," and to commence on the day of delivery to the charterer at a United States Atlantic port north of Hatteras, which delivery was duly made on the 18th day of March, 1901, at 10 o'clock a. m., and to continue until redelivery to the owners upon the completion of the second trip at a similar port. Payments were duly made for the hiring prior to the 18th of June. At the time of filing the libel—June 26, 1901—the steamer had begun the second trip, and was on her way towards Philadelphia, the port of return delivery. The charter party provided:

"(5) That should the steamer be on her voyage towards the port of return delivery at the time a payment of hire becomes due, said payment shall be made for such a length of time as the owners or other agents and charterers or their agents may agree as the estimated time necessary to complete the voyage, and when the steamer is delivered to owners' agents any difference shall be refunded by steamer or paid by charterers, as the case may require."

The parties were unable to reach an agreement under this clause, and the action was brought on the theory that another month's hire became due. *Tonnellier v. Smith*, 2 Com. Cas. 258. The steamer subsequently arrived at Philadelphia, and completed the delivery of her inward cargo there in the afternoon of July 4, 1901, but was immediately arrested under process issued upon a libel filed on the 3d day of July by the charterer in the United States district court for the Eastern district of Pennsylvania, alleging that the vessel had failed to comply with the terms of the charter party. The eighth clause provided:

"That the whole reach of the vessel's holds, decks, and usual places of loading, and accommodation of the ship (not more than she can reasonably stow and carry), shall be at the charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores, and fuel."

The charterer claimed damages under the clause to the extent of \$966.24. The libel also contained another claim against the ship for delay at the port of Hamburg owing to sufficient steam not being furnished to run the winches, in conformity with the twenty-fourth clause of the contract, and asking damage in such respect in the sum of \$512.40. The vessel remained in custody under the seizure until the next day, when she was voluntarily released. These same matters set up in the Philadelphia libel are alleged by the charterer in its answer in the case at bar, excepting that the damages claimed for the ship's failure to furnish cargo space are \$971.84, instead of \$966.24. Additional offsets are also claimed in the answer for coal remaining in the bunkers of the steamer at the time of redelivery, which the owners were to pay for under the contract, amounting to \$458.20; for sundry disbursements made at the return port upon the request of the master of the vessel, amounting to \$14.55; for disbursements made on behalf of the vessel at Ham-

burg, amounting to \$699.92; and for an address commission of $2\frac{1}{2}$ per cent. The libelants herein admit the coal claim, \$458.20, the disbursement claim of \$14.55, and the address commission claim. No proof was offered by the respondent to sustain the claim of \$512.40, loss of time at Hamburg, and it has been abandoned. The claim of \$699.92 for disbursements at Hamburg was paid by the libelants there. There is a claim made by the libelants for \$18.18 deducted by the respondent as a commission on advances alleged to have been made on the first voyage. It was admitted by the respondent on the trial that hire was due up to July 4th, and such hire has been proved to amount to \$4,163.25. There are now, therefore, three matters in controversy, viz.: (1) Whether the hire should be computed up to July 4th, when the vessel was free from cargo, or to July 5th, when she was released from custody; (2) whether the respondent has an offset by reason of not receiving all the cargo space it was entitled to; (3) whether the libelants are entitled to recover the sum of \$18.18, deducted by the respondent from the hire for the first voyage.

1. It does not appear that there was any actual notice of a redelivery of the steamer on the 4th of July. Nor were there any steps taken by the respondent to indicate an intention on its part to terminate its relations to the steamer. Doubtless a redelivery would have been effected by operation of the provisions of the charter party when the inward cargo was discharged, and the hiring would have been in fact then terminated, in the absence of any act by the respondent to prevent it; but, instead of permitting the owners to resume possession, the respondent invoked the process of the court to prevent it, and by such means actually detained the vessel 25 hours beyond the time when the owners would otherwise have taken her back. At this time the respondent admittedly owed the libelants \$4,163.25, less a deduction of $2\frac{1}{2}$ per cent. address commission, amounting to \$104.08, or \$4,059.17. The respondent's claims against the steamer or the steamer's owners then were the sums mentioned in the Philadelphia libel, \$966.24 and \$512.40. The only other claims which it has at any time pretended to have were, respectively, \$458.20, \$14.55, and \$699.92, as hereinbefore described, and the additional \$5.60 on the cargo space claimed, aggregating, with the libel claims, \$2,656.91. The respondent, therefore, when it caused process to be issued and the vessel arrested, was, according to any possible computation, actually in debt to the libelants some \$1,402.26. Under the circumstances it is claimed by the libelants that the hire should continue during the 25 hours the vessel was under seizure. While the ordinary arrest of a vessel in a cause of damage, security for costs having been given by the libelant, is an inconvenience to which the owner is required to submit without a remedy, upon his success in the action, beyond the costs, yet where the libelant proceeds without an honest belief that he is using a rightful remedy, and his action is in the nature of a malicious prosecution, he should be held in any damages suffered by the shipowner through his wrongful act. The *Walter D. Wallet* [1893] Prob. Div. 202; The *Adolph* (D. C.) 5 Fed. 114; *Kemp v. Brown* (D. C.) 43 Fed. 391;

The *Alex Gibson* (D. C.) 44 Fed. 371, 374; The *Wasco* (D. C.) 53 Fed. 546. The facts here conclusively establish that the respondent could not have proceeded against the steamer in good faith. If all the facts of the transaction known to the respondent had been stated in the most favorable manner, it would have appeared on the face of the libel that nothing was due, and process could not properly have been issued. The arrest of the steamer was obtained by a suppression of the facts, and the proceedings on the part of the respondent were mala fide, and an abuse of the process of the court. The respondent contends, in this connection, that the libelants' claim is not properly raised by the pleadings, and is not in issue. I think that a libel claim for a month's hire sufficed to raise the question, which has been so litigated that the respondent has had ample opportunity to present any defense it wished to make. There does not seem to be any dispute about the facts, and, if my views are correct with respect to the law, it seems that I should grant the relief. The contract is maritime, and, the court "having jurisdiction over the entire contract, it will proceed to inquire into all its breaches, and all the damages suffered thereby, however peculiar they may be, and whatever issues they may involve." *Church v. Shelton*, 2 Curt. 271, 5 Fed. Cas. 675 (No. 2714). And see *The Electron* (D. C.) 48 Fed. 689, 690; *The Normannia* (D. C.) 62 Fed. 469, 472; *Boutin v. Rudd*, 27 C. C. A. 526, 82 Fed. 685, 686. I hold, therefore, that there was no proper redelivery of the steamer on the 4th of July, but that the hire continued to the 5th of July, when the steamer was released from custody. The hire to such time amounts to \$4,430.12, from which should be deducted an address commission of $2\frac{1}{2}$ per cent., —\$110.75,—leaving a balance of \$4,319.37.

2. The claim of the respondent in this respect is stated in the answer as follows:

"Seventh. That at the time of the making of the charter party the said steamship *Ventnor* was in the United Kingdom, and was unknown to the respondent, except by name. That the libelants, by their duly-authorized agent, warranted and represented to this respondent that the space to be occupied by cargo in the said steamship and as shown on her plans in the peaks, lazarette, and poop was 16,565 cubic feet, all of which, reserving only proper and sufficient space for the ship's officers, crew, tackle, apparel, furniture, provisions, stores, and fuel, should have been at the disposal of the charterers; that a proper and sufficient space for these purposes would be 4,000 cubic feet; that said plans showed the upper forepeak of said vessel was of the cargo carrying capacity of 2,023 cubic feet, that the intermediate forepeak and lower forepeak was of the cargo carrying capacity of 4,421 cubic feet, that the afterpeak was of the cargo carrying capacity of 2,372 cubic feet, and that her poop was of the cargo capacity of 7,349 cubic feet,—in all 16,565 cubic feet. And relying upon such warranty and representation, and believing the same to be true, entered into the charter party marked 'Exhibit A,' annexed to the libel herein."

It was assumed that the terms of the clause 8, covering the contention, opened the door for proof as to the quantity of space the charterer was entitled to, exclusive of that which belonged to the ship for stores, etc., and full opportunity was given the respondent to prove all the circumstances relating to the matter, including representations prior to the contract; but nothing was elicited tending to show the

representations claimed. It appeared that the owners' agent in the negotiations gave a card to the respondent's agent on which the estimated general capacity of the vessel was stated, but it was also stated therein that such particular was "believed correct, but not guaranteed." It was after the contract was executed that a plan of the vessel was sent to the respondent, and it is upon such plan, and some plans made by the respondent's agents, that the claims are made. There was, therefore, no guaranty or warranty of space, and the question is whether the terms of clause 8 were complied with. There is testimony on the part of the respondent tending to show that it did not get all the space its agents thought they ought to have had, and for which they applied to the officers of the steamer; but such testimony is denied in substance by the officers of the steamer, who say that no such demands were made upon them, but that, on the contrary, the whole control of the loadings of the steamer was under the charterer's agents, as provided by clause 9 of the contract, to the effect that the captain should be under the orders and direction of the charterer as regarded "employment, agency, or other arrangements," and that the entire capacity of the steamer was at the charterer's disposal, excepting proper reservations for the ship's stores, not exceeding about the quantity conceded by the charterer, even excluding some latitude which the master could reasonably have exercised in the matter. Upon consideration of the testimony, some of which I heard, I do not feel inclined to allow the claim. In the midst of the conflict probabilities intervene which are persuasive against the respondent. For example, after the loading for the first voyage was completed (the claim embraces both voyages) the respondent made no claim in respect to deprivation of space, but on the 21st of March wrote to the master of the steamer, "Your vessel being now loaded, please proceed to the port of Hamburg." After the loading for the second voyage was completed, similar sailing orders were given containing the expression, "Your vessel being loaded." There was no protest to the owners on either occasion, nor anything to indicate positive dissatisfaction at such times, and there is ground for reasonable belief that the whole claim is a resuscitation for the purposes of a legal dispute of some controversies between the officers of the steamer and the respondent's loading agents, which, if of serious existence, were abandoned. I therefore disallow it.

3. The claim of the libelants for \$18.18 alleged to have been improperly deducted from the hire by the respondent, I do not allow. It was not made a subject of contention by the pleadings, and, in any event, is not sufficiently established. It arose out of charges made for advances to the steamer on her first entry to the port of Philadelphia. The testimony shows that the advances were actually made by the charterer for the steamer's disbursements, but it is contended that the ship then had coal in her bunkers, which the charterer was bound to pay for when the ship arrived, and that it was therefore in funds to pay the claim out of the owners' money. There is some plausibility in the claim, but the difficulty is that the disbursements seem to have been made before any adjustment could be made of the amount due for the coal. The money was paid out by

the charterer before it was under any obligation to pay for the coal, and, I think, became a proper subject for a commission charge.

Decree for the libelants for the sum of \$3,846.62, with interest and costs.

NEWBURYPORT WATER CO. v. CITY OF NEWBURYPORT.

(Circuit Court, D. Massachusetts. March 5, 1902.)

No. 924.

1. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS.

St. Mass. 1893, c. 471, authorized a city to build its own waterworks, after submission to a vote of the people, notwithstanding the previous grant of a franchise to plaintiff. After a vote of the city to supply itself with water without buying the works of plaintiff, St. Mass. 1894, c. 474, was passed, obliging the city to purchase plaintiff's waterworks before proceeding to supply itself with water, if plaintiff within a certain time notified the mayor of the city of its desire to sell. *Held*, that such latter act is not a violation of Const. U. S. art. 1, § 10, prohibiting an act impairing the obligation of contracts, because of the contract for water existing between the plaintiff and the city, as it simply gave plaintiff the option of selling its property on the terms mentioned.

2. SAME.

Evidence that the commissioners, in valuing plaintiff's property under the act of 1894, did not in fact value the water contract which plaintiff had with defendant, could not affect the terms of the act, so as to render it unconstitutional.

In Equity. For former opinions, see 85 Fed. 723, and 103 Fed. 584.

Robert M. Morse and Lauriston L. Scaife, for complainant.

Albert E. Pillsbury and Horace I. Bartlett, for defendant.

Before COLT, Circuit Judge, and BROWN, District Judge.

PER CURIAM. It has been decided by this court, upon full and careful consideration, that there was no taking of the complainant's property under the acts of 1893 and 1894; that the deed of the complainant's property was voluntary, and not compulsory; and that consequently the complainant had not been deprived of its property without due process of law, in violation of the fourteenth amendment to the constitution of the United States. The complainant now maintains that the act of 1894 was in violation of section 10 of article 1 of the constitution, which provides that "no state shall pass any law impairing the obligation of contracts." The complainant raises this question by asking the court to admit the testimony of the commissioners appointed to value the complainant's property under the act of 1894, to the effect that they did not in fact value the water contract entered into between the complainant and defendant. The act of 1893 authorizes municipal competition, which the legislature had a legal right to authorize. The act of 1894 forbids municipal competition, provided the complainant chose to deed its property to the defendant on the terms specified. This act did not impair any contract which had been entered into between the complainant and defendant. It simply gave the complainant the option, if it chose, to sell

its property to the defendant on the terms mentioned. The complainant, if it so desired, could have retained its property and its contract with the defendant; but it did not do so, and voluntarily deeded its property to the defendant. If it lost any right to any contract by this action, it was because it deemed it wise to take advantage of the provisions of the act of 1894, which obliged the defendant to buy the waterworks, if the complainant so desired, before it should undertake to build waterworks of its own. Assuming that this testimony could properly be offered at this stage of the case (a question which we do not find it necessary to pass upon), and that the complainant could show that the commissioners did not in fact value the water contract in estimating the value of the complainant's property, we are of the opinion that this testimony would not be material, and that it would be entirely ineffectual. It does not tend to prove that the act of 1894 was in violation of the contract clause of the constitution, because what was done or omitted by commissioners appointed under the act could not affect the terms of the legislative act itself, or make the act unconstitutional. Furthermore, after a full hearing upon the question of duress, this court has already decided that all the proceedings which took place under the act of 1894 were entered into voluntarily by the complainant in order to avoid great disaster arising from municipal competition.

Our conclusion upon this point is conclusive against the admission of the testimony, offered by the plaintiff, that the commissioners did not value the water contract. The motion to enter the final decree dismissing the bill is granted.

DAVIS v. MILLS et al.

(Circuit Court, D. Connecticut. February 20, 1902.)

No. 457.

CORPORATIONS—TRUSTEES—FAILURE TO FILE REPORT—ACTION—LIMITATIONS.

Where an action was commenced in Connecticut in 1897 against the trustees of a Montana corporation to recover of them individually debts owing by the corporation in 1893, because of the failure of such trustees to file the report which they were required by statute to file in that year, the action was barred either under Code Civ. Proc. Mont. § 515, providing that an action upon a statute for a penalty or forfeiture given to an individual must be brought within two years, or Gen. St. Conn. § 1379, providing that no suit for any forfeiture upon any penal statute shall be brought after one year from the commission of the offense.

John A. Shelton and William A. Wright, for plaintiff.
Gross, Hyde & Shipman, for defendants.

TOWNSEND, District Judge. Demurrer to complaint in action at law. This case has already been considered on motion for leave to amend (83 Fed. 982), and on demurrer to plea to jurisdiction (99 Fed. 39). The present demurrer is on the ground that the cause

of action is barred by the statutes of limitations both of Montana and Connecticut. The defendants contend as follows:

"First, that the statute of the state of Montana under which this action is brought is penal, in so far as the application of the statute of limitations is concerned; second, that the statute of limitations of the state of Montana must govern the decision of this court; and, third, that, whether the statute of the state of Montana or the statute of the state of Connecticut is applied, the court must hold that the plaintiff's cause of action is barred."

The question of the character of the Montana statute was exhaustively discussed on a former hearing, and was fully considered in the opinion. The conclusion was there reached that the statute was not a penal one in the sense that it could not be enforced in a foreign jurisdiction. 99 Fed. 39. The statute of Montana (Code Civ. Proc. § 515) reads as follows:

"Sec. 515. Within two years. (1) An action upon a statute for a penalty or forfeiture when the action is given to the individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

The Connecticut general statute as to penalties is as follows:

"Sec. 1379. No suit for any forfeiture upon any penal statute shall be brought but within one year next after the commission of the offense."

That the statutory liability in this case comes within the terms of the Montana statute has been decided in the highest court of that state (*Gans v. Switzer*, 9 Mont. 408, 413, 24 Pac. 18; *Elkhorn Trading Co. v. Tacoma Min. Co.*, 16 Mont. 322, 40 Pac. 606; *Bank v. Johnson*, 45 Pac. 662, 33 L. R. A. 552, 56 Am. St. Rep. 591; *Wethey v. Kemper*, 17 Mont. 491, 43 Pac. 716), and the construction of the Montana statute is binding upon this court. Plaintiff claims strongly that the Connecticut statute of limitations, and not that of Montana, must be applied. If the liability comes within the terms of the Montana statute, it would seem that it also comes within that of the Connecticut statute. The words "penalty or forfeiture" in the Montana statute are substantially equivalent to the words "forfeiture upon any penal statute" in the Connecticut statute. If the Connecticut statute above quoted is not applicable, it is not clear that any statute of that state would bar this action, and the liability of defendants might thus be continued indefinitely. While there is no decision of the highest court in Connecticut precisely bearing upon the question arising here, *Mitchell v. Hotchkiss*, 48 Conn. 18, 40 Am. Rep. 146, concerns a somewhat similar state of facts. The Connecticut statute provided that if the president and secretary of a corporation should intentionally neglect or refuse to file annually certificates showing the condition of the corporation with the town clerk, those officers should be liable for all the debts of the corporation contracted during the period of such neglect. The question raised was whether the cause of action survived the death of the officer who had become liable under this statute. The court held that the statute did not create any contract relation or duty between the creditors of the corporation and its president; that there was no privity between the president and the plaintiff, and that the former had owed the latter "no private duty from which a promise might be implied";

that the duty to be performed was a public duty, required by public policy for the general welfare; and that the willful neglect of the prescribed duty was a public wrong, invoking the penalty of the statute,—and cites various authorities to the same effect. A comparison of *Mitchell v. Hotchkiss*, *supra*, with *Plumb v. Griffin*, 74 Conn. 132, 50 Atl. 1, very recently decided in the supreme court of Connecticut, confirms this view. A statute of Connecticut provides that “any person who cuts trees or timber on the land of another without a license, shall pay to the party injured two dollars for every tree, or one for any timber.” It was claimed that this was a forfeiture, and that suit must be brought within one year. The court holds that a statute which merely gives to the party injured increased damages, is not a penal statute. In *Mitchell v. Hotchkiss* the court held that the statute making officers of corporations liable for failure to file reports comes clearly within the definition of a penal one, and that the action did not survive against the executor. If necessary for the decision of this case, it should be held, following the intimation in *Hobbs v. Bank*, 37 C. C. A. 513, 96 Fed. 396, Id., 41 C. C. A. 205, 101 Fed. 75, and the decision in *Brunswick Terminal Co. v. National Bank of Baltimore*, 40 C. C. A. 22, 99 Fed. 635, 48 L. R. A. 625, that the Montana statute of limitations controls the operation of the statute governing the penalty in other states as well as in Montana; and, if this be not so, it should be held that the action is for a penalty and should be brought within one year under the Connecticut statute.

The demurrer is sustained.

W. H. BEARD DREDGING CO. v. HUGHES et al.

(District Court, S. D. New York. January 27, 1902.)

1. SHIPPING — DAMAGES FOR BREACH OF CHARTER — SALE OF VESSEL BEFORE EXPIRATION OF TERM.

Where a dredge and three scows, to be used in connection therewith, were chartered for a minimum term of three months, but were returned and the dredge was sold by the owner before the expiration of the term, the charterer is not chargeable with the hire of either vessel as damages for breach of charter after the date of such sale.

2. SAME—INJURY TO CHARTERED VESSEL—LIABILITY.

A charterer is liable for an injury to the chartered vessel through the negligence of a company which he hired to tow the same.

3. SAME—NEGLIGENCE.

There can be no recovery from a charterer for injuries to the vessel, without proof of negligence.

In Admiralty. Action to recover charter hire and damages.

Addoms, Hinman & Smith, for libellant.

Robinson, Biddle & Ward, for respondents.

ADAMS, District Judge. This is an action brought to recover some unpaid hire and damages for a breach of a charter of the libellant's dredge *Samson* and three scows, known as Nos. 1, 2, and 3; also for damages alleged to have been caused to two of the scows

by the negligent manner in which they were used. The charter was a verbal one, confirmed by a letter dated March 9, 1901, as follows:

"Mess. Hughes Bros. & Bangs, 1 Madison Av., N. Y.—Gentlemen: We herewith confirm the verbal agreement made on the 8th inst. with your Mr. Morrison, which was as follows: We agree to furnish the combination dredge Samson, with crew of eight men and equipment, for dredging at New Haven, Conn., also three scows, No. 1X, 572 yards, No. 2X, 643 yards, and No. 3X, 644 yards, U. S. Govt. measurement, at one hundred and fifty (\$150.00) per day; time to begin when the plant commences work at New Haven; minimum time to be three months. You are to tow the plant from New York, and to return it to New York when the work is finished, and to furnish coal and water to the dredge at your expense. Loss of time caused by breakdown of dredge in excess of thirty minutes to be charged against the plant at the rate of twelve (\$12.00) dollars per hour. Payments to be made on the 15th of each month for work of the preceding month. The dredge is to be rigged with a dipper. Should you wish to equip her with a clamshell bucket, it can be shipped on at any time. Sundays and holidays are not to be included in working time.

"Yours, truly,

The W. H. Beard Dredging Co.,

"By William Beard, Pres."

The vessels were delivered to the respondents, under the contract, on the 18th day of March, and were returned to the libelant on the 3d day of May. The respondents admit a breach of the contract, and liability on their part for hire from May 3d to May 16th, at which time the dredge was sold by the libelant. A question arises whether the sale of the dredge relieved the respondents from subsequent liability under the contract. The further claim for damages to the vessels is in consequence of injuries received by them while in possession of the respondents, the theory of the libelant being that a failure to return them uninjured imposed liability upon the respondents. The injury claim is resisted by the respondents on the ground that there was no proof of negligence as to one of the scows, and that the other was injured by an independent contractor.

With respect to the hire, it seems that after the return of the vessels the plant was kept in reasonable readiness for service until the dredge was sold, and after that the scows were kept so, and efforts made to obtain employment for them, with little success, up to the time of the expiration of the contract. But I do not see how there can be any recovery for damages, in the nature of hire, after the dredge was sold. The plant was thereby dismembered, and, for aught that appears, the sale may have been a profitable one to the libelant, which it was enabled to take advantage of by having obtained possession of the vessels through the respondents' breach of contract. The libelant will be allowed hire up to the 16th of May, credit being given for payments made in March and April.

There can, I think, be little doubt as to the liability of the respondents for any injuries to the scows through negligent handling, whether caused by the respondents directly, or by a towing company employed by them, which is called an "independent contractor." *Smith v. Bouker*, 1 C. C. A. 481, 49 Fed. 954; *Hastorf v. Moore* (D. C.) 92 Fed. 398. Scow No. 3 was negligently towed on a rock while in the respondents' service, and they must respond for the damages caused thereby. With respect, however, to scow No. 2, though there is testimony tending to show that she was returned to the owner

in a damaged condition, there is no evidence from which it can be determined in what manner the injury was received. This contract amounts to a simple bailment for hire, and, without proof of negligence on the part of the hirers or charterers, there can be no recovery against them. *Clark v. U. S.*, 95 U. S. 539, 542, 24 L. Ed. 518; *Association v. Moore* (Jan. 13, 1902) 184 U. S. 10, 11, 22 Sup. Ct. 240, 46 L. Ed. —.

Decree for the libelant, with an order of reference.

THE PENCOYD.

(District Court, D. New Jersey. January 29, 1902.)

TUGS AND TOW—LIABILITY OF TUG FOR LOSS OF TOW—IMPROPER COUPLING.

Evidence considered, and *held* insufficient to sustain the allegation of the libel that the sinking of a barge while being towed with others was due to the fault of the tug in improperly coupling the barges to each other.

In Admiralty. Action against tug for loss of tow.

Linsly Rowe and James J. Macklin, for libelant.

James Armstrong, for claimant.

KIRKPATRICK, District Judge. This libel is filed by Albert J. Cook, as the owner of the barge Swenson, which sank in the East river in February, 1899, owing, as is alleged, to the negligence of the steam tug Pencoyd. The libel sets out that the barge Swenson, laden with a cargo of coal, was, with five other boats, taken in tow by the Pencoyd, to be transported from Port Liberty, N. J., to foot of Stanton street, East river, New York; that the tow was made up under the direction of the master of the Pencoyd, and in such manner as to cause the captain of the Swenson to object thereto; that, in consequence of the improper coupling of the tow, the barge Swenson sustained injuries which caused her to sink and become a total loss.

It appears from the testimony in the case that both the North and East rivers were at the time of the accident full of heavy floating ice, and it is suggested in the libel that the method of coupling the tow caused the sterns of the Swenson and Philadelphia & Reading Barge No. 5, which was abreast of her, and upon her port side, to be drawn together, so that the ice accumulated between the boats, and caused the injury complained of. While it is apparent that the drawing together of the sterns of the Swenson and Philadelphia & Reading Barge No. 5 would have had the effect to prevent the ice from passing between them, and, by becoming tightly packed in the space, thereby have had a tendency to cut through the boats, and in that way caused her to spring a leak, yet there is not a scintilla of evidence that the sinking of the barge was due to that cause. On the contrary, the testimony of libelant's witnesses tends to show that the injury which the barge sustained was due to a bumping by the boat astern of her in the tow, which bumping was the result of improper coupling. The allegation of libelant is that the starboard bow of

the hindmost boat was attached to the starboard side of the Swenson, and that her port bow was attached to the port side of Philadelphia & Reading Barge No. 5, and that, in consequence, as the tow veered from a straight line, the McLain (the boat astern of the Swenson) would bump into the stern of one of the boats ahead of her, at one time the Swenson, and then Philadelphia & Reading Barge No. 5, until finally she struck the Swenson such a crushing blow in the stern that she sprang a leak and in 15 minutes sank by the head. The testimony upon which libellant relies is that of Cook, the owner of the Swenson, who tells the story as above, Lyttle, the captain of the Swenson, and Brundage, the captain of the McLain. But the testimony of Cook is impeached by the story which he told to Bloomsbury immediately after the sinking of his boat, when he made no mention of any bumping, but supposed the accident was due to the ice. Brundage's evidence is contradictory of itself and inconsistent with his letter written soon after the occurrence. The captain of the Philadelphia & Reading Barge No. 5 testified that, although he was on the deck of his barge from the time the tow left Port Liberty until after the accident, he was not aware of any bumping of his boat, as alleged by Cook, the libellant; and the fact that the Philadelphia & Reading Barge No. 5 did not show any signs of injury upon an examination made soon afterwards would seem to corroborate his statement. It also appears that an inspection of the McLain failed to discover that the McLain had sustained any damage from the alleged bumping, and it does not appear that any claim therefor has ever been made. It is, of course, immaterial whether the tow was properly coupled or not, unless it be shown that the damage to the Swenson resulted from improper coupling, which is the negligence complained of.

The evidence fails to show to the satisfaction of the court that the sinking of the Swenson was due to the negligence of the claimant. The burden of proof being on the libellant, his libel must be dismissed.

UNITED STATES v. GREENE et al.

(District Court, S. D. Georgia, E. D. February 17, 1902.)

1. CONSPIRACY—INDICTMENT—PLEA IN ABATEMENT—NATURE OF PLEA.

A plea in abatement to annul an indictment of a grand jury, being dilatory, and not favored by the courts, must conform with strict exactness to the requirements as to form, and contain all essential averments, pleaded with accuracy.

2. SAME—IRREGULARITY IN DRAWING GRAND JURY—JUDICIAL NOTICE.

The court, in considering a plea in abatement to an indictment for an omission of the clerk in drawing the grand jury, will take judicial notice of its record relative to the duty which it is claimed the clerk failed to perform.

3. SAME—SUFFICIENCY OF PLEA—PERFORMANCE OF CLERK'S DUTY BY DEPUTY.

A plea in abatement to an indictment averring that the clerk did not place the names of the grand jurors in the box, but that they were placed therein by the jury commissioner and a deputy clerk, without mentioning the deputy's name, or that his action was not done in the clerk's presence, nor alleging that the deputy and commissioner were

of the same political faith, that either was moved by improper motives, or that incompetent or partial jurors were selected, is insufficient.

4. **SAME—MANNER OF PLACING JURORS IN BOX.**

Where jurors were lawfully chosen by jury commissioners of opposing political faiths, it is of no moment that their names were placed in the jury box by the handfals, instead of alternately by the clerk and by the commissioner.

5. **SAME—CUSTODY OF JURY BOX.**

An indictment will not be quashed on the ground that the jury box was not kept continuously in the clerk's custody, but was delivered by him to strangers, thus giving an opportunity to tamper with the jury box, where it has been the practice, when necessary at the official residence of the judge to draw a jury for another division of the district, to issue a suitable order to the clerk to transmit the jury boxes by a reliable express company, and that was done in the instance referred to in the plea.

6. **SAME—PUBLIC DRAWING—JUDICIAL NOTICE.**

The court will take judicial notice that a grand jury was publicly drawn in the presence of the officials required to be present.

7. **SAME—VENIRE FACIAS—ISSUANCE.**

An indictment will not be quashed on the ground that no venire facias was issued by the clerk, nor filed in the clerk's office for the Eastern division of the Southern district of Georgia, until after the persons whose names were drawn had been summoned, where it is not denied that a venire facias was issued by a deputy clerk of the court having his residence in the Western division.

8. **SAME—INSTRUCTIONS TO JURORS.**

A plea in abatement to an indictment that instructions were given by "those in authority" that the officers serving a grand jury summons should keep secret the names of persons drawn, and enjoin on those summoned the necessity of keeping secret that they had been summoned to serve as a grand jury, is insufficient, where it is not alleged who "those in authority were," and no such instructions were issued by the court.

9. **SAME—NUMBER OF NAMES IN BOXES.**

Where the district court jury box and the circuit court box at the time of the drawing of a grand jury contain exceeding 300 names, and the court directs the jury drawn from the "jury boxes," the indictment cannot be quashed on the ground that the jury box from which the jury were drawn contained less than 300 names, for, though the particular jury was drawn from one of the boxes, all of the names in both boxes may be regarded as the jury body from which the grand jury were selected.

10. **SAME—DRAWING FROM PARTICULAR COUNTIES.**

Under Rev. St. § 802, requiring that jurors shall be returned from such parts of the district as the court shall direct so as to be most favorable to an impartial trial, the fact that the court directs that grand jurors be drawn from particular counties does not disqualify other jurors from other counties, whose names are in the jury box.

11. **SAME—IMPARTIALITY OF JURORS.**

An indictment for conspiracy to defraud the government of money appropriated for harbor improvements will not be quashed on the ground that grand jurors from counties where the improvements were located, and who were peculiarly qualified to act because of familiarity with such improvements, were excluded from the jury box, where such alleged conspiracy was notorious in such counties, and the court was endeavoring to secure an impartial jury.

12. **SAME—WAIVER OF PLEA.**

Defendants under indictment for conspiracy to defraud the government waive their right to plead in abatement to the indictment for alleged irregularity in the drawing of the grand jury where they, by unnecessarily resisting the processes of the court, and resorting to dilatory

tory proceedings in another state to prevent being brought before the court, have delayed the trial for more than two years before appearing to present their plea.

13. SAME—ADVICE OF COUNSEL.

In such case it is of no avail to the defendants that they were advised by their counsel that they could not be removed to Georgia for trial, and were under bond to the courts in New York for appearance in proceedings instituted by them to prevent their removal.

Indictment for Conspiracy.

The parties arraigned before the court are under indictment with Michael A. Connolly and Oberlin M. Carter for the offense of an alleged conspiracy to defraud the United States of America of large sums of money appropriated by congress for certain river and harbor improvements within the Southern district of Georgia. It will suffice at present to state in general terms that it is alleged that Oberlin M. Carter was a captain in the engineer corps of the United States army; that he was in charge of the improvements; that it was contemplated by the alleged conspirators that competition in bidding for contracts for this government work would be cut off, and that the alleged co-conspirators, or some person or corporation acting for them, would be the only bidders for such work; that this was done secretly for the benefit of the parties indicted; that the contracts would be let at high and exorbitant cost; that Carter should, with fraudulent intent, so draft the specifications for constructing jetty works and training walls as to provide that, in his option, he might require large quantities of material known as the "log and brush mattress" to be paid for by the square yard at a cost comparatively very great, but which also enabled him to permit the contractor to place in the works the same number of square yards of another specified design of brush mattress, of much less value, at a much cheaper cost to the contractors, but at the same cost to the United States; that the specifications were so devised and drafted that all persons not parties to the said scheme to defraud would be kept in ignorance of this option on the part of the engineer until the bids were in; that other bidders were compelled to put in bids based on the design of mattress of the most expensive and costly construction, while the alleged conspirators would be advised beforehand that if they, or some one of them, were successful bidders, Carter would require to be put in the works mattresses of the cheapest design; that these alleged conspirators were thus enabled to be successful bidders for all of this work at the lowest cost to the contractor and the very highest cost to the United States; that, if there were other successful bidders, Carter, the engineer officer, would require from them the utmost exactitude in the performance of the most expensive contract, but, while passing on the work of the alleged co-conspirators, he would deal most liberally with them; that he would so order and inspect the contracts of his co-conspirators as to insure to them the maximum profit at the least cost and for work and material of inferior value to the government. It is further alleged that this fraudulent scheme was furthered by rejecting on technical grounds other bids, and by enabling the co-conspirators to meet unanticipated competition by second bids on guarantees known to be forgeries; by the fraudulent approval by Carter for payment to the alleged co-conspirators of accounts thus fraudulently made, and as disbursing officer by fraudulently paying to them, or to some person or corporation for them, the amount alleged to be due on such contracts so fraudulently entered into and performed. This being done, it is alleged that the conspirators would divide between them and appropriate to their own use said moneys so fraudulently obtained. It is further charged in the indictment that as the result of this alleged conspiracy, and by means of a number of overt acts, to wit, the presentation for payment of such fraudulent accounts set out therein, the alleged conspirators have defrauded the government in the amount of \$700,000.

On arraignment the following defendants, Benjamin D. Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor, presented and filed a plea in abatement. This document consists of nine grounds, constituting one

plea or nine pleas, accordingly as they may be construed. The first ground is that the indictment was found by a body of men purporting to be a grand jury, but which had no legal existence, for the reason that the names of persons placed in the jury box from which the said alleged grand jury was taken were not placed therein by H. H. King, the clerk of this court, and the jury commissioner, nor put in at all alternately as required by law, but that, the said H. H. King, clerk as aforesaid, being accessible, and in no wise disabled or disqualified, the said names were placed in said box by the said jury commissioner and a deputy clerk by the handfuls or bunches, contrary to the statute laws of the United States of America, which required that the clerk should be one of the persons to place the names in the jury box, and that they should be placed therein alternately by the said clerk and the said commissioner; and which tended to the injury and prejudice of these defendants, and of each of them, in that they are entitled by the law of the land to have any charge against them considered by a grand jury selected under the restrictions prescribed by law, and in accordance with the provisions thereof, and in which selection no unauthorized persons shall have or take any part; and this they are ready to verify. A second ground or plea is that the indictment should be quashed because the jury box of the division was not kept, as required by law, continuously in the custody of the clerk of the court, but that during the month of November, 1899, it was delivered by him, or some one connected with his office, and without authority of law, into the hands of strangers in no wise connected with this court, and was carried away from the city of Savannah, where was the office of said clerk, and transported beyond the limits of this division, which gave abundant opportunity to outsiders, who were not under any binding oath or obligation to this court, to violate the sanctity of said jury box. A third ground or plea is that the grand jury was not publicly drawn in the Eastern division, as required by the laws of the United States, and that, not being drawn publicly, these defendants could have no opportunity to challenge said jurors for any cause, or even to know that there was to be a grand jury. A fourth ground or plea is that the indictment should be quashed for that the names of the persons who were drawn as the grand jurors who found the indictment were drawn in the city of Macon, beyond the limits of this division, in a court house other than that of the Eastern division; that no publication of said drawing of the names drawn was made; that no venire facias was issued by the clerk of this court, nor any filed in the clerk's office of the said Eastern division, until after the persons whose names were drawn had been summoned, instructions having been given by those in authority that the marshal and his deputies serving said summons should keep secret the names of such persons so drawn, and should enjoin on each person so summoned the necessity of keeping secret the fact that he had been summoned to serve as a grand juror at said term; so that the choice and selection of such alleged grand jurors were not made public until the court met on December 1, 1899. A fifth ground or plea is that the alleged indictment should be quashed for that there were not, as required by law, 300 names of qualified jurors in the box, and in fact there were less than 200 names of qualified jurors therein on November 22, 1899. A sixth ground or plea is that the indictment should be quashed for that the judge, by an order on November 22, 1899, disqualified as grand jurors all persons whose names might be in the jury box who at that time resided in the counties of Chatham and Glynn, and prescribed in such order that the said grand jury be returned from the counties of the Eastern division other than Chatham and Glynn and thus eliminated from the prospective grand jurors those who were most familiar with public harbor improvements, the necessity therefor, and the cost thereof, and who, from such knowledge, would be in a better position to impartially consider the matters urged against the defendants. A seventh ground of plea or plea is that the indictment should be quashed for the reason that the judge of this court by his order directed that the grand jury be returned from the counties of said Eastern division other than the counties of Chatham and Glynn, and that the grand jury be drawn from the jury box of the Eastern division, before a jury box had been constituted which did not include jurors

from Chatham and Glynn. An eighth ground of plea or plea is that the indictment should be quashed because the judge of this court directed that the grand jury should be returned from the jury box of the Eastern division under the restriction aforesaid, because it appeared to said court that such return of jurors would be most favorable to an impartial trial, and prevent the incurring of unnecessary expense; it being illegal for said judge then and there to pass any such order restricting the drawing of a grand jury to any particular part of said division for any reason, and tended to the injury and prejudice of these defendants. A ninth ground of plea or plea is that the indictment should be quashed for the reason that the judge of this court having, upon the said 22d day of November, 1899, outside the limits of this division, to wit, in the city of Macon, Ga., passed the order before described, did in the city of Macon on said day proceed to draw said grand jury from a box which did not contain the names of grand jurors returned from the counties of said Eastern division other than the counties of Chatham and Glynn, but which only contained, irrespective of said counties of Chatham and Glynn, the names of jurors from the counties of Bryan, Liberty, Ware, Wayne, Pierce, Clinch, Lowndes, Brooks, Thomas, Decatur, Effingham, and Bulloch, there being in said Eastern division, in addition to said counties, the following counties: Appling, Berrien, Camden, Coffee, Charlton, Colquitt, Echols, Emanuel, Irwin, Montgomery, McIntosh, Screven, Tattnall, and Worth, there having been no revision of the jury box, or any return, as contemplated by said order; and that the drawing of said alleged grand jury was illegal, and tended to the prejudice of the defendants, and was further illegal for the reason that the box did not contain names from the counties of McIntosh and Camden, which are the only other counties of this division in which are or might be public harbor improvements, and the citizens whereof would, from their knowledge of such matters, like the citizens of Chatham and Glynn, be best qualified to pass impartially on the charges made against these defendants.

It is averred: That because of the alleged illegal proceedings before mentioned they were not advised in any manner or form that a prosecution of any character or description was impending against them. That they were in the state of New York, in the pursuit of their legitimate business, which at that time required their presence there. That they were not residents of Georgia. That the records of the court show that the bill of indictment was found against them on the 8th of December, 1899, and that a warrant thereupon was issued for the arrest of these defendants; these defendants not having been under arrest or recognizance when said grand jury was empaneled. That so soon as these defendants were advised that such a warrant was in New York for their apprehension, they voluntarily sought out the officer in whose possession they were told it was, and surrendered themselves into his custody. That, having been advised by lawyers skilled in the law that they could not be compelled to go from where they were to the Eastern division of the Southern district of Georgia to answer for any alleged offense said to have been committed therein unless a valid indictment had been preferred against them, and that probable cause of their guilt existed, they, in pursuance of their legal rights and of their constitutional privileges in this respect, demanded an examination into these matters by the constituted authorities having jurisdiction thereof in the state of New York. That the questions involved were considered by a United States commissioner, who decided that these defendants should be remanded to this jurisdiction; but that they, being further advised that said decision was erroneous, and that they were being deprived of their constitutional rights, brought the questions involved to the consideration of the judge of the United States district court for the Southern district of New York, who, after patient consideration, decided that the said commissioner had erred in his decision, and remanded the case to him for further inquiry. That the said commissioner having again reported, adjudging that these defendants should be remanded to the said jurisdiction of the Eastern division of the Southern district of Georgia, these defendants again laid said questions before the said judge of the Southern district of New York, who, having decided against these defend-

ants, they, under legal advice that the decision of said court was erroneous, caused to be brought against the official having them in charge the writ of habeas corpus to inquire into the legality of their detention; the case thereupon arising having been finally disposed of by the supreme court of the United States at its present October term. That on the 12th day of March, 1900, when, as they have since been informed, the case at bar was called in this honorable court, and these defendants then and there summoned to appear and plead, these defendants were in the state of New York, subject to the jurisdiction of the said court for the Southern district of New York in regard to the case at bar, and under a solemn bond and obligation, given on the 20th day of February, 1900, by the terms of which they obligated themselves to personally appear before said district court for the Southern district of New York, or the judge thereof, whenever and as soon as the final order should be entered in the said proceeding, and then and there surrender themselves to the marshal of said district of New York, and abide the order of said district court, or the said district judge, and not depart without leave. That upon the 5th day of March, 1900, and upon the 12th day of March, 1900, and at all intervening times, the said bond and the said obligation to answer to said court, and not to depart without leave, was operative against these defendants. That the February term, 1900, of this honorable court adjourned on the 7th of May, 1900, and that the said bond was operative on that day, and operative on all dates intervening the said 12th day of March, 1900, and said last-named date. That no session of the district court in and for this division was held until the 7th day of January, 1901, and that on said date and on the 9th day of February, 1901, when this court adjourned for the term, and at all intervening dates, these defendants were still under said bond and obligation to appear day by day in the jurisdiction of the district court of New York. That since the session last named of this honorable court there has been no session of this court until January 25, 1902, when the court met for the purpose of sounding the dockets thereof, these defendants then being under bond to appear in this court on this, the 11th day of February, 1902, and were by and with the consent of the district attorney of the Southern district of Georgia, to appear now and here for the purpose of pleading to this indictment. That these defendants, had they been within this jurisdiction at any time from the 22d of November, 1899, until the 8th day of February, 1902, could not have interposed the pleas in abatement to the said alleged indictment on the ground that instructions were given to keep the drawing and summoning of said jury secret, because said facts did not come to the knowledge of the defendants, or either of them, and were therefore not available until the said last-named date: they having the right to assume, if they had ever heard of the drawing of said alleged grand jury, that the same was publicly done. Wherefore they pray judgment on the said alleged indictment, and that the same be quashed.

To this plea the United States attorney for the government filed a special demurrer on grounds which may be sufficiently indicated in the opinion of the court.

See 100 Fed. 941, and 108 Fed. 816.

Marion Erwin, U. S. Atty., and Samuel B. Adams, Sp. Asst. U. S. Atty., for the United States.

Walter G. Charlton, Fleming Du Bignon, Thomas B. Felder, and Daniel W. Rountree, for defendants.

SPEER, District Judge (after stating the facts as above). The defense offered at this period of the case by the persons arraigned is a plea in abatement, which is a dilatory plea. It is an attempt to annul an indictment of the grand jury of a United States court, without any regard to the question of the guilt or innocence of the prisoners or of the public interest at stake. Pleas of this character, where it is not made to appear that any unfair prejudice has been

done to the accused, are regarded with great disfavor. This is made to appear not only by the controlling act of congress on the subject, but by a long and unbroken line of decisions of courts of the highest repute. The act of congress, which is section 1025, Rev. St., provides:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding therein be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

In the valuable *Encyclopædia of Pleading and Practice* (volume I, p. 23) the general rule is stated as follows:

"Pleas in abatement, as they do not deny the merits of the plaintiff's claim, but merely tend to delay the remedy, are not favored by the courts, and the greatest strictness is applied to them, and they will not be aided in construction by any intendments. With them correctness of form is matter of substance, and any defect of form is fatal. They must answer the whole case, and contain a full, direct, and positive averment of all material facts."

In the same volume, on page 44, it is declared:

"Such pleas must be certain to every intent, and leave nothing to be drawn by inference. They must anticipate and include all such supposable matter as would, if alleged by the opposite party, defeat the plea."

It is said that the doctrine thus announced with regard to pleas in abatement is but an application of the harsh rules of the common law, and it is contended in the interesting argument of counsel for the accused that the rules of pleading are much more liberal now than they were at common law. This statement is not without an important qualification. The more liberal methods evolved by the advance in modern jurisprudence have been designed to make effective the trial of a case, whether civil or criminal, upon its merits, that the right may in truth be ascertained, that the innocent may be acquitted or the guilty brought to justice. In the case of *U. S. v. Terry* (decided in the Northern district of California, by Judge Hoffman, in 1889) 39 Fed. 364, the learned judge remarks:

"It may, I think, be justly said that, while the rigorous and apparently harsh, though ancient and well settled, rules of the common law have in some instances been departed from, it has always been in the interest of substantial justice, and to prevent a manifest wrong to the defendant; and conversely where it is plain that substantial justice will not be promoted, nor a manifest wrong to the defendant prevented, the indictment should not be set aside on grounds of technical errors, informalities, or irregularities."

This deliverance of Judge Hoffman related to a plea in abatement where facts contrary to the record were alleged, and not only did the court hold that a demurrer to such a plea cannot be regarded as admitting the truth of such allegations, but it was held that the plea in abatement was bad so far as it contradicted the record. The learned judge continues:

"Assuming, however, that the plea in the case is open to exception as a formal plea in abatement, it does not follow that the defendant is without remedy. Thus, for example, where it is alleged that there has been improper conduct on the part of officers employed in the designating, summoning, and returning of the grand jury, the defendant who may have been

prejudiced thereby may bring the matter before the court by suggestion or motion or affidavit, even where no right of challenge to the array is allowed by law. But this motion is addressed to the discretion of the court, and the court, having general power to preserve the pure administration of justice, will freely exercise its sound discretion for the purpose of serving that end."

A more recent decision upon the same subject and by the supreme court of the United States is *Agnew's Case*, 165 U. S. 44, 17 Sup. Ct. 238, 41 L. Ed. 627. In that case the plea in abatement was filed because of what seemed at first to be an unusual proceeding in the drawing of the grand jury. Under the practice in the district of Florida it seems that the clerk and marshal draw grand jurors from the jury box. The grand jury was incomplete, and, as stated by the chief justice in his opinion:

"The court ordered a special venire to issue for ten grand jurors to be drawn according to law, to be taken from the county of Duval; that the clerk and marshal, in drawing said venire, whenever a name was legally drawn from the box, if said party so drawn was not from the county of Duval, laid aside said name, and continued drawing until ten names from the county of Duval were obtained; and that, some of the ten returned on the second venire being excused, other names were drawn in the same way, and a third venire was issued, and still another, until the grand jury was completed with grand jurors from Duval county."

It also appeared from the statement of the chief justice that there were orders of court, certified as part of the record, which directed the drawing according to law from the various counties exclusive of Duval county, and then from that county. This, like the order of the court in this case, excluding jurors from the counties of Chatham and Glynn, was done in pursuance of the power given by section 802, Rev. St. Says Chief Justice Fuller, for the court:

"Section 802 of the Revised Statutes was brought forward from a clause of section 29 of the judiciary act of September 24, 1789, which was regarded by Mr. Justice Curtis as applicable to grand as well as petit juries."

It is interesting, then, to reflect that the statute under which the court in this case selected jurors from counties other than Chatham and Glynn was, in substance, enacted by the first congress of the United States, which assembled after the formation of the constitution, received the approval of George Washington, and has been in full force and effect for more than 110 years anterior to the action of the court now under consideration.

The doctrine that for such irregularities as do not prejudice the defendant he has no cause of complaint and can take no exception is expressly reaffirmed in the opinion of Chief Justice Fuller in the case just cited, and the learned chief justice cites in support of his statement a number of authorities from the courts of the states and of the United States. Indeed, the chain of authorities on all of the cardinal principles hereinbefore stated seems to be unbroken, and so clear is this that the efforts and research of counsel in this case have not produced a single decision in which a plea in abatement has been sustained by the United States courts in a criminal case. On the contrary, a multitude of authorities have been cited where such pleas were denied where they did not conform with strict exactness to the requirements of the law, and failed to contain the essential

averments of such dilatory pleading. In *U. S. v. Williams*, decided in the circuit court for Minnesota, and reported in 12 Myers, Fed. Dec. pars. 1826, 1827, Fed. Cas. No. 16,716, Circuit Judge Dillon, sitting with District Judge Nelson, declared:

"Pleas of this character are dilatory, and, not being favored, the law requires that they shall contain all essential averments, pleaded with strict exactness."

In *U. S. v. Hammond*, 2 Woods, 197, Fed. Cas. No. 15,294, Circuit Judge Woods held that although, in view of the law at that period of our history, the disqualification of a grand juror was absolute, and did not rest in the discretion of the court, the juror, having been a Confederate soldier, the plea was bad, because it did not state "when and where the juror took up arms and joined the rebellion and insurrection against the United States." In the same case this famous circuit judge, afterwards associate justice of the supreme court, expresses with emphasis the disfavor with which such pleas are regarded, and the exactitude with which every requirement in form as well as substance is insisted upon by the courts. On the latter requirement, see 1 Chit. Pl. *479, *583; 1 Chit. Cr. Law, *448; 1 Enc. Pl. & Prac. p. 27, and authorities cited; 1 Archb. Cr. Pl. *82; 1 Bish. Cr. Proc. par. 435; *U. S. v. Richardson* (C. C.) 28 Fed. 64. The decision in the last case cited was by Mr. Justice Gray. A very instructive case upon the general topic is *U. S. v. Chaires*, decided in the Northern district of Florida by Circuit Judge Pardee and District Judge Swayne, reported in 40 Fed. p. 821. The opinion contains this pertinent language:

"The third plea is to the effect that the names of the persons placed by the jury commissioner and the clerk in the box were not drawn from the entire territory within the Northern district of Florida, but were drawn from an alleged division of the district. No injustice or prejudice is averred. Section 802, Rev. St., permits jurors to be returned on an order of court from parts of a district. No injury or prejudice can, therefore, be inferred. We think this plea is bad in form and substance."

In view of principles so clearly announced and so incontrovertibly established by text writers and courts, all of whose conclusions deserve, and some command, obedience, the questions raised by this plea may, we think, be readily determined.

The first ground is that the names of persons placed in the jury box from which the grand jury was taken were not placed therein by H. H. King, clerk of this court, and the jury commissioner, but that, H. H. King being accessible, and in no wise disabled or disqualified, the names were placed in the box by the jury commissioner and a deputy clerk by the handfuls or bunches, and that they should be placed therein alternately by the said clerk and by the said commissioner, and that this tended to the injury and prejudice of these defendants. In passing upon this plea the court will take judicial notice of its own record relative to the duty which it is said the clerk failed to perform. On January 26, 1897, the following order was made:

"In the District Court of the United States for the Eastern Division of the Southern District of Georgia. In re Revision of the Jury List. It appearing to the court that there is a necessity for a revision of the jury of

this court, it is upon consideration ordered that Edward S. Elliott be, and he is hereby, appointed jury commissioner of this court for the Eastern division of the Southern district of Georgia; and it is ordered that the said Edward S. Elliott and H. H. King, clerk of this court, conformably to law, shall proceed as soon as may be to revise the jury list of said court, and for the purpose of convenience and economy in serving said jurors it is ordered that the jurors be selected from the counties of Chatham, Bryan, Liberty, Ware, Glynn, Wayne, Pierce, Clinch, Lowndes, Brooks, Thomas, Decatur, Effingham, and Bulloch."

This order is on the minutes, and is also found attached to the jury list or jury book, as it is indifferently called, which is also of file. Thus, by order, a distinct duty was placed upon the clerk to act with the jury commissioner. The order attached to the jury list which is found of file in the clerk's office sufficiently identifies such list. It is not averred that the names in the jury box did not conform to the names on the jury list or book referred to. It is averred that a deputy clerk placed these names in the jury box. This would not, in my judgment, have been a violation of law, and assuredly would not have disqualified the jurors whose names were placed in the box, provided the clerk was present, took part in the selection of the names, and supervised the manual act of placing the tickets in the box. Whart. Cr. Law, p. 171. While the statute on this subject is apparently mandatory, and while, in my opinion, there is a personal trust imposed by the act of congress upon the individual who is the clerk, yet, in the absence of any charge of bad faith or corrupt motive in the selection of a jury, or other conduct prejudicial to the defendant, if he fails to comply with literal strictness to the provision of the statute, yet does substantially comply, his action will not be regarded as vicious and unlawful. This is especially true where no juror selected is alleged to be disqualified, and no intimation of political or other bias is ascribed to a person or the persons whose names are placed in the box. In the case of *U. S. v. Ambrose*, 3 Fed. 286,—decision by the circuit court Southern district of Ohio, Circuit Judge Swayne presiding,—the learned judge declared with regard to the manner in which the names of persons shall be placed in the jury box:

"Upon full consideration of the subject I feel bound to hold that this provision of this act of congress was not directory, as I was inclined to think at first; and I think no sound view of the subject will warrant any other conclusion than that that provision is mandatory, and I think it is the duty of every court of the United States to regard it and carry it out; * * * but, on the other hand, * * * that all that is required is an honest intention to conform to the statute, and to carry out its provisions in good faith. Beyond that I think the statute has no efficacy. Beyond that I think it may be held to be merely directory. I think that any irregularity arising from motives other than those of an evil character—any slight irregularity, such as may arise in any case in spite of the greatest care and caution—is not fatal to the indictment."

Upon the same topic it is stated in 12 Enc. Pl. & Prac. p. 277, that :

"The great weight of authority is to the effect that the mere fact that officers intrusted with the several duties prescribed failed to conform precisely to such requirements will not invalidate their action, unless it appears, or may be reasonably inferred from the circumstances, that the complaining party has been prejudiced, or that injury has been sustained by reason of neglect or omissions charged."

In support of this statement of the rule by the Encyclopædia from the supreme appellate courts of 21 states of the Union a large number of authorities are cited. Indeed, the necessity of showing prejudice to invalidate a criminal proceeding is a distinctive feature of the laws both of the state and of the United States. In *Doyle v. U. S.* (C. C.) 10 Fed. 269, it was held that the irregularity, even, of a judge communicating privately with one of the jurors while they are deliberating on their verdict, furnishes no sufficient ground for reversal, where it is not claimed that it worked of necessity a prejudice to the accused. In the absence of any sufficient showing to the contrary, the presumption is that the jury was selected and drawn according to law. *Kie v. U. S.* (C. C.) 27 Fed. 351. In the absence of any sufficient showing to the contrary, it is presumed that the clerk did his duty as jury commissioner, and that the other jury commissioner performed his duty also. This is an ancient principle of law, as old as Coke upon Littleton. "*Omnia præsumuntur rite et solemniter esse acta.*" Broom, Leg. Max. Justice Story, in the case of *Bank v. Dandridge*, 12 Wheat. 68, 6 L. Ed. 554, declares that the law "presumes that every man in his private and official character does his duty, until the contrary is proved. It will presume that all things are rightly done unless the circumstances of the case overturn this presumption."

Starting, therefore, with the presumption in favor of the regularity of the jury and of the proper performance of duty on the part of the clerk, what is there alleged in this plea to avoid that presumption? Merely this: That Mr. King, the clerk, did not place the names of the jurors in the box, but that they were placed in the box by the jury commissioner and a deputy clerk. The name of the deputy clerk is not mentioned in the plea. It is not alleged that this action of the deputy clerk was not done in the presence of the clerk, nor is it alleged that the deputy was of the same political party with the jury commissioner, or that any bad or evil purpose moved either one of these parties, or that any incompetent or partial juror was selected. Yet this plea must be certain to every intent, and leave nothing to be drawn by inference. It must anticipate and include all such supposable matter as would, if alleged by the opposite party, defeat the plea. 1 Enc. Pl. & Prac. p. 24, and authorities cited. It is therefore entirely compatible with this plea that every judicial and discretionary function on the part of the clerk as a jury commissioner, all of which is necessarily included in the power to "place in the box," was done, and the plea, while literally true as far as it goes, is bad. It does not negative the presumptions I have mentioned, nor is it averred with that strictness as to essentials under the rules stated which will defeat the solemn indictment of a grand jury. Nor does it matter if the names of the jurors were bunched before they were put in the box, if they were lawfully chosen by the jury commissioners of opposing political faiths, and this it is presumed was done.

The second ground or plea is that the jury box was not kept, as required by law, continuously in the custody of the clerk; that during the month of November, 1899, it was delivered by him, or some

one connected with his office, and without authority of law, into the hands of strangers, which gave opportunity to outsiders to violate the sanctity of said jury box. This is wholly uncertain, and is, besides, contradictory of the well-known proceedings in this case, which are in the knowledge of the presiding judge, and of which he must take judicial notice. It has been the uniform and invariable practice of the judge to lock the jury boxes after drawing a jury, and to seal the same with wax, imprinting his personal seal, and deliver the keys to the marshal and the box to the clerk. Whenever it has been necessary at the official residence of the judge to draw a jury for another division of the district, suitable order is issued to the clerk to transmit the jury boxes by a reliable express company. No safer method of transmission is obtainable. They are received by the officials of the court, receipted for to the express company with the unbroken seal of the court thereon. That was true in the instance referred to in this plea. It is impossible, therefore, that any person could have tampered with the jury box from which these jurors were drawn.

The contention in the third plea, that the grand jury was not publicly drawn, is likewise known to the court to be untrue. This grand jury was publicly drawn in the United States court house in Macon, Ga., in the presence of all the officers who were by law required to be present; and of this fact the court takes judicial notice. It is, indeed, alleged in the fourth ground of the plea that the jurors were drawn in the city of Macon in a court house other than that of the Eastern division. It is said in this plea that no *venire facias* was issued by the clerk of this court, nor any filed in the clerk's office of the said Eastern division, until after the persons whose names were drawn had been summoned. It does not deny—that the court judicially knows to be true—that a *venire facias* was issued by the deputy clerk of this court, who has his residence at Macon. It is alleged that instructions had been given by "those in authority" that the marshal and his deputies serving said summons should keep secret the names of such persons so drawn, and should enjoin on each person so summoned the necessity of keeping secret the fact that he had been summoned to serve as a grand juror at said term; but who were "those in authority" who gave such instruction is not alleged, and, since no such instructions were issued by the court, it is wholly unimportant and irrelevant to the validity of the grand jury. Nor were such instructions, if given, in any sense prejudicial to the rights of the defendants.

The fifth ground or plea is that the indictment should be quashed because there were not, as required by law, 300 names of qualified jurors in the box, but in fact that there were less than 200 names of qualified jurors therein, on November 22, 1899. This is also contradictory of the record. There were in the district court jury box at the time of the drawing, as appears by the jury list, 562 names, and in the circuit court box there were 578 names. The order of the court required that the jury should be drawn from the "jury boxes" of the district, and under the act of congress, which authorizes the use interchangeably of district and circuit court jurors when both

courts are in session, although this particular grand jury was drawn from the district court box, all of the names in both boxes may be regarded as the jury body from whom the grand jury was selected. It is said, however, that because the court, by its order, upon representations made by the district attorney, directed a jury to be drawn from certain counties of the district exclusive of Chatham and Glynn, this disqualified the jurors from those counties, and that their names are to be regarded as taken from the jury box to the injury and prejudice of the defendants, in that there remained less than 300 names in the district court box. The fact, however, that for a particular emergency the court, in the exercise of the power vested in it by section 802, Rev. St., thought proper to draw jurors from particular counties, does not disqualify other jurors, whose names are in the box, who are from other counties. Their names are none the less in the jury box, and must none the less be counted. They are merely not among those jurors from whom the grand jury in a particular case is to be selected. But, even if the order of the court had the effect to disqualify and destroy the juror-acting capacity of jurors from Chatham and Glynn, this could not be prejudicial to the accused. All that they have the right to demand is a grand jury of which every member shall possess the legal qualifications of a juror, and unquestionably such a grand jury could be and was selected from the names remaining in the box after jurors from Chatham and Glynn were eliminated. The requirement as to the number of jurors fixed by the statute is merely to facilitate the convenient selection of an impartial jury. Nor is the court restricted to the use of the jury box designated and provided for by the statute, as, in its discretion, it may hold a stated term of its court in any locality in the district, so, in its discretion, it may draw a jury from the jury box of a state court in any county within its jurisdiction. It would have been competent, therefore, for the court in this case to have drawn this grand jury from the jury box of the state court, to which none of these statutory provisions applied, and might even now, if it thinks proper, order this case to trial at Valdosta, or Thomasville, or any other point in this division of the district, and before a jury not one of whose names may appear on the circuit or district court jury lists of this court.

It is, however, insisted in another ground or plea that jurors from Chatham and Glynn were peculiarly qualified to act in this case because of their familiarity with river and harbor improvements, and it was said, in substance, in argument,—no doubt humorously,—that the jurors who were summoned from the interior counties were so unfamiliar with such matters that they would be startled, and their minds frightened from their propriety, by the bare mention of such sums as it is alleged were fraudulently obtained from the government by the alleged transactions described in the indictment. Such considerations, if justifiable, even, have no weight when contrasted with the motive of the court to obtain a grand jury entirely impartial for the investigation of the tremendous averments of fraud and speculation set forth in this indictment. It was represented to the court by the district attorney that ex-Captain Oberlin M. Carter, charged as

a co-conspirator here, had been tried by court-martial in this county with regard to criminal charges relating to enormous expenditure of government funds in this and in Glynn county. Multitudes of people here heard the testimony delivered on oath; newspapers published in the communities gave graphic accounts of the trial, which itself, conducted with all of the paraphernalia and impressiveness of a military court-martial, had produced a profound effect upon the public mind. Men had taken sides. In view of these facts, partly brought to the attention of the court by the district attorney and partly within the knowledge of the presiding judge, it was determined to choose from that great body of merchants, bankers, manufacturers, and farmers from a number of the law-respecting interior counties of the district a high-minded jury which had neither formed nor expressed an opinion, who were without bias or prejudice, who were perfectly impartial, who would, in the language of their oath, "diligently inquire and true presentment make" as to these momentous issues now before the court. That the court had the right to draw the jury in Macon in open court, although the court was in vacation here, we have no doubt. The jury was drawn there as a matter of course, as has been the practice of the court, whenever necessary, for many years, and no prejudice to the defendants, or either of them, resulted therefrom.

After exhaustive argument by the eminent counsel and careful consideration by the court, I am finally convinced that the pleas are each and all bad. There is pleading defective in substance and in form. This I avoid to discuss further. The pleas set up no violation of any substantial right of these defendants. They do not allege or intimate that there was any unfairness on the part of anybody. They do not specify as an incompetent juror a single man on the grand jury who found this true bill as one not in a position to do them full justice, and who was not in all respects such a man as a grand juror of this court ought to have been. To quash this indictment, in view of the character of this pleading and the character of the indictment against the parties accused, would be, to my mind, abhorrent to the principles of public justice. But, if these pleas were all good in form and substance, they have been waived by these defendants, who, by unnecessarily resisting the processes of the court, and resorting to dilatory expedients of one sort and another, have delayed trial for more than two years, and who, not only refusing to come before the court as they ought to have done, but by exhausting every expedient to prevent the government from bringing them here, now come two years after the indictment was filed, and seek to have it denounced upon technical averments contradicted by the record and the law, but which, if true, would be in no sense prejudicial to them. Said Dr. Wharton, in his well-known work on Criminal Pleading and Practice (paragraph 344), with regard to pleas in abatement to indictments:

"The defendant must take the first opportunity in his power to make the objection. Where he is notified that his case is to be brought before the grand jury, he should proceed at once to take exception to its competency, for, if he lies by until a bill is found, the exception may be too late. But,

where he has had no opportunity of objecting before bill found, then he may take advantage of the objection by motion to quash or by plea in abatement; the latter, in all cases of contested fact, being the proper remedy."

This language is quoted with approval by the supreme court of the United States in a case where the venire issued November 18th, the court opened December 3d, the indictment was returned December 12th, the plea in abatement was filed December 17th, five days later; and that great court held that it was too late. How obvious it is that after two years the defendants are estopped. Subsequently to the decision in the Agnew Case, as late as April 10, 1900, the circuit court of appeals of this (the Fifth) circuit, quoting from the Agnew Case, and reiterating its principle, held that a plea in abatement filed two months after the indictment was too late. These authorities will suffice, but there are many others to the same effect. It is idle to contend that the accused can avoid the legal effect of their conduct on this plea because they were advised by their counsel that they could not be removed here for trial. It is equally futile to contend because they were under bond to appear before the district judge in New York. All the judicial tribunals from the commissioner in New York to the supreme court in Washington have finally adjudicated that the law commanded and compelled their appearance to answer this indictment. To excuse their failure to plead because of their abortive efforts to resist the process of the court would give them an advantage of their own wrong, for in the long interval between the filing of the indictment and the filing of this plea the bar of the statute may have intervened. Any advice to resist the process of this court given by their own counsel in New York is therefore wholly immaterial. And the bond given to the judge in New York had the purpose to make sure not that they should stay there, but that they should come here. If, at any time, they had surrendered to the marshal of this district, or appeared in court, eo instante they and their sureties would, by operation of law, have been exonerated from the obligation of that bond. The long delay in filing this plea is thus clearly seen to be due to their voluntary action, and they cannot now be heard to attack the indictment by this plea, as they might have done had they promptly respected the law, and made their appearance in obedience to its mandate.

For these reasons judgment will be entered overruling the pleas and ordering the defendants to respond to the indictment.

CONSOLIDATED FASTENER CO. v. TOPPEN et al.

(Circuit Court, S. D. New York. December 21, 1901.)

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where infringement is clearly shown, so as to entitle complainant to a preliminary injunction, and the infringing article is manufactured abroad and imported into this country, complainant has the right to the issuance of the injunction, and to use or publish it for legitimate purposes, notwithstanding the promise of defendant not to purchase or use any more of the articles.

In Equity. Suit for infringement of patent. On motion for preliminary injunction.

John R. Bennett, for the motion.
Stephen J. Cox, opposed.

LACOMBE, Circuit Judge. Construing the patent as it has been construed in the former opinions of circuit court and circuit court of appeals, infringement seems quite clear. Were the manufacturer in this country, there might be more force in defendants' suggestion that their promise not to purchase or use any more infringing articles be accepted as sufficient. As it is, however, complainant has made out a case for the relief now prayed, and, if defendants do not intend to import any more of this form of fastener, the latter will not be injured in any way by granting it. This, of course, is on the assumption that complainant is applying in good faith, and with no intention of using this decision improperly.

The motion for preliminary injunction is granted, with leave to defendants to move to set it aside should this decision be advertised or published by complainant, or any one in its behalf or in its interest, without such a statement as will clearly show that such decision affects only the particular device now before the court, and not the one set out in United States letters patent No. 662,844, of November 27, 1900.

OIMIOTTI UNHAIRING CO. et al. v. BOWSKY.

(Circuit Court, S. D. New York. January 7, 1902.)

1. PATENTS—SUITS FOR INFRINGEMENT—REFERENCE TO ASCERTAIN PROFITS.

Upon a reference to ascertain the profits realized by a defendant from the use of infringing machines, his testimony in another suit as to such profits is admissible against him as an admission.

2. SAME—EVIDENCE TO SUSTAIN FINDINGS.

Where a defendant testified as to the profits realized from the infringing machines used by him, without stating that any part of such profits arose from anything but the infringement, the master is justified in assuming that no part of such profits were to be distinguished as arising from the noninfringing parts of the machine, and in finding accordingly.

In Equity. Suit for infringement of patent. On exceptions to report of master.

See 95 Fed. 474.

Louis C. Raegener, for plaintiffs.
Henry Schreiter, for defendant.

WHEELER, District Judge. The master has found the defendant's profits from his admission on the stand that he testified in another proceeding that his profits for unhairing skins on the infringing machines were 75 cents per dozen, all expenses deducted.

One exception of defendant to the report is that the findings are "based upon irrelevant, incompetent, and inadmissible evidence"; another is that only a part of each machine infringed, and that there

is no evidence of what part of the profits "resulted from the use in the defendant's machines of this infringing device." The defendant's testimony in the other case, reproduced by his admission in this, related to this infringement, and to the profits realized from it, and there is no fair question but that it was admissible as evidence of the facts stated in it against him. It stated the profits as resulting from the use of the infringing machines, and did not state that any part of them resulted from anything but the infringement, and in reproducing it he did not so state voluntarily, nor on cross-examination by his counsel. Although profits arising from infringement must be distinguished by proof, the failure to claim that any of those testified to by the defendant arose from anything else than the infringement in question, at either time, seems to be evidence from which the master might find that there were none to be distinguished as arising from anything but the infringement.

Exceptions overruled.

CIMIOTTI UNHAIRING CO. et al. v. BOWSKY.

(Circuit Court, S. D. New York. January 18, 1902.)

EQUITY—REFERENCE—REOPENING HEARING BEFORE MASTER.

Upon a reference to ascertain the damages for infringement of a patent complainant introduced before the master testimony given by defendant in another suit as to the profits made by him by the use of the infringing machines. Defendant's counsel made no effort to correct such testimony, but elected to rely on his exception to the master's report on the ground that the testimony was incompetent. *Held* that, after the court had overruled such exception, it would not reopen the hearing before the master to permit defendant to show that his testimony in the previous suit was inaccurate.

In Equity. Suit for infringement of patent. On motion to reopen hearing before master. See 95 Fed. 474.

Henry Schreiter, for motion.

Louis C. Raegener, opposed.

LACOMBE, Circuit Judge. Upon the hearing before the master defendant was examined, and admitted that he had testified in another suit that he made profits on unhairing skins at the rate of 75 cents per dozen. He now says that the statement he made in the former trial was inaccurate, and that he knew it to be inaccurate when on the second trial he admitted that he had made it. The excuse given for not correcting it is that counsel supposed the master would give no weight to the admission of the witness. That excuse terminated when the master filed his report, which was based mainly upon this very admission. Defendant made no effort, by motion before the master, to have the case opened, and to be given the opportunity to show that his statement in the former trial was inaccurate. On the contrary, he elected to except to the report, saying nothing of any inaccuracy, and assuming that he would succeed in convincing this court that the master was in error. He failed to convince the court, and the master's report was confirmed. Defendant now

moves to reopen the case, and to be allowed to put in before the master testimony of which he knew, and which was available to him when the hearing before the master was going on. Such practice is unheard of, and would be intolerable.

The motion is denied.

THE JAMES TURPIE.

(District Court, D. New Jersey. February 4, 1902.)

1. SALVAGE—COMPENSATION—RESCUE OF STRANDED SHIP.

Salvage services performed by a wrecking tug and barge equipped expressly for the service, and having a crew of 30 men, by which a steamship stranded in a dangerous position on the coast was promptly and skillfully rescued without injury to herself or cargo, held to entitle the salvors to an award of 5 per cent. on the amount salvaged, the value of ship and cargo being \$153,000 and pending freight about \$4,000.¹

2. SAME—SUIT IN REM TO RECOVER FOR SERVICES—COLLATERAL ISSUES BETWEEN SHIP AND CARGO.

In a suit by a salvor against a ship and cargo to recover for salvage services the court cannot determine issues which may incidentally or collaterally arise between the parties libeled. The ship cannot be required in such suit to answer to a claim of the cargo owners of negligent navigation as affecting the question of liability between ship and cargo, having been brought into court for a different purpose, and service of process on her proctor on behalf of the cargo is ineffective to raise such an issue.

In Admiralty. Suit to recover for salvage services.

Black & Kneeland, for libellant.

Convers & Kirlin, for the James Turpie and freight moneys.

Butler, Notman, Joline & Mynderse, for cargo.

KIRKPATRICK, District Judge. The libel in this case is for salvage, filed on behalf of the North America Wrecking Company against the steamship James Turpie and a cargo of sulphur, fruits, nuts, and other merchandise on board of her, and against the freight moneys for the carriage of said cargo. It appears from the record in the case that on October 25, 1898, the steamer James Turpie, bound from a port in Sicily to the port of New York, laden with a cargo of sulphur, fruits, nuts, and other merchandise, during a dense fog, was stranded on the Brigantine Shoals off the coast of New Jersey. The captain communicated with the owners of the cargo in the city of New York, and telegraphic notice of the accident was sent to the Delaware Breakwater, where the wrecking tug North America, was lying, and thereupon the said tug North America, which is a vessel provided with all the necessary appliances for rendering prompt and efficient assistance to vessels in distress, proceeded at once to the aid of the said Turpie. In the forenoon of the 26th of October, upon her arrival, the North America offered her services to the Turpie, but her aid was declined; and thereafter the Turpie endeavored with her own power to

¹ Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

back off the shoals upon which she had stranded, but failed in the attempt, so that at the conclusion of her efforts she lay broadside to the beach. In the meanwhile the North America lay by for the purpose of rendering aid if the same should be necessary. After the ineffectual attempt of the Turpie to relieve herself, her captain requested assistance from the North America, and such efforts were made that soon thereafter the Turpie was floated uninjured, and proceeded upon her voyage under her own steam. It is stipulated in the case that the value of the Turpie was \$50,000, that the value of the freight was \$4,150, and that the value of the cargo was \$103,083. It also appears that the libelants are engaged in maintaining other appliances than the North America for rendering prompt assistance to vessels in distress, and that they sent to the aid of the North America a wrecking barge, equipped with steam winches, anchors, and hawsers such as are used for that purpose, and also furnished a crew of 30 men, who aided in performing the services necessary to float the Turpie. It is not denied that the services rendered were meritorious, nor that they were performed promptly and in a skillful manner. I cannot doubt that, lying broadside to the beach, and exposed to the open sea, the situation of the Turpie was a dangerous one, and that, in the event of an easterly storm, such as is liable to occur at that season of the year, the peril of a ship so situated would be extreme. The danger and risk to the salvors were not great. Nevertheless, I am of opinion that for its prompt and efficient aid the libelants are entitled to fair and reasonable compensation, and that such compensation should be 5 per cent. on the whole amount salvaged.

It is insisted on the part of the cargo that the court should at this time consider the question of negligent navigation on the part of the steamer as affecting the question of liability between the ship and cargo. It is alleged that no soundings were taken and no lookout kept, but that, notwithstanding the fog, she proceeded with undiminished speed. But this question of negligence is an issue which the ship has had no opportunity to traverse, and one which cannot be determined in this case. The only matter in dispute is how much the salvor is entitled to for its services. The question of whether the cargo shall be relieved of its proportionate part of the burden must be settled in a suit between the ship and cargo, brought for that purpose. It is urged that notice was given that such negligence would be insisted upon before the court at this time. But the ship was not in court for the purpose of receiving any such notice. An attempt was made on the part of the cargo to serve process upon the proctor of the ship to answer to such charge of negligence, but this court held that service upon the proctor, employed to defend as against a claim for salvage, was not sufficient to compel the ship to appear and answer to such charge. Neither the charter party nor the bill of lading under which the ship assumed the risk of carriage is before the court. The ship is in court to have determined the amount due for salvage, and not to answer to negligence to the cargo or a breach of contract of carriage. If the cargo has any claim against the ship for relief on account of its negligence, it cannot be presented here at this time. The court cannot, in a suit between the salvor and those who were benefited by his

services, determine any issues which may incidentally or collaterally arise between the parties libeled therefor.

Let a decree be drawn in accordance with these views.

THE INDEPENDENT (two cases).

(District Court, D. Rhode Island. February 7, 1902.)

Nos. 1,086, 1,087.

SALVAGE—EXTINGUISHING FIRE IN BARGE—AMOUNT OF AWARD.

A wooden barge, valued at from \$40,000 to \$50,000, laden with a cargo of coal worth about \$10,000, took fire while lying in harbor, near a pier. There was no fire boat in the harbor, and the barge could not use her own fire apparatus, owing to the location of the fire. In response to her signal, four tugs, which were all that were within reach, each fully equipped with fire apparatus, came to her assistance, and rendered prompt and efficient service. After three or four hours work, the barge was scuttled on orders from the master of one of the tugs, and lay aground, with a free board of five to six feet amidships at high tide. The tugs continued to throw water into her for some 30 hours before the fire was extinguished, and then two of them pumped her out, one of them working for over three days in all. Through their efforts there was a saving of damage on barge and cargo of from \$20,000 to \$25,000. *Held*, that they were entitled to an award for salvage services of \$4,000.¹

In Admiralty. Suits to recover for salvage services.

E. D. Barrett, for A. M. Miles.

Matteson & Healy, for Providence Steamboat Co.

Peter S. Carter, for the Independent.

BROWN, District Judge. These are consolidated libels for salvage services rendered by the steam tugs Carrie A. Ramsey, Gaspee, and Reliance, owned by the Providence Steamboat Company, and by the steam tug Mars, owned by Bartlett & Shepard, of Philadelphia, Pa., in extinguishing a fire on the barge Independent. The Independent, a wooden barge 252 feet long, 52 feet beam, and 24 feet draught, with a cargo of 3,957 tons of bituminous coal, was anchored in the Providence Harbor, on the easterly side of the channel, nearly abreast of the Wilkesbarre Pier. About 8:30 a. m., on Thursday, March 7, 1901, fire broke out on the barge, and flames came up the forward companion way. The master blew the steam whistle, and put his flag in the rigging, Union down. The tug Carrie A. Ramsey, Walter E. Sutton master, came immediately in response to the signals, and within 10 minutes, at 8:40 a. m., was alongside, with her fire hose already coupled on, and almost immediately had a stream of water down the forward companion way. Though the barge was provided with engine and pumps, the forward part of the barge near the engine room was so full of smoke and flame that it was impossible to use them, and the barge herself was practically powerless to fight the fire. The Gaspee

¹ Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.

and the Mars arrived at about 10 o'clock, and the Reliance some time later, probably not far from 10:30. Sutton, master of the Ramsey, who had taken charge of extinguishing the fire, found that the efforts of the four tugs with five or six streams of water were insufficient, and determined that it was necessary to scuttle the barge. He sent for additional hose, and for a carpenter, who arrived at about 11 o'clock, and immediately began to cut a hole in the side. Water began to run in through this hole at about 11:30, and the carpenter worked until about 1 o'clock, when the tide water was entering the side freely. The barge, drawing some 24 feet of water, was aground the greater part of the tide. She had a free board of five or six feet amidships at high tide, and considerably more than this at low tide. High water was at 9:20 a. m. The cargo of coal did not catch fire, and this was probably prevented by the scuttling of the barge. The tugs continued to throw water into the barge during the remainder of the day and night of March 7th, and on the morning of the 8th. At about 1:30 p. m., on March 8th, they had the fire practically under control, and it was probably extinguished some time that afternoon, though there is a controversy as to the exact time. On Friday afternoon the barge was pumped practically full, and the water was two or three feet deep on her decks. Shortly after 5 o'clock the Reliance started to pump out the barge, and the Gaspee began soon afterwards. The Gaspee and Reliance continued pumping until 4 a. m., March 9th, when the Gaspee ceased, the Reliance continuing until 3:30 a. m., March 10th. The barge's own pumps had been rigged in the meantime, and she was then able to take care of herself. There is some evidence that the barge was in danger of straining, though this is in dispute.

The claimant, to reduce the salvage award, criticizes in about every particular the conduct of the salvors, and makes charges of bad faith upon the part of the Providence Steamboat Company, which, in my opinion, are entirely unfounded and unjustified. Nor do I consider that these contentions need to be dealt with in any detail.

The main contention is that the efforts of the tugs were useless; that the fire was actually extinguished by the scuttling of the barge; and that this might have been done by the master and crew of the barge without assistance. While it is true that the scuttling of the barge did undoubtedly protect the cargo, I am of the opinion that the service rendered by these tugs was an important and valuable service to the barge. Despite the efforts of the tugs, the damage to the barge is variously estimated at from \$8,000 to \$12,000, and I think, in view of the fact that the barge was absolutely powerless and could not use her own engine and pumps, that without the arrival of the Ramsey, and the subsequent arrival of the other tugs, it is highly probable that the barge would have been burned to the water's edge. During the early part of the fire the tide was falling, increasing the free board of the barge, which was between 5 and 6 feet amidships, 12 or 15 feet at the bow, and about 10 feet at the stern, at high water. Her free board was considerably more than this during a large part of the fire.

It is contended that the fire burned itself out without the assistance of the tugs; but I think that the only reasonable conclusion is that the fire was prevented from extending to and destroying the deck and

upper works of the barge by the efforts of the salvors. These tugs comprised all the available tugs, there being no public fire boats in the harbor. They were well equipped with fire hose; their services were rendered promptly and diligently; and Sutton, master of the Ramsey, who took charge, advised and ordered the immediate scuttling of the barge, and, by procuring a carpenter without delay, got a hole through her very much quicker than would have been the case had the master and crew of the barge undertaken it. This was important, as the tide was dropping, and the barge was aground.

In considering what was the value of the property saved to the owners, I encounter great disparity in evidence as to the value of the barge before the fire. I do not find it necessary to determine exactly the value of the barge upon this disputed evidence. It is sufficient, for the purposes of this case, to say that I am satisfied that she was worth anywhere from \$40,000 to \$50,000, and a variation of a few thousand dollars one way or the other would not affect substantially the amount which seems to me to be a fair compensation and reward to these salvors. Her cargo was sold alongside, after the fire, for \$10,511.22. Upon the present argument, it does not seem necessary to consider the freight as a separate item, and we may take the cargo itself, as enhanced in value by carriage from Norfolk, Va., to Providence. I think, however, that the cargo of this barge was not in very serious peril. It was saved by the scuttling, at a place near the Wilkesbarre Pier, where it could be easily handled, even with the barge sunk, and salvage on 25 per cent. would be probably an outside figure.

No evidence has been called to my attention as to what would have been the value of the barge had she burned to the water's edge, and I have difficulty, therefore, in determining, or even approximating, the actual amount which was saved to the barge owners through the efforts of the tugs. Assuming, however, that her actual damage was \$10,000, it would seem that, at the same rate, it could not have been far from \$30,000 or \$35,000 but for the efforts of the salvors. I think it fair to say that these barge owners were saved \$20,000 to \$25,000 by the efforts of the salvors. This is a rough estimate; but as I do not propose to award a definite percentage, and as the evidence is insufficient to enable me to do so, it is sufficient for the purposes of this case.

Considering, on the one hand, that this service was entirely without risk to the salvors, or without any serious inconvenience; on the other hand, that there was no public fire boat; that these tugs were equipped for fire service; the prompt action of Sutton, master of the Ramsey; and that there has been a considerable saving of valuable property,—I award the sum of \$4,000 for total salvage.

As to the apportionment of the salvage among the salvors, I shall ask for further assistance of counsel. I am of the opinion that Walter E. Sutton is entitled as master to rather a larger portion than the other masters, and request counsel to agree or to submit proofs as to a proper apportionment.

BOARD OF COM'RS OF STANLY COUNTY et al. v. COLER et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 290.

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—CONSTRUCTION OF STATUTES.

A decision of the supreme court of a state construing a valid statute, and holding invalid bonds of a county which had been previously issued thereunder and placed in the market, and had been sold to bona fide purchasers, where none of the bondholders were parties to the action, is not binding on a federal court in an action subsequently brought by bondholders against the county, but it is the duty of such court to determine the question independently.¹

2. COUNTIES—POWER TO AID RAILROADS—NORTH CAROLINA STATUTE.

Code N. C. 1883, § 1996, first enacted in 1869, and re-enacted in the Code in 1883, provides that "the boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest." The succeeding sections require the submission of the question of the proposed subscription to the voters of the county. The constitution of 1868 (article 5, § 4) expressly provides that the state shall give aid to railroads only when authorized by a direct vote of the people, or "to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution, or in which the state has a direct pecuniary interest." *Held*, that in view of the difference in the language of the two provisions, as well as of the plain and ordinary meaning of the words of the statute relating to counties, it could not be construed as limited in application to cases where railroads had been commenced and were unfinished at the time the constitution was adopted, and in which the counties, as such, had a direct pecuniary interest, but that it conferred power on counties to subscribe for stock, in the manner prescribed, in any railroad company which had been duly incorporated to build a projected road in which the citizens of the county, as a body, have a general interest because of the supposed benefits to be derived from it.

3. SAME—VALIDITY OF BONDS—EFFECT OF RECITALS.

Where a county issued negotiable bonds, as authorized by such statute, in payment for stock subscribed in a railroad company which built its road into the county as agreed, and the county received and continued to hold the stock, taxed the road, and for a number of years paid the interest on the bonds, it is estopped by recitals therein that they were issued by authority of such statute, as against a bona fide holder for value, to deny that the subscription was necessary to aid in the completion of the road, or that the citizens of the county had an interest therein, both of which were facts precedent to the right to exercise the power conferred by the statute.

Goff, Circuit Judge, dissenting.

On Rehearing. For former opinion, see 37 C. C. A. 484, and 96 Fed. 284.

A. C. Avery and James E. Shepherd (Avery & Avery, Schenck & Schenck, and Shepherd & Busbee, on the briefs), for appellants.

Charles Price (John F. Dillon and Harry Hubbard, on the briefs), for appellees.

¹ State laws as rules of decision in federal courts, see notes to *Griffin v. Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

Before GOFF, Circuit Judge, and MORRIS and BOYD, District Judges.

MORRIS, District Judge. The opinion expressing the conclusions of this court on the first hearing of this case was filed August 1, 1899. 37 C. C. A. 484, 96 Fed. 284. Upon the appellees' petition for a rehearing the whole case has been fully reargued in connection with the appeal in Wilkes Co. v. Coler, decided at this term, 113 Fed. 725, and in connection with the answers of the supreme court of the United States to the questions certified in that case. 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642.

The bonds in question are as follows:

"County of Stanly Six Per Cent. Bond.

"Stanly county, state of North Carolina, is indebted to the bearer in the sum of five hundred dollars payable, * * *" etc. "This bond is one of a series of eighty of the denomination of one thousand dollars each, and forty of the denomination of five hundred, making a total of one hundred thousand dollars, issued by authority of an act of the general assembly of North Carolina ratified the third day of March, A. D. 1887, entitled 'An act to amend the charter of the Yadkin Railroad Company,' and of sections 1996, 1997, 1998, and 1999 of the Code of North Carolina, and authorized by a majority of the qualified voters of Stanly county at an election regularly held for that purpose on the 15th day of August, A. D. 1889, duly ordered by the commissioners of Stanly county. This series of bonds is issued to pay the subscription of one hundred thousand dollars made by Stanly county to the capital stock of the said railroad, known as the Yadkin Railroad Company. * * *" etc. "In testimony whereof, the chairman of the board of county commissioners of Stanly county hath hereunto subscribed his name for and on behalf of said board, and the clerk of the superior court of Stanly county hath countersigned the same and affixed thereto the seal of said superior court this fourth day of July, A. D. 1890."

The recitals of present interest are (1) that the bonds are issued by authority of the act of March 3, 1887; and (2) of sections 1996, 1997, 1998, and 1999 of the Code; and (3) are authorized by a majority of the votes of the county.

The act of March 3, 1887, the supreme court of North Carolina has decided, never became a law of North Carolina, so far as it undertook to give authority to issue the county bonds, for the reason that it was not passed with the special formality required by section 14 of article 2 of the North Carolina constitution of 1868, which declares that no law shall pass, authorizing a county to raise money on its credit, or impose a tax, unless the bill be read three several times in each house of the general assembly, and pass three several readings on different days, and the yeas and nays on the second and third reading of the bill are entered on the journals. The recital of the invalid enactment of March 3, 1887, however, does not invalidate the bonds, if there was in force at the time the bonds were issued other valid legislation which gave power to Stanly county to issue them; and it is urged upon us by counsel for the bondholders that the recited sections of the Code, reasonably construed, and applied as understood at the time the bonds were issued, gave sufficient power and authority. *County Com'rs v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110; *City of Evansville v. Den-*

nett, 161 U. S. 434, 443, 444, 16 Sup. Ct. 613, 40 L. Ed. 760; Knox Co. v. Ninth Nat. Bank, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93; Wilkes Co. v. Coler, 180 U. S. 506-524, 21 Sup. Ct. 458, 45 L. Ed. 642. These sections of the Code were originally enacted as chapter 171 of the laws of North Carolina of 1868-69, and were re-enacted as sections 1996, 1997, 1998, 1999, and 2000 of the Code of 1883, with all the formality required by section 14 of article 2 of the constitution with regard to a law allowing counties to pledge their credit and impose a tax for that purpose. *Commissioners v. Snuggs*, 121 N. C. 394-401, 28 S. E. 539, 39 L. R. A. 439.

The following are sections 1996 and 1997:

Section 1996 of the Code of North Carolina: "The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

Section 1997 of the Code of North Carolina: "The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and, if a majority of the board shall vote for the proposition, this shall be entered upon the record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And, if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them and submitted to the people, subject to all the rules, regulations and restrictions of other stockholders in such company or companies. Provided, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper."

The bonds were duly authorized by a majority of the qualified voters of Stanly county, and were dated July ———, 1890, and were issued from time to time as the railroad was built, and were placed on the market and sold; and for four years a tax was levied and collected by the county, and the interest coupons paid. When the tax for the fifth year had been collected, the superior court of Stanly county, in 1897, at the instance of the commissioners of the county and certain taxpayers, held the bonds to be invalid, and enjoined the treasurer of the county from paying the interest; and on appeal the supreme court of North Carolina affirmed the ruling. *Commissioners v. Snuggs* (1897) 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439. The supreme court of North Carolina (Chief Justice Faircloth dissenting) held that Stanly county had no power or authority, under the above-recited sections of the Code, even with an affirmative vote of the qualified voters of the county, to issue bonds, and levy a tax for their payment, in aid of a railroad not begun before the adoption of the state constitution of 1868.

When this case was first heard in this court the argument of the counsel for the bondholders was largely devoted to the effort to show that the decision of the supreme court of North Carolina against the validity of the act of March 3, 1887, amending the charter of the Yadkin Railroad Company, and authorizing Stanly county to subscribe for its stock and issue these bonds, and declaring that act invalid

because not passed as required by the state constitution, was a ruling which this court ought not to follow. That question has been settled in favor of the county by the supreme court of the United States. *Wilkes Co. v. Coler*, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642. The other question,—how far this court was bound to follow the rulings of the supreme court of North Carolina in its construction of the sections of the Code recited in the bonds, was not fully discussed, and this is the question we are urged to re-examine upon this rehearing.

The articles of the Code, first enacted in 1868-69 (chapter 171), and re-enacted as part of the Code in 1883, before the Stanly county bonds were authorized or issued, does, in the broadest terms, by section 1996, declare that "the boards of commissioners of the several counties shall have power to subscribe stock to any railroad company when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest." The supreme court of North Carolina declared in *Commissioners v. Snuggs* (1897) that this language was to be held to mean that the railroad must be an unfinished one, which had been begun before the subscription was made, and that it must also be a railroad in which the county had a direct pecuniary interest. The question now to be re-examined is whether that construction is one to which, as a proposition of law, we can assent; and, if not, are we bound to follow the decision of the supreme court of North Carolina?

The case of *Commissioners v. Snuggs* was not a case to which any bondholder was a party. The county commissioners and certain taxpayers of the county were the plaintiffs, and the defendant was the county treasurer, who was the appointee of the county commissioners, had no personal interest to resist the plaintiffs, and represented no bondholder. The bonds had been sold as negotiable securities, and had been over four years on the market, and had been purchased by widely scattered investors. The railroad into Stanly county had been built and was in operation, and for over four years the authorities of the county had recognized the bonds as valid obligations of the county, and had paid the interest. The case was, in effect, a direct attack upon the property of bona fide holders of the bonds, in which they had no hearing. It seems, therefore, to be a case in which it is our duty to examine the question independently, with, however, an earnest disposition to lean towards the conclusion arrived at by the supreme court of North Carolina. *Folsom v. Township Ninety-Six*, 159 U. S. 611, 627, 16 Sup. Ct. 174, 40 L. Ed. 278; *Burgess v. Seligman*, 107 U. S. 20, 33, 34, 2 Sup. Ct. 10, 27 L. Ed. 359; *Loeb v. Columbia Tp.*, 179 U. S. 472-493, 21 Sup. Ct. 174, 45 L. Ed. 280.

Was there anything in the constitution, laws, or decisions of North Carolina which should have given warning to purchasers of the bonds that the power given to counties by section 1996 of the Code was not applicable to the Yadkin Railroad Company in Stanly county? As to state aid, the constitution clearly said (article 5, § 4) that it should only be given, unless submitted to a direct vote of the people of the state, "to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution, or in which the state has a direct pecuniary interest." The language used by the framers of the

constitution when dealing with the aid which might be given, not by the state, but, by counties, to railroads, is quite different, and it was to be presumed that the difference in language was significant of a corresponding difference in meaning, intention, and policy. With regard to counties, the language of the constitution is simply (article 7, § 7) that no county shall loan its credit, nor shall any tax be levied, except for necessary expenses thereof, unless by a vote of the qualified voters therein. With regard to section 1996 of the Code, there had not been, prior to the issuing of the bonds in suit, any decision of the supreme court of North Carolina construing its meaning. The import of its words, "The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest," was to be understood by those whose rights might be affected by them in their natural, ordinary, generally received sense. In the first place, there is nothing in the words or their context to indicate that when enacted in the Code, in 1883, they were not intended to be a guide for the future, and not for the past. The office of laws is to operate upon future actions, and the universal rule is that statutes are prospective in their operation, unless the statute itself declares it to be retrospective. It would seem, therefore, that while the Code remained unaltered whenever the case arose in which the citizens of a county might have an interest in a railroad, and county aid was necessary to its completion, section 1996 gave power to the board of commissioners to subscribe to its stock. *James v. City of Milwaukee*, 16 Wall. 159, 21 L. Ed. 267. Then follows section 1997, which prescribes how the board of commissioners shall by vote determine the amount, and whether the subscriptions shall be in bonds, money, or property, and how they shall, when they have so determined, submit the proposition to a vote of the people, and reiterates the provision that "the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper." Section 1998 provides how the election shall be had. Section 1999 declares that in case the county shall subscribe the amount proposed, in bonds, the county commissioners shall have power to fix the rate of interest, and when and where it shall be payable, and to raise by taxation from year to year the amount necessary to meet the interest on said bonds. Section 2000 provides that the taxes to be raised for the payment of interest and principal shall be collected in like manner as other state taxes, and paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners "as directed by this chapter." It would seem that the fair import of this valid legislation would be to give to the county commissioners of Stanly county power to do the very thing they have done in issuing these bonds. It is true that the supreme court of North Carolina has decided to the contrary, and has invalidated the bonds by its decision in 1897 in *Commissioners v. Snuggs*; but that was a case instituted five years after the bonds were put on the market, and in which the bondholders were not parties or represented. The supreme court of North Carolina was led to the conclusion that, when

the act of 1868-69 was re-enacted in the Code, section 1996 and the four succeeding sections, could have had reference to no case except where the county had a direct pecuniary interest in a railroad which had been begun and was unfinished at the time of the adoption of the constitution, in 1868, and could not apply to the Yadkin Railroad, which was begun in 1889. With this conclusion, after the most careful consideration, and having now heard the matter reargued, a majority of the judges composing this court are unable to agree. The framers of the constitution of the state, when intending to express such restriction, used such entirely different language that it is difficult to suppose that the legislature in 1868-69 and in 1883, with that language in the state constitution, intended the same thing when they used the language now found in the Code.

The words "in which the citizens of the county may have an interest" would seem to be the appropriate words to express the general interest which the whole body of the people of a county have in a railroad which they believe will benefit them, as distinguished from a direct pecuniary interest of the county as a corporation. When the framers of the constitution intended to limit and restrict the state in lending its credit to railroads, they said, "except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution, or in which the state has a direct pecuniary interest, unless by a direct vote of a majority of the people of the state who should vote thereon." How natural and to be expected it would be that, if the legislature had intended to restrict county aid to the same class of railroads, they would have used somewhat similar language! Finding that section 1996 gives power to the county to subscribe to stock in any railroad "when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest," is it not reasonable to read it as meaning to complete the raising of the money necessary to build the road? When the route is surveyed and determined upon, and the charter for a private corporation obtained, and part of the stock subscribed, but not sufficient to complete the road, is it not most natural, with regard to such a projected road, that the authority to the county to subscribe stock should be spoken of as aiding in the completion of the road? To complete a projected railroad for which a charter has been obtained, and for constructing which part of the stock has been subscribed, the thing needed is more subscriptions of stock. And when the subject in hand is aiding in the completion of the road by subscription of stock, those aid in its completion who make the additional subscriptions to the stock. The language of Mr. Justice Brewer in *Town of Andes v. Ely*, 158 U. S. 312-321, 15 Sup. Ct. 954, 39 L. Ed. 996, is pertinent:

"While courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requirements of a statute, in order that no burden may be recklessly or fraudulently imposed, yet such statutes are not of a criminal character, and proceedings are not to be so technically construed or limited as to make them a snare to those who are encouraged to invest in the securities of the municipality."

Cited, also, in *Provident Life & Trust Co. v. Mercer Co.*, 170 U. S. 593-600, 18 Sup. Ct. 788, 42 L. Ed. 1156.

In the resolution adopted by the board of county commissioners in June, 1889, ordering an election to be held in Stanly county to ascertain whether a majority of the voters favored the subscription, it was stated, "It appearing that the citizens of said county have an interest in said railroad," and it was provided:

"If the proposition to vote said subscription shall be ratified by a majority of the qualified voters of said county at said election, then said bonds shall be delivered to said Yadkin Railroad Company as follows: Twenty-five thousand dollars when ten miles of said road is constructed and in operation from Rowan county line into said county of Stanly, twenty-five thousand when said road is constructed and in operation from the town of Salisbury to the town of Albemarle, and the remaining fifty thousand dollars when said road is constructed and in operation from the town of Salisbury to the village of Norwood, in Stanly county: provided, that the said railroad company shall be required to begin the construction of said road at Salisbury within ninety days from and after the first day of October, 1889, and to complete the same to Norwood within 18 months thereafter, and, if not so begun and completed, then said bonds shall not be delivered to said company: provided, however, that the board of commissioners of Stanly county shall have full power and discretion to extend the time for the performance of the conditions and limitations hereinbefore mentioned."

Thus it would seem that the board of commissioners and the voters of the county, a majority of whom voted in favor of this proposition, understood very intelligently what was meant by aiding in the completion of a railroad in which the citizens of the county might have an interest. The meaning given to the language of the Code after the rights of the holders of the bonds had vested is too strained, unnatural, and unwarranted to be accepted, to the destruction of property rights acquired in good faith, based upon the ordinary meaning of the language. Reluctant as we have been, in deference to the opinion announced in *Commissioners v. Snuggs*, to come to this conclusion, we think there is no escape from it. Moreover, is not the legal effect of the recital in the bonds stating that they were issued by authority of sections 1996, 1997, 1998, and 1999 of the Code of North Carolina equivalent to a statement that the facts existed which authorized their issue under those sections, viz., that they were issued to aid in the completion of a railroad in which the citizens of the county had an interest, and is not the county now estopped from denying that recital? It seems to us that many cases have so held. *Chaffee Co. v. Potter*, 142 U. S. 355, 364, 12 Sup. Ct. 216, 35 L. Ed. 1040; *City of Evansville v. Dennett*, 161 U. S. 434-442, 16 Sup. Ct. 613, 40 L. Ed. 760; *Board of Com'rs v. National Life Ins. Co.*, 32 C. C. A. 591, 90 Fed. 230, 231; *Hughes Co. v. Livingston*, 43 C. C. A. 541, 104 Fed. 306-316; *School Dist. v. Rew* (C. C. A.) 111 Fed. 1, 7, 8; *Belo v. Commissioners*, 76 N. C. 489, 493, 494, 495.

It is urged in behalf of the county that legislation substantially the same, in terms, as sections 1996 to 2000 of the Code, had been held to be unconstitutional in 1885 by the supreme court of North Carolina in *Barksdale v. Commissioners* (1885) 93 N. C. 472. In that case the question was as to the legality of the tax assessed by the county for the support of schools under a general law giving power to all counties. The objection made was that the tax was in

excess of the limit prescribed by the constitution, and that the act allowing the commissioners to exceed the limit was unconstitutional, because in disregard of article 5, § 1. The tax in that case was levied without being submitted to a vote of the people of the county, and was therefore inhibited by section 7, article 7, of the constitution. The further objection also prevailed that the tax about to be levied exceeded the limit restriction of section 6 of article 5, viz:

"The taxes levied by commissioners of the several counties shall be levied in like manner with the state taxes, and shall never exceed the double of the state tax, except for a special purpose and with the special approval of the general assembly."

There is no allegation or evidence in this case that the payment of interest on these bonds requires a tax exceeding that limit, or that the tax collected and in the hands of the county treasurer, levied for the purpose of paying the coupons due at the institution of this suit, had exceeded that limit.

The case of *Galloway v. Jenkins* (1869) 63 N. C. 147, cited by counsel for the county, deals exclusively with the constitutional provision restricting the state from aiding railroads without a vote of the people, and has no relevancy to cases of county subscriptions. We find nothing in the decisions of the supreme court of North Carolina prior to the issue of these Stanly county bonds that pointed to any defect of power to issue them under the Code sections recited in the bonds. On the contrary, the opinion of that court in *Belo v. Commissioners* (1877) 76 N. C. 494, 495, is to the effect that as to bona fide holders the records of the proceedings of the commissioners affirming the existence of particular facts are conclusive, as well as the recitals in the bonds that they have been issued in pursuance of the law which authorized their issue.

The majority of the judges constituting the court on this rehearing are of opinion that the decree of the circuit court should be affirmed.

BOYD, District Judge. I concur with Judge MORRIS in his opinion filed in this case, and will give my reasons therefor:

The county of Stanly issued its bonds, in the sum of \$100,000, in the years 1890, 1891, etc., for the purpose of paying its subscription to the stock of the Yadkin Railroad, running from Salisbury to a point in Stanly (Norwood),—a distance of 44 miles. It is alleged in the bill that this road runs through the best and most fertile portion of Stanly county for a distance of 30 miles. It is also alleged that the county of Stanly "has received benefits from the same, in the greatly increased value of the lands of the county, in the increased and improved transportation within the limits of the same, and, further, by reason of the taxes paid into the treasury of the county by the company in each and every year." It is also alleged "that in return for, and in consideration of, said subscription, the Yadkin Railroad Company issued to said county of Stanly stock in and to the said amount of one hundred thousand dollars, which stock the county holds now, and has held since the date of the issue of the same, to wit, the year 1891." It appears, also, that the interest on the bonds so issued

by the county of Stanly was paid regularly to complainants and others holding the bonds until 1897,—some time before the commencement of this suit. It is alleged in the bill that complainants “bought, for valuable consideration, a large sum (the market price), a great number” of these bonds (48), of the denomination of \$1,000 each; “that the purchase of the bonds was for value, in good faith, and without any notice, expressed or implied, that there was any suggestion of their being void, invalid, or fraudulent, or otherwise than perfectly legal in their issue and sale.” It appears that the payment of the interest on these bonds was stopped by reason of a judgment of the superior court of Stanly county, affirmed by the supreme court of North Carolina, in 1897, in the case of *Commissioners v. Snuggs*, 121 N. C. 394, 401, 28 S. E. 539, 39 L. R. A. 439. In that action the bonds in question were adjudged void. It is to be noted, in the first place, that there was no bondholder party to the suit of *Commissioners v. Snuggs*; it being an action brought against the defendant, Snuggs, to restrain him from paying the interest on the bonds to the holders of the same; the interest, in the amount of \$6,000, being in his hands, as treasurer, having been paid to him by the sheriff of the county for that purpose, and only that. It was held by him—set apart from all other funds—solely for the purpose of the payment of the interest due July 1, 1897.

The contention upon the part of the defendants, as appears from the complaint filed in May, 1897, in the superior court of Stanly, in the action against Snuggs, in which they were plaintiffs, was that the bonds sued on here were void because the acts of 1870 and 1887 were not passed in accordance with the requirements of section 14, art. 2, “of the constitution of North Carolina, in that neither of the said acts passed its several readings in the house of representatives, on three different days,” and that the yeas and nays, if taken at all, were not entered upon the journal, as required, etc. In this contention the plaintiffs in this action in the state court were sustained. In the supreme court, however, it was insisted that, in addition to the power conferred by the statutes to issue the bonds, it was also conferred by sections 1996, 1997, 1998, and 1999 of the Code of North Carolina, recited in the body of the bond. The court, as appears from the opinion of Justice Montgomery, failed to uphold this contention, also, upon the sole ground, however, that the road was not shown to be an “unfinished road,” and that the “citizens of the county had an interest in the same.”

Section 1996 of the Code of North Carolina is as follows:

“The board of commissioners of the several counties shall have power to subscribe stock to any railroad company, or companies, when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.”

In the case of *Commissioners v. Snuggs* the sections of the Code were upheld by the court as valid statutes; and in this case were for the first time construed by the supreme court of North Carolina. They were passed regularly, and in accordance with the requirements of the constitution of the state. The court put its decision upon the ground that the sections of the Code did not apply. It was a con-

struction of a valid statute by the court six years after the bonds in question came into the hands of complainants, innocent purchasers for value. In the case of *Wilkes Co. v. Coler*, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642, it was decided that the decisions of the highest court of a state upon the question whether a particular act was passed in such manner as to become, under the state constitution, a law, should be accepted and followed by the federal courts. This decision was rendered in a case certified to the supreme court from this court,—*Wilkes Co. v. Coler*; one of the cases in which Judge MORRIS has filed the opinions suggested in the outset of this argument, and of a similar nature to this.

The question, then, is, in the case under consideration, whether the bonds are valid and legal bonds. It was contended in the argument that this court is bound by the decisions of the state court in the case of *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439. I think not, and, however much we may regret it,—and we do regret it,—it is still our duty to decide this case in accordance with the principles, as we understand them, laid down by the supreme court of the United States and by this court. In *Burgess v. Seligman* (the leading case upon this subject), the supreme court of the United States (Justice Bradley delivering the opinion of the court) says:

"Where contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or where there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights were accrued."

Says Justice Bradley further:

"Federal courts exercise their own judgment always in reference to the doctrines of commercial law."

The rights of these parties here are to be determined according to the doctrines of commercial law; it being well settled that the bonds in question are commercial securities,—negotiable instruments.

Pine Grove Tp. v. Talcott, 19 Wall. 666, 667, 22 L. Ed. 227, was an action in the United States circuit court upon coupons cut from bonds issued by that township in aid of a railroad under an act of the general assembly of Michigan. The plaintiff in error insisted that several decisions of the supreme court of the state holding that the construction of railroads was not a public corporate purpose, such as townships were authorized by the constitution of Michigan to aid, and that such statute and the bonds issued in pursuance of it were void, were controlling. The supreme court of the United States, in declining to be bound by those decisions, said:

"It is insisted that the invalidity of the statute has been determined by the two judgments of the supreme court of Michigan, and that we are bound to follow those adjudications. We have examined those cases with care. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. We think the dissenting opinion in the one first decided is unanswered. Similar laws have been passed in twenty-one states. In all of them but two it is believed their validity has been sustained by the highest local courts. It is not easy to resist the force of such a current of

reason and authority. The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the states where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment neither of the other departments of the government of the state lifted its voice against them. The acquiescence was universal. The general understanding of the legal profession throughout the country is believed to have been that they were valid. The national constitution forbids the states to pass laws impairing the obligation of contracts. In cases properly brought before us, that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective states, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

Justice Harlan, in *Wilkes Co. v. Coler*, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642, before referred to, shows that it is only in cases where the state court has held an enactment is not passed in accordance with the requirements of the constitution that its decision is controlling.

Here is a construction of a valid statute, recited in the bond, which this court is asked to follow. We are not bound by it, and, while we regret it in this case, we cannot follow it. Says Justice Harlan, in *Wilkes Co. v. Coler* (page 519, 180 U. S., and page 463, 21 Sup. Ct., and 45 L. Ed. 642):

"Observe that the issue is not as to the construction, meaning, or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose."

This paragraph from the opinion of Justice Harlan draws the distinction clearly and expressly between "the issue as to the construction, meaning, and scope of a statute," and the issue as to "whether that which purports to be a legislative enactment ever became a law for any purpose." The court holds that the decisions of the highest court of the state upon the question as to whether "an enactment in the form of a statute was ever passed, so as to become, under the state constitution, a law," or not, are not to be disregarded. The question here is not whether the sections of the Code relied on were ever passed as required by the constitution, so as to become valid laws (statutes of the state), but whether the circuit court of the United States is bound by the "construction, meaning, and scope of a statute" passed as required by the constitution, placed upon such statute by the highest court of a state after the issue of the bonds, which holds invalid and void bonds (negotiable instruments, commercial securities) issued by Stanley county "in good faith, put upon the market in due course of trade, purchased in open market for value"; the purchaser being unaware of any defect of authority or other irregularity on the part of the county, and there being nothing to excite suspicion of any defect or irregularity.

In the leading case of *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 573, 574, 19 Sup. Ct. 825, 43 L. Ed. 1081, Justice Gray says:

"In *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. Ed. 1008, this court stated, as an axiomatic principle in the law of corporations, this proposition: 'Where a party deals with a corporation in good faith, the transaction is not ultra vires, and he is unaware of any defect of authority or any other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.' 10 Wall. 644, 645; *Board v. Suttler*, 38 C. C. A. 167, 97 Fed. 270. The proposition was supported by citations of many English and American cases, and among them *Bank v. Turquand* (1856) 6 El. & Bl. 827; and the justices of this court, while differing among themselves in the application of the principle to municipal bonds, have always treated *Bank v. Turquand* as well decided upon its facts. *Knox Co. v. Aspinwall*, 21 How. 539, 545, 16 L. Ed. 208; *Moran v. Miami Co.*, 2 Black, 722, 724, 17 L. Ed. 342; *Gelpcke v. City of Dubuque*, 1 Wall. 175, 203, 17 L. Ed. 520; *St. Joseph Tp. v. Rogers*, 16 Wall. 644, 666, 21 L. Ed. 328; *Humboldt Tp. v. Long*, 92 U. S. 642, 650, 23 L. Ed. 752. And see *Zabriskie v. Railroad Co.*, 28 How. 381, 16 L. Ed. 488, above cited."

The cases cited by Justice Gray in the above paragraph are decided upon municipal bonds, and show that the principle he states applies to contracts municipal as well as to other corporations; and the late Justice Miller, in his dissenting opinion in the case of *Humboldt Tp. v. Long*, 92 U. S. 650, 651, 23 L. Ed. 752, says:

"The case of *Knox Co. v. Aspinwall*, 21 How. 539, 16 L. Ed. 208, the original case, on which the rule and principles are based, is itself based upon *Bank v. Turquand*."

In 1890, 1891, etc., Stanly county, for the purpose already shown, put the bonds in question upon the market for sale. They were in due form, and contained the usual recitals. These bonds were purchased in due course of trade by the complainants, unaware of any defect of authority or other irregularity in their issue. There was nothing to excite suspicion of any defect or irregularity in their issue. The railroad was constructed; the county had its stock in the same, and had for years paid the interest on the bonds. The county was, each and every year, collecting from the railroad company taxes levied upon the property of the same. Under conditions like these, I consider it the duty of this court, as said by Justice Gray in the case above cited, to uphold the bonds,—to declare them valid,—if, under any circumstances, the court can do so.

I have shown that this court is not bound by the construction put upon these valid statutes by the supreme court of North Carolina in the *Snuggs Case*, years after the issue and sale of the bonds. It becomes necessary, then, to inquire as to what construction the court will put upon the statutes. In construing these sections of the Code, we must do it in the light of the rule laid down by Justice Gray in the *Louisville, N. A. & C. R. Co. Case*. This is an easy thing to do, when we consider the decision of *Belo v. Commissioners*, 76 N. C. 489. Indeed, it seems to us that if the principles laid down in that case had been called to the attention of the court in the case of *Com-*

missioners v. Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439, the decision would have been different. As I have already said, no bondholder was a party to that suit. It seems to have been argued, however, but there is no reference to the Belo Case in the opinion, and, from that, I take it, there was none in the argument. In addition to the leading opinion of the court, written by Justice Montgomery, there were two concurring opinions, and in none of them is there any mention of the Belo Case. This, to us, is remarkable, when we consider the fact that it is the leading case in North Carolina upon the subject of municipal bonds; and the more remarkable when we consider the principles there laid down, decisive of the case here in favor of the bonds and their validity. What are these principles? The supreme court, in 1877, in *Belo v. Commissioners*, 76 N. C. 489,—the leading case upon the subject of municipal bonds, and the effect of recitals in the bonds,—lays down the law as follows:

"While the decisions are very uniform that the records of the justice's court, affirming the fact of compliance with the conditions precedent to the subscription of stock, are conclusive and estop the county from denying the validity of the bonds in the hands of a bona fide holder before maturity, they are equally uniform in giving the same effect to the recitals in the bonds themselves that they had been issued in pursuance of the law which authorized their issue. The recital is a determination of the question, and the holder has a right to rely on it. *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Knox Co. v. Aspinwall*, 21 How. 539, 16 L. Ed. 206. Mr. Justice Gray says: 'In the leading case of *Knox Co. v. Aspinwall*, the decision was rested upon two grounds. One of them was that the mere issue of bonds, containing a recital that they were issued in pursuance of the legislative act, was a sufficient basis for the assumption by the purchaser that the conditions on which the county was authorized to issue them had been complied with, and it was said the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. The position was supported by reference to the *Royal British Bank v. Turquand*, 6 El. & Bl. 327, in a case in the exchequer chamber, which fully sustains it.'"

Here the court in 1877 approved of the doctrine in the *Royal British Bank Case*, upon which *Knox Co. v. Aspinwall* was based,—the case Mr. Justice Gray bases his decision upon in the case of *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 573, 574, 19 Sup. Ct. 817, 43 L. Ed. 1081. The above are the words of Justice Gray,—the same used in the Belo Case by Justice Bynum; the leading case on municipal bonds in North Carolina.

To apply these rules to this case, what were the conditions on which the county of Stanly was authorized to issue the bonds? One was, "when necessary to aid in the completion of any railroad"; and another was, "of any railroad in which the citizens of the county may have an interest." Here was a power, legislative in its character, recited in the bond, to be exercised under certain conditions. By whom? The act says, the "board of commissioners." In June, 1889, an order was entered upon the record of the board of commissioners of Stanly county, when they came to consider the proposition to subscribe to the capital stock of the Yadkin Railroad, a part of which was as follows: "It appearing that the citizens of said county have an interest in said railroad," etc. In this same order, reference time and again was made to the Yadkin Railroad and its construction, and

to the conditions upon which it was to be constructed. Among others, it was ordered that "said railroad shall be of standard gauge." It appeared then to the board, and they (the commissioners) acted upon it, that there was a railroad to be completed,—constructed,—and that the citizens of the county had an interest in it. These were the conditions to be complied with, and some authority had to pass upon the same. It was not for the innocent purchaser of the bond to inquire as to whether the conditions were complied with, but for the municipal authorities who put it upon the market, and the recital in the bond that it was issued in pursuance of the power conferred by the sections of the Code "was a sufficient basis for the assumption by the purchaser that the conditions on which the county was authorized to issue it had been complied with." *Belo's Case*, supra. The proceedings had before the board of commissioners of Stanly county, printed in the record, show that the corporate authorities acted with the sections of the Code recited in the face of the bond before them, and that they passed upon all questions left for their determination, as said by Justice Brewer in his opinion in the *Mercer Co. Case*, 170 U. S. 601, 18 Sup. Ct. 791, 42 L. Ed. 1156. It shows these corporate authorities were acting in good faith, and wanted to perform their duty, according to law. On page 660, 30 C. C. A., and page 307, 87 Fed., in the case of *Township Ninety-Six v. Folsom*, the circuit court of appeals, speaking through Judge Jackson, says:

"It will be observed from the inspection of these bonds that their recitals show upon the face of the bond a compliance with the law under which they were issued. The purchaser had a right to assume that all the conditions of the law were complied with, authorizing the issue of the bonds. The question whether they were issued in compliance with the law was a question that properly belonged to the authorities who were authorized by the acts of the legislature to issue the bonds."

Purchasing these bonds with the recitals they contained, was it required of the purchasers to find out whether the citizens of the county of Stanly had an interest in the railroad? Was it required of them to find out whether the railroad was completed or uncompleted? These are matters for the corporate authorities, and for them alone. Says Justice Brewer in *Provident Life & Trust Co. v. Mercer Co.*, 170 U. S. 601, 18 Sup. Ct. 791, 42 L. Ed. 1156:

"By a long series of decisions, such recitals are held conclusive, in favor of a bona fide holder of bonds, that precedent conditions prescribed by statute, and subject to the determination of those county officers, have been fully complied with."

In the case of *Provident Life & Trust Co. v. Mercer Co.*, 170 U. S. 601, 18 Sup. Ct. 788, 42 L. Ed. 1156, it will be seen that the recitals in the bond, which are printed in the volume, are similar to those in the Stanly bonds. See, also, the recent case of *Gunnison Co. v. E. H. Rollins & Sons*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689, as to recitals in bonds; also *School Dist. v. Rew* (C. C. A.) 111 Fed. 1.

We understand the rule to be that the purchaser has to look no further than to ascertain if a power has been granted to issue the bonds. If there is a power, then he can depend upon the recitals in the bonds for the proper exercise of that power.

The above are the rules which have obtained in North Carolina since 1877,—the first time they were considered. They are to be found in the case of *Belo v. Commissioners*, 76 N. C. 489; and in the light of the same, so clearly and forcibly stated by Justice Bynum, we must assume, if that case had been called to the attention of the court when the *Snuggs Case* was argued, as suggested by Judge MORRIS, the decision might have been different. In *Union Bank v. Commissioners of Town of Oxford*, 116 N. C. 368, 21 S. E. 419; the court says:

"The purchaser of such coupons as those sued upon must so far act upon the notice contained in the recitals, as a general rule, as to examine the statutes referred to, and ascertain at his peril whether the essential prerequisites to the validity of the bonds have been met both by legislative and popular action. We hold that upon a fair construction of the organic law and pertinent statutes, and their application to the facts of this case, there has been a sufficient compliance with the essential requirements of the law to render the election valid. We think, therefore, that the court erred in holding that the plaintiff was not entitled to recover, and the judgment of nonsuit must be set aside and a new trial granted."

The recitals in the bonds in question, as they appear in the record, are:

"This bond is one of a series of eighty of the denomination of one thousand dollars each, and forty of the denomination of five hundred, issued by authority of an act of the general assembly of North Carolina ratified the third day of March, 1887, entitled 'An act to amend the charter of the Yadkin Railroad Company,' and of sections 1996, 1997, 1998, and 1999 of the Code of North Carolina, and authorized by a majority of the qualified voters of Stanly county at an election held for that purpose on the 15th day of August, 1889, duly ordered by the board of commissioners of Stanly county."

Under the decision in the *Belo Case*, and the rule to which the court calls attention in *Union Bank v. Commissioners of Town of Oxford*, both referred to above, the purchaser of the bonds "had only to examine the statutes referred to, and ascertain, at his peril, whether the essential prerequisites to the validity of the bonds have been met both by legislative and popular action." These sections of the Code recited in the bond as authority for their issue were passed by the legislature according to the constitution, and there is no doubt but that there was a large majority of the voters of the county of Stanly in favor of the issue of the bonds. These things are admitted. So that the bondholder had to look no further than to see if there was a power conferred to issue the bonds. The performance of the conditions was a matter to be determined by the corporate authorities. The bondholders had the right to rely on the recitals for that. They did rely on them. They did all that was required of them.

It was contended by the appellants in the argument that the provisions of section 1996 of the Code refer only to those roads that were unfinished in April, 1868, the time of the adoption of the constitution; and in support of this the attention of the court is called to the following:

"This reasoning leads us to the still further conclusion that, at the time when the act of 1868-69 was brought forward, in the Code (section 1996 and the four succeeding sections), it could have had reference to no cases

except those where the counties had a pecuniary interest in unfinished railroads at the adoption of the constitution of 1868." *Commissioners v. Snuggs* (1897) 121 N. C. 403, 28 S. E. 542, 39 L. R. A. 439.

This case was decided in 1897. The statute of April 10, 1869 (section 1996 of Code), made no reference to the constitution of 1868, nor to any other point of time in the past. Every word in section 1996 denoting tense is in the future tense, and the Code went into effect November 1, 1883. It is a universal rule of construction that all statutes are prospective in their operation, unless the statute itself says to the contrary. "No statute should be given a retrospective operation unless its words expressly require such construction." *State v. Littlefield*, 93 N. C. 614. What words in section 1996 require that its operation be referred to April, 1868,—15 years before it was re-enacted in the Code, and one year before it was ever put in any shape on the statute books of North Carolina? "Upon the same principle of construction, if section 1996 should be re-enacted in the Code of 1900, it would have no application to any road that might be built during the next century, but would apply to roads incomplete in the year 1868,—thirty-two years before its enactment." This principle has been passed on by the supreme court of the United States in *James v. City of Milwaukee*, 16 Wall. 159, 21 L. Ed. 267. In that case a statute authorized a city to lend its credit to any railroad company incorporated and organized, and the court held that companies thereafter organized were intended to be included, and the statute was applicable to them as well as those in existence. The court said (16 Wall. 160, 161, and 21 L. Ed. 267):

"The defendant in error insists that the power conferred was confined to companies already in existence at the date of the act, and such was the opinion of the court below. We entertain a different opinion."

In that case there was no word denoting the future tense,—no "shall," as in section 1996,—but the only words used were "incorporated" and "organized."

In this connection we observe that the supreme court of North Carolina, in the *Snuggs Case*, has construed the words of section 1996 of the Code, "the citizens of the county may have an interest," not to mean what the language imports. The court holds that these words require the county, as a county, to have a pecuniary interest in the railroad, in order that the section may apply. In answer to this, it is only necessary to say no such words are to be found in section 1996 of the Code. This construction takes out the words "the citizens," and inserts the word "pecuniary," and thus it holds that the words "any railroad in which the citizens of the county may have an interest" are to be construed as follows, to wit: "any railroad in which the county has a pecuniary interest." A mere statement of such a construction is enough to refute it. Here we may call attention to the language of article 5, § 6, of the constitution of the state, when it was dealing with the question of the right of the state to issue railroad aid bonds. There it refers to a railroad "in which the state has a direct pecuniary interest." This section 1996 of the Code was adopted about one year after article 5, § 6, of the constitution. Doubtless the legislators had be-

fore them this provision of the constitution, or at least were familiar with it. The difference in the language was obviously intentional and significant.

The history of the adoption of this provision of the state constitution as to state railroad aid bonds shows that it had a different purpose from that of the Code (sections 1996-2000). The report of the treasurer shows that prior to the meeting of the convention the state had undertaken to issue its bonds in aid of certain railroads, and that under the statutes then existing the state was liable to be called upon for the issue of additional bonds, or for the guaranty and payment of additional bonds; and the state owned stocks in certain railroads, thus having a direct pecuniary interest in them. The amendment made to section 5, article 5, of the constitution, above quoted, was designed to enable the state, without a vote of the people, to carry out its contracts already entered into on railroads, etc., already begun, and to protect its interest in the railroads, etc., already begun. With a vote of the people, the state was allowed to aid railroads, without restriction. As the constitution (article 7, § 7) did not allow counties to incur any debt in any case, except for necessary expenses, without a vote of the people, the reason for the provision as to unfinished railroads in case of state aid did not apply to counties, and was purposely omitted in the act of April 10, 1869 (now sections 1996-2000 of the Code). This view is supported by the following decision rendered by the North Carolina supreme court in 1869,—the year following the constitutional convention. In *Galloway v. Jenkins*, 63 N. C. 147, the suit was to enjoin an issue of state bonds in aid of the railroad company. The court held that the bonds were unauthorized, under the provisions of the constitution. In the course of the opinion (Pearson, C. J., writing the same) the court says with respect to the restriction of the power of the state to incur debt,—speaking of the debt existing at the time of the adoption of the constitution of 1868 (page 153):

"It will be found that most of the public debt was incurred in three modes: (1) By subscribing for stock in railroad and navigation companies, and issuing bonds to pay for the stock; the state becoming a member of the corporation. This is the heaviest item, and amounts to, say, eight million dollars. (2) By issuing bonds of the state, and exchanging such bonds for a like amount of the bonds of the corporation; the state not becoming a stockholder, and taking the collateral security of more or less value. This is the next heaviest item, and amounts to about three millions of dollars. (3) By indorsing the bonds of corporations, and taking a mortgage or some other collateral security. This item amounts to two millions. These are the three modes by which, judging from the past, it was apprehended the public debt might be so run up as to ruin the credit of the state, and tarnish her honor and her reputation for good faith. [Page 155.] The suggestion that the credit of the state was given by this statute to aid in the completion of an unfinished railroad was not strongly urged on the argument, and, indeed, it could not be. An unfinished road is one that has been begun and partly worked on, and such a road is made an exception on the ground that it might be proper to finish it, in order to prevent a sacrifice of the work that had been done. There is no evidence that such was the fact in regard to this road. The other suggestion, that the state has a direct pecuniary interest in this road, was properly abandoned. The word 'has' is in the present tense. The exception is obviously confined to roads in which the

state had a direct pecuniary interest at the time of the adoption of the constitution; otherwise the state might, by a subscription for stock, become directly interested in every railroad or navigation scheme that should thereafter be projected, and thus the restrictions of the constitution would be of no effect whatever."

Note the difference of the language of the constitution as to state aid bonds and the language of the Code as to county aid bonds. The constitution says "has," and note the comments of the court on the present tense. The Code says "may have," etc. The words used are different, and the purposes are different.

Such of these decisions of the supreme court of North Carolina as were rendered after the bonds in question were issued are not binding upon this court, and it is both the right and duty of this court to construe this language of sections 1996-2000 according to the natural and proper meaning. Within the meaning of section 1996 of the Code, the citizens of a county have an interest in any railroad running into or through the county.

It is insisted by appellants that there was a policy of the state of North Carolina, as evidenced in the constitution of the state adopted in 1868, against issuing railroad aid bonds, by either the state or counties, except in aid of roads which were unfinished at the time of the adoption of the constitution. There was no such policy. The only policy was this: that no state bonds should be issued to aid any new railroads unless there should be a vote of the people, but with such a vote the state could aid any railroad, whether it had been begun or not at the time of the adoption of the constitution. If the railroad had been begun and was unfinished at the time of the adoption of the constitution, state bonds might be issued in aid thereof without any vote of the people. As to counties, there was no distinction made as to whether the road was finished or unfinished at the time of the adoption of the constitution. A vote of the people of the county was required for the issuance of railroad aid bonds of a county in either case, whether a road had been begun or was a new railroad; and there was absolutely no distinction whatever made in the constitution between new roads and unfinished roads, so far as respects county aid, and no such distinction existed in the Code or in any other provisions of the statute. The definition given the word "completion," as it appears in section 1996 of the Code of North Carolina, by the supreme court in *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439, we think, with great respect, is too narrow, too refined. The court says it is not used in the sections of the Code suggested as synonymous with "construction," but the language here requires that there must have been an unfinished road. The court went further, and, as I say, held that there must have been a road unfinished at the time of the adoption of the constitution of April 24, 1868, in order that these sections of the Code might have application. This interpretation of the word "completion" is not the correct one, as it seems to me. It is used as synonymous with "construction." This view is, we think, supported by the obvious difference between this language and the language used in the state constitution, as respects the is-

sue of state railroad aid bonds. Article 5, § 4, of the constitution, prohibits the issue of state railroad bonds, "except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution." Section 1996 of the Code, adopted April 10, 1869, about one year after the framing of this provision of the state constitution, omits the significant words, namely, "unfinished at the time of the adoption of this constitution." "On no possible theory can these words be read into the statute. The legislature did not put them there, and the courts cannot put them there." The legislature, as before said, with the constitution before it, wrote the act of April 10, 1869, in the light of the words of the constitution; and, if it was its purpose in that enactment to make both the same, the same words would have been used. Different words were used, as the purposes were different. In this interpretation of the word "completion," it is well to observe the rule as laid down by Justice Brewer, in *Provident Life & Trust Co. v. Mercer Co.*, 170 U. S. 602, 18 Sup. Ct. 788, 42 L. Ed. 1156. In that case the justice says the meaning of a word "is often qualified by the context." He illustrates this by a reference to what is said in Bunyan's *Pilgrim's Progress*: "As I walked through the wilderness of this world, I lighted on a certain place, where there was a den, and laid me down in that place, to sleep." The writer does not mean that he passed from one end of the wilderness to the other, but "simply, that as he traveled in the wilderness he lighted on the den." So we must look at the context in this interpretation. In the foregoing I have kept in mind the rule laid down by Mr. Justice Gray in *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, already quoted in this opinion, that if, under any circumstances, the court can uphold bonds issued as the bonds in question were, it will do it.

To proceed further in the argument, already longer than intended, it is admitted that the board of commissioners of Stanly county was proceeding under the provisions of sections 1996, 1997, et seq., of the Code, as well as under the act of March, 1887. If this be true, then the bonds are valid, notwithstanding the recitals, provided the Code provisions conferred the power to issue them on the board. *Knox Co. v. Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93; *City of Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673; *Anderson Co. v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966. The defendants contend that these sections did not authorize the issue of the bonds, for the following reasons, also: Because said statutes are not local and special, as required by sections 1, 6, and 7 of article 5 of the constitution of North Carolina. In this connection there is no evidence in the record that the payment of the interest or principal of these bonds will require a county tax to exceed the double of the state tax. And further, under the decisions of the supreme court of North Carolina, this constitutional provision does not affect the validity of the bonds, and in no view of the case could affect more than the method of having a valid, existing, and binding obligation paid. "The legislative practice has uniformly been, as far as we know, to give approval in advance, and thus confer the requisite legal author-

ity to levy special taxes beyond the assigned limits, though, if given after the levy, it would doubtless be equally effectual." *Cromartie v. Commissioners*, 87 N. C. 140. In *Herring v. Dixon*, 122 N. C. 423, 29 S. E. 369, the supreme court again distinguishes between the power to confer a valid indebtedness without special legislative sanction, and the power to levy a tax to pay said indebtedness, when it says:

"In *Vaughn v. Commissioners*, 117 N. C. 429, 23 S. E. 354, while it was held that the commissioners could incur a debt for necessary expenses without a vote of the people, it was not held that they could levy a tax in excess of the constitutional limit to pay it, without special approval of the legislature."

So, under the rulings of *Cromartie v. Commissioners* and of *Herring v. Dixon*, the commissioners have the right to contract a valid debt without a special act. Here the money is in the hands of the trustee of the complainants, and no levy of any tax is necessary or asked. When a state law confers a general power on a county to subscribe to the stock of any railroad in the state for any amount, not exceeding \$100,000, the county may subscribe to the stock of two railroads, \$100,000 each. *Chicot Co. v. Lewis*, 103 U. S. 164, 26 L. Ed. 495. In *Daviess Co. v. Huidekoper*, 98 U. S. 104, 25 L. Ed. 112, the court upholds a subscription under a general statute of Missouri, almost identical in language with section 1996:

"Where an innocent purchaser buys bonds (negotiable securities) which recite that they were issued to fund a debt of the municipal corporation, the question of excessive indebtedness does not arise, and the purchaser is not required to consider or inquire concerning it." *School Dist. v. Rew* (C. C. A.) 111 Fed. 1.

The supreme court of North Carolina, in a late case (*City of Charlotte v. Shephard*, 122 N. C. 603, 29 S. E. 842), says that:

"Where such a corporation [speaking of a municipal corporation] has thus acquired the right to create a debt and issue the bonds, this power carries with it the power to levy the taxes necessary to pay said bonds and the accruing interest thereon."

Ralls Co. Ct. v. U. S., 105 U. S. 733, 26 L. Ed. 1220; *U. S. v. City of New Orleans*, 98 U. S. 381, 25 L. Ed. 225.

This doctrine of the North Carolina court is supported fully by the two decisions cited above.

The importance to all parties in interest, the amount involved, and the care with which the case has been presented to the court by counsel, seemed to demand a full discussion of its principles; and on that account I have gone over the entire record and the briefs filed, giving to them the best consideration in my power. The conclusion reached is that these bonds are valid bonds.

It follows that the decree entered in the circuit court in the *Stanly Case*, 89 Fed. 257, should be affirmed.

GOFF, Circuit Judge. I dissent from the opinion of the court, as well as from the judgment entered in this case.

BOARD OF COM'RS OF WILKES COUNTY et al. v. COLER et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 819.

1. MUNICIPAL BONDS—AUTHORITY TO ISSUE—EFFECT OF RECITALS.

The recital in municipal bonds that they were issued under an act which is invalid does not preclude inquiry as to whether there was other valid legislative authority under which the power to issue them can be upheld.

2. SAME—ESTOPPEL BY RECITALS.

A recital in county bonds of facts precedent to their issuance, which it was the province of the county officers to determine, is conclusive upon the county in favor of a bona fide holder.¹

3. STATUTE—CONSTITUTIONALITY OF ENACTMENT—PARTIAL INVALIDITY.

The fact that a statute, among other things authorizing a county to issue bonds, was not enacted in conformity to the mandatory requirements of the state constitution relating to that class of legislation, does not render it invalid as to its other provisions, to which such constitutional requirement does not apply.

4. MUNICIPAL BONDS—AUTHORITY TO ISSUE—CONSTRUCTION OF STATUTE.

The constitutional convention of North Carolina on March 9, 1868, passed an ordinance chartering a railroad company to construct a railroad from a point on another road "to some point in the northwestern boundary line of the state to be hereafter determined." It located the western terminus of the eastern portion of the line, which, when completed, should constitute "its first division." It further provided that all counties or towns subscribing to the stock of the company should do so "in the same manner and under the same rules, regulations and restrictions" as prescribed in the charter of another company previously incorporated, and such charter authorized "any town or county near or through which" the road might pass to subscribe for stock on a vote of the inhabitants, and to issue bonds in payment therefor. Such ordinance was held by the supreme court of the state to be valid, to continue in force after the adoption of the constitution, and to authorize the issuance of bonds in payment for stock of the company by a county into which the first division of the road extended as located by the ordinance. *Held*, that it conferred like power upon another county into which the road was extended under a subsequent act of the legislature, and that bonds voted and issued by such county in conformity to its requirements were valid obligations, although they purported to have been issued under the subsequent act, which, in so far as it attempted to authorize their issuance, was void.

Goff, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

A. C. Avery and James E. Shepherd, for appellants.

Charles Price (John F. Dillon, Harry Hubbard, and John M. Dillon, on the brief), for appellees.

Before GOFF, Circuit Judge, and MORRIS and BOYD, District Judges.

MORRIS, District Judge. This is a suit to determine the validity of certain bonds issued by Wilkes county, N. C., in aid of the con-

¹ Bona fide purchasers of municipal bonds, see note to *Pickens Tp. v. Post*, 41 O. C. A. 6.

struction of the second division of the railroad constructed by the Northwestern North Carolina Railroad Company, incorporated in 1868; the second division being from the towns of Winston and Salem, up the valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell. After hearing argument in this appeal at the November term, 1899, this court certified to the supreme court of the United States three questions: First, whether this court was controlled in dealing with the case by certain decisions of the supreme court of North Carolina in connection with article 2, §§ 14, 16, article 5, §§ 1, 4, 6, 7, and article 7, § 7, of the constitution of North Carolina, adopted April 24, 1868; second, whether, if there was no decision of the supreme court of North Carolina adverse to the validity of the bonds at the time when the appellees acquired them for a valuable consideration without notice, they were valid in the hands of the appellees; third, whether when the appellees acquired the bonds any decision then announced by the supreme court of North Carolina was adverse to the validity of the bonds which affected them in the hands of the appellees. The bonds were dated October 21, 1889, and each one contained the following recital:

"This bond is one of a series of one hundred issued by authority of an act of the general assembly of North Carolina ratified on the 20th day of February, A. D. 1879, entitled 'An act to amend the charter of the Northwestern North Carolina Railroad for the construction of a second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley by Wilkesboro to Patterson's Factory, Caldwell county,' and authorized by a vote of the majority of the qualified voters of Wilkes county, by an election regularly held for that purpose, on the 6th day of November, A. D. 1889, and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of one hundred thousand dollars, made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes."

Article 2, § 16, of the constitution of North Carolina, adopted April 24, 1868, provided that no law should be passed authorizing a county to raise money on its credit, or impose a tax, unless the bill for the purpose was read three several times in each house of the general assembly, and passed three several readings on different days in each house, and unless the yeas and nays on the second and third readings of the bill were entered on the journals. The supreme court of North Carolina in *Commissioners v. Call*, 123 N. C. 308, 31 S. E. 481, 44 L. R. A. 252; *Union Bank of Richmond v. Commissioners of Town of Oxford*, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487; *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439; *Rodman v. Town of Washington*, 122 N. C. 39, 30 S. E. 118; *Commissioners v. Payne*, 123 N. C. 432, 31 S. E. 711,—all cases involving the validity of county bonds,—has held that the provisions of the constitution of North Carolina requiring the entry of the yeas and nays on the journals was imperative, and the failure of such entry was absolutely fatal to the validity of the legislation, so far as it undertook to authorize the county to issue bonds in aid of a railroad. In *Commissioners v. Call* (1898) the validity of the bonds of the issue now in suit was called in question, and the supreme court of North Carolina

declared that the act of February 20, 1879, under which these bonds are recited to have been issued, was never legally passed so as to become a law giving authority to issue the bonds, for the reason that the yeas and nays were not entered upon the journals. To the questions certified by this court the supreme court of the United States gave the most thorough consideration, and held, Mr. Justice Harlan speaking for the court (*Wilkes County v. Coler*, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642), that the circuit court was bound by the decisions of the supreme court of North Carolina construing their own state constitution, and holding that the legislative enactments of 1868, 1879, and 1881 were not validly enacted, so as to give Wilkes county power to issue these bonds. But the supreme court of the United States further ruled that notwithstanding the invalidity of the act of February 20, 1879, the bona fide holders of the bonds might look to any valid legislation giving power to issue them, and that whether or not there was such power was to be determined by the law of North Carolina, as declared by the supreme court at the time the bonds were put upon the market. Mr. Justice Harlan, speaking for the court, said:

"But the *Belo Case*, 76 N. C. 489, involved other considerations. Forsyth county (whose liability on the bonds in suit in that case was directly involved) made the point that it had no authority to issue such bonds. The court, however, held that such authority was conferred by the convention ordinance of March 9, 1868, and the subscription and bonds made in the name of that county to the Northwestern North Carolina Railroad Company were upheld as valid under that ordinance, which was recognized as part of the law of the state and as conferring authority on the county of Forsyth to do what it did. It results that when the bonds here in question were issued, in 1880, it was the law of North Carolina that the ordinance of 1868, constituting the charter of the Northwestern North Carolina Railroad Company, was not superseded by the constitution of 1868, but was in force, and, therefore, gave power to the counties embraced by its provisions to take stock in that company and pay for it in county bonds, just as Forsyth county had done."

Mr. Justice Harlan then calls attention (page 531) to the rule that as in 1877 in the *Belo Case* the supreme court of North Carolina had recognized the power of the counties embraced within the provisions of the convention ordinance of 1868 to issue bonds to pay for stock in this same railroad, when the power was exercised by a county under the restrictions imposed by the constitution of 1868, that is to say, "not unless by a vote of a majority of the qualified voters therein," that no subsequent decision of the supreme court of North Carolina, made after county bonds had been put upon the market, could alter vested rights by holding that the constitution of 1868 abrogated the power given by the convention ordinance, and by holding that no subscription in aid of a railroad could be made except by virtue of a new statute passed in conformity to the requirements of section 14 of article 2, and thus invalidate bonds issued before the rendering of such a decision. The supreme court of the United States, while recognizing that the *Belo Case* (76 N. C. 489) and the *Hill Case* (67 N. C. 367) had held that the convention ordinance of 1868 gave power to the counties embraced within its terms to issue bonds such as those now in suit, declined to consider, under the questions certified by this court, whether Wilkes

county was embraced within the general powers of that ordinance, and suggested the following as some of the various questions which might arise in considering whether Wilkes county had the power under that ordinance, unassisted by any of the subsequent enactments, to issue the bonds sued on in the present case, viz.:

"Did the general power given by that ordinance to the Northwestern North Carolina Railroad Company to construct a railroad from its eastern terminus, 'running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state to be hereafter determined,' invest Wilkes county with authority to subscribe to the stock of the company and to issue bonds in payment of such subscription? Was Wilkes county in the same category with Forsyth county? Was the route of the road northwest of Salem and Winston to some point in the northwestern boundary line of the state to be determined by the legislature or by the company? If by the legislature, was that route ever determined otherwise than by the act of 1879, which has been adjudged never to have become a law of the state? Did Wilkes county have authority, under the ordinance of 1868 alone, to aid by a subscription of stock and bonds the construction of the second division of the road referred to in the act of 1879, extending from the towns of Winston and Salem up the valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell?"

The supreme court said:

"These are matters about which we do not feel disposed to express an opinion under the very general and indefinite questions certified from the circuit court of appeals. Nor do we deem it proper to express any opinion as to the scope and the effect upon the rights of the parties of sections 1996-1999 of the Code of North Carolina."

The recitals of the bonds in suit are as follows: (1) That the bond is issued by authority of an act of the general assembly of North Carolina ratified the 20th day of February, A. D. 1879. This act being an invalid enactment, and not a law, so far as it undertakes to give power to issue bonds, this recital does not preclude inquiry as to whether or not there was such a law, and the existence of legislative authority. *Northern Nat. Bank v. Trustees of Porter Tp.*, 110 U. S. 608, 4 Sup. Ct. 254, 28 L. Ed. 258. But the recital of an invalid act does not preclude inquiry as to whether there was in existence any other valid legislative authority under which power to issue the bond could be upheld. *Wilkes Co. v. Coler*, 180 U. S. 506, 524, 21 Sup. Ct. 458, 45 L. Ed. 642; *Board of Commissioners v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110; *City of Evansville v. Dennett*, 161 U. S. 434, 443, 16 Sup. Ct. 613, 40 L. Ed. 760; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93. (2) The second clause of the recital is to the effect that the bond is authorized by a vote of the majority of the qualified voters of Wilkes county by an election regularly held for that purpose on the 6th day of November, A. D. 1889, and by an order of the board of commissioners of Wilkes county, made on the 1st day of April, A. D. 1899. This is a recital of facts which it was for the board of commissioners of Wilkes county to ascertain and decide, and which, therefore, the county is estopped from denying as against a bona fide holder. *Board of Commissioners v. Beal*, 113 U. S. 227, 229, 5 Sup. Ct. 433, 28 L. Ed. 966; *Gunnison County v. E. H. Rollins & Sons*, 173 U. S. 255, 19 Sup. Ct. 390, 43

L. Ed. 689. (3) The bond further recites that, "This series of bonds is issued to pay the subscription of \$100,000 made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes." This recital is in the same way conclusive of the facts therein stated.

The question now to be passed upon, therefore, is whether, independent of the invalid legislative enactments attempted to be passed subsequent to the convention ordinance of March 9, 1868, Wilkes county had the power under that ordinance to submit the stock subscription to the vote of the qualified voters, and upon authorization by a majority of the votes to issue the bonds and levy taxes to pay the interest and principal. If Wilkes county was in the same category with Forsyth county, the supreme court of North Carolina adjudged in the case of *Belo v. Commissioners* (1877) 76 N. C. 489, that the power was conferred by the ordinance of the convention, and this ruling remained undisturbed by any subsequent adjudication of the supreme court of North Carolina, and until after these bonds were issued. The power thus held to be sufficient to authorize Forsyth county to subscribe to the stock of this railroad and issue bonds in payment is to be found in the following sections of the ordinance to incorporate the Northwestern North Carolina Railroad Company, ratified March 9, 1868:

"Section 1. That for the purpose of constructing a railroad of one or more tracks from some point on the North Carolina railroad between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, etc."

"Sec. 2. Be it further enacted that the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties in shares of one hundred dollars."

Section 5 provides that the president and directors shall proceed to locate the eastern terminus of the road and proceed at once to construct said road in five mile sections to the towns of Winston and Salem, in Forsyth county, which portion of the railroad when completed "shall constitute its first division."

Sections 8 and 9 provide that the state should loan its bonds to the railroad company as each five miles is graded and ready for its superstructure to the amount of \$10,000 per mile upon the security of a first mortgage of the entire road and its property.

Section 12 is as follows:

"Be it further ordained that the stockholders of said company may pay the stock subscribed by them either in money, labor or materials for constructing said road as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company."

"Section 13. Be it further enacted that the company shall have the power to construct branches of said road, one of which shall run from the towns of Winston and Salem, by way of Mount Airy, in Surry county, to the line of the State of Virginia."

Section 33 of the charter of the North Carolina & Atlantic Railroad Company, passed in 1852, c. 136, is as follows:

"Sec. 33. Be it further enacted that it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county in manner and form as hereafter provided."

Sections 34, 35, 36, and 37 provide the manner in which the vote of the qualified voters of the counties shall be taken and, if a majority of the qualified voters voting upon the question are in favor of the subscription, provide how the subscription shall be made, and that the county shall negotiate a loan or loans, and shall levy taxes to pay the principal and interest.

It will be seen by reading the sections of the charter of the North Carolina & Atlantic railroad into the charter of the Northwestern North Carolina Railroad, as required by its section 12, that every county near or through which the railroad may pass is authorized to subscribe for its stock to an amount authorized by a majority of the qualified voters of the county, and to issue bonds in payment, and to levy taxes to pay the principal and interest. The first question therefore now is, was the railroad which was constructed into Wilkes county by the Northwestern North Carolina Railroad Company a part of the railroad authorized to be built by its charter? If it was, then it would seem that the powers conferred by the charter operated to validate the action of Wilkes county, just as the same powers in the same charter were held by the supreme court of North Carolina in *Belo v. Commissioners* to have done in the case of Forsyth county. The convention ordinance authorizes counties to subscribe to the stock of the railroad company, and it provides that all counties subscribing shall do so in the manner and under the same rules, regulations, and restrictions set forth in the charter of 1852, c. 136. The only restriction in that charter which is drawn in question is the provision that the subscription shall be by counties near or through which the railroad may pass. The railroad in aid of which the bonds in suit were issued does pass through Wilkes county. It appears to us that it is the same railroad authorized by the convention ordinance. That ordinance authorizes a railroad running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state, to be thereafter determined, and contemplated and provided for its being built by divisions, and enacted that the portion to Salem and Winston should constitute its first division. The piece of railroad for which the bonds in suit were issued does run from Salem and Winston in the general direction of the northwestern boundary line of the state, and, indeed, it seems evident that such a railroad to a point in the northwestern boundary line of the state must pass near or through Wilkes county. The act of Feb. 20, 1879, which is recited in the bonds as the authority for issuing them, definitely located this road running into Wilkes county. It does it by enacting that section 13 of the convention ordinance shall be amended by adding certain words which make it read, when so amended, as follows:

Sec. 13. Be it further ordained that the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the state of Virginia (amendment), "and one of which shall be constructed from the towns of Winston and Salem, up the Valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell, which branch shall be known as second division."

Section 2 of the act of February 20, 1879, provides for convict labor being furnished for the purpose of constructing this second division; and section 4 provides for bond subscriptions by any county in the state. This act was invalid so far as it attempted to give power to the counties to create a debt, because it was not passed as laws for that purpose are required by the constitution of North Carolina to be passed, but that invalidity does not affect the sections of the law which deal with other matters. *Rodman v. Town of Washington*, 122 N. C. 39, 42, 30 S. E. 118; *Russell v. Ayer*, 120 N. C. 180, 189, 27 S. E. 133, 37 L. R. A. 246; *Gamble v. McCrady*, 75 N. C. 509; *Union Bank of Richmond v. Commissioners of Town of Oxford*, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487. So far as now appears, the amendment locating the road into Wilkes county was validly passed, and became a valid law of North Carolina. If section 13 had been originally enacted as it now reads as amended, it would seem clear that as when built this piece of road was declared to be the second division of said road, and as power was given to all counties "near or through which said railroad may pass" to subscribe for stock, that Wilkes county would be in the same category with Forsyth county, which is mentioned in the section locating the first division. Wilkes would be one of the counties through which the second division of the road was authorized to be constructed, just as Forsyth was a county into which the first division of the road was to be built. Has the supreme court of North Carolina ever interpreted this amendment and declared its meaning? We do not find that it has. In *Commissioners v. Call*, the majority opinion does not place the decision upon the contention that Wilkes county is not in the same category with Forsyth county, but upon a want of power affecting both alike, and upon the fact that an invalid enactment is recited on the face of the Wilkes county bonds as authority to issue them.

The original charter ordinance of 1868 having given authority to construct a railroad by way of Salem and Winston, in Forsyth county, to some point on the northwestern boundary line of the state, and to construct branches, and the legislature having afterwards validly enacted that one of these branches running towards the northwestern boundary line of the state, to be called the second division, should be constructed by way of Wilkes county, there would seem no sound reason for construing the legislation so as to deny to Wilkes county that power to issue bonds which the supreme court of North Carolina had in 1877 held that Forsyth county had.

It is urged in argument that the policy of North Carolina was declared by the constitution of 1868 to be hostile to permitting counties to bond themselves in order to subscribe to railroads which passed near or through them. We do not think this anywhere appears.

The constitution does not, as it might easily have done, if such had been the policy of its framers, declare that no county should have the power to create a debt for such a purpose; it merely provided that new laws for that purpose should be enacted with a special formality tending to insure their careful consideration by the legislature. The only inhibition which the constitution enacts against counties is by article 7, § 7, which is that no county shall loan its credit unless by a vote of the majority of the qualified voters, and the constitutional convention itself passed the charter of the Northwestern North Carolina Railroad with the power to the counties near or through which it should pass to issue bonds for subscription to its stock, and the constitution did not inhibit the execution of any powers previously given to counties to make subscriptions to railroad stock and issue bonds therefor. 180 U. S. 531, 21 Sup. Ct. 458, 45 L. Ed. 642. Nor does section 1996 of the Code of North Carolina, prescribing that counties shall have power to subscribe to aid in the completion of railroads in which their citizens may have an interest, nor the many enactments of the state legislature conferring upon counties the power to aid railroads, indicate such a policy, but, rather, a contrary one.

We think that Wilkes county when the bonds in suit were issued was in the same category with Forsyth county, and that the purchasers of the bonds had a right to rely and rest upon the decisions in the cases of *Hill v. Commissioners* (1870) 67 N. C. 367, and *Belo v. Commissioners* (1877) 76 N. C. 489, as to the power conferred by the ordinance of March 9, 1868, and that the different conclusion as to the power conferred by that ordinance arrived at and declared by a majority of the supreme court of North Carolina, long after the date of the issuing of the bonds in suit, cannot destroy the validity of the bonds in the hands of bona fide holders. *Loeb v. Trustees*, 179 U. S. 472, 492, 21 Sup. Ct. 174, 45 L. Ed. 280.

It is, of course, with great reluctance that we feel constrained to differ from the conclusion arrived at by the supreme court of North Carolina as announced in the majority opinion in *Commissioners v. Call* (1898), and it may be that the difference would not have arisen had the contentions in support of the validity of the bonds been as fully presented in that case in behalf of holders as deeply interested in them as they have since been in the supreme court of the United States and in this court in the litigation over their validity.

Having reached the conclusions herein expressed, it does not appear necessary to consider the effect of sections 1996-1999 of the Code of North Carolina giving power to counties to aid in the completion of railroads in which the citizens of the county have an interest.

The majority of the judges sitting in this appeal are of opinion that the decree of the circuit court should be affirmed.

BOYD, District Judge. In concurring with Judge MORRIS in his opinion in this case, I desire to say: This cause was argued upon the whole record, it being on appeal from a decree entered in the circuit court for the Western district of North Carolina at Greensboro, April

14, 1899, by Judge Purnell, designated to preside in that district by the circuit judge. The rights of the parties are to be determined upon the whole record, including the answers by the supreme court to the certified questions. The decision is reported in 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 642. The answers to the questions certified are, in substance, as follows: (1) That the circuit court should have regarded the decisions set out in the questions as controlling upon the inquiry whether the legislative enactments of 1868, 1879, and 1881 were passed in such manner as to become, under the constitution, laws of the state. (2) That the rights of the parties in this case are determinable by the law of the state as it was declared by the state court to be at the time the bonds here involved were made in the name of the county and put upon the market. The questions certified by this court to the supreme court involved the validity of an issue of bonds in the sum of \$100,000 by the county of Wilkes, in the state of North Carolina, in the year 1889, in payment of its subscription in this sum to the capital stock of the Northwestern North Carolina Railroad Company, a corporation constructing and owning a railroad running from Greensboro via Winston-Salem, in Forsyth county, to Wilkesboro, in Wilkes county. The power relied on by the complainants in the bill for the issue of the bonds was the ordinance of 1868, the charter of the company, and an act of assembly of the 11th of August, 1868, the sections 1996, 1997, etc., of the Code of North Carolina, an act of assembly of February 20, 1879, and an act of March 2, 1881, all referred to in paragraph 21 of the bill, page 7 of the record, etc. After the issue of these bonds, in due course of trade, there came into the hands of complainants 55 of the same, of the denomination of \$1,000 each. The purchase of the same was for value, the highest market price, in good faith, and without notice, express or implied, that there was any suggestion of their being void, invalid, fraudulent, or otherwise than legal bonds in their issue and sale. It is alleged that the interest on these bonds was paid regularly for eight years by the county, and that such payment was enjoined by a judgment of the superior court of Wilkes county, affirmed by the supreme court, rendered in an action by the board of commissioners of the county against the treasurer, one Call, who, as such, held in his hands a fund for that purpose. It is alleged in the bill that this railroad runs over 20 miles in the county of Wilkes, and is the only railroad in that county. It is contended upon the part of the appellants that the decision of the supreme court of North Carolina in the action above set out should be followed by the circuit court. The supreme court, in answering the questions certified, disposed of that contention. Therefore I will not discuss it further than I have already in the Stanly Co. Case (No. 290, at this term) 113 Fed. 705. By reference to the decision of the supreme court, it is to be noted one thing decided was that the ordinance of 1868 was valid, and was in force after the constitution was adopted; and, further, that the supreme court of North Carolina had so held in the cases of Hill v. Commissioners, 67 N. C. 367 (June term, 1870), and in Belo v. Commissioners, 76 N. C. 489 (Aug. term, 1877). Further, it was held expressly that the Belo Case decided the ordinance of 1868, March 9th, conferred the power upon Forsyth county to make the subscription

made by the county, and that this was so independently of any other legislation. As to Wilkes county, the court states the question to be as follows: "Whether Wilkes county was so situated with reference to the contemplated road that it could be said to have had the same authority as was given to Forsyth county." Mr. Justice Harlan, delivering the opinion of the court, says: "Was Wilkes county in the same category as Forsyth county?" In short, if Wilkes county was in the same category with Forsyth county, then it stands decided by the supreme court of the United States that the ordinance of 1868 did give to Wilkes county the authority to issue the bonds in question, irrespective of the legislation of 1868, 1879, and 1881; so that the only question now is, whether Wilkes county was in the same category with Forsyth county. If so, the answer of the supreme court to the second question applies, which is that the rights of the parties in the Wilkes county case, this case, are determinable by the law of the state as it was decided by the state court to be at the time when the Wilkes county bonds were put upon the market. It results, therefore, that if Wilkes county was in the same category with Forsyth county the question is conclusively decided in favor of the validity of the bonds by the supreme court of the United States, without anything more, and the circuit court of appeals should affirm the judgment of the circuit court in this case. The supreme court of North Carolina, in *Commissioners v. Call* (1898) 123 N. C. 308, 317, 31 S. E. 481, 484, 44 L. R. A. 252, undertakes to distinguish the case of *Belo v. Commissioners*, 76 N. C. 489, as follows:

"We have not overlooked the fact that in *Belo v. Commissioners*, 76 N. C. 489, this court strongly intimates that section 12 of the charter did confer the authority given in section 33 of the act of 1852. [Section 2 of the ordinance of the constitutional convention gave the power, and section 12 prescribed the manner of its exercise], but it does so incidentally, and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is clearly shown in the opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals, and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence on page 497, that 'as the case is presented to us, that question does not arise, and we do not decide it.' It evidently did not receive careful investigation, as it apparently did not arise in the pleadings. The court stated that the 'principle of equitable estoppel is a most important element in the transaction,' and that the recitals in the bonds (which were essentially different from those now before us) constituted an estoppel in pais upon the county of Forsyth."

There can be no estoppel by recitals in bonds in the absence of absolute legislative authority—power—to issue the same.

The whole discussion of the supreme court of North Carolina in *Belo v. Commissioners*, which, as stated by the court in the case of *Commissioners v. Call*, occupied four pages, proceeded upon the only possible ground,—that there was legislative authority in the ordinance of 1868, but that perhaps that authority had not been strictly followed. The question which the court on page 497 says "does not arise" is this question, stated in the very words of the opinion of the court, in *Belo v. Commissioners*, to wit:

"When the subscription was voted there is authority and reason for asserting that the justices could have been compelled, by process of law, to make the subscription, unless in defense they could have shown that the election was not fairly conducted, but was influenced by the fraud of the railroad company. *People v. Board of Sup'rs of City and County of San Francisco*, 27 Cal. 655. As the case is presented to us, that question does not arise and we do not decide it."

On the question of whether there was power to issue the bonds, the court said distinctly:

"The county was clothed with the power to issue them, and it is admitted that a majority vote sanctioned the subscription of stock and the issue of the bonds."

Again, the court said:

"It has been one purpose of this opinion to show that the bonds were valid in the hands of bona fide holders without the aid of this healing act;" that is, the act of August 11, 1868, the only other authority being the said ordinance.

The case of *Belo v. Commissioners* was decided in 1877, many years before the issue of these bonds, and, as before said, is the great leading case upon this subject in North Carolina. This decision, and the impression it made upon the supreme court of the United States, as shown by the importance attached to it by Justice Harlan, has left but little for this court to decide. As said by Bynum, J., the author of the *Belo* decision—opinion—there was but one purpose he had in mind: To show the ordinance of the convention of 1868, the original charter of the company, gave the power to Forsyth county to issue the bonds, and was not, and did not become, ineffective upon the ratification of the constitution. No recital in any bond ever did confer power to issue it. There must, in every case, first, be shown a power to issue, after which the recitals may be relied on by an innocent purchaser as assurance of the proper exercise of the power, and of the performance of the conditions precedent to the issue by the corporate authorities, putting the bonds upon the market. This rule—this principle—is axiomatic, universal, and has no exception.

Judge MORRIS has shown clearly that Wilkes county was in the same category with Forsyth county,—the only question left open by the supreme court of the United States. The importance, however, of the interests involved demands that I should add something to what he has said upon this question. In the case of *Union Bank of Richmond v. Commissioners of Town of Oxford*, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487, the act is expressly held valid as a charter, and for all purposes except as a taxing act. For that purpose it was void, because not passed as required by the constitution. Section 1 of the act of 1879, directing that the road should run "up the valley of the Yadkin, by way of Jonesville and Wilkesboro, in the county of Wilkes," etc., is valid, and an amendment to the charter, the ordinance of 1868. This puts Wilkes county in the same category as Forsyth county, in the sense suggested by Justice Harlan. The route of the road was determined by the legislature, and by the company also. Justice Harlan was not advertent

to the fact that the act of 1879 was only adjudged void as a taxing act by the court, not for all purposes, but for this purpose only. In the case of *Union Bank of Richmond v. Commissioners of Town of Oxford*, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487, the act is expressly declared valid as a railroad charter, because the certification cannot be impeached by the journals, but void as a taxing act, because, for that purpose, under the constitution, it can be impeached by the same journals. It is well settled in all courts that an act may be unconstitutional in part and constitutional in other respects. So section 1 of the act of 1879 is valid, because passed in all respects and certified as required by the constitution. See act of 1879, and especially section 5, etc., where, upon its face, it is shown to have been read three times and ratified. The case of *Union Bank of Richmond v. Commissioners of Town of Oxford*, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487, is decisive of this, being directly in point, and, indeed, is the case out of which all this litigation has sprung. And, further, if the route was not a proper one, it was acquiesced in by the county when the company could have been forced, by mandamus, to have selected the proper one; or it could have been enjoined anyhow from constructing the road on the route determined upon if not the proper one. *Rodman v. Town of Washington*, 122 N. C. 39, 42, 30 S. E. 118; *Russell v. Ayer*, 120 N. C. 180, 189, 27 S. E. 133, 37 L. R. A. 246; *Gamble v. McCrady*, 75 N. C. 509,—all cited by Judge MORRIS. So it appears the route was determined by the legislature, by the company, and, at last, acquiesced in by the county. I say by the company, because this legislation,—that is to say, the ordinance,—conferred the power upon the county of Forsyth and a privilege upon the company. Wilkes county is in the same category with Forsyth, so far as these powers are concerned, and it was one of the privileges of the company conferred also to determine the route of the road. These powers are not only conferred upon the counties, but are privileges of the company, the Northwestern North Carolina Railroad Corporation. It follows, therefore, that Wilkes county was in "the same category" with Forsyth county.

The route of the road was determined by both the legislature and the corporation. This was one of the privileges conferred upon the company. And, besides, as before said, it is not for the county of Wilkes, which participated in the determination of the route, to be heard to say, in a suit by an innocent bondholder, years after it was determined, there was no power to do it. In the case of the *Scotland Co. v. Thomas*, 94 U. S., on page 689, 24 L. Ed. 219, Justice Bradley says:

"The specific question in the present case, therefore, is whether the authority given the counties and towns, in 1847, to subscribe to the capital stock of the Alexandria and Bloomfield Railroad Company has become extinguished by the subsequent consolidation of that company with other companies."

Justice Bradley says, also, on page 688, 94 U. S., 24 L. Ed. 219, after quoting the words of the constitution of Missouri similar to the words of the North Carolina constitution of 1868, that:

"This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corporations. It does not purport to take away any authority already granted."

On page 693, 94 U. S., 24 L. Ed. 221, Justice Bradley goes on to say:

"But the case has other aspects which it is necessary to take into consideration. * * * The project of the railroad promised a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass. The power was sought at the hands of the legislature, and was given."

It was relied on by those who subscribed their private funds to the enterprise. Speaking of this power, he says:

"Why it should not still attach to this portion of the road as one of the rights and privileges belonging to it, into whose hands soever it comes, by consolidation or otherwise, it is difficult to see. * * * Subscription to the stock was not only a power of the county, but a privilege of the company."

I have not discussed the sections of the Code in this connection, because I do not consider it necessary, having already done so in the Stanly Case (at this term), before referred to. The supreme court, in answer to the certified questions, has narrowed the issues between the parties to a small compass in this case. It is clear that the two counties, Forsyth and Wilkes, were in the same category, as I say, in the sense expressed by Justice Harlan. Having determined that, our duty seems to me plain. The decree entered upon the circuit should, in my opinion, be affirmed.

GOFF, Circuit Judge. I dissent from the opinion of the court, as well as from the judgment entered in this case.

WEST V. EAST COAST CEDAR CO.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 426.

1. APPEAL—REVIEW—ACTIONS TRIED TO COURT.

Where a cause is tried by a circuit court without a jury, by stipulation, and no special finding of facts is made, the general finding must be accepted by the appellate court as conclusive upon all matters of fact, the same as the verdict of a jury, and the only questions reviewable are the rulings of law on the trial and the sufficiency of the pleadings to support the judgment.

2. SAME.

Under the rule that a plaintiff in ejectment can only recover on the strength of his own title, a judgment for defendant in such an action, tried in a circuit court without a jury, based on a general finding in defendant's favor, cannot be disturbed by the appellate court, where the validity of plaintiff's title was put in issue by the pleadings, and under the evidence such issues depended on questions of fact.

3. EJECTMENT—DEFENSES—PROOF OF PARAMOUNT TITLE.

A defendant in ejectment may prove an outstanding paramount title to defeat plaintiff's recovery without connecting himself with such title.

4. APPEAL—REVIEW—HARMLESS ERROR.

On the trial of an action to the court, the reception of irrelevant evidence, which does not appear to have influenced the court's decision, is not ground for reversal.

5. FEDERAL COURTS—FOLLOWING STATE PRACTICE—PROCEEDINGS FOR REVIEW.

In the federal courts, the practice, after judgment in an action at law, relating to proceedings for review in an appellate court, is regulated solely by act of congress, and is in no way affected or controlled by the state practice.¹

6. APPEAL—UNNECESSARY MATTER IN RECORD—HARMLESS ERROR.

A circuit court has no power to determine what shall be incorporated in a transcript of the record sent up on a writ of error to the circuit court of appeals, and its action in directing the incorporation therein of testimony which it excluded as incompetent on the trial, and which is not contained in the bill of exceptions, is erroneous; but the error is harmless, and is not ground for a reversal of its judgment.

In Error to the Circuit Court of the United States for the Eastern District of North Carolina.

For opinion below, see 110 Fed. 725. See, also, *Id.* 727.

Thomas B. Womack, for plaintiff in error.

F. H. Busbee (E. F. Aydlett, on the brief), for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

SIMONTON, Circuit Judge. This case comes up by writ of error to the circuit court of the United States for the Eastern district of North Carolina. The action below was to try the title to certain lands in the state of North Carolina. By stipulation between counsel, duly made part of the record, the case was submitted to the court without the intervention of a jury. At the conclusion of the testimony for plaintiff and defendant the plaintiff asked the court to hold, on all the facts of the case, that the plaintiff is entitled to recover the one undivided third part in the land sued for, less two-sixteenths thereof. This the court declined to do, and plaintiff excepted. The court then held that upon the evidence the plaintiff was not entitled to recover, answering the issue on this point, "No." To this ruling plaintiff formally excepted. Judgment was entered for defendant. Petition for writ of error was allowed, and the case is here on assignment of errors.

The plaintiff, in his complaint, alleges that he is the owner and entitled to the immediate possession of one undivided third part of a tract of land in the county of Dare, state of North Carolina, being a portion of a tract of land known as the "Northern Half of the McRae Patent," which tract is then described by metes and bounds; that the defendant is in possession of the whole of said tract, and withholds unlawfully the possession of one undivided third part from plaintiff; that the defendant claims title to the whole tract from certain heirs at law of one Bannister H. Jarvis and one Levi Walker. The complaint then goes on and recites that Bannister H. Jarvis and Levi Walker, on April 22, 1851, received conveyance by deed of a tract of land, of which the lands described in the complaint constitute a part and portion, from one John Sikes, Sr.; that on January 28, 1813, John Sikes, Jr., received a conveyance of this tract of

¹ Conformity of practice in common-law actions to that of state court, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Insurance Co. v. Hall*, 27 C. C. A. 392.

land in fee from John Sikes, Sr.; that John Sikes, Sr., had acquired an undivided interest in said lands with one Joseph Spence from Daniel Sawyer; that on May 6, 1812, Joseph Spence conveyed an undivided third to one Samuel Spruill, and that plaintiff holds this undivided third by sundry conveyances from the heirs of Samuel Spruill. So plaintiff and defendant claim title from the same person, Daniel Sawyer, who claimed under the McRae patent. The complaint then alleges that on information and belief defendant also claimed title under Samuel Spruill, which claim, however, is insufficient in law to establish title, yet it estops defendant from denying the title of Samuel Spruill. The answer sets up a claim of title by adverse possession under color of title by Jarvis and Walker, admits the Sikes deed to Jarvis and Walker, but denies that any other claim was made under it, except as color of title. Its claim of title is set out in these words:

"Answering the allegations of section 15 of the complaint, defendant denies that it claims any title by virtue of any conveyance from Samuel Spruill, but that Bannister H. Jarvis and Levi Walker owned, were in possession of, and claimed the land known as the 'Northern Half of the McRae Patent,' which includes the land described in section 2 of the complaint, and claimed the same under color of title from Joshua T. McCoy and John Sykes; that they claimed title to the entire northern half of the McRae patent; that they had adverse possession of it, which was of sufficient length to ripen their title into a perfect title; and the plaintiff and the defendant both claim under Bannister H. Jarvis and Levi Walker, whose title had ripened under color from John Sykes and McCoy to said Jarvis and Walker. And the defendant avers that the plaintiff is estopped to deny the title of the said Bannister H. Jarvis and Levi Walker to the said northern half of the McRae patent, and also to the lands described in section 2 of the complaint."

In the testimony was produced a grant or patent of all these lands to John Gray Blount, dated September 17, 1795. The McRae patent or grant is dated April 8, 1796. So the issues between the parties appear. His honor the trial judge did not make any special finding of facts with his conclusions of law. So the inquiry in this court must be limited to the sufficiency of the complaint and the rulings of law on the trial. *Lehnen v. Dickson*, 148 U. S. 72, 13 Sup. Ct. 481, 37 L. Ed. 373.

The cause having been tried by the court without a jury, this court cannot review the weight of the evidence, and can look only to see whether there was error in not directing a verdict for plaintiff, or whether there was no evidence to sustain the verdict as rendered. *Lancaster v. Collins*, 115 U. S. 222, 6 Sup. Ct. 33, 29 L. Ed. 373. If there be no special findings of fact, there can be no inquiry as to whether the judgment is supported. We must accept the general findings as conclusive upon all matters of fact, precisely as the verdict of a jury. *Lehnen v. Dickson*, *supra*. The trial court did not state separately its finding of facts and then its conclusions of law. This renders it difficult to consider this cause. But there can be found in the opinion of the court and in the exceptions the main facts in issue. These were: (1) The claim of the plaintiff that he holds a valid title, traced up to the McRae patent. This is denied by the defendant. (2) That the defendant holds title under the same patent. This the defendant also denies. (3) The existence of the

patent to John Gray Blount as older than the McRae patent. This does not seem to be denied. In seeking to establish his claim under the McRae patent, the plaintiff introduced conveyances from the heirs at law of Samuel Spruill. Defendant introduced a conveyance, dated May 22, 1832, purporting to convey, in the lifetime of H. G. Spruill, all his interest in the land. The deed is signed "Samuel Spruill, by H. G. Spruill." With the deed is this certificate: "This deed from Samuel Spruill to W. Foreman was exhibited in open court, and H. G. Spruill acknowledged that he signed it for Samuel Spruill, and by and with his direction and consent,"—certified by the clerk. One of the questions of fact was whether this deed was executed by H. G. Spruill as attorney for Samuel Spruill, or whether he signed it in the presence of, and for and instead of, Samuel Spruill. The deed was over 40 years old. The trial judge passed upon the facts, and held on the evidence that plaintiff was not entitled to recover. This would seem to end the case. "It is well settled that when a trial court, to which a cause has been submitted, makes a special finding of fact, this court has no authority to inquire whether the evidence supports the finding, but only whether the facts found support the judgment." *Syracuse Tp. v. Rollins*, 104 Fed. 961, 44 C. C. A. 277. In ejectment the plaintiff must recover on the strength of his own title, not on the weakness of his adversary. *McNitt v. Turner*, 16 Wall. 362, 21 L. Ed. 341. In the case at bar he rests his claim on the McRae patent, and seeks to trace his chain of title to it. The trial judge found that there existed a grant older and paramount to the McRae patent. He found also a defect in plaintiff's chain of title. To meet the paramount title, the plaintiff insists that the defendant and plaintiff claim under a common grantor. This defendant denies in its pleading and in the evidence. The trial judge so finds the fact in defendant's favor. The claim of defendant is an undivided estate in the whole tract, and this is so stated by the plaintiff himself, and the plaintiff insists that this claim is based on a paper title. Yet his whole case proceeds on the proposition that defendant cannot maintain this claim because of broken links in the chain of title. On the other hand, the defendant repudiates this, and stakes its case on possession under color of title adverse to and in contradiction of any claim behind Jarvis and Walker. It may be that it does this because of the defects in the paper title. It may be that, if called upon to prove its possession under color of title, it may fail. But under no rule of law can the defendant be called upon to prove any title until the plaintiff has first established *prima facie* his own title. Until this is done, "*potior est conditio defendentis*."

The plaintiff in error has filed six assignments of error. What has been said meets the fourth and fifth of these assignments. The first assignment of error is to the admission in evidence of the patent to John Gray Blount. There are two reasons given to sustain this assignment. The first is that plaintiff and defendant claim under the junior grant, and so defendant is estopped. As has been seen, the decision of the trial judge has overruled this. The second reason is that it was incompetent for the defendant to show a paramount outstanding title, without connecting himself with that title. But the

plaintiff must stand on his own title, not on the weakness of his adversary. In *Marsh v. Brooks*, 8 How. 223, 12 L. Ed. 1056, the court says:

"Where the same land has been twice granted, the elder patent may be set up as a defense by a trespasser, when sued in ejectment by a claimant under the younger patent, without giving further proof as to present ownership."

The second assignment of error objects to the introduction in evidence of a part of the record of the circuit court of appeals in a cause in which the present defendant in error, the Richmond Cedar Works, and the plaintiff in error here are parties, and insists that this record works no estoppel against the plaintiff in error. There is no way of discovering from the record the purpose of introducing that record. If it was introduced for the purpose of showing that defendant in error always based his claim on possession under color of title, it was relevant. If for any other purpose, it was irrelevant. But it does not seem to have influenced the judgment of the court, and so it is not a sufficient ground for reversal. *Mining Co. v. Taylor*, 100 U. S. 37, 25 L. Ed. 541; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868; *Railroad Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827.

For the same reason the third assignment of error, respecting the introduction in evidence of the judgment in *Hawkins v. Richmond Cedar Works*, 122 N. C. 87, 30 S. E. 13, is overruled.

The only remaining assignment of error is that the court erred in permitting evidence ruled out and excluded by the court as incompetent to be incorporated in the transcript of the record to this court. Of course, this was error, but not reversible error. This court will not consider this part of the record at all. No doubt this was incorporated in the record under misapprehension of the practice in writs of error from this court, or some confusion of our practice with the practice in the state court. In cases at law the practice of the federal court follows as nearly as may be the practice in the courts of the state, and in which they exercise jurisdiction (*Rev. St. § 914*), up to and including the judgment. Everything after judgment, looking to its review in an appellate court, is regulated solely by act of congress, and is in no way affected or controlled by state practice. *Muller v. Ehlers*, 91 U. S. 251, 23 L. Ed. 319; *Whalen v. Sheridan* (C. C.) 5 Fed. 494; *U. S. v. Train* (C. C.) 12 Fed. 853; *Fleitas v. Richardson*, 147 U. S. 538, 13 Sup. Ct. 429, 37 L. Ed. 272. In order to obtain relief from supposed errors in a trial at law, a writ of error must be sued out of the appellate court. With this writ of error the record must go up,—the whole record, unless the parties by stipulation agree to except unnecessary parts of it. With the record go up such portions of the testimony as are needed to elucidate the exceptions taken at the trial. This record is prepared by the clerk, aided by the counsel in the case. With it the trial court has no concern, and over it no control. If a difference of opinion arises between counsel as to the preparation of the bill of exceptions as to what and what character of exceptions were taken at the trial, this difference the trial judge settles. Beyond this he does not concern himself. If the record sent up is too meager, the appellate court,

upon proper application, settles it by a certiorari. *Redfield v. Parks*, 130 U. S. 625, 9 Sup. Ct. 642, 32 L. Ed. 1053; *Hoskin v. Fisher*, 125 U. S. 217, 8 Sup. Ct. 834, 31 L. Ed. 759. If it contain unnecessary matter, the appellate court can rectify this in fixing the costs of the case. In no event can the mere existence in the record of testimony excluded by the court, and not considered by it, and not brought up by bill of exception, work a reversal here.

The decree of the circuit court is affirmed.

WEST v. EAST COAST CEDAR CO.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 427.

1. **APPEAL—QUESTIONS REVIEWABLE—ALLOWANCE OF COSTS IN EQUITY.**

The awarding of costs in equity is discretionary with the court, and no appeal lies from its action in the matter.

2. **SAME—APPEALABLE ORDERS—FINALITY OF DECREE.**

A decree dismissing a bill, upon which an injunction *pendente lite* has been issued, conditioned on the giving of a bond by complainant, is final and appealable, notwithstanding it orders a reference to a master to ascertain what, if any, damages have been sustained by defendant by reason of the injunction, since such order does not relate to a matter within the pleadings, but is made simply in execution of the decree.

3. **INJUNCTIONS—ANCILLARY SUITS—DISMISSAL.**

A suit for an injunction against waste, ancillary to an action in ejectment by complainant against defendant, is properly dismissed on the entry of judgment for defendant in the law action.

4. **SAME—DAMAGES FOR BREACH OF BOND—POWER OF COURT TO ALLOW.**

Whether or not a court of equity, which has, in the exercise of its discretion, required a bond to be given as a condition to the issuance of an injunction, has jurisdiction to assess damages for the breach of such bond on dissolving the injunction, it has power to decide whether damages shall be allowed; and a reference to ascertain what, if any, damages have been sustained by defendant, is within its discretion.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina, at Raleigh.

For opinion below, see 110 Fed. 727.

T. B. Womack, for appellant.

E. F. Aydlett and F. H. Busbee, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the Eastern district of North Carolina. An action at law to recover possession of an interest in a large tract of land was pending on the law side of the court. The plaintiff at law, William A. West, filed a bill on the equity side of the court, praying an injunction against the East Coast Cedar Company, the defendant, restraining it from cutting timber on the land in dispute pending the action at law. An injunction was issued, and as a condition thereto an injunction bond was required from complainant. The

case at law having terminated in favor of the defendant in this suit, the bill was dismissed, the injunction was dissolved, costs and disbursements were awarded the defendant, and the court adds:

"That defendant recover of the complainant and the sureties on the injunction bond such damages as defendant has suffered by reason of the issuing of such injunction. It is further ordered by the court that this cause be referred to Wm. M. Bond, Esq., of Edenton, N. C., who is hereby appointed special master for that purpose, to ascertain and report to this court what damages, if any, defendant has suffered by reason of the injunction aforesaid."

Leave was granted to appeal from this judgment. The cause is here on several assignments of error, to wit: (1) Error in dismissing the bill; (2) error in dissolving the injunction before a final hearing, and at such final hearing dismissing at the cost of defendant; (3) in that costs were to be taxed against complainant, and not against the defendant; (4) in that it was adjudged that defendant recover of complainant and his sureties on the injunction bond such damages as the defendant may have suffered by reason of the issuing of the injunction and referring the case to a special master to ascertain and report the same, whereas his honor should have decreed that the complainant was not liable for any damages upon the injunction bond in this case.

The second and third assignments of error cannot be entertained in this court. They complain that costs are taxed against complainant. Costs in equity are within the discretion of the court, and hence no appeal lies to this court in the matter of costs. *Stuart v. Boulware*, 133 U. S. 78, 10 Sup. Ct. 242, 33 L. Ed. 568; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Mining Co. v. Sweeney*, 24 C. C. A. 578, 79 Fed. 277. No abuse of this discretion is shown. *Clarke v. Warehouse Co.*, 10 C. C. A. 393, 62 Fed. 328.

With regard to the first and fourth assignments of error, there is doubt at the threshold whether the decree below is final. If it had stopped at the dismissal of the bill, of course it would have been final. But continuing, the court below ordered a reference to inquire and report what damages, if any, defendant has suffered. So the bill is dismissed in words, but it is retained in effect, for the purpose of ascertaining the damages. The test of the finality of a decree is that, if it be affirmed in the appellate court, nothing will be required of the court below but to execute its own decree. *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73. Or as it is put in *Mower v. Fletcher*, 114 U. S. 127, 5 Sup. Ct. 799, 29 L. Ed. 117:

"A judgment of a superior court remanding a case to an inferior court for entry of judgment, and leaving no judicial discretion to the latter as to further proceedings, is final."

In the case at bar the order relating to the injunction bond, and damages thereunder, cannot be said to be within the pleadings. It is ordered simply in execution of the decree.

In *McGourkey v. Railroad Co.*, 146 U. S. 545, 546, 13 Sup. Ct. 172, 36 L. Ed. 1076, the law is thus stated:

"It may be said in general that if the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final. But if it refer the case to him as a sub-

ordinate court, and for a judicial purpose,—as to state an account between the parties, upon which a further decree is to be entered,—the decree is not final. But even if an account be ordered taken, if such accounting be not asked for in the bill, and be ordered simply in execution of the decree, and such decree be final as to all matters within the pleadings, it will still be regarded as final."

The provision in the order of the court below with reference to the damages is simply in execution of the decree, and imposes no judicial duties on the special master. He is to decide nothing. We are of the opinion that this decree, under this case, is final. This being the case, we see no error in the court below in dismissing the bill. It was filed only as ancillary to the suit at law, in order that matters should remain in statu quo pending the result of that case. The case at law has ended in favor of the defendant. The case in equity has served its purpose, and should be dismissed.

The complainant, however, appeals, and assigns for error the order respecting the damages secured by the injunction bond. The requirement of a bond from complainant in granting an injunction is a matter within the discretion of the court. The amount of such a bond is also within its discretion. Even where a bond has been required, it is still within the discretion of the court whether it ought to be enforced. *Russell v. Farley*, 105 U. S. 442, 26 L. Ed. 1060. It has been doubted whether the court, when a bond has been taken, can assess the damages, or leave the defendant to his action at law on the bond. In *Bein v. Heath*, 12 How. 168, 13 L. Ed. 939, Chief Justice Taney said, in so many words, that in such a case the bond must be sued at law. And this opinion was followed by Mr. Justice Curtis, on circuit, in *Merryfield v. Jones*, 2 Curt. 306, Fed. Cas. No. 9,486. But Mr. Justice Bradley, speaking for the court in *Russell v. Farley*, supra, discussing these cases and others quoted to it, says:

"Upon a careful examination, we are not satisfied that they furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damages assessed under its own direction. This is the ordinary course in the court of chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case, and, having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice and put an end to the litigation."

He also says, if it has this power, it is a matter of discretion. These remarks of Mr. Justice Bradley are obiter dicta. In *Meyers v. Block*, 120 U. S. 214, 7 Sup. Ct. 525, 30 L. Ed. 642, the power of the court of equity to impose any terms in its discretion in granting or continuing an injunction is stated as beyond question. In *Coosaw Min. Co. v. Farmers' Min. Co.* (C. C.) 51 Fed. 107, the circuit court, in a case of this character, assumed jurisdiction to assess the damages. The reasons given are that the suit, from its inception, was in that court; the conduct of the parties is always under its supervision; the character of the questions involved, and the ease or difficulty in reaching a conclusion upon them, can nowhere be as well known as in the court which heard, considered, and decided them. Be this as it

may, it is clearly within the power of the court to decide whether or not damages be allowed in a case where an injunction bond has been given. This was the precise point decided in *Russell v. Farley*, supra. This is within its discretion. The order of the court below refers to a special master the duty of inquiring whether or not defendant has suffered damages, and to what extent. This was simply to furnish it with information as a guide to the exercise of its discretion. The report on the inquiry may induce the court to content itself with fixing the costs only on complainant. "On this point the judgment of the court approaches so near to an exercise of discretion that we would require a very clear case to be made in order to induce us to reverse it." *Russell v. Farley*, 105 U. S. 446, 26 L. Ed. 1060.

The decree of the circuit court is affirmed.

UNITED STATES GRAMOPHONE CO. v. SEAMAN.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 419.

APPEAL—REVIEW—ORDER GRANTING PRELIMINARY INJUNCTION.

Under the settled rule that the granting or refusing of a preliminary injunction is not a matter of strict right, but rests largely in the discretion of the court, which will not be interfered with except where improvidently exercised, an order granting or continuing such an injunction will not be reversed on appeal, where it was made in an ancillary suit, and followed a similar order granted by another court in the principal case, and where the court acted after a careful consideration of the issues and facts, which were complicated.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

This case comes up by appeal from the circuit court of the United States for the district of West Virginia. The appeal is from an order granting and continuing a temporary injunction. The facts essential to a discussion of the questions involved in this appeal are these:

Emile Berliner was the inventor, patentee, and owner of a certain sound-producing machine, to which he gave the name of Gramophone. The United States Gramophone Company, a corporation of the state of West Virginia, became entitled to all the right, title, and interest of Berliner in these patents. Being so entitled, on 2d September, 1895, this corporation assigned and gave to one W. C. Jones, of New York City, the sole and exclusive right to manufacture, sell, lease, and deal in said inventions of Berliner in the United States. The consideration of this transfer is the payment of money and the performance of mutual covenants, all of which are carefully set out in detail. Jones is allowed to organize a company within 90 days from the date of the contract to take his place therein, enjoy all his rights thereunder, and assume and perform all contracts and obligations, and be bound by the conditions imposed on him in his contract with the United States Gramophone Company. One of the conditions of the contract is the right of forfeiture reserved to both parties upon the failure of the other party to perform its covenants thereunder. That Jones thereupon organized the Berliner Gramophone Company, and invested it with all his rights under this contract. The Berliner Gramophone Company, a corporation of the state of Virginia, on 18th October, 1896, entered into a contract with Frank Seaman, in which, styling itself the licensor, it declares itself to be in exclusive control, in the United States, of the inventions of Emile Berliner relating to the

gramophone, and thereupon grants to Frank Seaman the exclusive license to buy, sell, and deal, throughout the United States of America (except in the District of Columbia), in gramophones and gramophone goods embodied in the said inventions, and all improvements therein that may come to the licensor's control, excepting recording apparatus. Among the provisions of this agreement is this: The price which the licensor shall receive from the licensee for gramophones and gramophone goods shall be the sum of the following items: (1) The actual manufacturing cost; (2) a margin of 40 per cent. of the said manufacturing cost; (3) a royalty which the licensor is required to pay to the United States Gramophone Company, to the amount of 10 per cent. of the retail price of the gramophone and gramophone goods. There is also provision for cancellation by the licensor of the agreement in case of breach of covenant by Seaman. Differences arose between Seaman and the Berliner Gramophone Company. These culminated in a suit by Seaman in the circuit court of the United States for the Western district of Virginia against the company, charging breaches of the covenants, and praying injunction; whereupon a temporary injunction was granted. The interest in, and certain actions of, the United States Gramophone Company, in connection with this contract, having been developed at the hearing, Seaman filed his bill against the Berliner Gramophone Company and the United States Gramophone Company in the Western district of Virginia. No service could be made of process under this bill on the United States Gramophone Company, inasmuch as it was a resident of West Virginia, and had no one in Virginia who could be served for it. Thereupon Seaman filed in the circuit court of West Virginia the bill the basis of this suit. The United States Gramophone Company is a corporation of West Virginia.

This bill recites the filing of the proceedings against the Berliner Gramophone Company in the Western district of Virginia; the granting of the temporary injunction upon it; the various proceedings thereupon; the filing of a bill against both the Berliner Gramophone Company and the United States Gramophone Company, seeking relief; the failure of this bill to effect its purpose, because the United States Gramophone Company was not a resident of that district. It was then charged that certain stockholders in these two Gramophone Companies had signed an agreement for the sale of a controlling interest in their stock to one Charles Adamson, whereby the two corporations are practically dissolved, and a new corporation created, called the Consolidated Talking Machine Company of America, the object, purpose, and effect of which is to enable the Berliner Gramophone Company, by colluding with the United States Gramophone Company, to avoid the result of its breach of contract, and to escape the effect of the decrees of the court. It then recites the transaction between the United States Gramophone Company and Jones; the confirmation of this transaction by Berliner, the patentee; the vesting of all Jones' rights in the contract in the Berliner Gramophone Company; the contract between this gramophone company and the complainant, by which complainant acquired the exclusive right to sell all the gramophones and gramophone goods manufactured by the said gramophone company; the active prosecution by complainant of his work under said contract, and the large expenditure of money by him in promoting it; the failure of the Berliner Gramophone Company to perform its contract, and the suit thereupon by the complainant. The bill then goes on to charge a conspiracy between these two gramophone companies and other persons for the purpose of injuring and defrauding complainant, of the refusal to deliver him the goods according to the contract, and of their forfeiture of the contract, and that to this end they have served him with notice of the cancellation of the contract, not only between him and the Berliner Gramophone Company, but also between these two companies, which notices, however, it is charged, are entirely insufficient, and not in conformance to or compliance with the contract, and in the case of the latter notice is collusive and fraudulent, not properly given, and not justified by the terms of the contract, and that the United States Gramophone Company has all along had full notice of the rights of complainant.

The bill prays an injunction restraining the cancellation of the contract made between the Berliner Gramophone Company and the complainant, and

between the same company and the United States Gramophone Company; also an injunction against the United States Gramophone Company, and all persons acting under it, from assigning, transferring, or in any manner disposing of, alienating, or affecting, the right, title, and interest of the defendant in the patent rights transferred by and described in said contracts, and from dealing with them in any way by which they may go into the hands of any one, save subject to the rights of complainant therein; that the United States Gramophone Company be enjoined from effecting or carrying out any scheme of consolidation with the Consolidated Talking Machine Company of America or any other corporation; that it be required to produce and file with the clerk, pending the determination of the controversy in this case, all the originals of the said patents and improvements thereon, the subject of the contracts aforesaid; and for general relief.

On 4th October, 1900, upon filing the verified bill, a temporary injunction was issued, with leave to defendant, on 20 days' notice, to move to set it aside. On 5th November, 1900, the defendant gave notice of a motion to dissolve the temporary injunction, and on 6th November filed its answer to the bill. On 30th November, 1900, the motion came up for a hearing, and was postponed by the court until certain depositions could be taken by both sides. On 24th January leave was given to complainant to file a supplemental and amended bill, in which is set out in full the alleged agreement for consolidation of the two gramophone companies. It contains practically the same prayers as the original bill. To this supplemental amended bill the defendant demurred: (1) Because no cause is stated entitling complainant to the relief prayed therein. (2) Because the Consolidated Talking Machine Company of America and Charles Adamson and the Berliner Gramophone Company were necessary parties to the bill. (3) Because they are nonresidents of this district, and cannot be compelled to answer herein. (4) There seems to be a defect in this ground, which is in these words: "That there is not any person or persons or corporations who or which have or has a common interest with the said Consolidated Talking Machine Company of America, or the Berliner Gramophone Company, or Chas. Adamson, or the persons who signed the agreement of June 15, 1900, either collectively as a class or individually, whose interests in the said bill affect and who will be affected if the relief prayed for is granted." (5) Because by plaintiff's own admission he has a complete remedy against the Consolidated Talking Machine Company of America, and therefore his remedy is against that company, and not this defendant.

On 27th April, 1901, defendant moved to dissolve the injunction granted 4th October, 1900. The court did not pass on the motion, but on 15th May, 1901, entered this order: "(1) The plaintiff, Frank Seaman, shall, within fifteen days from this date, enter into a stipulation with the United States Gramophone Company, whereby he shall agree upon his part to carry out in good faith, and in all respects, all the terms, covenants, agreements, and stipulations contained in the contract of October 10, 1896, between him and the Berliner Gramophone Company; and the said United States Gramophone Company shall likewise stipulate within a like period of time to carry out and perform all the agreements, covenants, and stipulations contained in said contract, so far as the same were to be performed by the said Berliner Gramophone Company,—that is to say, the United States Gramophone Company shall take the place under said contract of the Berliner Gramophone Company, and perform the said contract just as it is provided therein to be performed by the Berliner Gramophone Company. (2) Should either the said Frank Seaman, plaintiff, or the United States Gramophone Company, defendant, within the time aforesaid, fail to enter into such stipulation, or, if entered into, fail to carry out the same in good faith, in all respects, then, and in that event, the motion to dissolve the injunction, awarded in this cause on October 10, 1900, is continued until June 12, 1901. Should said stipulation be entered into, however, this decree shall not be construed so as to relieve Frank Seaman, the plaintiff, of the performance and execution of any covenant and agreement to pay the United States Gramophone Company the royalties provided for under the contract of October 10, 1896; but, on the contrary, it is the intention of this decree to declare that said roy-

alties shall be paid to the said United States Gramophone Company, if said stipulation be entered into, in the same way, and in the same amounts, as provided for in said contract. The said stipulation, if entered into, shall in no wise prejudice the rights of any of the parties to this or any other litigation, and it shall only be in force and effect until the further order of the court, and in no event longer than the end of the litigation now pending in Virginia between Frank Seaman and the Berliner Gramophone Company."

On 5th June, 1901, defendant filed its answer to the amended supplemental bill. Efforts were made to prepare the stipulations ordered by the court, but it appears by an order of 15th June, 1901, that the defendant had not signed the stipulation; whereupon the court on 15th June, 1901, directed that the United States Gramophone Company and the Berliner Gramophone Company should both sign the stipulation within 10 days. If they did not do so, the motion to dissolve the injunction would be overruled, and the same continued. On 15th June, 1901, defendant filed his petition for leave to appeal, with assignment of errors. The appeal was allowed, and the cause is here. There are 12 assignments of error, as follows: "(1) It was error to award the injunction of October 4, 1900, without notice to the defendant company. The order awarding said injunction is hereby referred to and made a part of this assignment. (2) It was error to make and enter the decree of November 30, 1900, instead of hearing the motion then submitted to dissolve the injunction, due notice of which had been given. (3) It was error to permit the plaintiff, without notice to the defendant, to file his amended and supplemental bill. (4) It was error to have overruled the demurrer of the defendant company to said amended and supplemental bill, as was done by the decree of May 15, 1901. (5) It was error to have rejected the stipulation tendered by the defendant company in pursuance of the requirements of decree of May 15, 1901, and to have required the defendant company to make another and new stipulation, as was done by the decree entered in this cause June 15, 1901. (6) It was error to make and enter the decree of May 15, 1901, and by that decree to require the parties, plaintiff and defendant, to enter into any stipulation whatsoever. (7) It was error in the decree of June 15, 1901, which put upon the defendant company the necessity of procuring the execution of the new proposed stipulation by the Berliner Gramophone Company, and it was error to enter the last order of June 15th, modifying previous orders and decrees. (8) It was error in the decree of June 15, 1901, in providing for a new stipulation, and further providing that, unless the new stipulation was executed within ten days from the date of said decree by the defendant company and the Berliner Gramophone Company, the motion to dissolve the injunction awarded October 4, 1900, should stand overruled, and the injunction continued. (9) It was error not to have sustained the motion of the defendant company to dissolve the said injunction awarded, as aforesaid, on October 4, 1900. (10) It was error to overrule the motion made by the defendant in the order of May 15, 1901, for an increase in the penalty of the injunction bond. (11) It was error to have entered any decree in this cause after the first regular term of the court held after October 4, 1900; the next regular term of the said court after October 4, 1900, being fixed by law to begin on the 10th day of January, 1901. (12) There are other errors apparent on the face of the record on account of which the appellate court will be asked to reverse the proceedings had in this cause."

Marshall McCormick (Isaac Nordlinger, on the brief), for appellant.
John T. Harris and Waldo G. Morse, for appellee.

Before SIMONTON, Circuit Judge, and PURNELL and WADDILL, District Judges.

SIMONTON, Circuit Judge (after stating the facts as above). The record is large and confusing. It is essential, therefore, to keep in mind the question, and the only question, which presents itself to this

court under this appeal at this term. It is an appeal from an interlocutory order; and the only order from which an appeal can be taken at this stage of the case is the order of 15th June, 1901, continuing the injunction. Under the act of congress of 1900 (31 Stat. 660) appeals lie from interlocutory orders granting or continuing an injunction, provided the appeal is taken within 30 days from the entry of the order. The first temporary injunction was granted October 4, 1900. The appeal in this case was 15th June, 1901. So the first and ninth assignments of error need not be regarded.

With regard to the other assignments of error, they are directed largely to the merits of the case, and bear incidentally on the question as to continuing the temporary injunction. Was this improvidently awarded? The rule upon this subject is clearly stated in *Welsbach Light Co. v. Cosmopolitan Incandescent Light Co.*, 43 C. C. A. 419, 104 Fed. 84, and it applies as well to the granting as to the refusing to grant an injunction.

"In determining in a given case whether the circuit court erred in refusing an injunction pending litigation, it is to be remembered that such injunction in no case is a matter of strict right. The application for it must be addressed to the sound discretion of the court. It may be granted or refused unconditionally or on terms. Upon appeal ordinarily the question is simply whether the court acted improvidently. Only when clearly erroneous will the order be reversed."

See, also, *Ritter v. Ulman*, 24 C. C. A. 71, 78 Fed. 222, 42 U. S. App. 263.

In the case at bar the record presented grave questions requiring careful deliberation. There were charges and counter charges. The facts were complicated, and needed full investigation. Another court of co-ordinate jurisdiction was engaged in the same investigation and examination, and had issued its temporary injunction. The case was evidently auxiliary to the case referred to pending in the Western district of Virginia, and was brought in the district of West Virginia solely because the present defendant refused to waive its privilege of trial in the district of its residence. The court below clearly was impressed with the comity due to the court in Virginia. The learned judge, who had had the widest experience, gave the case his most careful and patient examination. He came to his conclusion slowly, and not improvidently. Under all these circumstances, it seemed to him desirable that the status quo should be maintained, certainly until the main issues should be passed upon and determined in the case before the circuit court of the Western district of Virginia.

We are not prepared to say that the action of the court below in continuing the temporary injunction was improvident. Its decree is affirmed.

BERLINER GRAMOPHONE CO. v. SEAMAN.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 412.

1. EQUITY—DISMISSAL OF BILL BY APPELLATE COURT—EFFECT OF PRIOR AMENDMENT.

After the granting of a preliminary injunction by a circuit court, complainant, by leave of court, filed an amended and supplemental bill. Defendant afterwards appealed from the order granting the injunction, but the record on appeal did not show the amended bill, nor was it called to the attention of the circuit court of appeals. That court, on the hearing, ordered the dismissal of the bill. *Held*, that on the filing of the amended and supplemental bill such bill, together with the original bill, constituted one pleading and one record, and that the order of the appellate court, having been made upon a defective record, did not operate to dismiss the bill as amended.

2. APPEAL—REVIEW—ALLOWING AMENDMENT OF PLEADINGS.

The granting of leave to file an amended and supplemental bill is a matter within the discretion of the court, and its action will not be reviewed in an appellate court unless there has been a gross abuse of this discretion.

3. EQUITY—GROUNDS OF JURISDICTION—SUFFICIENCY OF BILL.

A bill in equity, which alleges that the parties entered into a contract, the performance of which was to extend over a term of years, and that defendant, which is a corporation, has conspired with others to take such action as will render it impossible to perform the contract on its part, and will also render it insolvent, for the purpose of defeating the rights of complainant, states grounds for equitable relief, and is not demurrable.

4. SAME—RETENTION OF JURISDICTION ACQUIRED—ENJOINING ACTION AT LAW.

A court of equity which has rightfully taken jurisdiction of a controversy and has all the parties before it will retain such jurisdiction to grant full relief, and may enjoin the institution and prosecution of an action at law by one of the parties in any other court involving the matters in controversy before it.

5. APPEAL—APPEALABLE ORDERS—REFUSING TO DISSOLVE INJUNCTION.

Under Act Cong. June 8, 1900 (31 Stat. 600), an interlocutory order of a federal court refusing to dissolve an injunction is not appealable.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

See 108 Fed. 714.

Wm. Gordon Robertson and Marshall McCormick (Albert B. Weimer and Frederick M. Leonard, on the briefs), for appellant.

John T. Harris and Waldo G. Morse, for appellee.

Before SIMONTON, Circuit Judge, and JACKSON and PURNELL, District Judges.

SIMONTON, Circuit Judge. This case comes up again by appeal from an order of the circuit court of the United States for the Western district of Virginia granting a temporary injunction on the filing of an amended and supplemental bill. The case has been in this court on appeal from an order of the same court granting a temporary injunction upon an original bill. The appeal was heard May 18, 1901,

opinion filed in July, 1901 (110 Fed. 30), and by the mandate the injunction was dissolved, and the case was remanded to the circuit court, with instructions to dismiss the bill. It seems, however, that pending this appeal, and before citation issued or served, before the record was filed in this court, the court below, on application of complainant, had permitted an amended supplemental bill to be filed. The petition for leave to file this amended supplemental bill was filed October 17, 1900, whilst the court had the question as to the injunction on the original bill under consideration. On December 3, 1900, leave was given to file the amended supplemental bill after argument by counsel on both sides. The supplemental bill was filed December 7th following. The defendant filed demurrer to the whole bill January 7, 1901. This was set down for argument, and in the order it was provided that, as soon as the demurrer shall have been passed upon, the defendant shall have leave to plead or answer thereto, as he may be advised, in accordance with the equity rules. On March 23, 1901, argument was had on the demurrer, and it was overruled. Thereupon, by leave of the court, the defendant filed its answer. The complainant thereupon moved the court for a temporary injunction on the prayers of his bill. The court on the same day granted the motion so far as the fifth prayer was concerned, to wit, restraining the defendant from prosecuting an action at law brought by it against the complainant in the circuit court of the United States for the Southern district of New York, praying damages against him for breach of the contract, the subject-matter of this suit in equity. A decision upon the other prayers of the complainant was reserved. Thereupon the defendant was allowed an appeal on May 4, 1901, on assignments of error filed that day, and the case is here.

In advance of the discussion of the assignments of error, the defendant in the court below (appellant here) contends that the dismissal of the original bill carries with it the dismissal of this amended and supplemental bill. As has been said, nothing appeared on the record, and no mention was made in the argument of the first case, of the leave to file a supplemental bill and the orders thereon immediately following the decree appealed from, all filed before that appeal was finally completed. If such facts had appeared, it is more than probable that this court would have postponed the hearing of the appeal. The question now is, does this dismissal of the original bill operate as a dismissal of all proceedings subsequent to the date of the order appealed from in the first case? The motion for leave to file an amended and supplemental bill was an admission by complainant that the original bill was defective in important particulars, and the action of the court in granting leave to file the amended and supplemental bill was a recognition of this position. So, when the cause was heard here, it was not the case made below, but on a condition of the case admitted on all sides to be defective, and with its defects cured so far as the court below was concerned. Apart from any authority, it would seem that on principle the decision of this court upon a defective presentation of the case should not be conclusive of it in all respects. An amended bill is a continuation of the original bill, and forms a part of it. The original and amended bills constitute one pleading and

one record. *1 Daniell, Ch. Pl. & Prac. p. 402, c. 6, § 7.* If they constitute one record, then everything in the amended bill and supplemental bill has as much claim upon the attention of the court as anything in the original bill. The real record is the amended and supplemental bill with the original bill, and they, amalgamated, constitute the case of complainant. In other words, the court no longer looks into the original bill to ascertain the character of relief sought, but to the new record, made up of the original and the amended and supplemental bills, and deals exclusively with that. This is shown by the illustration Mr. Daniell gives to the rule just quoted from him. "When," says he, "an original bill has been fully answered, and amendments are afterwards made, to which defendant does not answer, the whole record may be taken pro confesso generally, and an order to take the bill pro confesso as to the amendments only will be irregular." Daniell's doctrine on this subject is followed in *French v. Hay*, 22 Wall. 246, 22 L. Ed. 854; *Phosphate Co. v. Brown*, 20 C. C. A. 428, 74 Fed. 323, 42 U. S. App. 57; *Miller v. McIntyre*, 6 Pet. 62, 8 L. Ed. 320. It is clear that at the time these parties were heard in this court upon the original bill the controversy between them was no longer presented by the original bill, but was contained in a record made up of the original bill and the amended and supplemental bills. So the dismissal of the original bill did not work a dismissal of the controversy.

The case before this court now has not gone to final judgment. It comes up on an interlocutory order, the granting of an injunction. If the court below had jurisdiction of the cause appearing in this record, the only question which we can consider is, was the temporary injunction providently issued? The gravamen of the new record made in the amalgamation of the original and amended and supplemental bills is a contract between the complainant and the defendant, whereby the defendant, being in control of the manufacture and sale of all gramophones and gramophone goods under the Berliner patent, contracted with the complainant to give him the exclusive agency for the sale of such goods in nearly every part of the United States, he fulfilling certain covenants on his part; that, this agreement being in existence, the defendant had entered into a conspiracy with another corporation and certain persons, whereby all control of the patented articles was put out of its power, so that it could not fulfill any of the terms of its contract, and to this end it has served on complainant a notice of cancellation of the contract, which, however, is entirely insufficient both in law and equity, and not in conformance to or in compliance with the terms of the contract; and in pursuance of the same purpose, and carrying out its conspiracy with the United States Gramophone Company, from whom defendant derives its rights in said gramophone invention, the last-named company has declared its contract with defendant company canceled, which notice, however, is collusive and fraudulent, and intended to operate to the prejudice of complainant, not properly given and not justified by the terms of the contract; and that this United States Gramophone Company and the other parties in the conspiracy are without the jurisdiction of the court; that this action on the part of defendant renders it insolvent, and deprives the complainant of all hope of relief. It, in effect, delays, hinders, and defeats

him. That portion of the bill with which this appeal is concerned is with respect to a suit instituted by the defendant against this complainant in the circuit court of the United States for the Southern district of New York, involving precisely the same issues as were made in the court below, and on precisely the same points which that court then had under advisement. As has been stated, the court below granted the temporary injunction on the fifth prayer for relief, reserving the others. This fifth prayer is in these words:

"That the said defendant, the Berliner Gramophone Company, its officers and attorneys, may be enjoined and restrained from in anywise prosecuting, conducting, or carrying forward in any manner whatsoever until after the final hearing and determination of the issues, matters, things, and questions whatsoever joined, raised, or presented in this action, said action at law, brought by it against your orator."

To this bill the defendant demurred, and, the demurrer being overruled, it at once filed an answer. The answer being in, and on the motion for a temporary injunction evidently being read as an affidavit, the court made this order:

"And thereupon the plaintiff, by counsel, moved the court for the injunction prayed for in the first, second, and fifth prayers of said amended and supplemental bill. Upon consideration whereof the court doth order, adjudge, and decree that the defendant, the Berliner Gramophone Company, its officers, agents, and attorneys, be, and the same are hereby, enjoined and restrained, until the further order of this court, and, preceding the determination of this cause, from in any wise further prosecuting, conducting, or carrying forward in any manner whatsoever any and all of the matters, things, and questions whatsoever joined in this suit in the action at law instituted by the defendant, the Berliner Gramophone Company, against the plaintiff, Frank Seaman, in the United States circuit court for the Southern district of New York, on the law side thereof, on the 23d day of October, 1900. But this injunction order shall not take effect unless and until the said plaintiff or some one for him shall execute bond, payable to the said defendant, conditioned according to law, to be approved by the court, in the penalty of fifteen hundred dollars. And as to the granting of the injunction prayed for in the first and second prayers of said bill the court takes time to consider. And thereupon the defendant moved the court to dissolve the said injunction herein awarded upon the record of this cause, which motion the court doth overrule."

The defendant files four assignments of error: (1) It is assigned as error that the court should not have granted leave to file the amended supplemental bill, upon which said decree was based. (2) It is assigned as error that the court overruled the demurrer of the defendant to said bill. (3) It is error on the part of the court to award the injunction contained in the decree of March 23, 1901, because the action mentioned in the proceedings as having been instituted in the state of New York was instituted for the purpose of obtaining from the plaintiff damages from an alleged breach of the contract between the parties, and was in the nature of a counterclaim or set-off, and was not being litigated in the above cause, no question being raised by the pleadings as to what damages the defendant suffered and none being claimed by it in this proceeding. (4) It is assigned as error that the court overruled the motion of the defendant to dissolve the injunction awarded by said decree of March 23, 1901, for the same reasons that are set forth in the foregoing assignment of error.

1. The granting leave to file an amended and supplemental bill is within the discretion of the court. *Railroad Co. v. Newman*, 23 C. C. A. 459, 77 Fed. 791. The granting or refusing leave to file an amended bill or plea is a matter within the discretion of the trial court, and will not be reviewed in an appellate court unless there has been gross abuse of this discretion. *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; *Gormley v. Bunyan*, 138 U. S. 623, 11 Sup. Ct. 453, 34 L. Ed. 1086; *Marco v. Hicklin*, 6 C. C. A. 13, 56 Fed. 549. As a general rule, matters resting in the discretion of the court below cannot be re-examined in the appellate court. *Cheang-Kee v. U. S.*, 3 Wall. 320, 18 L. Ed. 72. In the case at bar the court exercised its discretion after careful examination. A petition was filed asking leave to file the amended and supplemental bill. Notice was given. A day was fixed for the hearing, and full discussion was had. After this the decision of the court was made. We see no abuse of discretion in the court. "All that the court inquires into in such an application is whether probable cause exists for granting leave, and whether the application states facts and circumstances which, if properly pleaded, would sustain a supplemental bill or an original bill in the nature of a supplemental bill. The practice in the circuit courts touching applications under the rule for leave to file supplemental bills is liberal toward the applicant, and upon such application the court will not proceed to try the cause, nor to determine questions which may never appropriately be raised by demurrer to the bill when filed." *Bates*, Fed. Eq. Proc. § 637

2. Was it error to overrule the demurrer of defendant to the bill? The demurrer admits the facts stated in the bill. These facts complainant states were only discovered at the first hearing, and many of these have accrued since that hearing. These statements as to these facts have been set out above. If they be true, there is certainly ground for filing the bill and for an investigation of the facts as stated, and for relief therein. They are of an equitable character and go to sustain the jurisdiction of the court.

3. The third assignment of error goes to the injunction restraining the defendant from proceeding in its action at law in the Second circuit. The court below had taken jurisdiction of all matters in controversy between the complainant and defendant, and was proceeding to adjust the equities between them. It claimed to have entire jurisdiction over the whole controversy, and to afford relief. After this decision was made, and whilst it was still operative, the defendant went into a court of law, and, upon the same facts and circumstances set out in pleadings in the cause in the court below, sought relief in this law court. The complainant was thus compelled not only to go into another jurisdiction to try points at issue below, but also to go into the jurisdiction of a law court in which he could not avail himself of his equities. Under these circumstances the court below enjoined him. It is a familiar principle that when a court of equity has taken jurisdiction of a controversy and has all the parties before it, it proceeds to give full relief, and it can enjoin any proceedings in any other court touching the matters in controversy be-

fore it. *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538.

4. The fourth assignment of error is that the court overruled the motion of defendant to dissolve the injunction awarded by the decree March 23, 1901, for the reasons set forth in the other assignments of error. Under Act Cong. June 6, 1900 (31 Stat. 660), this court no longer can entertain an appeal from an interlocutory decree refusing to dissolve an injunction. *Westinghouse Air-Brake Co. v. Christensen Engineering Co.*, 44 C. C. A. 92, 104 Fed. 622; *Wire Co. v. Boyce*, 44 C. C. A. 588, 104 Fed. 173; *National Automatic Mach. Co. v. Automatic Weighing, Lifting & Grip Mach. Co.*, 44 C. C. A. 664, 105 Fed. 670; *Heinze v. Mining Co.*, 46 C. C. A. 219, 107 Fed. 165; *Rowan v. Ide*, 46 C. C. A. 214, 107 Fed. 161.

The decree of the circuit court granting the injunction is affirmed.

McMILLAN v. MORAN.

(Circuit Court of Appeals, Second Circuit. January 7, 1902.)

No. 60.

TOWAGE—INJURY OF TOW—NEGLIGENCE OF TUG.

The master of a tug did not exercise reasonable prudence in attempting to take a tow under the Brooklyn Bridge when it was high tide, or nearly so, knowing that at mean high tide there was a margin of safety not exceeding one foot between the mast of the tow and the bridge, and the tug is liable for the damages caused by the breaking of the mast against the bridge.

Appeal from the District Court of the United States for the Southern District of New York.

Chas. C. Burlingham, for appellant.

J. Parker Kirlin, for appellee.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

PER CURIAM. While we do not agree with all the findings of fact in the opinion of Judge Brown in the court below (107 Fed. 149), we agree with him in the more essential facts in the case, and concur in his conclusion that the tug did not exercise due care under the particular circumstances in performing the towage service. Her master was informed that the mast of the tow was about 134 feet high. Assuming that he had a right to suppose that the bridge was 135 feet above the water at mean high tide, the margin of safety was too narrow in the condition of the tide at the time. He ought to have been aware, upon observation of the piers and slips, that it had receded but a little. In taking the chances when this was apparent or should have been, he disregarded reasonable prudence.

Decree affirmed, with interest and costs.

GENERAL ELECTRIC CO. v. WEBSTER & D. ST. RY. CO.

WEBSTER & D. ST. RY. CO. v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, First Circuit. January 23, 1902.)

Nos. 374, 375.

PATENTS—INFRINGEMENT—ARMATURE COILS OR WINDING.

The Eickemeyer patent, No. 377,996, for a coil or winding for dynamo-electric machines, describes, in claims 1 and 2, all of the patentee's invention, which consists of an armature coil for drum armatures, having a certain structural form, and a mode of operation by virtue of such form, the essential feature of which is that one side, or substantially one-half of the coil, is of lesser external dimensions than the internal dimensions of the other half, so that the short side of one coil may be passed into or through the long sides of other coils. Claim 4, which is for a winding composed of detachable counterpart coils, while broad in its terms, can only be sustained, in view of the prior art, when limited to the novel form of such coils described in the preceding claims. Claims 1, 2, and 4 considered, and *held* not infringed.

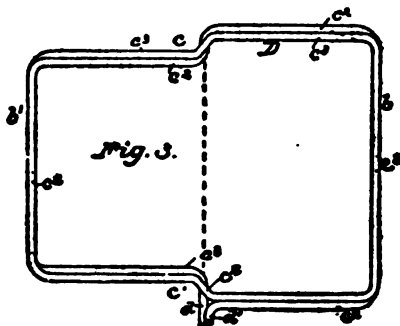
Appeals from the Circuit Court of the United States for the District of Massachusetts.

Frederick P. Fish and William K. Richardson (J. L. Stackpole, Jr., on the brief), for General Electric Co.

William H. Kenyon (George Harding and Richard Eyre, on the brief), for Webster & Dudley St. Ry. Co.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

COLT, Circuit Judge. The subject-matter of these cross appeals is the Eickemeyer coil or winding for dynamo-electric machines covered by letters patent No. 377,996, dated February 14, 1888. Claims 1, 2, and 4, of the patent are alone in issue; and the only question which arises is whether the defendant's coil infringes any of these claims. The circuit court held that claims 1 and 2 were not infringed, and that claim 4 was infringed. The form of the coil, with its axial line indicated, is illustrated in Fig. 3 of the drawings of the patent. Other coils shown in the drawings have more convolutions of wire, but all have essentially the same configuration.



The two parts of the coil containing the offsets are called the "ends." They are the inactive portions outside of the magnetic field, and they lie alongside of or adjacent to the ends of the armature core. The two remaining parts opposite the axial line are called the "sides." They are the active portions, which rest on the periphery of the armature core. It will be noticed that the axial line splits the offsets in the center. It will also be noticed that the coil is divided by its axial line into two unequal halves, and that the relative dimensions of the two halves are such that the smaller half may pass into and through the larger half, or, what is the same thing, the short side through the long side. In describing this structural feature, the patentee uses several synonymous forms of expression: The coil "at one side of what may be termed its axial line is of lesser external dimensions than the internal dimensions of the opposite portion." Again: "Each [coil] having substantially one half thereof of lesser external dimensions than the internal dimensions of the other half." Again: "Thus making one side of the coil longer than the other side, so that the short side of any one coil may be passed into and through the long sides of other coils." Again: "In each coil there is a long side, b, and a short side, b', and in each case the short side can be passed into or through the long side."

The claims in issue are as follows.

"(1) A dynamo-electric armature coil or winding, which at one side of what may be termed 'its axial line' is of lesser external dimensions than the internal dimensions of the opposite portion, both of said portions being alike in contour, substantially as described. (2) In a dynamo-electric armature-winding, a series of coils which are counterparts in contour, each complete and separable from the others, and each having substantially one half thereof of lesser external dimensions than the internal dimensions of the other half, substantially as described, whereby portions of each of said coils overlies and other portions underlie appropriate portions of other coils. (4) In a dynamo-electric armature, a winding composed of detachable counterpart coils, each of which is placed in immediate contact with the periphery of the armature core at one side only, substantially as described."

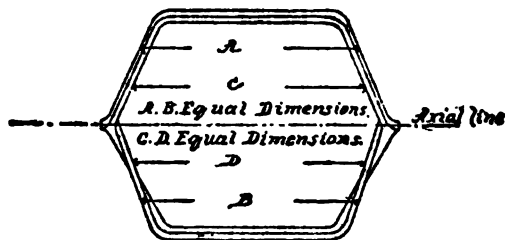
The first claim is for the novel coil. The second claim is for a winding composed of a series of such coils. The fourth claim is for a winding in which the coils are placed in a particular way on the periphery of the armature drum. These claims are carefully drawn. They are expressed in clear and unambiguous terms. The first two define with accuracy and exactness Eickemeyer's main invention. Read in connection with the specification and drawings of the patent, their meaning is plain, unmistakable, and certain. Eickemeyer had a problem to solve, and he solved it, as is common with real inventors, by the application of a simple principle. The problem was the construction of a practical form-wound drum-armature winding for dynamo-electric machines, especially of the bipolar type, composed of detachable, interchangeable, counterpart coils. This problem he solved by the simple method of making the two halves of the coil of such unequal dimensions that the smaller half of one coil may pass into and through the larger halves of other coils. In this conception lay the Eickemeyer invention. Where this construction and mode of opera-

tion are present, there is present the Eickemeyer invention; and where this construction and mode of operation are absent, the Eickemeyer invention is absent. The lesser external and greater internal dimensions of the two halves of the Eickemeyer coil are made the sole test and criterion of the invention on every page of the drawings and specification of the patent, whether the coil be adapted to bipolar or multipolar machines, or to single or double layer windings. It is the one, fundamental, essential, fixed, and unvarying characteristic of the Eickemeyer coil. The first claim declares that the coil "at one side of what may be termed its 'axial line' is of lesser external dimensions than the internal dimensions of the opposite portion." The second claim declares that each coil has "substantially one half thereof of lesser external dimensions than the internal dimensions of the other half." Taking in the hand an Eickemeyer coil, we see at a glance the lesser external and greater internal dimensions of its two halves. Turning to the drawings of the patent, the same characteristic feature is always apparent. It is also stamped on every page of the specification, as sufficiently appears from the following extracts:

"Whether my coils or windings are adapted for use in bipolar or in multipolar machines, they are novel, in that each at one side of what may be termed its 'axial line' is of lesser external dimensions than the internal dimensions of its opposite portion, and both of said portions are substantially alike in contour, so that they can be symmetrically assembled upon a drum or core, and enable at the ends of said core one portion of each coil to overlie and the other portion to underlie appropriate portions of other coils." "In this armature [referring to Figs. 1 and 2] there are thirty-six counterpart coils, D, of conducting wire, and each coil at one side of its axial line (indicated in dotted lines in Fig. 3) is of lesser external dimensions than the internal dimensions of the opposite portion, and both of said portions are substantially alike in contour, and this characteristic feature is always maintained by me regardless of the number of windings in the coil and of variations in the form of the armature to be covered." "In each coil there is a long side, b, and a short side, b', and in each case the short side can be passed into or through the long side, because for the first time a portion of each coil which is at one side of its axial line is of lesser external dimensions than the internal dimensions of the opposite portion of the coil, although both portions are substantially alike in contour."

The inspection of an Eickemeyer coil, the examination of the drawings of the patent, and the reading of the specification, leave no room for doubt as to the meaning of the first two claims, and the novelty and scope of the invention therein described. The patentee expressly declares that his coil is "novel" in that one portion "at one side of what may be termed its 'axial line' is of lesser external dimensions than the internal dimensions of its opposite portion"; that "this characteristic feature is always maintained"; and that "for the first time, a portion of each coil which is at one side of its axial line is of lesser external dimensions than the internal dimensions of the opposite portion of the coil."

The defendant's coil, with its axial line corresponding to Fig. 3 of the Eickemeyer patent, is shown in the following cut:



It is apparent that the two halves of this coil are equal and its two sides equal, and that consequently one half cannot pass into and through the other half. Manifestly this coil has neither the structural form nor the mode of operation of the Eickemeyer coil. It does not have the lesser external and greater internal dimensions of the two halves, nor the mode of operation whereby the smaller half of one coil may pass into and through the larger halves of other coils. There is absent from this coil the "novel" feature "always maintained" of the Eickemeyer coil, and hence the very essence of the Eickemeyer invention.

To hold that defendant's coil infringes claim 1, we must, by construction, add to the claim the following words:

"This claim is not limited to a coil in which one portion at one side of its axial line is of lesser external dimensions than the internal dimensions of the opposite portion, but includes a coil in which one portion, at one side of its axial line, is of the same dimensions as the opposite portion."

And to hold that defendant's coil infringes claim 2, we must, by construction, add to the claim the following words:

"This claim is not limited to a series of coils 'each having substantially one half thereof of lesser external dimensions than the internal dimensions of the other half,' but includes a series of coils in which the dimensions of each half of each coil are the same as the dimensions of the other half."

Further, to hold that defendant's coil infringes these claims we must ignore the express language of the specification, wherein the patentee defines the "novel" feature of his coil, and declares that "this characteristic feature is always maintained by me."

The most liberal rule of construction known to the patent law will not sanction such an interpretation of the specification and claims of a patent, or such an expansion of the invention. Such a construction and enlargement of the patent are manifestly a contradiction of its specific terms, and an attempt to read into the patent a structure never contemplated by the patentee, and entirely outside of his invention.

The complainant seeks to show infringement of these claims by two theories of construction, which are equally untenable. The first may be called the theory of the complainant's experts; and the second, the theory of the complainant's counsel, advanced during their closing argument in this court, and further supported by supplemental briefs. The first theory is founded upon the proposition that the two halves of the defendant's coil are to be measured, not by their own dimensions, but by their position on the armature drum, and that, when so measured, there are found the lesser external and greater internal

dimensions of the Eickemeyer patent. Mr. Bentley, complainant's expert, says:

"When the coil is in place in the winding, one side lies close along the drum, and the other side is lifted up into an outer layer by means of the offset, to embrace the lower half of the next coil. The elevated half of the coil then has the larger dimensions, and the depressed portion the smaller dimensions, the former being on one side and the latter on the other side of the coil axis."

The difficulty with this theory is that it is purely hypothetical. There is no suggestion of any such method of measurement in the Eickemeyer patent, and, consequently, there is no warrant for applying such a method of measurement to defendant's coil. The halves of the Eickemeyer coil are measured by their own dimensions, and not by their dimensions when placed on the armature-core, or their dimensions relative to the axis of such core. The first claim of the patent is for a single coil of the specific form described. The second claim is for a series of these coils, each of the specific form described; and the only question is whether the defendant's coil has substantially the same structural form. We are dealing with the form of specific things, and not with their position relative to something else. We cannot alter the form of a thing by placing it upon another thing. The Eickemeyer coil does not change its form either by laying it on a table or by the collection of a series upon a drum armature. Nor can changes in position alter the relative dimensions of the halves of such coils. They cannot make unequal halves equal, or more equal, or less equal; and the same is true of defendant's coil. Its equal halves remain equal, and it is impossible to make them unequal by mere change of position. The measurement of the two halves of the defendant's coil relative to their positions on the armature is an attempt to prove infringement by an assumed and indefensible method. The adoption of this theory of measurement would make the halves of the Eickemeyer coil equal in some of the various forms of its use described in the patent. This theory illustrates that, as soon as we depart from the plain, simple, and unmistakable description and drawings of the Eickemeyer patent, we become involved in a maze of irrational and contradictory conclusions. The complainant's experts did not find the axial line of the Eickemeyer coil in any other position than as shown in Fig. 3 of the patent, or the axial line of defendant's coil in any other position than as indicated in the cut shown above; the line in each case splitting the offsets of the coils in their center. They undertook, however, to prove that the defendant's coil had, in fact, the unequal halves of the Eickemeyer coil, by measuring those halves with reference to their position on the armature core. This contention may be said to have been substantially abandoned at the argument, and the new theory advanced that the true axial line of the Eickemeyer coil is not the line indicated in Fig. 3, but another line which would include the whole of the offsets in the larger half or portion of the coil, and that the axial line of the defendant's coil is not the line which divides the coil into equal halves, but is a line which includes the whole of the offsets in one half. This theory may be illustrated by the following figures, taken from complainant's supplemental brief:

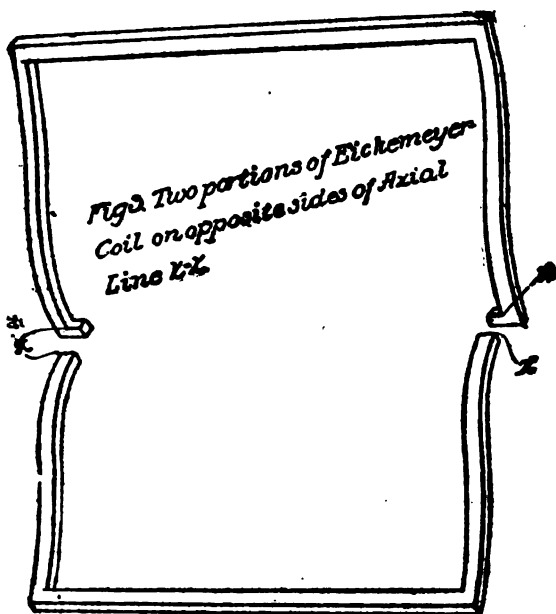
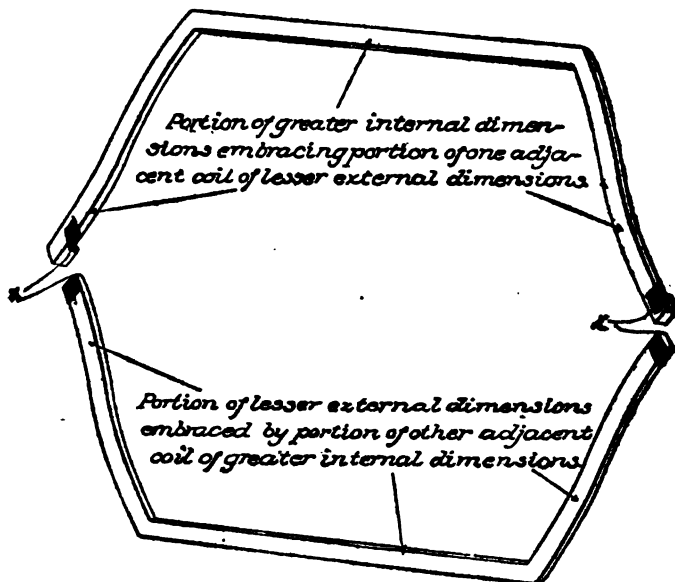


Fig 18.
Defendants coil with portions on opposite sides
of axial line L & separated.



Here again we have a pure theory based upon false premises. The first false premise is the assumption of an axial line for the Eickemeyer coil which does not exist in fact, and the second false premise is the assumption of an axial line for defendant's coil which does not exist in fact. It can serve no good purpose to discuss the reasons why the axial line of the Eickemeyer coil should be or must be at one side of the offsets, or the consequences which flow from such an assumption, when the fact is otherwise. By arbitrarily changing the axial line of the Eickemeyer coil we can alter the relative dimensions of its two halves to suit our purpose, and by the same method we can make the two halves of the defendant's coil to conform therewith. By the same method also, or by making another arbitrary change in the axial lines, we might bring other coils within the Eickemeyer patent. But the question of infringement in this case is not to be determined by assumptions and hypotheses. We must keep within the region of facts and things. An Eickemeyer coil, on its face, by virtue of its configuration, has unequal halves, and there is no theory or hypothesis or reasoning which can make those two halves equal. The defendant's coil, on its face, by virtue of its configuration, has equal halves, and there is no theory or hypothesis or reasoning which can make these halves unequal. There is no justification in the Eickemeyer patent for the assumption that the axial line is not exactly where it is located in Fig. 3. The specification says that its position is indicated in Fig. 3, and this is further confirmed by the following description in the specification respecting the curves and offsets of each convolution of wire in the coil:

"In order that the crossing of the wire in each coil may be obviated, the wire at each end in each convolution is curved in evolute lines at both sides of what may be termed the 'axial line' of the coil, and at the center or inner ends of said evolute curves or bends the wire is offset and occupies lines which are parallel with the axis of the coil, thus making one side of the coil longer than the other side, so that the short side of any one coil may be passed into and through the long sides of other coils."

Each wire is curved in evolute lines on both sides of the "axial line," and at the center of the evolute curves the wire is offset and occupies lines parallel with the axis of the coil. This description locates the axial line exactly as shown in Fig. 3, where it splits the offsets in the center. The axial line of the Eickemeyer coil divides the coil into two unequal halves, so unequal that the lesser half must have the capacity of passing into and through the larger halves of other coils, for this is the function or mode of operation of this novel coil. The axial line in defendant's coil divides the coil into equal halves, having no such function or mode of operation. It follows, of necessity, that the defendant's coil is outside of the Eickemeyer invention disclosed in claims 1 and 2 of the patent, and therefore cannot infringe these claims.

The consideration of claim 4 remains:

"In a dynamo-electric armature, a winding composed of detachable counterpart coils, each of which is placed in immediate contact with the periphery of the armature core at one side only, substantially as described."

Upon its face, this claim covers every winding for a dynamo-electric machine composed of any form of detachable counterpart coils placed upon the periphery of the armature core in a double-layer winding.

having one side only of each coil in contact with the armature drum.

Claims 1 and 2 cover the novel Eickemeyer coil, whether the winding on the armature core be a single-layer winding or a double-layer winding. Claim 4, in terms, is much broader, and includes coils in which the Eickemeyer invention is absent; in fact all forms of coils, provided they are detachable and counterpart when assembled on the armature core in a particular type of double winding. Two features are embraced in claim 4, namely, a winding composed of detachable counterpart coils, and a method of double-layer winding. This broad claim, according to its literal reading, can only be sustained on one of three grounds: First. That the Eickemeyer invention set forth in the first two claims of the patent covers all forms of drum-armature coils which are detachable and counterpart. If this be true, then this claim may be a valid claim for the Eickemeyer invention when used in the type of winding described. Second. That the Eickemeyer invention disclosed in his patent resides in the conception or discovery of the attachability and counterpartism of armature coils, rather than in the means by which such coils are made detachable and counterpart. If this be true, then this claim may be a valid claim for such coils when placed on the armature core in a particular kind of double-layer winding. Third. That the Eickemeyer patent covers two distinct inventions, (1) a particular form of armature coils, and (2) a new method of double-layer winding. If this be true, this claim may be a valid claim for this method of winding where detachable counterpart coils are employed. This broad claim cannot be sustained on the first ground, because we have already held that the Eickemeyer invention is limited to a coil having the essential structural characteristics set out in claims 1 and 2, and therefore does not cover other detachable counterpart coils in which these essential structural characteristics are absent. This broad claim cannot be sustained on the second ground, because, at the date of the Eickemeyer invention, there was nothing new in the mere conception of detachable counterpart armature coils apart from the means by which such coils are made detachable and counterpart. The desirability of having form-wound coils detachable and counterpart had long been recognized in the art, and the invention of Eickemeyer resides wholly in the means by which these results are attained. This broad claim cannot be sustained on the third ground, because the Eickemeyer patent is not for two distinct inventions,—a novel coil and a new method of double winding,—but is for a novel coil, or a series of such coils, which may be collected on the armature core in several types of winding. That the Eickemeyer patent is limited to the novel coil, and was not intended to cover, as a separate invention, and could not cover, if so intended, the method of double-layer winding described in claim 4, is shown (1) by the patent itself, (2) by the history of the patent in the patent office, and (3) by the prior art. The Eickemeyer patent contains a full, clear, and comprehensive statement of the patentee's invention, and a fairly comprehensive statement of the prior art; and in the consideration of the questions which arise in this case, it is a relief to turn from the conflicting and often insolvable opinions and explanations of experts respecting this patent and other patents in evidence,

to the patent itself for light and guidance. As the meaning of claims 1 and 2 is made perfectly clear from the drawings and specification, so likewise is the meaning of claim 4. The general scheme of the patent is plain. The patentee points out his invention, and states its objects and advantages, and he then proceeds to describe, and illustrate by the drawings, the various arrangements in which his novel coils may be used. These show the capacity or adaptability of the patented coil, by virtue of its construction and mode of operation, for single-layer and double-layer windings. Most of the drawings of the patent illustrate single-layer windings, which the patentee evidently preferred. There are, however, two drawings which illustrate, as an alternative arrangement, the type of double-layer winding mentioned in claim 4. There is, however, no suggestion in the specification that Eickemeyer was the inventor of this method of double-layer winding. It only appears as one of the "arrangements" mentioned in the specification, and the patentee refers to it as follows:

"It is sometimes desirable that the wire at the sides of each coil should be in one layer, superimposed by the wires of another coil, to form additional layers, as illustrated in the coils D² of Figs. 12 and 13. * * * These coils have the same general characteristics of those previously described; but it will be seen that at each side of the core (indicated in dotted lines) each coil at its one side overlaps or overlies one side of another coil, and that at the opposite side this overlapping is reversed, thus placing all of the convolutions in both coils in a uniform position on the armature drum or core. This general arrangement can be carried out to any possibly desired extent."

The patentee states that "it is sometimes desirable" to make such a disposition of the two sides of the coil, and adds, "These coils have the same general characteristics of those previously described." There is no doubt, then, that all the patentee intended to cover by claim 4 was an alternative arrangement of his novel coils in a particular type of double-layer winding; and, if the claim is to be read in connection with the specification, or any significance is to be given to the words "substantially as described," it plainly must be limited to the coils of the patent. The proceedings in the patent office show that Eickemeyer attempted to claim this method of double winding and abandoned it. In the first application for his patent, there appears the following claim:

"7th. In a dynamo-electric armature, a 'winding' in which but one-half of the effective portion is placed in immediate contact with the armature core, substantially as described."

This claim was rejected on reference to the Freeman patent of July 29, 1884, and the Weston patent of June 13, 1882. Both of these patents describe the same method of double-layer winding with hand-wound coils. The prior art shows that this method of winding was well known. Not only is it disclosed in prior patents, but in one or more instances the patents state that it is a well-known method of winding. In the Hering patent of February 2, 1886, this method is mentioned as "a method heretofore employed" and "well known to those skilled in the art." The patentee further says: "Nor do I claim the disposition of the two halves of each coil alternately on the inner and outer layers of wire on the

armature." The Freeman patent of July 29, 1884, and the Weston patent of June 13, 1882, as already stated, exhibit the same method of winding. In the Edison patent of August 22, 1882, there is found a similar type of winding, and the specification says: "The double winding is in effect a single winding with the alternate bars located in an outer layer." In the Jehl patent, dated January 10, 1888, one side of the coil is in one layer, and the other side in another layer. The Vincent English patent of May 18, 1882, describes two layers, with the sides of each coil in different layers. In the Hering, Freeman, and Weston patents, the coils on the armature core were hand-wound, or wound on the armature core by hand, as distinguished from form-wound, or wound on a former and then placed on the armature core. Assuming that Eickemeyer was the first to extend the use of this method to form-wound coils which are detachable and counterpart, this would not give him the right to a monopoly of all form-wound coils which are detachable and counterpart when placed on the armature core in this type of double-layer winding. But the prior art does not stop with the hand-wound coils. In the Jehl, Vincent, and Edison patents, form-wound detachable counterpart coils were arranged in this type of double winding on a disk armature; and the Vincent patent seems also to suggest the same arrangement for a drum armature. Without going further, it is manifest that the method of double-layer winding set out in claim 4 was old in the art.

These references to the patent, the proceedings in the patent office, and the prior art, demonstrate that Eickemeyer is not entitled to a broad claim covering the application to a drum armature of this type of double-layer winding when composed of any form of coils which are detachable and counterpart; and it follows that claim 4 must be held invalid unless it is limited to the detachable counterpart coils of the Eickemeyer patent. Assuming claim 4 to be valid when so limited, the defendant's coil does not infringe this claim, because, as we have already found, it lacks the essential structural characteristics of the Eickemeyer coil.

The complainant's counsel has sought to impress upon the court the importance, value, and broad scope of the Eickemeyer invention. It seems true, notwithstanding the disclosure in the obscure Rapieff British patent of 1879, that Eickemeyer made an important practical improvement in windings for dynamo-electric armatures; but we should not for this reason magnify his invention. Eickemeyer did not invent form-wound coils to take the place of hand-made coils, nor was he the inventor of detachable counterpart form-wound coils; but the most which he accomplished was the production of a form-wound detachable counterpart coil adapted for use on a drum armature, as distinct from a disk or ring armature. But, even as to drum armatures, the prior art admittedly shows form-wound detachable coils which were in a degree counterpart. Eickemeyer specially directed his attention to an improved winding for a bipolar drum armature. In a bipolar machine, the disposition of the ends of the coils is a serious problem, as the two sides of each coil occupy diametrically opposite positions on the periphery

of the drum. This problem he solved by making a coil of such shape that the lesser half of one coil may pass into and through the larger halves of other coils. By this means, the ends were economically disposed of in a minimum space alongside the ends of the armature core, and other advantages obtained which are set out in the patent. In his specification Eickemeyer recognizes the state of the art and the scope of his invention. He says:

"In certain prior multipolar machines the armature coils have been capable of ready attachment to and removal from the armature drum or core, and several of the coils in each armature have been counterparts in size and form, but several different sizes and forms have been necessary in each machine; but I know of no prior multipolar or bipolar machines in which the several armature coils were counterparts in size and form, or any prior bipolar machine which has had coils capable of being applied to or removed from the drum or core without actually unwinding the wire, although, in certain prior machines having bar conductors, the bars could be readily applied to and detached from the drum or core by separating the bars from such disks or other radial conductors. * * * Regardless of the character of the armature with reference to its polar arrangement, I believe it to be broadly new to cover a drum or core with a series of coils which are counterparts in size and contour, and which are therefore interchangeable, one with another, with reference to their positions on the armature drum or core."

The defendant contends that the prior art was in advance of this statement, in that the Alioth German patent of 1885 and the Vincent British patent of 1882 disclose an armature drum with a series of coils which were counterpart and interchangeable. But it is unnecessary to enter into this field of controversy, for, taking Eickemeyer's statement of the prior art and of his invention as correct, we find that all he invented was an armature coil for drum armatures having a certain structural form and a mode of operation by virtue of such form; and, this being true, his invention cannot cover other armature coils of an essentially different form, and with a different mode of operation.

As all the coils used by the defendant (which we assume are like the exhibits in evidence) have equal halves, so that one half of one coil cannot pass into and through the halves of other coils, they do not contain the Eickemeyer invention, and therefore do not infringe either the first, second, or fourth claims of the patent in suit.

The decree of the circuit court is reversed, and the case is remanded to that court, with the direction to dismiss the bill of complaint with costs; and the costs of this court are awarded to the Webster & Dudley Street Railway Company.

In re SEABOLT et al.

(District Court, W. D. North Carolina. February 10, 1902.)

1. EXEMPTIONS—PARTNERSHIP—EXEMPTION FROM PARTNERSHIP PROPERTY.

One of two or more partners may have a portion of the partnership effects set apart to him as his personal exemption with the consent of the other partner or partners.

2. SAME—SURVIVING PARTNER.

A surviving partner can have his personal exemption set apart to him from the partnership effects, if he have the consent of the administrator of the deceased partner.

2. SAME—BANKRUPTCY.

Const. N. C. art. 10, § 1, declares that the personal property of any resident, to the value of \$500, shall be exempt from sale under execution or any other final processes of any court issued for the collection of any debt. *Held*, that a debtor's right to the exemption out of his property accrues to him when his creditors institute proceedings in bankruptcy against him; and, on the appointment of the trustee, the title of the property reserved by law as the exemption does not vest in the trustee, but remains in the debtor awaiting the formality of an appraisal and setting apart.

4. SAME—DEATH OF DEBTOR.

On the death of a debtor, property which would have been set apart to him under his exemption, had he lived, remains a part of his estate, and goes to his administrator.

5. SAME—WIDOW'S ALLOWANCE.

On the death of one against whom proceedings in bankruptcy have been instituted, the federal court has no power to administer the widow's right of allowance for a year, given under the laws of the state, which provide that a widow has the right to a year's support from the stock, crops, and provisions on hand; the matter being one exclusively within the state jurisdiction.

6. HOMESTEAD—UNBORN CHILD—ALLOTMENT.

Const. N. C. art. 10, § 3, declares that a homestead, after the death of the owner, shall be exempt from the payment of any debt during the minority of the children; and by Code N. C. § 514, if the owner of a homestead die without the same being set apart, the widow, or his child or children under the age of 21, may have the same laid off. Section 1328 enacts that a child unborn, but in esse, shall be deemed a person capable of taking any estate. *Held*, that a child in ventre sa mere at the time of its father's death is entitled to have a homestead allotted from the homestead of her father.

7. SAME—DOWER.

Where a widow is entitled to dower, and a child to a homestead right in the same lands, the dower will be assigned so as to include the homestead, and the right of children to enjoy the homestead during their minority must be taken subject to the paramount right of dower.

In Bankruptcy.

Swink & Swink, for creditors.

Glenn, Manly & Hendren, for bankrupts.

BOYD, District Judge. This matter is before the court upon exceptions to the report of Alexander, referee. The facts necessary to an understanding of the points involved are as follows: On the 1st of July, 1901, L. W. Seabolt Company, a partnership composed of L. W. Seabolt and W. M. Mosley, filed a general deed of assignment of partnership property for the payment of debts, reserving, each for himself, the homestead and personal property exemption allowed by the constitution and laws of North Carolina. A petition in involuntary bankruptcy was filed by the creditors against L. W. Seabolt and W. M. Mosley, trading as L. W. Seabolt Company, and L. W. Seabolt and W. M. Mosley individually, on the 25th of July, 1901, and on that day a receiver was appointed of both estates. In the meantime, to wit, on the 15th day of July, 1901, the entire assets of the firm, with the consent and approval of a large majority in amount of the creditors, was converted into cash by a sale, but the said bankrupts had no voice in the proceeding to sell, and did not participate in the same in any way. On the 25th of November, 1901, the said firm and individual partners were adjudged bankrupts, and shortly

thereafter a trustee was appointed for both estates, who qualified and entered upon the performance of his duties. Subsequent to the filing of the petition in bankruptcy, and prior to the adjudication, the partners agreed in writing that each should reserve his personal property exemptions, such as are allowed by the constitution and laws of North Carolina, out of the partnership assets. After the filing of the petition and the agreement as to exemptions referred to, and before the adjudication, L. W. Seabolt died, leaving a widow, and since his death, to wit, on the 27th of October, 1901, his widow gave birth to a child, which is now living. W. M. Mosley has no estate except his interest in the partnership property, and L. W. Seabolt had no estate except his interest in the partnership property and certain real estate mentioned in his individual schedule, amounting to \$2,326.25, subject to a mortgage of \$700, and personal property to the value of \$21.50. At the time of the filing of the petition in bankruptcy the firm and the individual members were insolvent. A demand has been made on the trustee by W. M. Mosley for his personal exemption out of the firm assets, and a demand has also been made by the administrator of Seabolt for an allotment of the personal exemption which he would have been entitled to were he living, to the end that this exemption may be administered as a part of Seabolt's estate, with a view of setting apart the year's allowance to his widow and posthumous child. Demand has also been made in behalf of said child for his homestead out of the individual real estate of the said Seabolt. The administrator of Seabolt was, on the 27th of November, 1901, made a party to the bankruptcy proceedings, and since Seabolt's death Mosley has given his consent again, in writing, that Seabolt's personal exemption may be allotted from the firm assets, and the administrator of Seabolt has given his consent that Mosley may take his exemption also out of the partnership funds. The trustee comes into court and asks to be advised as to the course he should pursue in the premises. The referee reports in favor of the allotment of the personal exemptions to Mosley and to the estate of Seabolt as demanded; also that the widow of Seabolt is entitled to her dower in his individual real property; and that the infant child, born after his death, is entitled to homestead, under the provisions of the North Carolina constitution; and to these conclusions of the referee the creditors have excepted.

The personal exemption in North Carolina is by virtue of section 1 of article 10 of the constitution of the state, which reads as follows:

"The personal property of any resident of the state, to the value of five hundred dollars, to be selected by such resident, shall be and is hereby exempted from sale under execution or other final process of any court issued for the collection of any debt."

There can be no question about the right of Mosley to have allotted to him from the partnership effects his personal property exemption to the amount of \$500, for it is held in this state that one of two or more partners can have a portion of the partnership effects set apart to him as his personal exemption, with the consent of the other partner or partners (*Burns v. Harris*, 67 N. C. 140); and in the same case it is held that the partnership creditors cannot object to this exemption, for they no more have a lien on partnership effects for their debts

than creditors of an individual have on his effects. The facts in this case show that after the proceeding in bankruptcy was begun, and before Seabolt's death, he and Mosley filed their consent in writing, each that the other might have his personal exemption allotted from the partnership property; and, if this were not true, the facts show that since the death of Seabolt his administrator has filed his consent that Mosley, the surviving partner, should have allotted to him his personal exemption from the partnership assets. A surviving partner can have his personal exemption from partnership effects with the consent of the administrator of the deceased partner. *Richardson v. Redd*, 118 N. C. 677, 24 S. E. 420.

The question then remaining in this regard is whether Seabolt having died after the proceedings in bankruptcy were commenced, and after the consent of the partners was had for exemptions from the partnership effects, the allotment which he would have taken had he lived vests in his administrator. It is my opinion that it does. A creditor pursuing a debtor by execution or other legal proceeding, for the purpose of subjecting his property to the payment of his debt, does not acquire a lien upon that part of the debtor's personalty which is exempted by the law. The exemption in North Carolina is in favor of a debtor against execution for debt.

The purpose of the law undoubtedly is to save the exempted property from sale at the hands of creditors, for the benefit of the debtor and his family. This is no doubt the humane object which the framers of our constitution and the makers of our exemption laws had in view. A statute of exemption is properly a remedial statute, evidently intended to prevent families from being stripped of their last means of support, and left to suffer, or cast as a burden upon the public, and to rescue them from the hands of unfeeling creditors. *Leavitt v. Metcalf*, 19 Am. Dec. 718. It would be a strange construction of the law, therefore, to hold that, whilst the exemption would obtain against what is known as an execution, or other final process issued for the collection of a debt, it could still be swept away by another proceeding on the part of creditors, and the debtor and his family thus be deprived of its benefits. The right to the exemption accrued to the debtor when the creditors instituted proceedings in bankruptcy to subject his property to the payment of his debts, and upon the appointment of a trustee in bankruptcy the title of the property reserved by the law as the debtor's exemption did not vest in such trustee, but remained in the debtor, awaiting the mere legal formality of having it appraised and set apart to him. This being the case, the exempted property which would have been set apart and allotted to Seabolt had he lived remained a part of his estate at his death, and belongs to his administrator, and not to the trustee in bankruptcy; and the only duty with respect thereto which rests upon the trustee is, upon application of the administrator, to proceed as in other cases to have it appraised and set apart. The exceptions of the creditors are therefore overruled, and the report and findings of the referee, in respect to the personal exemptions of both Mosley and the estate of Seabolt, are confirmed.

No difficulty can arise as to the manner of making the appraise-

ment and allotting the personal exemptions in this case; the property of the firm having been sold, and the proceeds thereof in cash, more than sufficient to cover the amount of both exemptions, being now in the hands of the trustee. Under the laws of North Carolina, a debtor is allowed a personal exemption to the amount of \$500, and he can take this in articles of personal property, or have it allotted in money, provided the money is on hand. The cash being on hand in this instance, there is nothing left for the trustee to do except to pay it over to the parties entitled; that is, \$500 to W. M. Mosley, and \$500 to the administrator of Seabolt.

So far as the right of allowance for year's support to the widow is concerned, this court has no power to administer it, it being exclusively within the state jurisdiction. Under the laws of North Carolina, upon the death of a husband a surviving widow has the right to have set apart to her from the crop, stock, and provisions on hand a year's support, not to exceed \$300 in amount, and an additional amount of \$100 for each member of her family under 14 years of age. In the absence of crop, stock, and provisions, the administrator is authorized to pay such allowance for year's support from the personal assets of the estate which may come to his hands. Therefore, when the administrator of Seabolt has in hand the money paid to him by the trustee for the personal exemption, so much of it as is necessary can be set apart as a year's support to the widow by a proceeding in the state court under the statute providing for such cases.

We come now to consider the right of homestead in the real property of which Seabolt died seised. He left surviving him his widow and a female child in ventre sa mere, which since and shortly after his death has been born, and is now living. The following are the provisions of the constitution of North Carolina relative to homestead (section 2, art. 10):

"Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwellings and buildings used thereon, owned and occupied by any resident of this state and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt."

Section 3, art. 10:

"The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children or any one of them."

And there is a further provision that if the owner of a homestead die, leaving a widow and no children, the rents and profits of such homestead shall inure to the benefit of the widow during her widowhood, unless she be the owner of a homestead in her own right. The only point involved here is as to whether Lena W. Seabolt, the posthumous child of L. W. Seabolt, deceased, is entitled to have a homestead allotted from the lands of her father, and to hold the same exempt from the payment of his debts during her minority.

Section 514 of the Code of North Carolina is as follows:

"If any person entitled to a homestead exemption die without having had the same set apart, his widow, if he leave no child, or his child or

children under the age of twenty-one years, if he leave such, may proceed to have said homestead exemption laid off according to sections 511 and 512."

And it is held in *Lambert v. Kinnery*, 74 N. C. 348, that:

"The title to the homestead is vested in the owner by the constitution of the state, and the allotment by the sheriff is not necessary to vest the title thereto. The only object of the allotment is to ascertain if there be an excess over the one thousand dollars, which is subject to execution."

The law is well settled, therefore, that, although the owner of a homestead or a person entitled thereto die without having the same allotted in his lifetime, the same can be allotted at the instance of his minor child or children, if he leave such, or, in the absence of minor children, at the instance of his widow. The contention of the creditors in this case is that the infant *Lena W. Seabolt* is not entitled to the homestead of her father by reason of the fact that she was not born at the time of his death, and that, therefore, the right could not accrue to her. The court cannot sustain this view. "A child in ventre sa mere is a child while yet unborn. From the time of conception the infant is in esse for the purpose of taking any estate which is for his interest, whether by descent, devise, or under the statute of distributions." 10 Am. & Eng. Enc. Law (1st Ed.) p. 624. The early English doctrine that an unborn child is not to be regarded as in esse has been long ago exploded, and the decisions of the courts now are uniformly to the effect that children in ventre sa mere are included within the meaning of the word "children." This principle is so well established and so fully understood by the profession that it is not deemed necessary to cite authorities to support it. As bearing upon this point, however, we may call attention to section 1328 of the North Carolina Code, which reads as follows: "An infant unborn but in esse shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born;" and also cite *Heath v. Heath*, 114 N. C. 547, 19 S. E. 155.

In the argument before the court, the counsel for the creditors did not appear to seriously insist that the widow was not entitled to dower in the lands of her deceased husband. By the statute law of North Carolina widows are endowed as at common law, and every married woman, upon the death of her husband intestate, or who dissents from his will, is entitled to an estate for her life in one-third in value of all the lands whereof her husband was seised and possessed at any time during the coverture, in which one-third part shall be included the dwelling house in which her husband usually resided, together with other buildings thereunto belonging or appertaining; and, further, that the dower of a widow shall not be subject to the payment of debts due from the estate of her husband during the term of her life. It is true that in a case like this the dower and homestead will include, partly if not wholly, the same premises; but Chief Justice Pearson, in *Watts v. Leggett*, 66 N. C. 197, has clearly defined the relative rights of a widow having a dower and an infant child entitled to the benefit of homestead at the same time, in the same lands. He says:

"Thus the dower will be assigned so as to include the homestead or a part thereof, and the right of dower having attached at the time of marriage

would have been paramount, and the right of the children to enjoy the homestead during the minority of any one of them must have been taken subject to this paramount right of dower, the effect being to postpone the enjoyment of the children as to so much of the homestead as is covered by the dower until the death of the widow, leaving them, of course, to the present enjoyment of such part of the homestead and the land appertaining thereto as is not covered by the dower."

It is therefore ordered by the court that the exceptions be overruled, not only as to the right of Mosley and the estate of Seabolt to have their personal exemptions, but also as to the rights of the widow to dower, and the infant child to a homestead, and the report of the referee in these respects is hereby confirmed, and judgment rendered accordingly.

The clerk will tax the costs of this proceeding against the excepting creditors.

THE LAKME.

THE TYEE.

THE QUEEN ELIZABETH.

(District Court, D. Washington. February 3, 1902.)

COLLISION—STEAM VESSELS MEETING—NEGLIGENT NAVIGATION.

The steamship Queen Elizabeth, in tow of the tug Tyee, was passing up Puget Sound to the southward from Port Townsend, near the west shore, at about 4 in the morning, when they met the steam schooner Lakme, going out from Tacoma, which came in collision with the Elizabeth. The tug and schooner saw each other's lights when three or four miles apart, and were then nearly head on. Later the Tyee signaled her intention to pass starboard to starboard, which was acceded to, and she immediately starboarded her helm. *Held*, under the evidence, that she was justified in choosing the outside course in passing with her tow, owing to the nearness to the shore, and that neither she nor the Elizabeth were in fault, but that the fault for the collision rested entirely upon the Lakme, for being in charge at the time of an unlicensed and incompetent mate and too close in shore, for porting her helm, instead of starboarding, after answering the signal, and changing only when the vessels were in close proximity, and in failing to reverse at once when the danger of collision became apparent.

In Admiralty. Cross actions for collision.

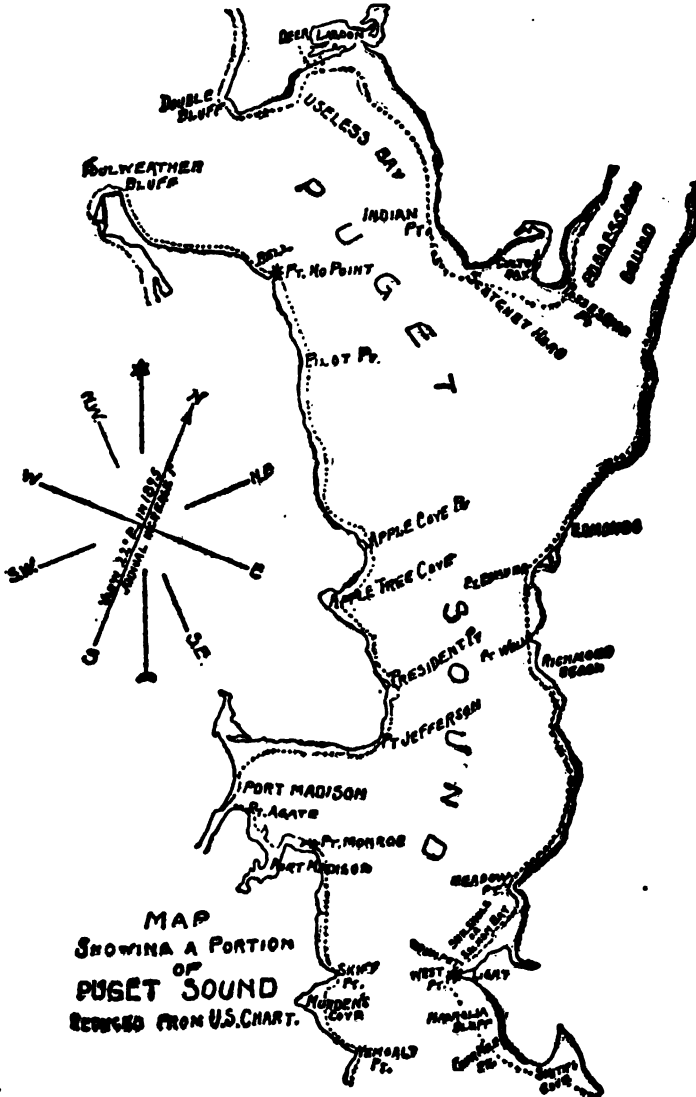
Preston, Carr & Gilman, for libellant.

Herbert S. Griggs and W. A. Peters, for cross libellant.
Struve, Allen, Hughes, & McMicken, for respondent.

HANFORD, District Judge. For convenience in designating the different parties to these suits, the Queen Elizabeth Company, owner of the ship Queen Elizabeth, will be referred to as the "libellant"; Charles Nelson, owner of the steam schooner Lakme, will be referred to as the "cross libellant"; and the Puget Sound Tugboat Company, owner of the steam tug Tyee, will be referred to as the "respondent." The first suit was commenced by the libellant against the Lakme to recover damages sustained in a collision between the Lakme and the British ship Queen Elizabeth, which occurred between 3 and 4 o'clock on the morning of April 14, 1900, in the vicinity of Point No Point lighthouse, on the west side of Puget Sound;

the Lakme being at the time bound from Tacoma to San Francisco, and the Queen Elizabeth being towed by the steam tug Tyee from Port Townsend to Port Blakely. The cross libellant charges responsibility for the collision upon the Tyee, and claims damages for the injury sustained by the Lakme.

In order that the full effect of some of the testimony introduced in behalf of the cross libellant may be appreciated, a map showing the contour of the shores of Puget Sound from Foulweather Bluff to a point south of West Point lighthouse is here inserted.



The night was clear, and each of the vessels carried all the lights required, though there is a dispute as to whether the colored lights on the Lakme were arranged properly, so as to show from dead ahead to two points abaft the beam, as the law requires. It is admitted, however, that the vessels were seen approaching each other by the officers in charge of both the Tyee and the Lakme, when they were distant from each other 3 or 4 miles; but the parties differ with respect to the exact location of the vessels when their lights became visible to each other, and at the time of the collision. All agree, however, that the collision occurred south of Point No Point lighthouse, a few minutes after the Tyee and the Queen Elizabeth had passed that point. The speed of the Lakme was $7\frac{1}{2}$ miles per hour, and the Tyee, with her tow, was making 8 or 9 miles per hour. The Lakme was in charge of her second mate, her captain and the first mate being asleep, until the mast head lights of the Tyee were seen, when the captain was called and told that they were near Point No Point; but he was not informed that the other vessels were seen ahead, and he did not come out on the bridge until it was too late to avoid the collision. The second mate of the Lakme did not have a license or certificate entitling him to be employed as an officer of a steam vessel, either as master, pilot, or mate, and there was not at that time any licensed pilot on duty. The facts recited so far are either admitted or established by uncontradicted evidence. The particular circumstances and movements of the vessels immediately preceding the collision are stated in the evidence of the officer who was in charge of the Tyee as follows:

The Tyee took the Queen Elizabeth in tow, and started from Port Townsend southward, between 1 o'clock and 2 o'clock a. m., and reached Point No Point in about two hours. As she was coming around Point No Point, the lights of the Lakme were seen for the first time. The Tyee and the ship in tow made a curve around Point No Point until their position was approximately one mile from the west shore of Puget Sound, and then took a straight course, steering southeast. When the Tyee's helm came to steady on this course, the Lakme appeared to be straight ahead, but steering an irregular course, so that all her lights were visible at times, and then the red light and green light alternately disappeared. Four minutes before the collision, when the steamers were about one mile apart, and when the Lakme was showing her green light, the Tyee signaled, giving two blasts of her whistle, indicating her purpose to pass on the starboard side. This was immediately answered by two blasts from the Lakme. The pilot of the Tyee then put her helm hard to starboard and she swung to port. At the same time the Lakme, instead of turning to port promptly, as the signals indicated that she should do, swung around to starboard so that she showed her red light, and came on directly in the way of the other vessels, but steadied up when she came near to the Tyee, when the witness called out: "Are you crazy or what? Starboard your helm! Starboard your helm!" The two steamers passed each other starboard to starboard; the Lakme going astern of the Tyee. Her stem caught the steel towline, and she then swung to port, and went

slipping along the towline until she struck the Queen Elizabeth on the port side of her bow. The towline parted just at the time of the collision.

In the testimony of this officer, he gives as the reason for sounding two blasts of the whistle for a passing signal that they were near to shore on the right-hand side, and, the Tyee having the burden of a ship in tow, it was safer for her to pass the other steamer on her starboard side, because at that place the tide sets in toward the shore. The testimony of the pilot who was in charge of the Tyee, above narrated, is corroborated by the quartermaster, who was in the pilot house steering the Tyee. It is consistent with all the evidence on the part of the libellant and of the respondent, and it harmonizes with the undisputed facts that the only signals given from one steamer to the other were two blasts of the Tyee's whistle, answered by two blasts from the Lakme, and that the Lakme did pass on the starboard side of the Tyee, and her port bow struck the port bow of the Queen Elizabeth.

On behalf of the cross libellant, the captain of the Lakme testified that when he came on the bridge, after hearing the two blasts from the Tyee, and the answer given by the Lakme, the Tyee was just crossing the bow of the Lakme. The first thing he did was to inquire as to the position of the helm, and was told that it was hard a-starboard, to which he responded, "Keep her there." The Lakme was then turning slowly to port, and the Queen Elizabeth was still off her port bow, and, seeing that a collision was inevitable, he ordered the engines stopped and the helm hard a-port. He did not order the engines reversed, because the propeller was liable to get foul of the towline. As to these matters, I can find no conflict between the testimony given by the captain and the testimony for the other parties. There appears to have been time enough to change the wheel from hard a-port to hard a-starboard, while the captain was coming from his cabin. If the Lakme had been swinging to starboard on a port helm, that movement would place her so that the Queen Elizabeth would appear to be off her port bow, and the fact that she was turning to port slowly with her helm hard a-starboard corroborates the testimony tending to prove that she was not given her starboard helm until the two steamers were very close to each other. The captain does, however, give his estimate of the distances from the place where the vessels met to Point No Point, and to the west shore opposite, which, if accurate, would locate the place of the collision one mile, or a little more than a mile, further from the shore, and one mile, or a little more than one mile, nearer to Point No Point, than indicated by the testimony of the witnesses who were on the Tyee; and the difference in the location would tend to support the contention of the cross libellant that the Tyee was in fault for giving two blasts of her whistle and going to port, instead of observing the general rule of the road, requiring vessels meeting end on, or nearly so, to turn to the right and pass each other port to port. But, considering the fact that the captain had no time to study the situation after coming on deck, and that his mind must have been fully occupied with other things, it is not probable that he could

have made an estimate of the distances with as much accuracy as could the pilot of the Tyee, who knew the route, had time for observation before there was any occasion for excitement, knew the speed his vessel was making, took notice of her compass, and ordered her courses.

The first mate of the Lakme was asleep before the collision occurred. Both sides called him as a witness; but, as I am not obliged to decide the disputed question with respect to the shape and construction of the screens or boxes in which the Lakme's colored lights were placed, I do not regard his evidence as being of any importance. The man who steered the Lakme has not been called as a witness. So the case for the cross libellant depends mainly upon the testimony of her second mate, who was in charge of the deck, and the man who was on duty as lookout; and I regard the testimony of both of these witnesses as being entirely unworthy of belief. By way of illustration, the lookout, upon his examination in chief, conducted by the proctor for the cross libellant, testified as follows:

"Q. How long after you reported the light on the port bow was any signal given by any ship? A. A few minutes after he gave us two whistles. Q. Who gave? A. The tugboat gave us two whistles first. Q. What was done then? A. We answered the two whistles back again, and turned the wheel over. Q. What way was the wheel turned when the whistle was given? A. I was steering straight. After the whistle came, he turned to the port. That called for hard a-starboard. It was turned to the port. Q. You put your helm hard a-starboard? A. Hard a-port. Q. When the two signals came? A. When the two signals came. * * * Q. After the tug blew her two whistles, did she make any change in her course? A. Not before we came close to them. We made the change. Q. What change did she make? A. She turned the wheel to port, too. Q. What way did she come? A. She came to cross our starboard bow. Q. She came to cross your starboard bow? A. Yes."

In answering other questions on his direct examination, this witness also testified that the order given by the second mate to the man at the wheel, after the signals had been given, was "Hard a-starboard!" and that the order was obeyed promptly; and on cross-examination, answering a direct interrogatory, he made this statement: "Yes, sir; our wheel was put hard to starboard." These contradictory statements make it impossible to ascertain from the testimony of this witness whether the Lakme's wheel was first turned to starboard, or to port, after the signals were exchanged. I would not reject his evidence for a mere inadvertent misstatement; but, taken as a whole, it is confused and unsatisfactory.

The Lakme left Tacoma after 9:30 p. m., the evening preceding the collision, and her log shows that she passed West Point lighthouse at 1:40 a. m. In his deposition, the second mate says, in effect, that he was the officer in charge of the deck from midnight until the time of the collision; that he made an entry in the log of the time of passing each point; that the speed of the Lakme was 7 miles or 10 miles an hour; that at 12 o'clock, when he went on deck, she must have been 100 miles from Tacoma; that he did not know what courses were steered after passing West Point, except that his last course was west half north; that she was kept in the middle of the

channel; that he first noticed the Tyee and the Queen Elizabeth when they were coming around Point No Point, 3 or 4 miles ahead of the Lakme; that he then saw only the Tyee's masthead lights; that he did not see her starboard light until she crossed the Lakme's bow; that, after rounding the point, the Tyee was two points off the port bow of the Lakme, and showing her red light. I now quote from his deposition the following questions and answers:

"Q. What, if anything, did you do with reference to steering your own vessel at that time? A. We were steering clear. I did not do anything at that time, until we got a little closer. She was still on our port bow, when I ported our helm to give myself a little more sea room. Q. That would throw you further off to starboard? A. Yes, sir; but, even if I had kept on my course, we would have gone perfectly clear. When she got close to us, she was about a point on our port bow. * * * Q. What happened after that with reference to signaling? A. There was no signaling at all. He was coming on our port bow. I had my hand up to pull the whistle, when he blew two, and, of course, I answered him with two. I said, 'Hard a-starboard!' The man at the wheel put the wheel hard a-starboard. Q. How long was that after you got back on the bridge and had called the captain before those signals were passed? A. It may have been between three and five minutes. It may have been more, and it may have been less. Q. It may have been less than what? Less than three minutes? A. I could not exactly say. Q. Do you know whether or not you were there any appreciable time? A. I was there, walking up and down the bridge, I should judge, for about five minutes before the captain came up. Q. And during that five minutes what was the course of the two vessels? A. We were going about west half north, I should judge, or west quarter north. I would not be sure."

Then, answering further inquiries as to the distance of the Lakme's position out from shore at the time the signals were given, he made this statement:

"We were right in the center of the stream. We were just coming a mid-way course down the sound. Q. Did you keep that position up to the time that you ported your helm to give him more room? A. Yes, sir."

By referring to the chart, it will be seen that, if the Lakme was anywhere near the middle of the sound, three or four miles south of Point No Point, and steering a course west a half north, or west a quarter north, she would have been heading directly for the west shore, and any steamer showing a red light off her port bow would have been clear to the south, and standing on a course which would have made a collision impossible, unless one of the steamers had turned and chased the other. The statement that the Lakme had traveled 100 miles in $2\frac{1}{2}$ hours also shows the witness to be stupid and reckless. On cross-examination, this officer reaffirmed the statement that, after the tug rounded the point and straightened up on a southerly course, the Lakme was heading west half north, and later, on cross-examination, other questions were propounded and answered as follows:

"Q. How far were you apart when you first ported your helm? A. We must have been probably a mile. Q. Then you changed from west half north to what course? A. West by south, just to give myself a little more sea room. Q. You changed from west half north to west by south? A. Just about that. Q. How could you change from west half north to west by south with a ported helm? A. With a starboard helm. Q. That is not what I asked you. You said you ported your helm to give yourself

more sea room. A. Yes, sir. Q. And changed from west half north to west by south? A. Something about that. Q. With the port helm, and then the tug and Lakme were about a mile apart when you ported your helm? A. Yes, sir."

He also testified, on cross-examination, that, when the Tyee blew two whistles, he supposed that he was obliged to answer with two. The testimony of this witness in its entirety shows the man to be ignorant of the duties of an officer of a steam vessel, and entirely incapable of giving an intelligent report of the manner in which he handled the steamer preceding the collision, and I find no trustworthy evidence in the case with respect to the material facts to be weighed against the testimony of the pilot and quartermaster of the Tyee.

In the light of all the evidence, I find the following facts to be fully proven: The Lakme, before meeting the other vessels, was out of the proper course for a vessel going north, being too far over toward the west shore, instead of being on the right-hand side of the stream. She was steered negligently. Her wheel was turned the wrong way after answering and assenting to the passing signals, and without any excuse she failed to stop and reverse her engines, when she came into dangerous proximity to the other vessels, until it was too late to avoid striking the Queen Elizabeth. I consider that the evidence proves the Lakme to have been in fault in the following particulars: (1) For being under way without being in charge of a licensed pilot. (2) For approaching Point No Point from the southward, in the way of vessels going in the opposite direction, without any necessity or reason for being so far over toward the west shore. (3) For steering an irregular course after the lights of the Tyee and her tow had come into view ahead of her. (4) For porting her helm when she was distant from the Tyee one mile or less, without having previously given the proper signals indicating her purpose to change her course to starboard. (5) For being too slow in putting her helm hard a-starboard, after answering and assenting to the signal of the Tyee, indicating that the steamers were to pass each other starboard to starboard. (6) For not stopping and reversing her engines promptly when the danger of a collision became apparent. In view of the situation shown, I consider that the Tyee had a right to choose the course to be taken to avoid a collision, and was justified in signaling to pass starboard to starboard, and in changing her course in accordance with that signal after it had been assented to by the Lakme. The Tyee, therefore, did not commit any error which contributed to cause the collision, and the Queen Elizabeth is also shown by the evidence to be free from any fault in the matter.

The evidence proves that the damages to the Queen Elizabeth, including demurrage for her delay while necessary repairs were being made, amounts to the sum of \$4,500. A decree will be entered in favor of the libellant for said amount, with legal interest from the 1st day of May, 1901, and costs.

THE THOMAS P. SHELDON.

THE S. L. WATSON.

(District Court, D. Rhode Island. January 24, 1902.)

Nos. 1060, 1062.

1. CONTRACTS—BREACH—RULE REQUIRING DILIGENCE TO AVOID OR LESSEN DAMAGE.

The rule which requires reasonable diligence on the part of one injured by the breach of a contract by the other party to reduce the resulting damages should not be invoked by the party in fault as the basis for a critical examination of the conduct of the injured party, nor is he entitled to a reduction of the damages because he is able to show on afterthought that different action would have been more advantageous to him. Reasonably prudent action only is required.

2. MARITIME LIENS—BREACH OF CHARTER.

The lien arising out of a contract of affreightment is created by the law, and is mutual and reciprocal between ship and cargo, attaching only when the cargo has been delivered on board or into the custody of the master, and being discharged when the cargo is delivered at its destination and the freight paid. Hence there is no lien in rem on a vessel for breach of a charter which is wholly executory, or which has been partly performed by the carriage and delivery of one or more, but not all, of the cargoes contracted to be carried.

3. ADMIRALTY—JOINDER OF CAUSES IN REM AND IN PERSONAM.

There seems to be no fixed rule of admiralty practice, and no reason on general principles, which prevents the joinder in one libel of causes of action in rem and in personam, when such joinder will promote the cause of justice, and conduce to the convenience of the parties and the court, and is not governed by the admiralty rules of the supreme court.

In Admiralty. Suits for breach of charter party.

Carver & Blodgett, for libellant.

F. Dodge and H. Putnam, for claimants.

BROWN, District Judge. These libels are for breach of contract contained in a charter party dated July 26, 1899, providing for the carriage of five full cargoes of coal from Lambert's Point, Norfolk, Va., to Providence, R. I., by two barges,—the Thomas P. Sheldon and the S. L. Watson. The contract states: "It is understood that the above five cargoes are to be delivered in Providence previous to October 1st, 1899." In part execution of this contract, one cargo was carried by the Sheldon, and freight was paid. The libellant seeks damages for failure of the barges to carry the remaining four cargoes.

The first question relates to the authority of Stanwood, as agent, to sign the charter. I find as a matter of fact that on July 26th—the date of the charter—Stanwood was general agent of these barges, and was duly authorized to execute the charter. The libelee contends that his authority did not begin until August 1st, and was limited to making charters for single trips. I find against it both as to the date of the beginning of his authority and as to its scope. The testimony as to a limitation upon the number of voyages the agent could contract for was not satisfactory or convincing. But whether Stanwood's authority originated in the document of July 24th, or in previous arrangements, or on August 1st, does not seem to be of vital consequence. His authority as general agent extended over the period from August 1st to October 1st, within which the con-

templated voyages were to be made, and within which the agent, with full authority, entered upon the performance of the contract.

The next question is whether one or two cargoes were delivered under the contract. I find, as a fact, that but one cargo was delivered,—1,037 tons by the Sheldon. There is positive evidence that the cargo of 907 tons was carried by the Watson in pursuance of a previous oral charter. The testimony of Slater, agent of the Providence Gas Company, shows clearly that two distinct contracts were made for coal at different rates of freight. It is argued for the libelee that the Virginia Iron, Coal & Coke Company had existing engagements under two contracts for the delivery of 6,300 tons of coal to the Providence Gas Company; that, as the charter provides for five trips of about 1,250 tons each, this would have been an adequate tonnage to fulfil both contracts; and therefore that the oral charter, if one was made, was merged in the written charter. But this inference is not strong enough to overcome positive testimony to the contrary. It is entirely reasonable to suppose that the five-trip charter was simply for the conveyance of the 5,000 tons of coal purchased by the Providence Gas Company on its second contract. Though the charter states that the Sheldon and the Watson have a capacity of "about 1,250 tons each," this was manifestly much more than the actual carrying capacity of either of the barges. The cargo actually delivered by the Watson on the previous contract was 907 tons; that of the Sheldon, 1,037 tons. Gilchrist himself testifies that the capacity of the Watson was from 1,000 to 1,100 tons; and of the Sheldon, 1,100 tons. It is apparent, therefore, that five trips would have been insufficient, by more than 800 tons, to complete the carriage of the coal on both contracts. It is much more probable that five voyages were contracted for to carry the 5,000 tons than that they were contracted for to carry 6,300 tons. There is a strong preponderance of evidence to the effect that an oral charter was made which had no relation to the 5,000 tons, and that this charter was not merged in the written charter. Though this matter has been argued at some length, it is difficult to see what possible advantage could result to the libelee by adopting its argument. If, on its theory, we increase the amount delivered, we must consistently apply the same theory, and increase by a larger amount the quantity which it is bound to deliver. If we assume that the owner agreed to carry 6,250 tons of coal in five voyages, and that it has delivered two cargoes,—one of 907 tons, and the other of 1,037 tons,—amounting to 1,944 tons, it has, according to its argument, an undelivered remainder of 4,306 tons. The libelant claims that it is in default only to the amount of 4,024 tons.

The next matter to consider is the contention that the libelant prevented performance by its unreadiness to deliver coal. It is satisfactorily proved by the evidence of Wilmer that throughout the entire period from August 1st to October 1st, with the exception hereafter to be mentioned, there was an ample supply of coal on hand to furnish full cargoes to either the Watson or the Sheldon. Nothing was done by the libelee until the barge Georger reported on September 18th, being tendered as a substitute. Her turn did not arrive, however, until after October 1st, the date specified in the con-

tract for the completion of the delivery of the five cargoes. The owner was then already in default, and in no condition to take technical advantage of breaches by the charterer after that date. While there was a partial shortage of coal from the 29th of September to the 4th of October, this would not have resulted in any special delay, —probably not more than two or three days; nor did it absolve the owner from the consequences of its negligence in not earlier reporting vessels for the remaining four cargoes. Upon the evidence, the charterer was ready and willing to make substantial performance upon its part, and the withdrawal of the *Georger* was not justified under the circumstances existing, and renders her tender of no avail.

It is contended that the detention of the *Georger* was due to the preference of steamers arriving for bunker coal; but the evidence as to the rule of the port that steam vessels are entitled to this preference is not contradicted, and is not met merely by characterizing such preference as extraordinary. The owners were chargeable with knowledge of the usage of the port. *Randall v. Sprague*, 21 C. C. A. 334, 74 Fed. 247.

I am of the opinion that there is no evidence to sustain the contention that the barge *Page* was tendered in substitution.

I find that the owner, the Lake Shore Transit Company, is liable in damages for its breach of contract to the amount of the increased freight for the substituted tonnage, to wit, 95 cents per ton on 4,024 tons, amounting to \$3,822.80; and also to the amount of \$985.81, paid by the libellant for demurrage, not due to its fault, on the substituted vessels; making a total of \$4,808.61, with interest from the date of the filing of the libel.

I see no reason for reducing the damages by the application of the rule of *Warren v. Stoddart*, 105 U. S. 230, 26 L. Ed. 1117, which requires reasonable effort to reduce damages. The delay in procuring other vessels, caused by negotiations and efforts to induce the libelee to perform its legal obligation, was, under the circumstances, both reasonable and prudent. Furthermore, it was necessary for the libellant to modify its contract with the gas company in consequence of the inability to get barges. It proceeded with reasonable diligence to do this, and to get the best terms for sailing vessels. The rule of *Warren v. Stoddart* requires reasonable conduct on the part of one whose legal rights have been violated; but it should not be invoked by a defendant as a basis for critical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which were wiser or more advantageous to the defendant. Reasonably prudent action is required; not that action which the defendant, upon afterthought, may be able to show would have been more advantageous to him.

It is next necessary to consider the form of the libels, and the decree to be made upon each. The libel against the Sheldon is solely in rem. She carried one cargo under the contract; but no other cargo was set apart for her by the charterer, or delivered to her, or came under the control of the master. The *Watson* carried no cargo under the contract; nor was any cargo set apart for her, or deliv-

ered to her, or to the control of her master. So far as the libellant is proceeding in rem, a decision that the Sheldon is not liable in rem necessarily involves a decision that the Watson is not liable in rem, and renders it unnecessary to consider objections to a lien upon the Watson which are inapplicable in the case of the Sheldon. According to the weight of authority, a vessel is not liable in rem for the breach of a contract of charter party wholly executory. The *Monte A.* (D. C.) 12 Fed. 331, and *The Ira Chaffee* (D. C.) 2 Fed. 401, contain learned discussions of the authorities upon this subject. See, also, *The General Sheridan*, 2 Ben. 294, Fed. Cas. No. 5,319; *The William Fletcher*, 8 Ben. 537, Fed. Cas. No. 17,692; *The Asa Eldridge* (D. C.) 8 Fed. 720; *The City of Baton Rouge* (C. C.) 19 Fed. 461; *The Missouri* (D. C.) 30 Fed. 384; *The Eugene* (D. C.) 83 Fed. 222; *Id.*, 31 C. C. A. 345, 87 Fed. 1001; *The Bella* (D. C.) 91 Fed. 540; *The Ripon City*, 42 C. C. A. 247, 102 Fed. 176, 180; *The Universe* (D. C.) 108 Fed. 968. The libellant contends, however, that, if any cargo has been taken under the contract of affreightment, the right in rem attaches for full performance. If there is, in this case, a lien in rem, it is difficult to see upon what principle we are to base it. The lien does not arise from the contract itself, but is created by the law upon a delivery of a cargo to the vessel or to the control of the master. What is the extent and character of the lien created by the law upon such delivery?

In *The Freeman v. Buckingham*, 18 How. 182, 188, 15 L. Ed. 341, 344, it was said:

"Under the maritime law of the United States the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo until some lawful contract of affreightment is made, and a cargo shipped under it."

In *Vandewater v. Mills*, 19 How. 82, 90, 15 L. Ed. 554, 556, it was said:

"Now, it is a doctrine not to be found in any treatise on maritime law that every contract by the owner or master of a vessel for the future employment of it hypothecates the vessel for its performance. This lien or privilege is founded on the rule of maritime law as stated by Cleirac, 597: '*Le batel est obligée à la marchandise et la marchandise au batel.*' The obligation is mutual and reciprocal."

In *The Lady Franklin*, 8 Wall. 325, 329, 19 L. Ed. 455, 457, it was said:

"The doctrine that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board or in the custody of the master, has been so often discussed, and so long settled, that it would be useless labor to restate it, or the principles which lie at its foundation."

In *The Keokuk*, 9 Wall. 517, 519, 19 L. Ed. 744, 745, it was said:

"It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master, or some one authorized to receive it."

It seems very clear from these authorities that the contract itself creates no lien, and that the lien which is created by the law is mutual and reciprocal. The parties to this contract undoubtedly had mutual

and reciprocal rights of lien during the carriage of the first cargo, but the lien of the ship on cargo was discharged by the payment of freight and by delivery to the consignee. The contention that the lien in rem now exists cannot be based upon the principle that the ship is pledged to the cargo and the cargo to the ship; and, if there is a lien, it is unilateral, and not mutual or reciprocal. The libellant argues that we are to infer that part performance of an executory contract for the carriage of a number of cargoes creates a lien from the following language in *The Freeman v. Buckingham*, 18 How. 182, 188, 15 L. Ed. 341, 344:

"But the law creates no lien on a vessel as a security for the performance of a contract to transport cargo until some lawful contract of affreightment is made, and a cargo shipped under it."

But the preceding language, stating the principle that the vessel is bound to the cargo and the cargo to the vessel, as well as the other extracts from decisions of the supreme court, declares so clearly the rule that the lien created is a mutual and reciprocal lien as to exclude the view that a shipment of a single cargo, to which the shipowner's lien is limited in respect to a single voyage, creates in favor of the cargo owner a unilateral lien upon the ship for the performance of the contract to carry other cargoes. The lien of the cargo owner upon the ship must, therefore, be limited by the corresponding and reciprocal rights of the ship owner upon the cargo.

The libellant contends that the courts have held that, where any cargo has been taken under the contract of affreightment, the right in rem attaches for the full performance of the contract, "thereby brushing aside the theory of reciprocal rights only, and admitting a full right in rem wherever the contract has become in any part executed." This is practically a concession that, unless the theory of reciprocal rights can be brushed aside, and unless we are to treat these repeated expressions of the supreme court as mere dicta, we must deny the libellant's right to proceed in rem. The libellant has presented no authority which states any principle upon which a part performance which does not create a mutual and reciprocal lien can create a unilateral lien. Part performance gives no further validity to the contract, since the contract is valid irrespective of performance.

The libelee cites the case of *The G. L. Rosenthal* (D. C.) 57 Fed. 254, and *The Oscoda* (D. C.) 66 Fed. 347, and points out that these cases are distinguishable from the present case by the fact that they were upon towage contracts, and that by part performance a reciprocal lien between the tug and the tow had been established. In the present case no lien ever arose in favor of the vessel in respect to the four cargoes, for noncarriage of which the libel is brought.

While it may be considered a hardship that the charterer should have no remedy against the vessel for an abandonment after she had entered upon a contract contemplating numerous voyages, the hardship is no greater than where, after making the contract, she has failed to perform any part of it; and, though there may be dicta to the effect that, if a ship enters upon performance, it be-

comes pledged to the complete execution of the contract, no argument has been advanced nor case presented which sets forth any satisfactory reason why we should not apply in this case the principles reiterated by the supreme court that the maritime lien between the cargo owner and the ship owner in respect to the carriage of cargoes is a mutual and reciprocal lien, not arising from the contract itself, but created by law upon the delivery of the cargo to the vessel, or to the control of the master.

While there may be, and probably are, other considerations which should be taken into account, they have not been presented, nor have they occurred to me. I therefore feel constrained to decide this case upon the principles of law that have been argued. No authority has been presented which would justify an acceptance of the libellant's contention that the theory of reciprocal rights so clearly stated by the supreme court has been brushed aside.

The libelee, by timely exceptions, raised the question of the right to join in one libel a cause of action in rem and a cause of action in personam. This question was before this court in the case of *Heney v. The Josie*, 59 Fed. 782. Judge Carpenter, in delivering the opinion of the court, said:

"The general principle is that several issues may be tried in one action when that course will promote the cause of justice, and conduce to the convenience of parties and of the court, and when no considerable inconvenience will arise therefrom. On this principle actions are sustained against a defendant for several independent but analogous claims, and also against several defendants for claims arising out of the same transaction, where the claims themselves are analogous. On general principles, there is no reason why a libel both in rem and in personam should not be retained in cases where the matter comes within the above definition, and when this practice is not forbidden by the rules of the supreme court."

In *The Eliza Lines* (C. C.) 61 Fed. 308, 324, Judge Putnam had occasion to consider an objection to the joinder of a proceeding in rem with one in personam; and, holding that this technical question of pleading had been waived, intimated by a dictum that, if it was necessary to consider the fundamental question involved, the court would probably come to the same result. While I incline to the view that in a case like the present, not provided for by the admiralty rules of the supreme court, there is no fixed rule which prevents the joinder in one libel of causes of action in rem and in personam, and that the present joinder was justifiable and for the convenience of all parties, I do not deem it necessary to dwell upon or to decide this point; for the libel against the *Watson* and the *Lake Shore Transit Company*, which joined proceedings in rem with proceedings in personam, must be dismissed so far as it is in rem, and in retaining it as a proceeding in personam I follow the suggestion of the brief for the libelee.

Decrees may be presented dismissing the libel No. 1,062 against the *Sheldon*, with costs to the libelee; dismissing the libel in No. 1,060, so far as it is in rem, against the *Watson*, with such costs as the libelee may have sustained by reason of the seizure; and awarding damages against the *Lake Shore Transit Company* in the sum of \$4,808.61, with interest from the date of the filing of the libel, and with costs as upon a libel in personam.

COLTRANE et al. v. BLAKE et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1902.)

No. 425.

1. BUILDING AND LOAN ASSOCIATIONS—LAW GOVERNING CONTRACTS—DUAL RELATIONS WITH BORROWING STOCKHOLDERS.

The relations between a building and loan association and its stockholders, as such, are the same as between other business corporations and their stockholders, and their respective rights and obligations under the contract are governed by the general law, unless modified by statute. As to matters arising out of such relations, the decisions of the courts of the state are not binding upon the federal courts, but when a stockholder becomes also a borrower his contract as such is governed by the local law, and upon the question of his rights and liabilities thereunder the state decisions are controlling.

2. SAME—DISTRIBUTION OF ASSETS IN INSOLVENCY—STATUS OF HOLDERS OF FULL-PAID STOCK.

Holders of full-paid stock issued by a building and loan association as authorized by its by-laws, and which differs from the common or installment stock only in the fact that the holders are paid interest or a fixed dividend at stated periods instead of their proportionate share of the profits of the association, are stockholders, and not creditors, and on the winding up of the corporation in insolvency are entitled to no preference over other stockholders.

3. SAME—EFFECT OF NOTICE OF WITHDRAWAL.

A matured notice of withdrawal given by a stockholder of a building association, as permitted by the terms of his contract, does not operate to terminate his membership, and convert him into a creditor entitled to preference of payment over other members in the distribution of the assets of the association in insolvency, contrary to the express provisions of the by-laws.

4. SAME.

Where certificates of paid-up stock issued by a building association gave the holder the right to withdraw and have his stock redeemed subject to the provisions of the by-laws, which required 30 days' notice of intention to withdraw to be given, the status of a holder of such a certificate as a stockholder is not affected by a notice of withdrawal, given less than 30 days before the commencement of proceedings in insolvency against the association.

5. SAME—ACCOUNTING WITH BORROWING STOCKHOLDERS.

Where a stockholder in a building and loan association becomes also a borrower, his contract as such is governed by the local law, and where by such law it is usurious, in a settlement on the winding up of the association in insolvency before the maturity of his loan he should be charged with interest on the sum borrowed at the legal rate, and credited with all sums paid as premiums and interest, but the local law does not govern as to payments made by him as dues on his stock which are made under his contract as a stockholder, and the principles of equity require that as to such payments he be placed on an equality with nonborrowing stockholders, and share ratably with them in the assets remaining after the debts of the association are paid; and he is not entitled to credit on his loan for such payments where the proceedings are in a federal court, whatever may be the rule of the courts of the state.

Appeals from the Circuit Court of the United States for the District of Maryland.

See 110 Fed. 272, 281, 293.

118 F.—50

Wm. Hepburn Russell (Wm. Beverly Winslow, Morton Schaeffer, Randolph Barton, and Archibald R. Watson, on briefs), for appellant receivers.

Richard S. Culbreth, for appellant Coltrane.

Fielder C. Slingluff, for appellant Baltimore Building & Loan Ass'n.

William Pinkney Whyte, for appellee Powhatan Improvement Co.

Thos. Foley Hisky and M. N. Packard, for appellee Blake and others.

E. S. Douglass and George H. Lamar (Joseph D. Wright, on briefs), for appellees Cummin and Gulliver.

Edwin J. Farber (David Stewart and E. Stanley Toadvin, on briefs), for appellee Wilkins and others.

Henry C. Kennard (Henry A. Whitaker, on briefs), for appellees Eunice R. Pearce and others.

Before GOFF and SIMONTON, Circuit Judges, and PURNELL, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the district of Maryland. There are now before us three separate appeals growing out of the settlement of the affairs of the Baltimore Building & Loan Association. The Baltimore Building & Loan Association is a corporation created under the laws of the state of Maryland. It conducted a large business for several years, had members, and had placed loans in North Carolina, Virginia, West Virginia, Pennsylvania, and the District of Columbia, as well as in the state of Maryland. The association having become embarrassed, proceedings were instituted in the circuit court of the United States for the district of Maryland by Daniel B. Coltrane, in behalf of himself and all other stockholders against the association, praying for the appointment of a receiver, and for the administration of the affairs of the corporation in that court. The cause coming on to be heard, Bird M. Robinson was appointed receiver, and subsequently Randolph Barton, Esq., was associated with him as co-receiver. Auxiliary suits were instituted in the circuit courts of the United States for the states above mentioned, and in the supreme court of the District of Columbia, and the assets of the association were put in process of collection. The receivers having made progress in this collection, and a goodly part of the assets having been realized, the court entered an order providing for the intervention in the cause of all stockholders and investors in the association for the purpose of ascertaining and protecting their rights. At the same time John C. Rose, Esq., was appointed special master for the purpose of receiving proofs of claims, and he was instructed to report thereon, with his conclusions of law and findings of fact. A large number of interventions have been made. The special master has made his report. The claimants are all holders of stock in the association. Some have paid up their stock subscription entirely, and have been enjoying fixed semiannual dividends at the rates of 8 per cent. per annum with some, and 6 per cent. per annum with others. Some, having paid up their stock

in full, have attempted to exercise the privileges of withdrawal given by the by-laws, and have in accordance with them given the required notice. The insolvency of the association defeated the payment of this withdrawal value. All of these two classes claim to occupy the position of creditors. Others are stockholders who have obtained an advance from the funds of the association and have given security therefor. They claim that in settling, ascertaining, and repaying this advance they are entitled to credit for all sums paid in by them by way of dues, premiums, and interest, and that on an adjustment so made they will be discharged from any further obligation as stockholders. Others are stockholders who have paid their dues regularly up to the insolvency of the association, and have never had any advance. They claim that they are entitled to be paid out of the assets of the association, realized and to be realized, the value of their stock, in equal proportion with all the other holders of stock certificates.

The special master, in an exhaustive and able report, discussed the claims of all these classes, and disallowed those of the first three set out above. He held that all holders of certificates of stock were stockholders, entitled to share in equal proportion the remaining assets of the association, the proportion to be measured by the number of shares held by each. And with regard to the third class, the advanced shareholders, he held that they were not entitled as a credit on their advances to the amount of dues on stock subscription paid by them. Exceptions were taken to his report, and the cause was heard by the circuit court. All the exceptions were overruled, except those to his conclusion as to the third class, the advanced stockholders. As to these the court differed with the special master, and held that they were entitled to credit their advance with the dues as well as with all other money paid by them into the association, by way of premium and interest. Appeals and cross appeals were allowed to the decree of the circuit court, and the whole case is here on many assignments of error.

Before entering in detail into a discussion of these assignments of error, a question underlying all of them must first be met. The court below felt itself bound by the decisions of the court of last resort in Maryland in the solution of all questions arising in the administration of the assets of this insolvent Maryland corporation. It held that these decisions led inevitably to the conclusion reached by it. On the other hand, it is earnestly contended that the questions involved in this case, establishing the relations between stockholders and the corporation the Baltimore Building & Loan Association, are questions of general law, determining the nature and obligation of the contracts growing out of these relations, to be solved according to the principles of equity governing the federal courts, and in no wise controlled by decisions of the state courts.

Building and loan associations differ from an ordinary corporation created to deal in money in this: They are allowed to lend out their money, and, under certain restrictions, as such, are exempted from the usury laws of the state. In many other respects they are as other corporations. Their stockholders, in their relations with the

corporation as stockholders, enter into the same character of contracts, come under the same character of obligations as do stockholders in other business corporations. And these are regulated by the general law, unless modified by statute. The statute law of Maryland has not modified this relation in these respects. The Maryland statutes, so far as building and loan associations are concerned, have special provisions as to the lending of money by them. In this respect do the Maryland decisions control. A corporation of this character is in one aspect a limited copartnership. Each stockholder ventures a certain sum of money, the amount of stock purchased or subscribed by him. His liability is measured by the stock held by him. Usually, if the enterprise fails, and its assets are exhausted in the payment of debts, the stockholder loses the stock, then valueless, and his liability ends. Sometimes as stockholder he is subject to an additional liability, measured always by the stock held by him. As stockholder he shares in the profits of the association, and, of course, to the extent of his stock and any fixed liability beyond it, he must share the losses. "*Qui sentit commodum sentire debet et onus.*" Each stockholder stands on the same footing with regard to each share of his stock, and each is liable equally and in the same respect with every other for his subscription, according to the form in which he contracts to pay it, whether it be in an entire sum in cash or whether it be in installments at fixed intervals. All these are governed by general law,—the law merchant.

But when a building and loan association begins to exercise the purpose of its creation, becomes a lender of money, and any person—a stockholder—gets any of that money, such stockholder assumes a new relation to the association. Whether such a transaction is called an advance from the common fund, or whether it is called a loan, the transaction makes the corporation the creditor, and such person, though a stockholder, the debtor. He incurs a liability which must be discharged. This feature in the business of a building and loan association is regulated and controlled by the local law. Is such a loan or the incurring of such a liability legal? Does the question of usury arise? Are the general statutes against usury modified with respect to this building and loan association? Are the securities given in this transaction valid? All of these questions must be determined by the local law. Provisions as to such matters vary with the states in which they are made.

In the case at bar, each stockholder—every stockholder in the Baltimore Building & Loan Association—bound himself to pay his stock subscription. This was a contract in which every creditor and every other stockholder of the corporation was interested. He had the option of paying it in cash at once, or he could pay it in certain installments at certain fixed times. All the money so paid under these contracts of subscription went into the common treasury, in which every stockholder had an interest. This transaction is perfectly legal, and not dependent for its legality on any local law. It comes within the general law of contracts. If any one, being a stockholder, because he is a stockholder, concludes to get from the common treasury money in it, and gets it, call it a loan or call it an advance, it has

all the characteristics of a debt for which *ex æquo et bono* he is responsible. He hopes to pay this perhaps by the maturity of his stock at the usual period of similar companies. The insolvency of the company defeats this hope; insolvency brought about by causes which could not be prevented, or perhaps caused by the negligence, fraud, or incapacity of the agents of the stockholders. But this, of itself, cannot release him from his contract, or free him from his responsibility as a stockholder, or cancel his stock. The disappointment which he suffers is common with every stockholder in the association. Every stockholder—each one—has paid his subscription, either in cash or in installments by way of dues, expecting profit at the maturity of the stock in the hoped-for time. The money of each of them has gone into the common fund, and he has used a part of it. The insolvency of the association frees him from the payment of any other dues. But to the extent of the dues paid he is and he remains a stockholder, with all the rights and subject to all the responsibilities of a stockholder. This is according to the law merchant, and no statute of Maryland has altered this law. So the stockholder who has had an "advance" or "loan," whichever term is used, occupies a twofold relation to the company. He is, first of all, a stockholder, bound by his contract of subscription, and enjoying the advantages and suffering the responsibilities of a stockholder. He afterward becomes a debtor, subject to the terms of his contract as borrower,—a contract wholly distinct from that he assumed as stockholder. The one contract comes under the law merchant; the other contract is controlled by the local law.

Holders of paid-up stock; are they creditors of the association? In his very able report the special master discusses and exhausts this question. He holds that they remain stockholders, and are not entitled to stand as creditors. "There is nothing in any of the by-laws of the corporation which as much as suggests that the holders of paid-up stock are anything other than stockholders. They were allowed a vote at stockholders' meetings, and many of them, including the petitioners intervening in this cause, did vote at least by proxy. They were eligible to office, and were so elected. It is true that they received a definite dividend on their stock, and would not have been entitled to any more, no matter how great the profits of the corporation might have turned out to be. But such a contract is not uncommon between corporations and holders of certain classes of stock." And then he quotes *1 Cook, Stock, Stockh. & Corp. Law*, § 269; *Hamlin v. Railroad Co.*, 24 C. C. A. 271, 78 Fed. 664, 36 L. R. A. 826; *Mercantile Trust Co. v. Baltimore & O. R. Co.* (C. C.) 82 Fed. 365. These cases sustain him. The case last quoted was decided by the circuit court of the United States for the district of Maryland. In that case the circuit court (a full bench) says: "There is a legal inference that the claim of a stockholder, with a voice in the management of the corporation, is subordinate to debts due to creditors. That this inference is a well-recognized rule of law, and that to rebut it the expression of a contrary intent, in clear and unambiguous language, is required, is shown by the following citations." Then follows a long list of authorities. If this be the status of this paid-up stock, the

holder of it comes within the rule of law which governs other stockholders. They cannot share the assets until all debts are paid. *Plimpton v. Bigelow*, 93 N. Y. 592; *Fisher v. President, etc.*, 5 Gray, 373; *Gibbons v. Mahon*, 136 U. S. 557, 10 Sup. Ct. 1057, 34 L. Ed. 525. And so they are neither more nor less than stockholders. The Maryland courts adopt this view also, *Tax Cases*, 50 Md. 321. We concur with the court below in overruling the exception to the report on this point, and in adopting the conclusion of the special master.

Are stockholders who have given notice of withdrawal creditors? The special master finds as a fact that, under the by-laws of the association as amended, it is expressly declared that a withdrawal notice does not constitute a withdrawal or terminate the membership, or give to the person filing such notice the status of a creditor, or create any rights of action, legal or equitable, against the association, or in any manner alter or disturb the rights or duties as a member. This ends the case so far as those are concerned who acquired their stock after May, 1899, the date of the amendment.

The master also finds as a fact that, under the by-laws of 1891, 30 days' notice was required before the stock could be withdrawn or reduced. In fact no notice of a desire to withdraw was given 30 days before the appointment of a receiver in any claim proved in this case. The master discusses the question at some length, and reviews the authorities. He shows that there is a conflict of authorities upon the question whether a stockholder who has exercised his right to withdraw, and has given the notice required, and such notice has matured, can rank as a creditor. But all authorities agree that he cannot be recognized as a creditor if such notice has not matured. And this is based on reason. The condition precedent to a right to withdraw is notice for 30 days. This condition has not been fulfilled. The insolvency of the association forbids and prevents its fulfillment. This insolvency puts an end to all business of the association, and destroys its vitality as a going concern.

What are the rights of stockholders who have had advances? It is contended by this class of stockholders, and the contention is sustained by the circuit court, that in the administration of the assets of this insolvent corporation they are to be charged with the sum actually advanced to them, with lawful interest at 6 per cent. per annum, and they are to be credited with all payments made by them by way of dues, premium, and interest, with interest at the same rate, upon the principle of partial payments. Is this the law?

It will be noted that they are stockholders, and that by subscription to the stock they have become bound, as all other stockholders are, to pay this subscription; that by the by-laws it is expressly declared that the losses, if they exceed the undivided profits, shall be charged pro rata against the several shares; that there are other stockholders who have faithfully fulfilled their contracts of subscription; that by the insolvency of the corporation each of them has been disappointed in the expectation upon which their payments were made; yet, by the conclusion reached by the court below,

each stockholder who has had an advance gets back every dollar he has paid into the association, not only upon the contract for usurious interest, but for the sums paid upon his subscription to the stock, whilst every other stockholder who made the same stock contract as he did, upon precisely the same expectation, but who has not enjoyed any advance, is remitted to his pro rata of the depleted assets. Surely this establishes an inequality which is not equity, and throws upon a part of the stockholders all the losses which by the by-laws must be borne by all. This conclusion confuses the obligation of two entirely distinct contracts. In subscribing to the stock, the shareholder binds himself to pay the subscription, either in cash at once or in installments, called dues. This is a perfectly legal contract, if the corporation be a legal one, as the one in question undoubtedly is. Having become a stockholder, he then gets an advance from the common fund. This is another and an entirely distinct contract, based upon an entirely distinct consideration. When one subscribed for stock and paid for it by a mortgage payable at times mutually agreed upon between the parties, this was merely a mode of payment. He stands in two capacities,—one as debtor to the association, the other as stockholder in it. These capacities are independent of each other. Payments on stock are not payments on the mortgage debt, and do not ipso facto work an extinguishment of so much of the mortgage. The payment on one is not necessarily a payment on the other. *Ely v. Sprague*, 1 Clark, Ch. 351; *Southern Building & Loan Ass'n v. Anniston Loan & Trust Co.*, 101 Ala. 582, 15 South. 123, 29 L. R. A. 120, 46 Am. St. Rep. 138; *Wilson v. Martinez*, 47 C. C. A. 591, 108 Fed. 705. The conclusion reached by the court below gives to the advanced stockholder the benefit of all payments made upon this independent contract, and also aids them with payments made on the other contract, wholly distinct from it. The contract made by a stockholder subscribing to stock in a business corporation is regulated by the general law common to all such corporations. He binds himself to pay his subscriptions. He shares in the profits of the corporation so long as it is a paying, going concern, and when its career ceases he gets his share of its assets after payment of all the debts. *Gibbons v. Mahon*, 136 U. S. 557, 10 Sup. Ct. 1057, 34 L. Ed. 525. When he borrows funds of the corporation, he assumes a different relation. Its obligations are determined by the local law. If the loan be usurious, it is not relieved of this taint simply because it is a transaction between the stockholders and the corporation. In adjusting the debt, the local law must be followed. So, in the case at bar, inasmuch as the Maryland statutes make usurious the demand of a fixed premium, and the payment of interest on the whole sum borrowed despite the premium, the stockholder who has borrowed is only accountable for the exact sum received, with interest, and is credited with all sums improperly paid, either as premium or interest. But this adjustment cannot affect his responsibility upon his contract of subscription, and cannot equitably be held to have canceled that obligation. Under the by-laws of this

corporation he does not cease to be a stockholder when he becomes a borrower.

It is supposed that when a stockholder borrows money from the association the consideration influencing him is the ability to repay it in several periodical payments spread over a number of years; that by the insolvency of the corporation this consideration is lost, and the borrowing stockholder released from much of his obligation. But how is his case different in this respect from every other stockholder? A building and loan association is a business enterprise, entered into in the hope of profit. Every stockholder partakes of the adventure, and hopes to share the profit. He cannot escape a share in the losses, limited if it be incorporated, general if it be unincorporated. Each hopes and expects that, with a period approximately definite, the corporation will mature and the profit be realized,—the paid-up stockholder getting his fixed dividend, in the meanwhile expecting full return of the cash paid in; the nonborrowing stockholder paying his dues in several increments, spread over a number of years, and hoping when the maturity is reached that he will get back all he has paid in and a reasonable profit besides. The borrowing stockholder gets the hoped-for profits in advance, and expects at maturity to get back his securities canceled. Each has the same expectation. Each meets with the same disappointment. Yet the conclusion reached by the court below compensates the borrowing stockholder for his disappointment at the expense of every other class.

There is another point of view. A stockholder in a corporation, by reason of his ownership of shares, has the right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately, on its dissolution, in the assets remaining after payment of its debts. *Plimpton v. Bigelow*, 93 N. Y. 592; *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525; *Fisher v. President, etc.*, 5 Gray, 373. So, upon the dissolution of the corporation, after the debts are paid, the stockholders rank as creditors, and have a legal claim on so much of the capital stock as remains. The rule in the United States is that the capital stock of a corporation is impressed with a trust for the payment of the creditors of the corporation. *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731. Especially is this the case with insolvent corporations. The capital stock of a building and loan association is composed of the subscriptions to it, either by cash or by dues. If any part of these dues is diverted from the claims of creditors generally, and is used for the benefit of a single stockholder by way of credit on a debt due by him to the corporation, it is a misuse of trust funds, and so unlawful.

In our opinion, the debt due to the association by the borrowing stockholder should be adjusted by charging him with the sum really advanced, with interest thereon at 6 per cent., and by crediting him with all sums paid by way of premiums and interest, upon the principle of partial payments, the remainder thus ascertained to be part of the assets of the association; that on the debt account

he receive no credit for dues paid by him; and that in the final distribution of the assets he share in them in proportion to the amount paid in by him as dues upon his stock, with interest thereon for the average time prior to March, 21, 1890, according to the rule recommended by the special master in his report on the Blake intervention.

**NATIONAL FOUNDRY & PIPE WORKS, Limited, v. OCONTO CITY
WATER SUPPLY CO. et al.**

(Circuit Court of Appeals, Seventh Circuit. February 1, 1902.)

No. 673.

1. MORTGAGE—SUIT TO REDEEM FROM SALE—RES JUDICATA.

Complainant brought suit in a federal court to establish a mechanic's lien upon the property of a water company for supplies furnished in the construction of its plant, and obtained a decree establishing its lien, and also a judgment against the company. Pending such suit a mortgage upon the plant of the company was foreclosed in a state court, and the property was sold and purchased by the mortgagees, who were not parties to the suit in the federal court. Thereafter complainant brought a creditors' suit in the federal court in aid of its judgment, one of the purposes of which was to obtain a decree of priority of its lien claim over the mortgage, and the title acquired by the mortgagees thereunder. It obtained such decree, but on appeal its bill was dismissed by the circuit court of appeals, following a decision that had in the meantime been rendered by the supreme court of the state, holding that, under the state statute, waterworks property was not subject to a mechanic's lien. *Held*, that such judgment was a conclusive adjudication of the invalidity of complainant's lien as between it and the mortgagees, and that, having only the status of an unsecured creditor, it could not maintain a suit against such mortgagees and their grantee to redeem from the mortgage sale.

2. COURTS—JURISDICTION OF SUBJECT-MATTER—PENDENCY OF SUIT IN ANOTHER COURT.

The pendency of a suit in a federal court to obtain a judgment and a decree establishing a mechanic's lien, in which the court does not take possession of the property which remains in the defendant, does not affect the jurisdiction of a state court to entertain a suit for the foreclosure of a mortgage on the property; nor does the decree in the lien suit bind the mortgagee, who is not a party thereto, or affect the rights of a purchaser at the foreclosure sale.¹

3. LIS PENDENS—OPERATION AND EFFECT—PERSONS BOUND BY DECREE.

The doctrine of *lis pendens* affects only intermediate purchasers who voluntarily acquire rights from one of the parties pending the suit. It has no application to a case where, pending a suit to establish a lien upon property, a mortgage thereon antedating the lien suit is foreclosed in another court, so as to render the decree in the lien suit binding on the purchaser at the foreclosure sale, whose title relates back to the date of the mortgage.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

George H. Noyes, for appellant.

George G. Green and W. H. Webster, for appellees.

¹ Conflicts of jurisdiction between federal and state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 O. C. A. 356.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This is a suit in equity to compel redemption of a waterworks plant in the city of Oconto, Wis., from sale under several mortgages foreclosed in the state court by the appellees Andrews & Whitcomb, purchased and bid in by them upon sale under the foreclosure for some \$64,000, moneys loaned and advanced by them and used in the erection and construction of the plant, and afterwards sold by Andrews & Whitcomb to the appellee, the Oconto City Water Supply Company, and since owned, occupied, and operated by said company. The subject has been in litigation for several years both in this court and the state courts, and the matters involved in this suit, if not *stare decisis* or *res adjudicata*, in view of the decisions already made in the state and federal courts, there is in the judgment of the court, upon a careful study of these cases and of the record, but little ground for the appellant to stand upon. Almost any person or party less heroic in contested and stubborn litigation, and not so skilled in shifting attitudes and raising new points, would have been reasonably satisfied, in view of the decision of this court in a former suit involving the same subject and title, and reported as *Andrews v. Pipe Works*, 22 C. C. A. 110, 76 Fed. 166, 46 U. S. App. 281; *City of Oconto v. National Foundry & Pipe Works*, Id.; *Chapman Valve Mfg. Co. v. Oconto Water Co.*, 89 Wis. 264, 60 N. W. 1004, 46 Am. St. Rep. 830; and *National Foundry & Pipe Works v. Oconto City Water Supply Co.*, 105 Wis. 48, 81 N. W. 125,—to have given up the struggle without further effort at litigation. The opinion of the district judge who heard this case, which is printed in the record, seems to be entirely satisfactory, and places the decision dismissing the bill upon solid ground. The facts are not fully stated in that opinion, but they have been so many times stated in the cases referred to, both in the state and federal courts, and the history of the litigation so fully given, that it seems almost a needless labor to go over the work again. But perhaps a brief statement will be prudent, if not necessary to the proper understanding of the questions involved.

The foundation of the appellant's claim against the property in the various forms in which it has been successively made is the furnishing to the Oconto Water Company, a corporation organized to construct a system of waterworks in the city of Oconto, a quantity of pipe sold to the water company between September 8 and November 24, 1890, amounting to the sum of \$25,637.32, and used by that company in the construction of the plant. On September 13, 1890, the water company mortgaged its plant and franchises to Andrews & Whitcomb, citizens of Maine, who advanced and loaned to the company money to the amount of \$64,000, and which was used in the construction of the plant. On January 30, 1891, the appellant began suit in the court below against the Oconto Water Company to enforce a mechanic's lien on the company's water plant, and on October 3, 1892, obtained a decree for such lien in the sum of \$24,250.04. It also obtained a judgment at law in the same court for the amount

of its claim. On June 17, 1891, Andrews & Whitcomb commenced an action in the state court to enforce their mortgages, and obtained a judgment of foreclosure and sale in due form of law on August 13, 1891; and under this judgment a sale of the property and franchises was made to the mortgagees, Andrews & Whitcomb, which sale was duly confirmed by the court, and a deed and conveyance of the plant and franchises and all the property appurtenant thereto or connected therewith was made to Andrews & Whitcomb. After the title was thus vested in Andrews & Whitcomb, on July 12, 1892, they transferred the property to the Oconto Water Supply Company, a corporation organized for the purpose of purchasing the same and operating the plant to supply the city and the citizens thereof with water. On July 11, 1892, appellant commenced a creditors' suit in the United States circuit court for the Eastern district of Wisconsin supplemental to and in aid of its judgment at law, one of the purposes of which was to obtain a decree of priority of its lien claim upon the plant and property over the title of Andrews & Whitcomb under the mortgage foreclosure proceedings and deed of conveyance. In this action the rights of the parties to that suit, including the right of the appellant to a lien under the mechanic's lien laws of Wisconsin, as against Andrews & Whitcomb, were presented for adjudication. The claim on the part of Andrews & Whitcomb was that they were not bound by the lien judgment, because not made parties to the suit to enforce it, and that the waterworks were not subject to the laws of Wisconsin respecting mechanics' and material men's liens. On the part of the appellant, the National Foundry & Pipe Works, the validity of the mortgages under which Andrews & Whitcomb claimed title was attacked, and it was claimed that its lien was a first claim against the water company's property, and should be so adjudged. The decree of the circuit court gave the appellant all it asked, and made its claim a first lien, and ordered a sale of the plant and franchises of the water company to satisfy the lien. The case was appealed to this court. Before a hearing could be had here, however, the supreme court of Wisconsin, in *Chapman Valve Mfg. Co. v. Oconto Water Co.*, 89 Wis. 264, 60 N. W. 1004, 46 Am. St. Rep. 830, had, upon full consideration, decided that a water plant provided by a city, by contract with a private corporation, for the protection and convenience of its citizens, is not, under the laws of Wisconsin, subject to lien claims under chapter 143, Rev. St. 1878. The circuit court had entered a decree in the suit sustaining the lien judgment, and adjudging that it was binding upon Andrews & Whitcomb as privies of the water company; the theory being based on the fact that they were owners of the stock of the water company when the indebtedness accrued for which the lien was claimed. This decree as to Andrews & Whitcomb was reversed by this court, and the bill dismissed. See 22 C. C. A. 110, 76 Fed. 166, 46 U. S. App. 284. The issues in that case were much broader than in the case at bar,—broad enough, probably, to have included the issue made here upon the right of the appellant to redeem from the sale under the mortgage foreclosure, if such a claim had been made and such relief asked for. But in that case appellant did not ask to redeem as though it were a junior incumbrancer,

but asked for a decree adjudging the title and right of the property to be in the appellant, without money and without price, unless its claim was paid. The contention was that its rights in the property were superior and paramount to those of Andrews & Whitcomb. This issue was adjudged against the appellant; this court holding that under the decisions of the state court the appellant never had any lien upon the property, and that the judgment adjudging a lien was erroneous, although it was *res adjudicata* as to the parties to that suit, in which the lien was adjudged. In that opinion this court, by Woods, circuit judge, say:

"The question of primary importance, it is evident, is whether the liens decreed in favor of the complainant and one of the interveners were authorized by the provisions of section 3314, *Sanb. & B. Ann. St. Wis.* As between two of the parties to the record, the question has been decided by this court in the affirmative. *Oconto Water Co. v. National Foundry & Pipe Works*, 7 C. O. A. 603, 59 Fed. 19, 18 U. S. App. 380. But in another and later case, in which the Chapman Valve Company, also a party to this appeal, was the complainant, the supreme court of Wisconsin, in a carefully considered opinion, affirmed the contrary ruling of the circuit court for Oconto county. *Chapman Valve Mfg. Co. v. Oconto Water Co.*, 89 Wis. 264, 274, 60 N. W. 1004, 46 Am. St. Rep. 830. The ruling of this court was based upon the opinion delivered in the circuit court by Judge Jenkins, who, it will be observed, deduced his conclusion from the analogies of previous decisions of the supreme court of Wisconsin, none of which involved the precise question. That opinion and its affirmance by this court are referred to in the later opinion of the Wisconsin court, which declared itself 'constrained to a different judgment by the force of its former decisions and by the logic of the situation,' and added that the view taken was deemed to be 'in accord with the weight of authority and the better reason.' That decision, being the first direct ruling of the supreme court of the state upon the exact question under consideration, must be regarded as establishing a construction of the statute which the federal courts will follow without further inquiry. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; *Stutsman Co. v. Wallace*, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. Ed. 1018; *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; *Lowndes v. Town of Huntington*, 153 U. S. 1, 14 Sup. Ct. 758, 38 L. Ed. 615; *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747; *Folsom v. Ninety-Six Tp.*, 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278; *Balkam v. Iron Co.*, 154 U. S. 177, 14 Sup. Ct. 1010, 38 L. Ed. 953. In *Forsyth v. City of Hammond*, 18 C. O. A. 175, 71 Fed. 443, 34 U. S. App. 552, to which reference has been made, this court declined to follow the latest ruling of the supreme court of the state from which the case came, but it will be observed that it was because the decision was deemed to be distinctly inconsistent with the previous decisions of that court, and in conflict with the weight and general current of authority on the subject. In respect to the title of Andrews & Whitcomb, we are of opinion that the mortgage of the franchise carried with it the water plant. The franchise, as described in the ordinance referred to in the mortgage, included the right to 'construct, own, maintain, and operate' the particular water plant which was in contemplation and already in process of construction when the mortgage was executed. In the opinion in *Chapman Valve Mfg. Co. v. Oconto Water Co.*, 89 Wis. 264, 273, 60 N. W. 1004, 1005, 46 Am. St. Rep. 830, it is said: 'Nor does the franchise follow the plant by force of the rule that the incident follows its principal. If that maxim has any application, it should be considered that the franchise is the principal thing. All other rights spring from the franchise.'"

It seems to this court now that after that decision there was not much standing ground for the appellant, founded upon its claim to a mechanic's or material man's lien under the statute. If the appellant has no lien subsequent and subordinate to the appellees' title, it is

difficult to see on what solid ground it could base a claim to redeem. It is simply in the position of a general creditor. As such it could not have been made a party to the foreclosure of the mortgages, because it had no lien upon, nor interest in, the property covered by the mortgages. And, no doubt, that was why it was not made a party to that foreclosure. If it could not be made a party to the foreclosure and its interest barred, it is difficult to see how, after Andrews & Whitcomb had purchased the property and sold it to the water supply company, the appellant, without any lien at all, can come in and demand the right to redeem and take the plant from the purchaser.

But this is not all the litigation that has been had between the parties. After the decision of this court was rendered adjudging that the appellant had no lien, and dismissing the bill for want of equity, an action was brought by this same appellant against the Oconto City Water Supply Company, in possession, to compel that company to surrender the waterworks property to the plaintiff, upon the theory that the defendant water company, by organizing under the statute to acquire title to such property, and the right to exercise all the rights, privileges, and franchises of the old corporation, and taking such property with knowledge of the plaintiff's lien, became a mere continuation of the old organization under another name. Judgment was prayed against the defendant for the amount of the plaintiff's claim against the old Oconto Water Company, and that it be given possession of the waterworks property; that defendant be enjoined from using the property,—particularly the pipes furnished by plaintiff and used in the construction of the plant,—unless within a reasonable time defendant should pay its claim. It will be observed that this suit was in equity, and went to the right and title to occupy and use the property. Defendant answered the complainant, and the issues thus formed were tried and determined by the state circuit court of Oconto county; the decision being, in effect, that in the aforesaid action in the federal court, to which the plaintiff and defendant were parties, it was decided that plaintiff was not entitled to any lien upon the waterworks property as against the title under the Andrews & Whitcomb foreclosed mortgages; that the issues raised in the case were all presented in the case in the federal court, and were adjudicated adversely to the plaintiff; and that such adjudication was binding between the parties, and conclusive in that action. Judgment was rendered in favor of the defendant, dismissing the plaintiff's bill of complaint. An appeal was taken from this judgment to the supreme court of the state, and an elaborate and satisfactory opinion given by Judge Marshall, affirming the decree of the circuit court. On the question of the issues in the case at bar being *res adjudicata*, in view of the former decision of this court and that of the supreme court of Wisconsin, what that court said in that case seems quite as applicable to this case as to the case in the state court. The court says:

"The question of whether the trial court erred in deciding that the judgment of the federal court is *res adjudicata* on all points upon which appellant relies to recover is presented for consideration. It is elementary that all questions appertaining to a cause of action, within the issues, and actually litigated, or which might have been litigated, are irrevocably an-

swered by the final decree, so far as affects the parties to such action, as regards the subject thereof. That, of course, includes not only the primary right sought to be enforced by the action, but matters germane to, and actually involved in, it. *Wentworth v. Racine Co.*, 99 Wis. 26, 74 N. W. 551. It is conceded that under that rule it was not open for appellant in this case to litigate the question of whether its lien judgment was binding on the respondent. But it is said the right of appellant to hold the respondent liable for its claim, upon the ground that the latter took the property in controversy subject to its lien claim, was not involved in the former litigation, or presented to the court, or decided. It is with some difficulty, we confess, that we can follow the course of reasoning which leads to the statement of such premises as correct, or the conclusion based thereon. The validity of the Andrews & Whitcomb mortgages, and the title acquired through the foreclosure of them, were subjects of controversy in the creditors' suit. The pleadings show that, and the opinions filed, as well. If appellant was possessed of a claim upon the property, either by reason of the judgment against the Oconto Water Company or otherwise, paramount to the rights claimed under the Andrews & Whitcomb mortgages, they were entitled to have had such claim declared to them in the creditors' suit. The object sought by such suit was to obtain a decree to the effect that appellant was entitled to the property in controversy as it stood September 15, 1890, free from any claim of Andrews & Whitcomb, or any other party to the action. That brought before the court for adjudication the nature and validity of the title obtained through the foreclosure proceedings, not only as regards whether it was affected by the lien decree against the Oconto Water Company, because of Andrews & Whitcomb's connection with such company, but whether such title was subject to the appellant's claim under any circumstances. An examination of the pleadings in the creditors' suit leaves no doubt on that question, and, by reference to the published opinions of Judge Woods in the case, it appears that all the matters involved in the controversy above mentioned were actually decided. We might quote at length from such opinions, found in *Andrews v. Pipe Works*, 22 C. C. A. 110, 76 Fed. 166, 36 L. R. A. 139, and *Id.*, 23 C. C. A. 454, 77 Fed. 774, 36 L. R. A. 153, conclusively establishing what is here said, but it is not deemed necessary. It is sufficient to say that in our judgment the decision in the creditors' suit is just as decisive that the title acquired by the foreclosure sale passed to the purchasers free and clear of any claim of the appellant, as it is that Andrews & Whitcomb were not bound by the lien judgment. Appellant's counsel concede that the effect of the decree is that their claim was not a lien upon the water company's property as against the Andrews & Whitcomb mortgages. With that concession, there was nothing left undecided, as it seems, which is involved in this case. If there was no lien as against the mortgagees, the owner under the foreclosure sale did not take any benefits which belonged legally or equitably to appellant."

It is true that the particular relief prayed for in this suit was not asked for in the former cases in the federal and state courts. But the issues involved and the prayers for relief were broad enough to cover the relief sought here if counsel had seen fit to make the claim. Under the decisions, what might fairly and properly have been litigated in these cases must be considered as having been litigated, and are answered by the final decree, as well as those things which were openly and professedly litigated. Upon the merits of the controversy in the state court, aside from the question of *res adjudicata*, the supreme court says:

"The mere fact that a suit is pending in the federal court on one cause of action or subject of action, affecting property not in the custody of the court, does not prevent the commencement or prosecution of any number of actions between other parties on other causes or subjects of action affecting the same property, or prevent the property from being seized in such other actions, so long as no prior possession of the *res* by the federal court is dis-

turbed. * * * Identity of subject of action or disturbance of actual possession is what limits the exclusive jurisdiction of the federal court as applied to this case. In that view, it is readily seen that the proceedings in the state court to foreclose the Andrews & Whitcomb mortgages did not conflict in the slightest degree with the jurisdiction of the federal court to enforce appellant's lien against the Oconto Water Company. * * * If the Andrews & Whitcomb mortgages were valid liens upon the waterworks property, paramount to plaintiff's claim, so that by the enforcement of the mortgages the purchaser at the foreclosure sale only obtained the benefit of the mortgage security, they became possessed of no benefit that they did not fully pay for, or anything that was equitably applicable to the payment of plaintiff's claim. The essential of prior equity of plaintiff in the property, which is an absolute essential to the liability of the new owner of such property for the debts of its predecessor, does not exist, so the principle invoked does not apply. * * * The defendant became the bona fide owner, for full value, of the property of the Oconto Water Company, and all the franchises possessed by it for the profitable use and enjoyment of such property. The purchasers at the foreclosure sale took title to the property with the incidental right conferred by section 1788, Rev. St. 1898, to form a new corporation to take the same by assignment, and possess the rights of the old organization. When the mortgages were given, section 1788, Rev. St. 1898, became a part of them, and a very material element in the value of the security. The right guaranteed by such section was as much a part of the mortgage security as the tangible property described. The theory of the appellant is that the statute clothing a corporation circumstanced as the defendant is with the right to exercise the powers, privileges, and franchises possessed by the old corporation, which it shall have acquired bona fide, by mortgage sale, or by assignment based on a title acquired through such a sale, instead of adding to the value of a corporate mortgage covering all the property of the corporation, tangible and intangible, impairs it, and may destroy it, because a new corporation cannot be organized with the benefits of the statute without incurring the penalty of being liable for all the unsecured indebtedness of the old corporation, whether before the foreclosure sale the owner of the mortgage indebtedness had a first lien on the property or not. In other words, that the statute not only operates to prevent the general creditors from being cut off by the foreclosure proceedings, but transposes the parties so as to give the general creditors a claim on the property paramount to the mortgage. The statute will not admit of a construction leading to such an absurd result, even if the question were an open one; and it is not, as we have seen. The manifest purpose of it, as indicated, is to add to the value of a corporate mortgage of the kind under consideration. That is too plain to admit of serious controversy. Candor compels us to say that we do not think that the contrary theory merits the consideration we have given to it, since its fallacy is so glaringly apparent, and has so often been exposed in this and other courts. * * * To satisfy the above-indicated requirements, we are told that when Andrews & Whitcomb purchased the waterworks property at the foreclosure sale they knew that plaintiff had an adjudged lien thereon for the amount of their claim, good against the common debtor, and that the respondent was likewise circumstanced when it took the title; therefore, though it may be conceded that title passed to the respondent, it was subject to the lien judgment, and the respondent should not be allowed to use such property, except upon condition of paying the appellant's charge upon it. If that is good law, all a junior lien claimant need do to acquire precedence over the prior lien is to obtain a judgment for the enforcement of it in an action to which the prior lien claimant is not a party. We cannot agree with that proposition. The rights of Andrews & Whitcomb under their mortgages, relative to the rights of the appellant under the claim for a lien on the mortgage property, were not affected in the slightest degree by the judgment in the federal court in the lien suit. They were not parties to it or in privity with the Oconto Water Company so as to be bound as such. That seems too clear for serious controversy, and was adjudicated between the parties in the creditors' suit. So, if the appellant was not entitled to a lien on the waterworks plant as

against *Andrews & Whitcomb*, the latter derived no advantage from the foreclosure sale, except that for which they gave a full equivalent by a satisfaction of the mortgage indebtedness. They took the property without any burden resting upon it; hence incurred no duty, within the maxim which the learned counsel invoke."

There can be little question but that the decision of the state court is conclusive on the question of jurisdiction. It was fairly before that court for decision, and it decided it. But aside from the question being *res adjudicata*, there can be no doubt about the jurisdiction of the state court in the foreclosure proceedings. The appellant was not made a party to that suit, and so was not bound by the decree. The appellees were not parties to the suit to establish the mechanic's lien, and so were not bound by that judgment. On the question of the state court not having jurisdiction of the foreclosure proceedings because a suit for a wholly different purpose was pending in the federal court, it may be said there was no possession, actual or constructive, in either the state or federal court, during the pendency of foreclosure proceedings. The mortgagor was in actual possession during the whole time. There was no reason why the actions might not have proceeded concurrently as well as successively. The question of the better right to the property was open. Suit was brought by appellant to test that right in the federal court, and the judgment of the court went against it. Suit was then brought in the state court to test the same right, shifting the ground of the action, and the judgment of the state court was against the appellant's claim. A third suit is brought here to test the same claim, again shifting the ground of the action, but setting up and relying upon the same facts. As has already been said, if the issues involved are not fully and technically *res adjudicata*, they are so nearly so as to leave the appellant small standing room in court. It may properly be said that it has had its day in court. It has had its day in two courts,—in this court and in the state court. The decisions of those courts cover fully the several grounds of recovery as the appellant was then able to state them, and it cannot, by changing the grounds of its claim, continue the litigation indefinitely. One of the grounds of recovery stated in the former suit in the federal court, if it had been good for anything, was entirely adequate to furnish relief and give title and possession to the appellant. If it was entitled to a mechanic's and material man's lien on the plant, that, under the statute, would relate back to the very beginning of the improvement, and constitute a lien paramount to the lien of the mortgages; and, if the decree of the United States circuit court for the Eastern district of Wisconsin had been affirmed by this court, that would have given appellant title to the property under the sale which was made to it by the marshal under that decree. But that decree was reversed, and the bill dismissed. It had been held upon full consideration by the unanimous judgment of the highest court of the state, in the first case where the question had been squarely and fully considered, that the lien laws of Wisconsin had no application to properties of this kind. The terms of the statute were not broad enough to cover such a case, and it

was against public policy that it should. As the plant could not be separated from the franchise by any adverse process, there could be no lien by judgment on it. That was the settled law of the state, and this court could not do otherwise than follow the decision of the supreme court of Wisconsin. *Improvement Co. v. Wood Co.*, 81 Wis. 559, 51 N. W. 1004, 17 L. R. A. 92; *Fond du Lac Water Co. v. City of Fond du Lac*, 82 Wis. 332, 52 N. W. 439, 16 L. R. A. 581; *Chicago & N. W. Ry. Co. v. Forest Co.*, 95 Wis. 80, 70 N. W. 77; *Chapman Valve Mfg. Co. v. Oconto Water Co.*, 89 Wis. 264, 60 N. W. 1004, 46 Am. St. Rep. 830.

In announcing its opinion in the *Chapman Valve Mfg. Co. Case*, supra, the supreme court of Wisconsin was simply enforcing the logic of its own prior rulings,—that the franchises and rights of a quasi public corporation, owing important duties to the public, and the property vested in it necessary for their use and enjoyment and the accomplishment of the purposes for which it was created, constitute an entirety, and, in the absence of special statutory authority, are not subject to be seized and sold on execution, or for mechanics' liens, or on tax process. *Chicago & N. W. Ry. Co. v. Forest Co.*, 95 Wis. 80, 70 N. W. 77. The same principles were delivered by the supreme court of the United States in *Buncombe Co. v. Tommey*, 115 U. S. 122, 5 Sup. Ct. 1186, 29 L. Ed. 305, and *Railway Co. v. Doe*, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. Ed. 136. So that it is *stare decisis*, as well as *res adjudicata*, that the statute of Wisconsin gives appellant no lien on this property,—the visible property or the franchise. *Andrews v. Pipe Works*, 22 C. C. A. 110, 76 Fed. 166, 36 L. R. A. 139; *Id.*, 23 C. C. A. 454, 77 Fed. 774, 46 U. S. App. 619, 36 L. R. A. 153; *National Foundry & Pipe Works v. Oconto City Water Supply Co.*, 105 Wis. 48, 81 N. W. 125. This last case affirms a judgment which determines that the appellant has not, and never has had, a lien on the plant and franchise, and that the Oconto City Water Supply Company owns the property by purchase from Andrews & Whitcomb under the foreclosure sale, by title paramount to, and free and clear of any claim or lien of, appellant. This might well have ended the litigation. If the appellant had no lien either prior or subject to the title of the water supply company, on what substantial ground could it claim a right to redeem the property from sale under the Andrews & Whitcomb mortgages? The appellant having no lien in fact, it was merely a general creditor of the water company, which it had trusted with material to go into the plant, and could not have been properly made a party to the foreclosure proceedings. *Stout v. Lye*, 103 U. S. 66, 26 L. Ed. 428; *Herring v. Railroad Co.*, 105 N. Y. 340, 12 N. E. 763. As was said by the court below in its opinion in this case:

"The contention on behalf of complainant that the construction of the lien statute adopted by this court in the rendition of that judgment, which was affirmed on appeal (7 C. C. A. 608, 59 Fed. 19, 18 U. S. App. 382), being prior to the ultimate construction by the supreme court of the state, must control as a rule of decision up to the time of the final utterance, is opposed to the express ruling in *Andrews v. Pipe Works*, supra, and is not consistent with the rule stated recently by the United States supreme court in *Wade v.*

Travis Co., 174 U. S. 499, 19 Sup. Ct. 715, 43 L. Ed. 1060. In the absence of a lien or title in fact, there can be no right to redeem. It is true that a mortgagee during the continuance of that relation is not permitted to contest the bona fides or validity of an actual conveyance from the mortgagor upon which to predicate the right. Even before foreclosure the mortgage cannot be subjected to payment or redemption by one who is in the status of a mere stranger to the title; and certainly the purchaser under a valid foreclosure may dispute either the fact of an interest acquired in the equity of redemption, or of the existence of such equity. Of the numerous cases cited in support of such right in the case at bar, none appear applicable."

The contention that the *lis pendens* filed in the lien suit puts the appellant in a position to demand redemption from sale under the foreclosure is also without foundation. It is true that by the lien action the parties were brought within the jurisdiction of the court, so that the *lis pendens* would bind any intermediate purchaser taking an interest from either party as a volunteer. But there is no warrant for saying that a like rule is applicable to the institution and completion of foreclosure proceedings by a mortgagee either in the same or some other court of co-ordinate jurisdiction. The opinion of this court by Judge Woods rendered on the decision of the motion for a rehearing when the case was here before (see *Andrews v. Pipe Works*, 23 C. C. A. 454, 77 Fed. 774, 46 U. S. App. 619) seems to be conclusive of this question. As there said:

"These defendants were not volunteer purchasers intervening as strangers. They purchased upon the foreclosure of their own mortgage, which antedated the commencement of the suit of the lienholders, and the title which they obtained related back to the date of their mortgage. The doctrine of *lis pendens*, as we conceive, does not apply."

If one decision of the same question is enough, then the appellant should be satisfied with that determination, which was made upon argument and consideration. The question was there fully presented upon the record, and there seems no reason to suppose any need to reargue the question in a new case. But upon the merits of the question we are satisfied that the lien decree was not operative in any such way, or in any way that has been suggested, to disturb or affect the title taken under the foreclosure. The mortgagees were the only persons having a lien upon the plant. At any rate, if there were any others, they are cut off by the foreclosure. They had advanced the amount of their mortgages in cash, which went into the construction of the waterworks plant. By their action and enterprise, and only thereby, was the plant saved to the city and to the people. The equities are all in favor of their grantee. Their mortgages were foreclosed, and all persons having any interest were made parties. They bid in the property for the full amount of their claim for money advanced, and for its full value, and sold to the water supply company.

There is some ground for the charge that the appellant has been blowing hot and cold with reference to its claims to this property, and that its positions in the same suit, even, are inconsistent with one another. The creditors' suit was grounded on the claim of a paramount title, and, as we have seen, if the appellant had had any lien at all, it would be paramount. But this court and the state court both

held, as to these appellees, it had no lien at all, either paramount or subordinate. After that litigation ended by the dismissal of its bill, this suit was brought, which cannot obtain unless the appellant's lien is subject and subordinate to the appellees' title. In the former suit appellant set up the lien decree, sale and marshal's deed, and the foreclosure of the mortgages in the state court, claiming a conditional title, to wit, an absolute title unless appellees paid its debt. In the present suit, upon the same facts, it claims a conditional title, but with a totally unlike condition, viz., that it pay appellees' debt. These remedies are quite inconsistent, but much akin in this: that they are equally unfounded. It may be quite doubtful whether the appellant can be allowed to pursue such contradictory remedies upon the same facts. If it can, there is no reason why litigation cannot be continued so long as counsel can suggest new points and make fresh presentations. It was held by the supreme court in *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52, that where a party has two remedies inconsistent with each other, any decisive act by him, done with knowledge of his rights and of the facts, determines his election of his remedy. And in *Green v. Bogue*, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. Ed. 1061, the supreme court held that:

"Where the facts averred and relied upon in a former suit between the same parties which proceeded to final judgment are substantially those alleged in the pending case under consideration, the fact that a different form or measure of relief is asked by the plaintiffs in the later suit does not deprive the defendants of the protection of prior findings and decision in their favor."

See, also, *Crook v. Bank*, 83 Wis. 31, 52 N. W. 1131, 35 Am. St. Rep. 17; *Franey v. Park Co.*, 99 Wis. 40, 74 N. W. 548.

If the appellant's title under the marshal's deed is paramount to the appellees', as it still claims all through its brief, there is no need of an action to redeem, which cannot be maintained but by one holding a junior incumbrance. The language of the statute is:

"Any person having a lien at any time before the sale upon the mortgaged premises, or any part thereof or interest therein, subsequent to the lien of such mortgage may redeem." Section 3167, Rev. St. Wis. 1898.

And this is the law independent of statute. 2 *Jones, Mortg.* § 1055; *Dawson v. Overmyer*, 141 Ind. 438, 40 N. E. 1065; *Lysinger v. Hayer*, 87 Iowa, 335, 54 N. W. 145; *Compton v. Jesup*, 15 C. C. A. 397, 68 Fed. 331; *Moore v. Beasom*, 44 N. H. 215. If its title is paramount, it has a complete remedy in ejectment, and a court of equity has no jurisdiction. If it has a lien subordinate to that of the appellees, which is also apparently claimed,—for the appellant asks the privilege of redeeming,—from whence arises the lien, if not by virtue of the mechanic's lien laws of Wisconsin, which two courts have decided has no existence in fact or in law?

Other contentions are made, which have been duly considered by the court, but which it seems unnecessary to notice. The appellant is in the peculiar attitude of asking this court to enforce a judgment against the appellees to which they were not made parties, and which it must be now conceded was erroneously rendered upon a mistaken view of the effect of the lien law of Wisconsin, and against the law and public

policy of the state, as has now been declared by the highest authority. This the court cannot do. The court will not make haste to found a decree for new relief upon a previous decree which it must now be admitted was erroneous and contrary to the public policy of the state. *Lawrence Mfg. Co. v. Janesville Cotton-Mills*, 138 U. S. 552, 11 Sup. Ct. 402, 34 L. Ed. 1005; 2 Beach, Eq. Prac. § 904; *O'Connell v. McNamara*, 3 Dru. & War. 411; *Gay v. Parpart*, 106 U. S. 679, 27 L. Ed. 256; *Lawrence v. Berney*, 2 Rep. Ch. 127; *Hamilton v. Houghton*, 2 Bligh, 169.

We find no error in the record, and the decree of the circuit court is affirmed.

Note. Since the preparation of this opinion WOODS, Circuit Judge, departed this life, but he fully concurred in the opinion. The handing down of the opinion has been withheld until the case of *National Foundry & Pipe Works v. Oconto City Water Supply Co.*, taken by writ of error to the United States supreme court from the decision of the supreme court of Wisconsin, should be decided. A decision by the United States supreme court in that case affirming the judgment of the supreme court of Wisconsin was handed down on January 6, 1902. 22 Sup. Ct. 111, 46 L. Ed. —.

In re SOUDAN MFG. CO.

STITES v. DUNNAHOO.

(Circuit Court of Appeals, Seventh Circuit. February 12, 1902.)

No. 828.

1. **BANKRUPTCY—LIENS—VALIDITY.**

Under Bankr. Act 1898, § 67d, which provides that "liens given or accepted in good faith and not in contemplation of, or in fraud upon, this act, and for a present consideration, * * * shall not be affected by this act," the validity of a mortgage given to secure a present loan of money within four months prior to the borrower's bankruptcy does not depend upon his solvency at the time, or upon notice of his financial condition by the mortgagee, actual or constructive, but, to invalidate such a mortgage, it must be shown that the borrower was insolvent; that the purpose of the loan was to accomplish unlawful preferences, or otherwise violate the act; and that the lender knew, or was chargeable with notice of, both of such facts.

2. **SAME—MORTGAGE TO SECURE BORROWED MONEY.**

A mortgage on the plant of a manufacturing corporation to secure a loan of money made in good faith by the mortgagee, who was wholly unacquainted with the company, and acted through an agent, upon representations made by the president of the company and the report of an agent sent to examine the security, is not rendered void by the bankruptcy act, where the company was at the time a going concern, and actively conducting its business, and not known by the lender or his agent to be insolvent, although it was in fact insolvent and became a bankrupt within four months, and although the mortgagee knew that a large part of the money borrowed was to be used in paying outstanding unsecured debts.

3. **CHATTEL MORTGAGES—VALIDITY—INDIANA STATUTE.**

Under the laws of Indiana, as construed by its supreme court, the fact that a chattel mortgagee verbally agrees at the time the mortgage is given that the mortgagor may sell certain of the property covered thereby for his own benefit does not invalidate the mortgage as to other property to which such agreement does not apply.

Appeal from the District Court of the United States for the District of Indiana.

This appeal is from a judgment of the district court, sitting in bankruptcy, in the matter of Soudan Manufacturing Company, bankrupt, on review of findings by the referee, whereby a mortgage lien claimed by Robert N. Stites, appellant, against the plant, machinery, and tools of the bankrupt, is disallowed, and upon additional findings by the court the ruling of the referee that the mortgage "constitutes no valid existing lien on any of the property" of the bankrupt is affirmed. The Soudan Manufacturing Company, an Illinois corporation, had its plant, consisting of machinery, tools, and fixtures, at Elkhart, Ind., and was there engaged in the manufacture and sale of bicycles, while its president, A. H. Winters, resided at Chicago, Illinois. The mortgage in question was executed August 1, 1900, to secure a present loan of \$12,500 by the appellant for the purposes of the corporation, and was duly recorded prior to August 10, 1900, when a creditors' petition was filed for an adjudication of bankruptcy against the corporation. In the course of proceedings thereupon the appellant filed his petition to have such mortgage declared a first lien upon the machinery, tools, and fixtures of the bankrupt with result as stated. The loan was made upon the mortgage security without previous business relations between the parties, with information that the corporation was carrying on an active business, was in need of funds to pay off existing indebtedness, especially to meet advances made by one Weber, to furnish relief from present embarrassment and increase the output; and relying upon an investigation alone of the title to and apparent value of the machinery and fixtures, then in operation as a going concern, and upon general statements on the part of Mr. Winters, the president, with no examination of the books of the corporation or other investigation of its financial standing and ability.

Smiley W. Chambers and James D. Andrews, for appellant.

George H. Peaks and James L. Harman, for appellees.

Before JENKINS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after the foregoing statement, delivered the opinion of the court.

The proof is undisputed that the mortgage in question was made and accepted to secure a present loan by the appellant to the corporation of \$12,500, and that previous to the negotiations for the loan no transactions had taken place and no acquaintance existed between the principals; but the validity of the mortgage is assailed upon two propositions: (1) That the corporation was insolvent, and by the transaction gave a preference to two of its creditors,—one being its president,—and the appellant received the mortgage with notice of such insolvency and purpose, thus violating the provisions of the bankruptcy act; (2) that the mortgage covered stock, manufactured and in process, with an understanding outside the terms of the instrument that sales could be made therefrom, by and for the exclusive use of the mortgagor, and the entire security was thus invalidated under the law of Indiana. Unless one or the other of these contentions is sustainable, the appellant is entitled to the relief sought by his petition, as jurisdiction to that end, if questionable, was not questioned, and the express submission amounts to consent. *Bryan v. Bernheimer*, 181 U. S. 188, 197, 21 Sup. Ct. 557, 45 L. Ed. 814.

1. The mortgagor corporation was insolvent in fact, if not so considered by its president, and obtained the loan for the purpose of

paying up certain indebtedness, and with the effect of giving a preference to the creditors mentioned, within the definition of section 60a of the bankruptcy act; and while the appellant was not "the person receiving" such preference, "or to be benefited thereby," within section 60b, it is clear that the transaction violated section 67e of the act, if the loan was made upon the mortgage with notice that the corporation was then insolvent, and that it was intended thereby to accomplish unlawful preferences, or under circumstances which charge the appellant with notice that violation of the act was the purpose of the loan. It is equally clear that section 67d saves from invalidity the security thus founded upon a present consideration, if "accepted in good faith and not in contemplation of or in fraud upon this act," and, in the absence of notice which impeaches the good faith of the transaction as so defined, the mortgagee is entitled to the benefits of his lien, notwithstanding the fraud, if any there was, on the part of the mortgagor. In this view the inquiry is narrowed to the proof of facts and circumstances brought home to the appellant, or to the attorney who conducted the transaction for him, touching both the insolvency of the borrower and the unlawful purpose of the loan. The findings below are, in effect, that the corporation was insolvent when the loan was made, and the appellant had notice of such condition, of the use to be made of the loan, and had "reasonable cause to believe that it was intended thereby to give" preferences. Conceding for the moment that the insolvency and notice so found would justify the conclusion against the validity of the mortgage, the review upon this appeal cannot rest upon such findings alone. Section 25 provides for the appeal to be taken "as in equity cases," and thus removes the "cause entirely, subjecting the law and fact to a review and retrial." *U. S. v. Goodwin*, 7 Cranch, 108, 110, 3 L. Ed. 284; 1 Rose, Notes, 485. And thereupon the material facts must be ascertained from the testimony which is brought up for review.

For a considerable period prior to the loan in controversy, and up to the filing of the petition for involuntary bankruptcy, the corporation was actively engaged in the business of manufacturing and selling bicycles. The amount of invested capital does not appear, but its plant consisted of machinery, tools, and fixtures, the value of which depended largely upon successful operation of the business, estimated on behalf of the appellant, when the loan was made, at \$25,000 to \$30,000, and appraised as bankruptcy assets at \$5,000. Mr. Winters, the president of the corporation, was a lawyer of Chicago, actively engaged in the practice of his profession; and his principal part in the business of the corporation was in connection with the finances, in the use of his personal credit and influence to obtain means for carrying on the operations of the company. Needful funds and credit were thus furnished, both through temporary loans made by his friends or clients upon collaterals of the company, and through a plan of "check-kiting," whereby Mr. Winters sent checks upon his Chicago bank, signed in blank, to be filled out and used by the company as required. Drafts or checks would then be forwarded by the company to him for the amount, and funds were provided to meet his Chicago check when presented, either through

friends, or by special arrangement at the bank. For the purpose of taking up indebtedness so incurred, and to provide a margin against future need for such expedients, Mr. Winters states that he applied to various parties for a loan, to be secured by mortgage upon the plant, and that Mr. Chancellor, an attorney representing the appellant, took the matter under consideration for his client, resulting in this loan of \$12,500,—the appellant taking no personal part therein, except in making the checks, and acting wholly on the advice and representations of Mr. Chancellor; and the latter, on his behalf, examined and found clear title to the mortgaged property in the corporation, sent an appraiser to ascertain the value of the machinery, and, upon report thereof, advised the loan. The details of the representations made by Winters to Chancellor as to the financial condition of the company and the demands for the money do not appear in the testimony of either, but Chancellor's version is substantially this: That Winters, who was an acquaintance of his partner, but not of the witness, "stated that his company had a fine bicycle plant" at Elkhart, and "they were in need of money to push their business with, and they wanted to secure a loan"; that witness "told him to bring a list of the machinery in his plant," and he would look it over; that the list was brought, with valuations carried out, and delay occurred in making the examination; that Winters called frequently meantime, and finally mentioned that the delay had made it necessary for him to obtain from one Webber further advances, and the indebtedness to him was to be taken up through the loan; that he further stated that they needed the money to push the business with a view to consolidation with or sale to a New York concern; that all the statements tended to convince him that the company "was a live concern, a good concern transacting a large business and that their notes would be paid promptly"; and that he made no inquiries as to the solvency of the company, "because that question did not come up," and no suspicions were aroused in his mind at any time. The testimony of Winters, the other party to the transaction, is of like general tenor. He states that he acted on an inventory and statement made at the factory for the purpose, and showing approximately the following assets: Merchandise, \$23,000; machinery, \$27,000; tools, fixtures, etc., \$3,000; accounts receivable, \$8,257,—making over \$60,000 of assets at fair valuation as a going concern, according to his information and belief, against \$33,000 of total indebtedness, and that he believed the company to be solvent when he negotiated the loan. Whether this statement was exhibited to Chancellor, the witness does not recollect, and says, "I have not got a clear memory as to what was said with regard to the general standing of the company, because I don't think that was gone into at all." In the course of his testimony, however, he is reported as saying to Mr. Chancellor, in reference to the notes held by Webber, "That practically the company at the time those notes were made was in a state of bankruptcy"; and notwithstanding the subsequent correction of such remark, and its inconsistency with his entire version of the negotiations, the language so reported is the chief reliance for the conten-

tion that the appellant had ample warning that the company was insolvent. But the context and the explanation which follow show that the witness did not intend to state this as a remark made to Mr. Chancellor, but as a comment which he volunteered at the hearing—and the introductory word “That” was probably inserted by the stenographer by mistake. With parties of the ability of these negotiators for a loan, it is not probable that such statement of disability would either be made or pass unchallenged. As remarked by Winters in his denial, he “was not going to frighten the man off.”

The testimony presents no ground for suspicion of actual fraud or collusion in the transaction, and on the part of the appellant and his attorney it is unquestionable that the loan was made as an interest-bearing investment, on the faith of the valuation reported of the mortgaged property as a going concern, and with the expectation of a continuance of operations to meet the payments. For the failure in expectation and judgment the appellant must bear the loss, but the bankrupt law does not invalidate his security for mere error in judgment. If he acted in good faith, contemplating no fraud upon the act, his remnant of security is left undisturbed, while mala fides on his part will deprive him even of benefit in that. On the issue so raised, the utmost that the testimony tends to show of notice of the financial condition of the company and the object of the loan is this: That the amount invested in the plant and material left it with insufficient funds to enlarge or carry on with profit a successful business; that it had been compelled to borrow, on short time and with collaterals, and was then owing several thousand dollars so borrowed, of which payment was required; that a permanent loan was urgently needed and desired to pay up such indebtedness and furnish means to push the business; and that the value of the plant was deemed sufficient to secure such loan. The conditions thus outlined cannot be treated as extraordinary in the line of manufacturing enterprise, and do not imply insolvency, as defined in the present bankruptcy act, in view of the valuation then placed upon the property by the appellant's appraiser. Notice of insolvency of the borrower, to impeach the bona fides of the loan, must be based on a valuation of assets in the condition existing when the loan was made, with the works in operation, and not on the appraised value after an adjudication of bankruptcy, whatever may be the rule for ascertaining the fact of insolvency when that issue is directly involved. So the appellant's knowledge of the intention to pay the indebtedness to Webber, and making his check for \$5,522.29 to pay the same, and information that other portions of the loan were intended to pay debts of the company which had been met temporarily by Winters' “check-kiting” arrangement, do not affect the bona fides of the loan, in the absence of notice of insolvency.

The validity of this security, however, does not depend upon the solvency of the borrower, or upon notice, actual or constructive, of its financial condition. The policy of the bankrupt law respecting liens for a present consideration differs radically from its treatment of preferences generally, or security for an existing indebtedness. While a preference is voidable (vide section 60b) when accepted with

"reasonable cause to believe it was intended thereby to give a preference," and liens or security given to creditors within four months are declared void (section 67c, e, f), irrespective of notice, the provision which governs this case (section 67d) makes good faith on the part of the appellant the sole test. In the bankruptcy act of 1867 no express provision appeared for this class of security, but in *Tiffany v. Institution*, 18 Wall. 375, 388, 21 L. Ed. 868, the doctrine applicable to security given upon a present consideration was thus stated:

"There is nothing in the bankruptcy law which interdicts the lending of money to a man in Darby's condition [an insolvent], if the purpose be honest, and the object not fraudulent. And it makes no difference that the lender had good reason to believe the borrower to be insolvent, if the loan was made in good faith, and without any intention to defeat the provisions of the bankrupt act. It is not difficult to see that in a season of pressure the power to raise money may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it financial ruin would be inevitable. If the struggle to continue his business be an honest one, and not for the fraudulent purpose of diminishing his assets, it is not only not forbidden, but is commendable."

And it was thereupon held, in conformity with the rule in England, "that advances may be made in good faith to a debtor to carry on his business, no matter what his condition may be, and the party making these advances can lawfully take security at the time for their repayment." See 8 Notes on U. S. Reports, 190, citing cases which follow this rule; also the same case, before Dillon, circuit judge, and Treat and Krekel, district judges, under the title of *Darby v. Institution*, 1 Dill. 141, Fed. Cas. No. 3,571. In accordance with the view so held, the act of 1867 was subsequently amended to provide that nothing in section 35 of the act (section 5128, Rev. St.) "shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of making such loan." 18 Stat. pt. 3, c. 390, § 11. The like provision in the present act was obviously framed in the same view, and the rule so stated is equally applicable. In *re Wolf*, 98 Fed. 84, 3 Am. Bankr. R. 555; In *re Davidson*, 109 Fed. 882, 5 Am. Bankr. R. 528. We are of opinion, therefore, that the appellant's security is not invalid under the provisions of the bankruptcy act.

2. The contention that the mortgage is void under the law of Indiana rests upon two propositions: (1) That a general clause in the mortgage, after the schedule of machinery, tools, and fixtures, includes as well the stock on hand and in process of manufacture, and that the proof shows an understanding outside the instrument permitting sale of such stock, in usual course, by the mortgagor for its exclusive benefit; and (2) that such an agreement is fraudulent, under the statutes of the state, and invalidates the entire mortgage. Assuming, but not deciding, the first proposition to be well founded, we are of opinion that the second is untenable, for the reason that the question is one of local law, and the supreme court of Indiana has ruled decisively against the construction sought in this case in *Davenport v. Foulke*, 68 Ind. 382, 34 Am. Rep. 265, and *Lockwood v. Harding*, 79 Ind. 129, approving the like ruling in *Barnet v. Fergus*, 51 Ill. 352, 99 Am. Dec. 547. The doctrine of these cases, which governs the mort-

gage in question on the assumption indicated, is thus stated in *Lockwood v. Harding*, 79 Ind. 133:

"It is clear, therefore, that the chattel mortgage was, in any event, a valid and binding lien upon the [property not subject to such sale by the mortgagor], and that far forth it was not void in any view of the law."

The earlier cases indicating a different view are thereby overruled, and those cited in the opinion below and on the argument as holding contra—including, of course, *In re Burrows*, 7 Biss. 526, Fed. Cas. No. 2,204, and *Stout v. Price*, 24 Ind. App. 360, 55 N. E. 964, 56 N. E. 857—cannot be followed. The petition filed by the appellant claims only the property scheduled in the mortgage, comprising machinery, tools, and fixtures, whereof sale by the mortgagee is expressly prohibited by the terms of the instrument; and it is not claimed that the alleged agreement for sale applied to such property,—no lien being asserted against the stock or other personal property in the hands of the trustee,—and, upon the authority of the decisions referred to, the lien so asserted must be upheld.

The decree of the district court is reversed, with direction to allow the claim of the appellant in conformity with this opinion.

THE NEW YORK.

SMITH et al. v. McALLISTER.

(Circuit Court of Appeals, Second Circuit. January 14. 1902.)

No. 87.

ADMIRALTY PRACTICE—CLAIMANT'S BOND.

Where, on motion of a libellant in rem, the court made an order, which it had power to make, setting aside a sale of the libeled vessel under a decree entered at the same term in another suit, on the ground of fraud and collusion, unless a bond was given by the claimant, and he furnished an ordinary claimant's bond, on which the vessel was released, he cannot thereafter be heard to deny that the bond stands in the place of the vessel, and is available to libellant in case of his recovery, unaffected by the prior decree and sale.

Appeal from the District Court of the United States for the Eastern District of New York.

See 93 Fed. 495.

Nelson Zabriskie, for appellant.

James K. Symmers, for appellees.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

WALLACE, Circuit Judge. That there was an implied warranty of the seaworthiness of the vessel, and that the libellants were entitled to enforce the maritime lien, are clear, and it is unnecessary to add anything to the opinion of the court below in respect to these questions. We entertain no doubt that the decree below is correct, unless the lien was displaced by the sale of the vessel under the decree relied upon, by the claimant, the present appellant.

The evidence shows that, immediately after the claimant became

aware that an action in rem against his vessel was to be brought to enforce the lien, he procured an action in rem to be brought against her in the United States district court for the Eastern district of New York. The nominal libellant in that action was the master of the vessel, and the claim alleged was one for wages. Process was issued in the action, a decree taken by default, and May 14, 1896, the vessel was sold by the marshal under a writ of venditioni exponas. The claimant purchased the vessel at the sale for \$160, she being of the value of upwards of \$7,000 or \$8,000. Shortly after the sale the libellant brought the present action in rem in the same court, and the vessel was seized upon process therein. Soon afterwards the libellants made an application to the court to vacate the default decree and the sale thereunder as fraudulent. The application was resisted by the claimant, but resulted in a decision by the court to vacate the decree and sale unless the claimant should give a bond in the present suit to release the vessel in the sum of \$2,000. The bond was given and the vessel released from seizure. The decree in the suit for wages was not formally vacated. The fraudulent character of the proceedings in the suit for wages is so manifest that it would be a waste of words to discuss the evidence. If the master had an honest claim for wages he had no cause of action in rem, as he had no lien upon the vessel. The suit and the sale were collusive proceedings instituted by the claimant himself with the sole object of defeating any lien of the libellants upon the vessel. There can be no doubt of the power of a court of admiralty to vacate its own decree for fraud. Whether another court can do so consistently with the principles which govern courts of equity we need not inquire. The claimant availed himself of the benefit of the decision allowing the decree and sale to stand, and must accept its burden. He secured the release of the vessel by giving the bond as a security for the claim of the libellants. It was the plain meaning of the decision that the decree and sale should not prejudice their lien, and that a bond sufficient to secure it should be given as a condition of the release of the vessel; in other words, that to the extent the bond was a substitute for the vessel it should stand for the vessel unaffected by the decree and sale. The claimant cannot now be heard to allege the contrary. *Compton v. Jesup*, 167 U. S. 1, 35, 17 Sup. Ct. 795, 42 L. Ed. 55; *Michels v. Olmsted*, 157 U. S. 198, 15 Sup. Ct. 580, 39 L. Ed. 671; *Davis v. Wakelee*, 156 U. S. 680, 15 Sup. Ct. 555, 38 L. Ed. 578.

The decree is affirmed, with interest and costs.

BRADFORD BELTING CO. v. KISINGER-ISON CO.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1902.)

No. 1,002.

1. EQUITY—CONSTRUCTION OF DECREE.

A decree dismissing a bill upon a general demurrer thereto must be presumed to have been passed upon the merits, and not for want of jurisdiction, in the absence of any statement therein to the contrary.

2. PATENTS—RIGHTS OF LICENSEE—EFFECT OF ASSIGNMENT BY LICENSOR.

A patent was adjudged infringed by an article manufactured under a later patent, and sold by the defendant under a license from the owners of such patent, by which they also contracted to protect it and its customers in the sale and use of such article, and save it harmless from any suit for infringement. Subsequently such owners sold and assigned their patent to other parties, who thereafter assigned it to complainant in the infringement suit, which then became the owner of both patents. *Held*, that such assignment did not enlarge the rights of defendant in such suit as licensee, nor affect the force, between the parties, of the adjudication of infringement, and therefore afforded no ground for a bill in equity by the licensee to establish the right to continue the sale of the infringing article under its license.

3. SAME.

While an assignee of a patent takes it subject to equities existing in favor of a previous licensee, he does not, in the absence of express contract, assume any obligation to perform the contract of his assignor with the licensee, or to protect the latter in the rights which the license purports to convey.

4. SAME—LICENSEE—BREACH OF WARRANTY OF VALIDITY.

A decree against a licensee, adjudging that an article manufactured under a patent and sold by defendant is an infringement of a prior patent, does not constitute an adjudication that the later patent is void, so as to establish a breach of a warranty of its validity by defendant's licensor.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

The Kisinger-Ison Company, the appellee in this appeal, on February 8, 1897, being the owner of letters patent No. 428,123, issued to David B. Morrison May 20, 1890, and of letters patent No. 491,811, issued to W. S. Kisinger March 7, 1893,—both said patents being for improvements in wire couplings,—exhibited its bill in the court below against the Bradford Belting Company, the appellant herein, complaining of the infringement by the latter company of the rights secured under the patents aforesaid. The answer of the defendant to the bill averred that the alleged infringement consisted of the sale of wire couplings made under and in accordance with letters patent No. 575,641, issued to Gerard and Lawrence January 19, 1897, and denied that their sales of couplings infringed either the Morrison or the Kisinger patents. Upon the hearing of that case the circuit court decreed in favor of the defendant, dismissing the bill. Upon appeal this court reversed the decree so far as it concerned the Morrison patent, which it held valid and infringed. An injunction was ordered, and a reference to a master to take and report an account of profits and damages, was directed. In pursuance of the mandate of this court, the circuit court issued a perpetual injunction against the defendant in that suit, and also ordered a reference to the master to take the account. The master proceeded upon the reference. Thereupon the defendant in that suit filed in the same court this bill, wherein, after setting forth the proceedings in the former suit as above recited, it alleged that, prior to the making of the sales of couplings which had been adjudged in said former suit to be an infringement of the Morrison patent, it had acquired, by grant from Gerard and Lawrence, the exclusive right of sale of wire couplings made under their said patent for the full term thereof; the said Gerard and Lawrence at the time of making such grant further stipulating to deliver to it (the Bradford Belting Company), at an agreed price, such couplings as it would from time to time order, or that upon their failure to do so the said Bradford Belting Company might manufacture them for itself, and, further, that they would protect it in the sale and use of said couplings, and save it harmless from all loss and damages from any suit that might be brought for infringement on account of the sale or use thereof. It was therein further alleged that about April 1, 1897, Gerard and Lawrence assigned all their right, title, and interest in their said patent, including their

said contract with it (said Bradford Belting Company), to one Edward Case; that on the 8th of April, 1897, Case assigned one-half his interest therein to Gerard, and that Gerard and Case continued to furnish couplings to said company until about the date of the determination of this court in said former suit; and, further, that after the final decree therein, and the perpetual injunction therein ordered had been issued, Gerard and Case assigned all their right, title, and interest in said Gerard and Lawrence patent to the Kisinger-Ison Company for the expressed consideration of \$150. It is charged that the Kisinger-Ison Company, at the time it took said assignment, had full knowledge of the rights of the complainant under its said grant and contract from and with Gerard and Lawrence, but that the said Kisinger-Ison Company refuses to perform the said contract. And it is complained that said Bradford Belting Company, as well as the public, are precluded from the benefits of said Gerard and Lawrence patent. The relief prayed by the bill is that the defendant, the Kisinger-Ison Company, be decreed to account for and pay over to the complainant the expenses of said former suit, as provided in the contract of the latter with Gerard and Lawrence; that the injunction in the former case be dissolved, and the complainant accorded its right as conferred by said contract with Gerard and Lawrence; that the complainant be absolved from all loss, cost, or damage arising out of said former suit; that specific performance by the defendant of the contract of Gerard and Lawrence with the complainant be decreed; and that such further relief be granted as the nature of the case requires. To this bill the defendant interposed a general demurrer. The case coming on to be heard on these pleadings, it was held and decreed "that the said demurrer be sustained, and the bill of complaint dismissed, at complainant's cost." Complainant appeals.

W. W. Wood, for appellant.

George J. Murray and Walter F. Murray, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and WANTY, District Judge.

SEVERENS, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

1. It is assigned as error that the court held that it had no jurisdiction over the matter complained of in the bill; but the demurrer raised no such question, nor is there anything in the record to show that the court held that it had no jurisdiction. On the contrary, the decree shows that it was passed upon the merits. If it had been dismissed for lack of jurisdiction, it should have been so stated therein. *Ashley v. Board*, 60 Fed. 55, 68, 8 C. C. A. 455; *Terry v. Davy*, 46 C. C. A. 141, 107 Fed. 50-52; *Cattle Co. v. Frank*, 148 U. S. 603-612, 13 Sup. Ct. 691, 37 L. Ed. 577. We must therefore presume from the decree that the bill was not dismissed on that ground. But it seems proper to say that we see no reason to doubt that, notwithstanding there is no independent ground of jurisdiction, the matter of the bill is so related to that of the original suit that it may be regarded as a dependency thereof, and may be supported upon the jurisdiction acquired in the former suit. *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Johnson v. Christian*, 125 U. S. 642, 8 Sup. Ct. 1135, 31 L. Ed. 820.

2. Upon the merits the contention of the appellant is that the appellee, by taking an assignment of the legal title to the Gerard and Lawrence patent with notice of the exclusive license to the appellant to sell articles covered by that patent, and of its contract with the pat-

entees, is now estopped from denying to the appellant the right to the full enjoyment of the privileges professed to be granted by its license and contract, notwithstanding the exercise of such privileges would infringe the Morrison patent, of which the appellee was and continues to be the owner, and notwithstanding the latter patent has been adjudged to be superior to the former, and, further, that the appellee is bound to execute the stipulations of Gerard and Lawrence in the contract which accompanied their license to the appellant. Can this contention be maintained? The decree in the former suit conclusively established, as between this appellant and the appellee, that at the time of its rendition the appellant had no right to use the Gerard and Lawrence patent under its license from those patentees in such a way as to infringe the Morrison patent, which belonged to the appellee. It was an adjudication that the Gerard and Lawrence patent conferred no right, as against the Morrison patent, so long as the term of the latter should endure. A subsequent assignment to a third person by Gerard and Lawrence could not have enlarged the right of the appellant. The status of the patent was already fixed, so far as the appellant was concerned, and the assignee would be incapable of improving the licensee's position. It appears there was a contract on the part of Gerard and Lawrence to furnish couplings to their licensee, or that in case of their failure the licensee should have the right to manufacture them. They also undertook to protect their licensee and its customers in the sale and use of the couplings, and to save the licensee harmless from any suit for infringement. It is alleged in the bill that the contract as well as the license was assigned to Case, and that an undivided one-half interest in both was assigned by him to Gerard. But it is not alleged that anything more than the patent itself was assigned to the appellee. The rights of the parties here are therefore not affected by the stipulations of the contract, except as they may affect the title to the patent. No doubt, the general rule is that the assignee takes the title subject to the equities of other parties who have acquired rights therein, of which he had notice, express or implied. But he takes no other burden. He comes under no affirmative obligation to make good the previous contracts of his assignor. The claim of the appellant is that it is let into the enjoyment of the Morrison patent by a transaction which it had no right either to compel or prevent. The appellant has been put in no worse situation by the transfer. What equity has supervened in its favor since the decree in the former suit? The appellee owed it no duty, and has not prejudiced the appellant. Nor has it acquired any right which it has not paid for, or which, owing no duty to the appellant, it had not equal right to purchase with any other person.

3. But there is another reason why this bill cannot be maintained, even if it were possible to hold that the appellee was affected by some positive duty of the licensor toward the licensee. It is not averred in the bill that the Gerard and Lawrence patent is void, or that the court has held it so. For aught that appears, it may be for an improvement upon the Morrison patent, or may be used in connection with other forms so as not to involve that patent. In such circumstances, there would be no breach of the guaranty of validity resulting from the decree complained of in the bill. In *Noonan v. Athletic Club Co.*, 39 C. C. A. 426, 99 Fed. 90, a bill was filed by the assignee of certain pat-

ents, complaining of the infringement thereof by his assignor, who was the patentee. The latter denied infringement. The complainant insisted that the defendant was estopped to deny the validity of the assigned patent, when construed in accordance with the full import of its terms. Upon this subject, Judge Lurton, in delivering the opinion of this court, said:

"It seems to be well settled that the assignor of a patent is estopped from saying his patent is void for want of novelty or utility, or because of anticipation by prior invention. But this estoppel, for manifest reasons, does not prevent him from denying infringement. To determine such an issue, it is admissible to show the state of the art involved, that the court may see what the thing was which was assigned, and then determine the primary or secondary character of the patent assigned, and the extent to which the doctrine of equivalents may be invoked against an infringer. The court will not assume, against an assignor and in favor of his assignee, anything more than that the invention presented a sufficient degree of utility and novelty to justify the issuance of the patent assigned, and will apply to the patent the same rule of construction, with this limitation, which would be applicable between the patentee and a stranger. *Babcock v. Clarkson*, 11 C. C. A. 351, 63 Fed. 607; *Ball & Socket Fastener Co. v. Ball Glove Fastening Co.*, 7 C. C. A. 408, 58 Fed. 818; *Cash Carrier Co. v. Martin*, 14 C. C. A. 642, 67 Fed. 786; *Chambers v. Orichley*, 33 Beav. 374; *Construction Co. v. Stromberg* (C. C.) 66 Fed. 550; *Clark v. Adie*, 2 App. Cas. 423, 426."

That decision has been confirmed in subsequent decisions of this court. *Smith v. Ridgely*, 43 C. C. A. 365, 103 Fed. 875; *Stimpson Computing Scale Co. v. W. F. Stimpson Co.*, 44 C. C. A. 241, 104 Fed. 893. *Smith v. Ridgely* was a case in which the suit was brought by the licensee of the patent against his licensor for infringement, and the question arose in regard to the extent of the estoppel resting upon the defendant. In regard to this we held (referring to the *Noonan Case*) that he was "precluded from denying the validity thereof [the patent] to the same extent, and to the same extent only, that a third person would be, subject to the limitation, however, that he could not allege the total invalidity of the patent; the result being that he is still left at liberty to show that, assuming his patent to be valid, it is nevertheless subject to the limitation of the prior art." In respect to the Gerard and Lawrence patent, the Morrison patent was a part of the prior art, and the former was restricted by it. However this might affect the undertaking to save the licensee harmless from infringement suits, it is clear that no ground for an estoppel is shown, arising out of the granting of the license or the authority to manufacture couplings. We think that the appellee acquired by its purchase only the right to manufacture couplings under the Gerard and Lawrence patent during the term thereof; that it had not the right of sale thereof, for the reason that such right had been carved out of it by the license of the patentees to the appellant; and that upon the termination of the Morrison patent the appellant will have the right, unrestricted by that patent, to sell couplings manufactured under the Gerard and Lawrence patent. Probably, it will also have the right to manufacture the couplings for its use after the Morrison patent has expired. And it has at all times the right to practice the Gerard and Lawrence invention, provided it does so in such a way as not to infringe the Morrison patent. The bill does not allege that any of these rights of the appellant are denied.

The decree of the circuit court will be affirmed, with costs.

VANDEGRIFT v. UNITED STATES.

(Circuit Court, S. D. New York. March 18, 1902.)

No. 3,025.

CUSTOMS DUTIES—LAP ROBES PART COTTON AND PART WOOL.

Lap robes made in part of wool, but of which cotton is the component of chief value, are assessable under Act 1897, par. 366, as "manufactures made wholly or in part of wool," and are not classifiable, under paragraph 322, as "manufactures of cotton not specially provided for."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Howard T. Walden, for the importers.

D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). The articles imported were lap robes, made in part of wool, cotton being the component of chief value. They were assessed by the collector under paragraph 366 of the act of 1897, as "manufactures made wholly or in part of wool." The importers insist that they should have been classified under paragraph 322 of the same act, as "manufactures of cotton, not specially provided for."

The decision of the board of appraisers is affirmed upon the authority of U. S. v. Altman, 46 C. C. A. 116, 107 Fed. 15.

UNITED STATES v. ROUSS.

(Circuit Court, S. D. New York. March 18, 1902.)

No. 3,017.

CUSTOMS DUTIES—CLASSIFICATION—COTTON QUILTS—FRINGE OF WOOL.

Cotton quilts having a fringe of wool are assessable under Act 1897, par. 366, as "manufactures made wholly or in part of wool," and are not covered by paragraph 322, governing "manufactures of cotton not specially provided for."

Appeal by the United States from a Decision of the Board of General Appraisers.

D. Frank Lloyd, Asst. U. S. Atty.

Albert Comstock, for the importer.

COXE, District Judge (orally). The merchandise imported consists of cotton quilts having a fringe made of wool. They were assessed for duty under paragraph 366 of the act of 1897, as "manufactures made wholly or in part of wool." The importer protested, insisting that the merchandise is covered by paragraph 322 of the same act as "manufactures of cotton, not specially provided for." As these quilts are made in part of wool they fall within the decision of U. S. v. Altman, 46 C. C. A. 116, 107 Fed. 15.

The decision of the board of general appraisers is reversed.

CONVERSE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 18, 1902.)

No. 8,095.

CUSTOMS DUTIES—CLASSIFICATION—COLORED COTTON CLOTH—GOAT HAIR POLKA DOTS.

Colored cotton cloth, having polka dots about one-quarter inch in diameter, composed of goat hair and superimposed upon the fabric with a species of glue, and applied by a process of printing, is assessable, under Act 1897, par. 366, as a "fabric made wholly or in part of wool," and is not dutiable under paragraph 308 as "cotton cloth," nor under paragraph 322 as a "manufacture of cotton," nor under paragraph 339 as a "fabric appliquéed composed wholly or in chief value of cotton."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Howard T. Walden, for the importers.

D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). The importations in question consist of colored cotton cloth having "polka dots," about one-fourth of an inch in diameter, composed of goat hair, superimposed upon the fabric with a species of glue and applied by a process of printing. It is conceded that the polka dots thus added are, for the purposes of tariff classification, made of wool.

The collector assessed the importations under paragraph 366 of the act of 1897, as a "fabric made wholly or in part of wool." The importers insist that they were properly dutiable under the proviso of paragraph 308 of the same act, as "cotton cloth," or under paragraph 322 of said act, as a "manufacture of cotton"; there is also an alternative protest under paragraph 339 of the same act, as a "fabric appliquéed, composed wholly or in chief value of cotton." The board finds that the goods in question are made in part of cotton and in part of wool, cotton being the component of chief value. The case is therefore ruled by the decision of the circuit court of appeals in *U. S. v. Altman*, 107 Fed. 15, 46 C. C. A. 116, which case has been recently followed in this court in the cases of *Vandegrift v. U. S.*, 113 Fed. 816, and *U. S. v. Rouss*, 113 Fed. 816.

The decision of the board of general appraisers is affirmed.

SOUTHWEST MISSOURI LIGHT CO. v. CITY OF JOPLIN, MO.

(Circuit Court, W. D. Missouri, W. D. February 7, 1902.)

No. 2,419.

1. MUNICIPAL CORPORATIONS—CONTRACTS—ORDINANCE GRANTING FRANCHISE TO ELECTRIC LIGHT COMPANY.

The statute of Missouri (Laws 1891, p. 60) which authorizes a city to erect and operate electric light or water works: "Provided, that the council may * * * grant the right to any person or persons or corporation to erect such works * * * upon such terms as may be prescribed by ordinance: provided, further, that such right * * *

shall not extend for a longer period than 20 years,"—provides two alternative methods by which a city may secure lights or water for its inhabitants; and where a city has acted under the second method, by passing an ordinance granting the right to erect and maintain electric light works for 20 years, and fixing the terms, rates of charge, etc., such ordinance, when accepted and acted on by the grantee, creates a valid contract, an implied term of which is that the city will not within the 20 years erect works of its own and enter into competition with the grantee in furnishing lights to private consumers.

2. CONSTITUTIONAL LAW—IMPAIRMENT OF OBLIGATION OF CONTRACT—CITY ORDINANCE.

An ordinance passed by a city, under assumed authority from the state, providing for the erection of electric light works for the purpose of supplying lights to its inhabitants, in competition with an electric light company, in violation of the implied terms of a contract made by a prior ordinance granting a franchise to such company for a term of years, is a law impairing the obligation of contracts, within the meaning of the contract clause of the federal constitution.

In Equity. Suit for injunction. On final hearing.

Trimble & Braley and John A. Eaton, for complainant.

C. A. Montgomery, Hugh Dobbs, and Lathrop, Morrow, Fox & Moore, for respondent.

McPHERSON, District Judge. Both complainant and respondent are citizens of the state of Missouri, and, the amount in controversy being sufficient, this court acquires jurisdiction because of the federal question presented,—the alleged impairment by defendant city of its contract with complainant, entered into by an ordinance conferring the right to establish an electric light system. This case was before this court on an application for a temporary injunction, and, the writ being granted, an opinion was filed. For the purpose of abbreviating this opinion, I refer to the former opinion, as found in 101 Fed. 23. Counsel before me in oral argument and in their printed briefs in no way criticise the former opinion as to the statement of facts, and the analysis generally of the situation; the contention being as to the conclusions of law in the opinion stated. And since that opinion was filed, the record, either by pleadings or the evidence, has not materially changed. In my judgment, the only questions of importance now presented were then presented. As I view the case, the question whether a light, and what kind of a light, was kept at the porch on Freeman's Foundry, is in no sense pivotal, let the facts be as they may. The same is true as to whether complainant at all times furnished lights up to the standard of the contract. In all such cases, in all contracts for public services, such as schools, churches, public franchises, such as street car service, gas lighting, telephones, and electric lighting, complaints are made. The complaints may be well founded in part, and may be made partly because of the right, real or supposed, to be in opposition to what exists. If defendant city operates a system of electric lighting, it will meet with like complaints. But many of these alleged shortcomings were adjusted by the city reducing complainant's bills. But in no event were any of these things of such importance as to warrant the city in avoiding its contract, if a contract exclusive in its character were made.

The complainant has erected its power house at some waterfall some

few miles outside the city limits. And this, it is claimed, is such a violation of the alleged contract as to warrant the defendant city in abrogating the contract. The very statute under which the ordinance in question was adopted provides that, when the city erects the lighting plant, it may exercise the power of eminent domain, outside the city limits, for right of way for pipe lines and other conveniences and necessities. The substantial thing required of complainant, under the ordinance, was to furnish electric lights. The city was and is in no way wronged or prejudiced by the fact that the electricity was conveyed from out in the country by wire into the city. And the small amount of taxes the city would lose because of the assessment of the power house by some country precinct is too trivial to discuss, and I only mention it because it is in the record. If the contract were made to induce the erection of the property for taxation, then let the city charge complainant with the taxes. But it is idle to claim that such was the purpose. The contract was to secure lighting. I can serve no purpose by analyzing and discussing the several things done, finally vesting in complainant all the rights under the ordinance in question. That it has all the rights conferred by the ordinance, I have no doubt; and the city from the first has so treated it, and at all times so recognized. I do not care to give any of the foregoing matters further attention. No one of them, as well as other matters singly, nor all combined, are in any sense controlling in this case, while I suspect that most of them are afterthoughts, arising when considering the defense to this action.

The question the deciding of which rules this case is a very important one, and is not easily solved. To it I have given much time. It arises upon the following statement: The statute of the state of Missouri, section 1519 (Laws 1891, p. 60), is set forth in the former opinion herein. 101 Fed. 24. It will be seen that a city is authorized to erect, maintain, and operate electric light works in the city, to light the streets, and to supply the inhabitants with light for their own use, and to establish the rates therefor, all of which may be done and prescribed by ordinance. Then the statute recites:

"Provided, the city may * * * grant the right to any person or persons or corporation to erect such works * * * upon such terms as may be prescribed by ordinance: provided, that such right * * * shall not extend for a longer period than twenty years." Laws 1891, p. 60.

Subsequent to the passage of that statute the defendant city adopted an ordinance authorizing complainant (its grantors) to erect an electric lighting plant in the city; and at great expense the plant was erected, and has since been maintained and operated. This ordinance of October 7, 1891 (No. 441), while conferring benefits upon complainant or its grantors, is quite drastic, and with much detail protected the rights of the city, and placed burdens upon the complainant. Private parties, as well as the public, were to be protected from all damage in the erection of the works and the occupancy of the streets and alleys. The work was to be commenced promptly and consummated with dispatch. The size and the placing of the poles were all provided for. The printing of the ordinance was to be paid for by complainant. The rates to be charged private consumers were fixed by the ordinance.

And all these requirements were complied with. The ordinance does not require the city to take street lights from complainant, and it was required to furnish one at a railroad crossing, which was to be, and has been, at no expense to the city. Shortly before this action was brought, the city adopted an ordinance providing for the erection by it, as by it claimed, by virtue of the statute hereinbefore alluded to, of a system of electric light works, with which it proposes to light its streets, and also to furnish lights to the inhabitants as private consumers. The purpose seems to be to enter into competition with complainant. That the city can, regardless of the ordinance, light its streets, I have no doubt. At all events,—and be this as it may,—the complainant cannot and does not make complaint as to that. But is the contract, by ordinance, between the city and complainant, impaired, and therefore in violation of the constitution, which recites, “No state shall * * * pass any * * * law impairing the obligation of contracts”? And whether the state as a state, or the state through a municipality, does the act complained of, the same inhibition applies. The history of the proposal of this constitutional provision, and what led up to it, and its adoption, as portrayed by Bancroft, as well as by others, and notably by Justice Samuel F. Miller, is to me one of the most interesting phases of our history. And the evils sought to be avoided and prohibited were, perhaps, after the commerce clause, and a few others, the important work of the convention. And to impair a contract does not mean to destroy it. If the rights under a contract are practically taken away, the contract is impaired. And another thing must be kept in mind: A city council, in adopting ordinances, acts sometimes in one capacity, and sometimes another. Some ordinances are legislation, making laws for the government of the people of a city. In so doing it is acting in a legislative capacity. Such ordinances are always and at all times subject to repeal, amendment, or modification. Other ordinances are enacted by the council under statutory authority granted, when the council is not acting in a legislative capacity, but in a business capacity. And such was Ordinance No. 441, under which complainant erected its plant, and has since operated it. There is no provision of the constitution of the state of Missouri bearing upon the question. And the legislature of the state has adopted no subsequent statute upon the subject,—facts to be kept in mind in view of some of the cases cited, and later to be noticed. The statute of 1891, before referred to, and the ordinance (441) must be considered and construed together. And the validity and regularity of the adoption of the ordinance are not questioned. Nor is it suggested that the ordinance is in excess of the statutory authority. The general scope of the statute is to authorize the city, by its council, to erect, maintain, and operate a lighting system by the agency of electricity. On that subject the statute is full and complete, and the unquestioned power is conferred upon the city. But in the same statute, and in the very same section, is a negative in the shape of a proviso. This proviso is that, instead of the city erecting and operating the plant, it may confer such privileges and impose the burdens upon persons or a corporation, such persons or corporation consenting thereto. And is it not a strained and unwarrant-

ed interpretation of the statute to say that the legislature conferred authority upon the city to do both at one and the same time? Does not the statute in effect provide that the city may erect and operate the plant, or it may have it done by some person or corporation? And I fully agree with all that is said in the former opinion herein as to how any statute shall be construed. The implied provisions and the spirit of the statute are as much of the statute as the express provisions. And the courts are no more justified in riding down the implied provisions and the spirit of the law than they would be in riding down the express provisions. "For the letter killeth, but the spirit giveth life," is well to keep in mind in the court room as well as elsewhere. The plain meaning of this statute, to me, is that the city may do one or the other thing, and only the one thing at a time. The city made its election. In the fall of 1891 it said, in effect, that it either could not, or, if it could, it would decline to exercise its right to, erect a plant. But it would, if it could, find some person, and grant the right to another. Terms were proposed, and those terms were accepted. By those terms complainant was to erect its plant within a certain time, and in a certain way, and pay certain expenses, and save the city harmless from damages, and furnish the city at a crossing a light free, and furnish the inhabitants lights for their houses and shops and stores at certain fixed rates. It is of little concern how the city accepted those terms,—whether in writing or verbally or by the acquiescence of both parties. The terms were accepted, and for years so regarded by both parties, and so acted upon by both parties. The council, acting in a business capacity, as above stated, proposed the terms, and complainant accepted. Why was a contract not then made? What element or phase of a contract was then lacking? One may possibly be suggested, but I can conceive of none. After the contract was made, the complainant erected its plant, and in so doing expended its money, assuming that under the statute the contract would continue in force for 20 years, at which time the whole matter will be relegated back to the people. But after a few years the officers of the city change, and they conclude that public ownership is the better way. And perhaps it is. But because one party to a contract changes its mind, and concludes that the contract was an improvident one, does not justify the abrogation of the contract. This can only be done by mutual consent, and in the case at bar the mutual consent to abrogate the contract is lacking. And I know of no reason why the government or a state or a county or city should not with the same good faith, in letter and in spirit, observe contracts, as is expected from individuals. And while every one ought to agree to this, yet the fact remains that, of all the cases taken to the supreme court under the constitutional provision in question, the greater number of cases are those where some subsequent municipal body concludes that it will not observe the contract fairly made by its predecessor.

That a contract was made, I have no doubt. What was the contract? Complainant was to erect the plant at its sole expense, and do so in the way above enumerated. It was to operate its plant at its sole expense. It was "to supply private lights for the use of the inhabitants of the city and its suburbs," in the language of the statute.

It is true that this quotation is taken from the part of the statute providing for the city to erect its own plant. But in the proviso the same power and rights are conferred upon the persons when they erect and operate them. The complainant was obligated to erect its works, place its poles, and string its wires. Its only compensation, and the only way it could be reimbursed, was to charge the private consumers. And it was to charge the private consumers the ordinance rates. What consumers did the ordinance contemplate? All those needing the lights, and able and willing to pay the ordinance rates. Such was the contract. Has it been impaired? The contract was to extend for 20 years. But if the city can now erect its plant, and place its poles, and string its wires by the side of complainant's, and charge the same, it is not speculative to say that, for the same service, complainant will do no business. Every inhabitant of Joplin is a partner with all the others, and every man of sense, for the same service at the same price, will patronize his own concern, and thereby increase the profits in which he will participate in one form or another. And then complainant will have a mere naked contract on paper, with the poles standing in the street, and its power house idle. That is not only an impairment, but a wiping out, of its contract. My own views are, independent of the cases, this should not be allowed. I regard the following cases in point: *Walla Walla Water Co. v. City of Walla Walla* (C. C.) 60 Fed. 957; *Id.* 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. In that case the city agreed not to build during the term covered by the contract. And in the case at bar the same agreement was impliedly made. The case of *Westerly Waterworks Co. v. Town of Westerly* (C. C.) 75 Fed. 181, is directly in point. The only criticism that can fairly be made of the case is that it was in a trial, and not in an appellate, court. But the reasoning of the opinion and the authorities cited make an unanswerable argument. *Hamilton Gaslight & Coke Co. v. City of Hamilton*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, is urged by the defendant herein, with earnestness, as supporting its contention. But that case is not in point, for several reasons. In that case the ordinance was not passed under legislative authority. In the case at bar the ordinance (No. 441) was passed under legislative authority. In that case the contracts had expired by limitation. In the case at bar the contract would not expire for 10 years from the time this action was commenced. Nor is the case of *Stein v. Water Supply Co.*, 141 U. S. 67, 11 Sup. Ct. 892, 35 L. Ed. 622, in point. In that case the contract was to bring water from a particular river, while the new contract was to bring water from another source. In *Washington & B. Turnpike Co. v. Maryland*, 3 Wall. 210, 18 L. Ed. 180, the old contract was with reference to a turnpike, while the new one was with reference to a railroad for the carrying of people who might never have used the turnpike.

At present I do not see but that the case of *Thompson-Houston Electric Co. v. City of Newton* (C. C.) 42 Fed. 723, decided by Judge Shiras, is in opposition to my views. The same ordinance was again before the same court in *Levis v. City of Newton* (C. C.) 75 Fed. 884, and it was held that the rights conferred by the ordinance could not be taken away by a repealing ordinance. And that decision was affirmed.

by the circuit court of appeals for this circuit in 25 C. C. A. 161, 79 Fed. 715. The question now under consideration was not decided, the court observing that the question is "serious and doubtful."

The case of *In re City of Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270, is not in point, because in that case the ordinance was construed as not granting an exclusive franchise to a company, and the second ordinance granted another franchise to another corporation,—a very different question from the one now under consideration. The same can be said of the great and leading case of *Charles River Bridge v. Warren Bridge*, 11 Pet. 536, 9 L. Ed. 773. And there are a great many like cases, which I do not take the trouble of citing. But these cases are in no way in point, because no such question is in the record in the case at bar. The city of Joplin has not, by ordinance or resolution, conferred or attempted to confer a like franchise upon another. It must be kept in mind that what is complained of is that the city itself is about going into the business of furnishing commercial lights inside the city limits. The effect of doing that is the question, and is the only question, in this case. I do not contend that all of the cases are in harmony. But I do contend that the weight of the authorities support these views. No case has yet been decided by the supreme court or by the circuit court of appeals for this circuit to the contrary. I regard the *Walla Walla Case*, above cited, by the supreme court, as controlling, because I believe that the implied provisions and the spirit of a contract are just as binding as are the express provisions. And when the city agreed that, if complainant would erect the plant, it would have the business of the private consumers at the ordinance rates, I believe that the city impliedly agreed to not itself erect a plant. Such, as it seems to me, was the spirit of the agreement. And if that be so, then the *Walla Walla Case* becomes controlling. The city did not, as is often done, reserve any right in the ordinance to alter or amend it. Therefore I conclude that fair dealing requires the city to abide by its contract until it expires by limitation, the end of 20 years from the adoption of the ordinance.

The decree will be for the complainant, and the temporary injunction will be made permanent.

JACK v. WILLIAMS et al.

STATE ex rel. CUNNINGHAM et al. v. JACK et al.

(Circuit Court, D. South Carolina. February 1, 1902.)

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF PARTIES—ACTIONS EX RELATIONE.

A suit in the name of a state, on relation, is to be treated, for the purpose of determining the jurisdiction of a federal court, as though the relators were alone the complainants.

2. RAILROADS—DUTY TO OPERATE—NATURE AND EXTENT.

In the absence of special circumstances, or an express contract embodied in a charter, the owner of a railroad, whether a corporation or individual, cannot be compelled to maintain and operate the same at an actual loss. The duty arising from the ownership of the franchise is merely to meet the public requirements, and, where the traffic on a road is not sufficient to pay its operating expenses, such duty does not require its operation, and it may be abandoned.

3. SAME—POWER OF COURT TO ORDER DESTRUCTION OF ROAD AND SALE OF MATERIALS.

A railroad company built a short piece of road, wholly with the proceeds of bonds sold, and then became insolvent. In a suit to foreclose the mortgage securing the bonds a receiver was appointed, who by leave of court issued certificates, with the proceeds of which he completed the road to a length of 12 miles, by which it connected two towns. He operated the road for a number of years in the most economical manner, and without salary himself, but its earnings barely paid operating expenses, producing nothing for creditors, or even for maintenance and repairs. After several attempts to sell the road, at which no bids were received, it was purchased for \$15,000 by three holders of receiver's certificates, and the sale confirmed. At that time private persons could own and operate a railroad under the laws of the state, but by a law passed soon thereafter all natural persons owning a railroad were required to organize into a corporation within 60 days, in default of which the franchise of the road was declared forfeited. The purchasers of this road failed to incorporate, and after its franchise had thus been forfeited one of them brought a suit to obtain a sale of the property and a division of the proceeds. A receiver was appointed, and the road was inspected by an expert, who reported that \$10,000 must be expended in repairs to render the road safe to operate for one year. There was no statute of the state making it obligatory upon the owner of a railroad to operate the same, nor was there any such requirement in the charter of the original company, which was permissive only, and the road had not been operated since its sale. *Held*, that to compel the owners to repair and operate the road at a certain loss, or to keep it intact, though unused, would be to deprive them of their property without compensation, and that the court was justified, under the circumstances, in ordering the receiver to dismantle the road and sell the materials.

4. SAME.

The receiver having taken up and sold the rails under an order of court entered without opposition, the court could not require the owners to purchase new materials and rebuild the road, on an offer by interveners to lease and operate the same if restored, especially in view of the fact that the franchise to operate it as a railroad had been forfeited.

In Equity. On cross bill of interveners.

See 102 Fed. 210, 106 Fed. 259.

Ansel & Cothran, for complainant.

B. A. Hagood, for defendants.

J. W. Barnwell, B. M. Shuman, and J. H. Heyward, for cross complainants.

Ansel & Cothran, B. A. Hagood, S. J. Simpson, and J. R. Lamar, for cross defendants.

SIMONTON, Circuit Judge. This case now comes up on the cross bill filed by the state of South Carolina, ex relatione T. B. Cunningham, and others, the answers thereto, and the testimony taken before the special master upon the issues therein set forth. Although the name of the state is used, still the suit being ex relatione, this court has jurisdiction. *Maryland v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822; *Indiana v. Glover*, 155 U. S. 517, 15 Sup. Ct. 186, 39 L. Ed. 243.

The legislature of South Carolina, in December, 1882, granted a charter to the Greenville & Port Royal Railroad Company, permitting it to construct a railroad from Greenville, S. C., to the port of Port

Royal, in the same state. It had the power to issue bonds and secure the same by the mortgage of its property and franchises, and natural persons and municipal corporations, as well as other corporations, were authorized to subscribe to its capital stock. In December, 1885, its charter was amended by the general assembly of South Carolina. Its name was changed into that of the Atlantic, Greenville & Western Railway Company, and its route was so changed as to extend from Greenville to Ninety-Six, in said state, with the privilege of extending eastward from Ninety-Six to some point on the Atlantic Coast, and westward from Greenville to the North Carolina line, by such route as the directors should select. By this act power was given to townships along the line of the road, or interested in its construction, to subscribe to the stock of said road, and to this end any such townships were declared to be bodies corporate. This special provision has been declared invalid. *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. 14, 2 L. R. A. 242. By an act passed in December, 1886, the Piedmont and Pelzer Manufacturing Companies were each authorized to subscribe to the capital stock of this road. It may be mentioned in passing that there is no evidence in the record showing that any municipal or private corporation or person subscribed or paid any cash or property toward the capital of this company. In 1887, under the provisions of the general railroad act of South Carolina, this Atlantic, Greenville & Western Railway Company was consolidated with a corporation existing under the laws of the state of North Carolina and of the state of Tennessee, and thus became known as the Carolina, Knoxville & Western Railway Company. Some parts of the roadbed of this projected railway were built, but no part of it was constructed, except some 12 miles, starting from Greenville, toward the town of Marietta, in said county. The story of this enterprise is one of disaster. The construction company which undertook the contract for building the road became insolvent, and was placed in the hands of a receiver. The railway company itself was also placed in the hands of a receiver, being utterly insolvent. Soon after his appointment the receiver of the railway company applied to the court for leave to issue certificates to be used in completing the road toward Marietta, a distance of three miles. At the time of this application the road had no other terminus except Greenville, the other terminus being in the woods, and it was hoped that should it be extended to Marietta its business would be improved and its profits increased, and perhaps means could be provided for extending the road into territory which would serve the purposes of the contemplated enterprise and induce prosperity. Leave was granted, and the town of Marietta was reached. So low, however, were the credit and prospects of the railway that but for the efforts of the receiver and his personal friends the certificates could not have been placed. The railway under the receivership was conducted with the greatest economy. Every unnecessary expense was cut off. The receiver himself received no salary, notwithstanding that he gave his personal attention to the management. As a result, however, whether owing to the poverty of the territory or to the indifference of the people, the part of the railway so constructed scarcely met its operating expenses. Finally, the

services of a superintendent could not be provided for, and the receiver had to fill the place himself. The roadbed of the other parts of the road and the railway on this small section had been constructed entirely from the proceeds of bonds secured by a mortgage of the whole road. Not a dollar of interest had been paid on any of these bonds, the amount of the total issue being \$200,000. The right of way contracted for and secured had not been paid for. The road ran through a territory requiring many trestles, and these and the roadbed itself were fast decaying, requiring immediate repair, their condition endangering life and property. Under these circumstances, the creditors applied for a sale of the road. No organization could be effected for its purchase, and a sale was ordered on 17th August, 1892, at an upset price of \$50,000. At the sale under this order no bids were received. Another sale was ordered 16th March, 1895, the upset price having been fixed at \$30,000. No bids were made at this sale. Then the upset price of \$25,000 was fixed at another sale ordered 23d September, 1895, and again no bids were made. Finally, on 24th June, 1896, a sale was ordered, and the highest bid, \$15,000, was received and accepted. At this sale James T. Williams became the purchaser. At the date of this purchase the road, roadbed, and rolling stock of the railway were in such a dilapidated condition that the railway could not have been operated without putting on many and expensive repairs. Williams did not operate it at all. Thereupon proceedings were instituted before one of the state judges, by way of mandamus, to compel him to operate the road. These proceedings failed because of an irregularity in them, the rule for the mandamus having been issued by one judge, and the return heard and mandamus issued by another judge, who was without jurisdiction. At the date of the purchase of this road the law of South Carolina gave the privilege to any purchaser of a railroad sold under foreclosure, of or under a provision in a mortgage, to organize a corporation to own and operate the same. Rev. St. S. C. § 1610.

In 1897, March 5th, the legislature passed an act requiring any person then owning any line of railroad in this state to reorganize, under section 1610, within 60 days after the passage of that act, under a penalty of \$50 per day for each day of failure to operate said road, unless reasonable cause be shown to the contrary, and, in addition to the penalty he should forfeit all the franchises, powers, and privileges granted to the railroad purchased. Williams did not accept the provisions of this act. Soon after the passage of the act, D. F. Jack filed his bill in this court, stating the purchase of this road by Williams; that the purchase was made by him for the benefit of himself, D. F. Jack, and H. C. Beattie; that he was not willing to organize a corporation under the requirements of the act of 1897; that it was impossible to rebuild the road, except at great expense, and with no prospect of gain; and praying an injunction against his co-tenants from making any effort in that direction; praying also for the appointment of a receiver to take charge of the property. Answers were filed, the injunction issued, and the receiver appointed. It is well to say here that this court in granting this order had no notice whatever of the mandamus proceeding in the state court. An inspection of the rail-

road property was had by a skillful railroad supervisor, under the instructions of the receiver, who reported that there were 22 trestles on the road, all of which but 2 needed extensive repairs; that 12,000 cross-ties were needed; that in many places the roadbed was covered with dirt two feet deep; and that it would cost over \$10,000 to put the road in proper condition to run one year.

The case thus presented to the court was this: This section of the railway had been built with borrowed money; had been operated for several years; had not, even when it was new and without need of repairs, earned more than its operating expenses, paying nothing on its debt by way of interest or principal, and paying nothing to the receiver. Its business had not increased. Its road had run down, requiring large additional expenditure. Its right of way had not been paid for, and the claims on this head were a first lien. It paid nothing on its first cost. It could pay nothing on the increased outlay which was imperatively demanded. Any one, natural person or corporation, attempting to operate it, would meet certain loss. It could not be operated except by a corporation, and the purchasers had lost the privilege of incorporation, and the right to exercise the franchises, under the provisions of the act of 1897. Under these circumstances, the court authorized the sale of the rails on the road, and the taking them up. The sale was made, and the rails brought \$28,000, the Charleston & Western Carolina Railway Company being the purchaser. After the order of sale the present relators filed their petition for leave to intervene, the prayer of which was granted, and leave was also given to review the previous action of the court in ordering the sale. They filed their answer to the original bill, and asked and obtained leave to file this cross bill. This has been answered. The main issue in the case is: Can the court authorize the taking up and the sale of the rails on this railroad, which has been under operation, thus practically authorizing its abandonment?

A railroad is in a sense a public concern. To its construction and operation the action of the sovereign is needed. If a corporation is created, the franchise to be a corporation can be given only by the sovereign. Its franchise as a common carrier for hire of passengers and freight comes from the sovereign. Its right to exercise the right of eminent domain can come only from the sovereign. And, as its road is in a sense a highway, the sovereign grants that also. The consideration for these acts of the sovereign is the utility of the enterprise to the public. To be thus useful to the public, the road must be kept up in such a condition that life and property both must be made as safe as practicable. The rates of transportation of persons and freight must be reasonable. And the reasonable number of trains must be kept up, dependent upon the circumstances surrounding the railway. Whilst thus serving the public, however, no corporation or private person is obliged to continue the service without a reasonable remuneration. No one can be compelled to serve the public for nothing. Private property of no kind, including railroad property, can be used for public purposes without compensation. *Smyth v. Ames*, 169 U. S. 467, 18 Sup. Ct. 418, 42 L. Ed. 819; *Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; *Chicago, M. & St. P. R. Co.*

v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; Railway Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. All these cases determine that a railroad company, in the full enjoyment and use and capacity to use its franchises, cannot be compelled to exercise its franchises without reasonable remuneration. A fortiori a railroad corporation, or a person owning a railroad, cannot be compelled to operate that road, not only without remuneration, but at a loss. And this not by any means because such corporation or person is insolvent. If a citizen has the wealth of the Rothschilds, he cannot be compelled to use a dollar of his wealth for public purposes without compensation. What, then, is a person to do who becomes possessed of wholly unproductive railroad property? Sell it? But in the case at bar several distinct efforts to sell had been made, and made in vain. No bid whatever had been made except by these purchasers. The public—even that portion of the public on the line of the road—could not be induced to make a bid on it. Repair it and put it in condition? But experience had shown that even when it was a new road, requiring no expense for repairs, it barely paid operating expenses. Could the state or the public, in the face of the fourteenth amendment, compel such an expenditure, involving certain loss? Evidence has been introduced of persons who are of the opinion that the road would pay. Can such testimony override the result of actual experience? It appears also in evidence that, notwithstanding the existence of this road, dealers in cotton and farmers preferred to carry their cotton to market in wagons, rather than to ship it by rail. The difference of cost must have been small. But, small as it was, the people about the road evidently estimate the general advantage of the road at a sum still smaller. Under these circumstances, what other course could have been pursued? The roadbed was in such a condition that it could not be operated. The expenses attending its repair held out no hope of remuneration. The purchasers had lost the privilege of incorporation and retention of the franchise. They owned the property. Was it to be kept idle and useless, or could they dismantle it?

This question is somewhat of novel impression,—at least, there is no decision exactly on all fours with it. The leading case on this subject is *Kansas v. Dodge City, M. & T. R. Co.* (Kan.) 36 Pac. 755, 24 L. R. A. 564, and this clearly resembles the case at bar. In that case a mandamus was refused. This is the headnote:

“Where a railroad company owning a short line of railroad, 26 miles only, is wholly insolvent, and such company has no cars or engines with which to operate it, and no funds or property to be applied to the payment of expenses of the company or the road, and the road has been abandoned for several months, and the road cannot be operated except at a great loss by any corporation or person, not taking into account the repairs of the road and the taxes thereon, the supreme court, having discretion in the granting of a writ of mandamus, will not compel by a peremptory writ the railway company to replace or put in repair its track, a part of which has been torn up, as such an order would be futile and of no public benefit.”

The facts of that case show that the road had been sold, and that a private person had bought it, and had sold to another person, who had removed the rails. Among other things the court says:

"The order prayed for should only be issued in the interest of the public. If the track is replaced there is no reasonable probability that the road will be or can be operated. If a railway will not pay its mere operating expenses, the public has very little interest in the operation of the road or in its being kept in repair."

Several cases are quoted in the note to this case, the annotator admitting that they leave the question uncertain. One of these cases (*Talcott v. Pine Grove*, 1 Flip. 120, Fed. Cas. No. 13,735) says that a railroad cannot be abandoned after it has become one of the great thoroughfares of the country. But this is clearly an obiter dictum, having no bearing on the case whatever, the question in which was the validity of certain municipal bonds. See *Pine Grove Tp. v. Talcott*, 19 Wall. 666, 22 L. Ed. 227. *State v. Sioux City & P. R. Co.*, 7 Neb. 357, was the case compelling a railroad company to keep up its entire line because of a contract growing out of land grants toward its construction. *People v. Albany & V. R. Co.*, 24 N. Y. 261, 82 Am. Dec. 295, went off on a question as to the remedy. In *Rex v. Railway Co.*, 2 Barn. & Ald. 648, the company was ordered to restore an abandoned tramway, designed for the use of others besides itself, but the court refused to order the maintenance of the tram road. In *State v. Hartford & N. H. R. Co.*, 29 Conn. 538, a part of the track of the railroad was abandoned in order to prevent competition by steamboats. This was held unlawful. And so with all the other cases quoted in this note. The question is incidentally touched upon in *Railroad Co. v. Dustin*, 142 U. S. 499, 12 Sup. Ct. 285, 35 L. Ed. 1095, and there the court says:

"If, as in *Railroad Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428, the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by mandamus. So, if the charter requires the corporation to construct its road and to run its cars to a certain point on tide water (as was held to be the case in *State v. Hartford & N. H. R. Co.*, 29 Conn. 538), and it has so constructed its road, and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a corporation to build a bridge in accordance with an express requirement of statute. *New Orleans, M. & T. R. Co. v. Mississippi*, 112 U. S. 12, 5 Sup. Ct. 19, 28 L. Ed. 619; *People v. Boston & A. R. Co.*, 70 N. Y. 569. But if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or maintain its road to that point, when it would not be remunerative. *Railway Co. v. The Queen*, 1 El. & Bl. 858; *Railway Co. v. The Queen*, 1 El. & Bl. 874; *Com. v. Fitchburg R. Co.*, 12 Gray, 180; *State v. Southern Minnesota R. Co.*, 18 Minn. 40 (Gil. 21). In *Com. v. Fitchburg R. Co.*, 12 Gray, 180, mandamus was refused to compel the running of passenger trains over a branch road on which this had been discontinued, after running them for a time, because they were unprofitable. The question is not as to the existence of the duty, but as to its extent and qualifications. The duty of a railroad company is not more than to meet the public wants. If trains run at reasonable and moderate fares, and cannot be supported, it is because they are not needed."

The text writer Morawetz also says:

"The duty of a railroad company to operate its road requires it merely to meet the public wants and exigencies. If there is not sufficient traffic over a particular line of road to pay for the expense of running trains, this is sufficient evidence that the public do not require it to be kept in opera-

tion. In such case the company may cease operating the road, unless this be contrary to the express terms of the charter." Mor. Priv. Corp. § 1119.

This is sustained in *Ohio & M. R. Co. v. People* (Ill.) 11 N. E. 350.

In *Coe v. Columbus, P. & I. R. R.* (Ohio) 75 Am. Rep. 524, the court says:

"If we are at liberty to suggest on what the legislature very probably relied for the continued operation of a railroad, once constructed, we should say it was the interest of the owners. If it can be operated profitably, the interest of those concerned will rarely, if ever, fail to keep it in operation so as to subserve the public use. If it cannot, we know of no mode by which the state can compel those by whom it was constructed to operate it at a loss, and certainly there is no mode provided by which it can be operated at the risk of the state."

There is another point of view. The purchasers of this railroad bought it at public auction, under an order of this court. They purchased all the visible property of the insolvent railroad corporation, its rolling stock, roadbed, iron on the road, together with its franchises, including the rights of way. At the time they purchased, private persons could buy, own, and operate a railroad. The legislature of South Carolina repealed this privilege, and required all natural persons owning railroads to organize as a corporation within 60 days, and, failing so to do, declared that they forfeited all the franchises of the railroad company. They did not fulfill this condition. They could not be compelled to fulfill this condition. No power exists in the legislature to compel an individual to join a corporation or to compel several individuals to become a corporation. They accepted the results of a failure to comply with the condition, and voluntarily forfeited its franchises. This, however, did not deprive them of their property, not included in their franchises. Being the owners of this property, having dominion over this property, they could dispose of it at pleasure. True, it had been applied to a public use. But the legislature has defeated and forbidden that use. If the purchasers, this act having been passed, cannot dispose of their property, they are deprived of it without due process of law.

So far the question has been discussed with reference to the facts and circumstances surrounding the case when the purchase was made, and the order permitting the removal of the iron was passed. Since this intervention two persons have made distinct and binding offers to lease the railroad, if it be restored, and so to operate the same. This offer comes too late. Rights have vested and acts have been done which cannot be set aside. The rails have been removed and have been sold. To restore them would require the investment of money by the purchasers, the remuneration of which will be fixed, not at its value, but at the rental value, which, in the estimation of third persons, will enable them to operate the road. Nor can these offers be taken as indicating the value of the road at the date of its sale. Apart from the fact that long experience has shown that the best test of the value of property is a sale at public auction open to all bidders, not one effort was made by any one, either among those using the road or owning property adjacent to it, either to buy it or to aid it in its extremity. Not a dollar of subscription money was used in its construction. Not a bid upon it was ever made except by

these purchasers, and two of them were holders of receiver's certificates, bidding to protect themselves. No better test could be had showing that in public opinion the property was not profitable. When the conveniences offered by the road—offered, but by no means accepted by the public—were withdrawn, then some of the public became awake to the fact that that road could have been made useful,—had been neglected. But this neither the purchasers nor the court could foresee. The value of the road, or rather its hopeless want of value as an investment, was determined by the facts existing at the time and the attitude of the public to it.

As the result of this examination, it will appear that, in the circumstances of this case, the purchasers could rightfully exercise the option of accepting the provisions of the act of the legislature by incorporating themselves within 60 days after its passage, and trying the operation of the road, or of forfeiting the franchises they had purchased; that they exercised this option, and forfeited the franchises, rendering any proceedings in quo warranto unnecessary; that thenceforward any attempt by them to exercise the franchises of a railroad company would have been unlawful; that they, being the owners of property which could not be used for the purposes of a railroad, by reason of this forfeiture, and the illegality of its use consequent thereon, could lawfully dispose of the same; that having thus taken up the rails on the road, and having sold them, this court will not compel them to buy other rails, rebuild the decayed trestles, decayed when the purchase was made, renew the cross-ties, which were also decayed at that time, and operate the railroad without remuneration.

There is another intervention in this case filed by landowners through whose lands the railroad company had rights of way. Their rights will depend upon the correctness of the adjudication on this branch of the case. As without doubt the review of an appellate court will be sought, further proceedings in the matter will be postponed to await such an adjudication.

SEAL v. BEACH.

(Circuit Court, D. New Jersey. December 26, 1901.)

1. PATENTS—EFFECT OF LICENSE—ESTOPPEL OF LICENSOR TO DENY VALIDITY.

The owner of a patent, who, for a valuable consideration, has granted an exclusive license thereunder, is estopped to deny that the licensee took good title to the privilege which he undertook to convey; and he cannot defend against a suit by the licensee against him for infringement on the ground that he had granted a prior license, of which complainant had notice.

2. SAME—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

In a suit for infringement by an exclusive licensee under a patent against the licensor, a defense that the license was procured by fraud cannot be considered on a motion for preliminary injunction, especially where the defendant has retained the consideration received, and has taken no steps to procure a rescission; and, for the purposes of such motion, the license must be treated as valid.

In Equity. Suit for infringement of letters patent No. 414,335, issued November 5, 1889, to Charles Henry Webb, as assignee of

Lester C. Smith, for an improvement in adding machines. On motion for preliminary injunction.

A. Parker-Smith, for complainant.

R. A. Parker, for defendant.

KIRKPATRICK, District Judge. The bill of complaint in this case sets out: That some time in the year 1889 Lester C. Smith filed an application with the proper authorities for a patent for a new and useful improvement in adding machines, and that before the patent office had acted upon said application said Smith conveyed to Charles Henry Webb all his right, title, and interest in and to said application, and the invention and improvement covered thereby, and requested that said patent, when granted, be issued to said Webb. Accordingly, on November 5, 1889, a patent (No. 414,335) issued from the patent office to said Webb for such improvement. That afterwards said Webb conveyed to Webb's Adder Company all of his right, title, and interest in said patent, and the said company afterwards conveyed the same to Edwin R. Beach, who is the sole defendant in this suit. The bill also recites that afterwards the said Edwin R. Beach granted to the complainant, by instrument in writing dated July, 1900, the full and exclusive license and authority to make and sell the improvement covered by said letters patent No. 414,335, for a period of three years, beginning August 1, 1900. The bill further alleges compliance on the part of the complainant with her part of said agreement of license, the payment of the sum of the \$300 called for therein, and the expenditure of a large sum of money in preparation to put upon the market the required number of adders. The bill charges infringement by said licensor, in that he had sold adders covered by the claims of the patent, which, to his knowledge, were made, not by the complainant, but contrary to the terms of the license. There is a prayer for an injunction pendente lite restraining defendant and his agents from further infringement.

The answering affidavits do not deny the specific charges of infringement set out in the bill of complaint, and which consist of sales of the patented article during the term of the license, but seek to justify them on the ground that the complainant did not get good title to her license—First, because the defendant at the time of executing said license had no legal authority to make the license, he having before that time given a similar exclusive license to another party, of which the complainant had notice; and, second, because, as defendant alleges, he was induced to execute the license to the complainant through false representations made by one Herring, who acted as complainant's agent in procuring the license, as to the financial responsibility of the prior licensee, and its capability to carry out its contract.

It is well settled that, as against the owner of a patent, a licensee cannot set up invalidity to avoid the payment of the royalties. He is estopped from so doing by acceptance of the license. For like reason it would seem inequitable and unjust that the grantor of an exclusive license under a patent should be permitted, during the term of the grant, to deny that the grantee took good title to the privilege which he himself undertook to convey. In a suit between the licensee and

third parties this objection might be raised, but surely not by one who received a valuable consideration for the grant. The purchaser of a license takes it subject to all outstanding licenses, and notice of their existence is not essential to their validity, nor necessary for their enforcement. Notice of an outstanding prior license would not render void, as between the parties, the license which had been given and accepted, but merely affect any remedy in the way of damages which might be sustained by reason of its existence. Whatever may be the right of the complainant under the license as against third parties, certainly as against the licensor she is entitled to protection.

The other defense cannot be sustained at this time. Allegations of fraud such as are relied on cannot be considered now. Their determination must await determination on final hearing. Until that time the license speaks for itself. It is admitted that when the contract was signed, according to its terms, the licensor accepted \$300. For more than a year this money has been retained, and no action has been taken by the defendant to rescind the contract for the fraud he now sets up, nor has he refunded the money. In the meanwhile he has stood idly by and permitted the complainant to expend large sums of money in preparing to make and put upon the market the patented machines.

On the case as made on the moving papers and answering affidavits, I am of opinion that the complainant is entitled to the preliminary injunction against the defendant as prayed for. Let a decree be prepared.

In re SALSURY.

(District Court, N. D. New York. February 10, 1902.)

No. 232.

BANKRUPTCY—DISCHARGE—FALSE OATH.

Clear and convincing proof is required to sustain objections to a bankrupt's discharge on the ground that he omitted property from his schedules and made a false oath thereto.

In Bankruptcy. On application for discharge.

G. S. & H. L. Hooker, for bankrupt.

James A. Wood, for creditor.

COXE, District Judge. I have read the report of the referee and have examined the papers submitted. I agree with the referee that the objections to the discharge have not been established. The questions discussed have heretofore been decided by me in analogous circumstances. In addition to the cases cited by the referee the attention of counsel is called to the following: In re Howden (D. C.) 111 Fed. 723; In re Eaton (D. C.) 110 Fed. 731. In these cases the objections principally relied on by the objecting creditor were considered, upon somewhat similar facts, and disposed of adversely to the creditor's contention.

The report is confirmed and the discharge is granted.

WESTERN ELECTRIC CO. v. ANTHRACITE TELEPHONE CO. et al

(Circuit Court, W. D. Pennsylvania. January 27, 1902.)

1. PATENTS—SUIT FOR INFRINGEMENT—EFFECT OF PRIOR ADJUDICATION.

A circuit court will not hold itself concluded by a decree entered by it in a prior suit adjudging the validity of a patent, although such decree has been affirmed on appeal, where it appears that prior to the hearing in the cause it had ceased to be an adversary proceeding, which fact was unknown to either court.

2. SAME—INVENTION—TELEPHONE APPARATUS.

The Carty patent, No. 449,106, for improvements in telephone circuits and apparatus, construed, and held void for lack of patentable novelty, in view of the prior development of the art and the definite prior knowledge by the electrical profession of the principles upon which the invention claimed therein rests, which rendered the combination of devices shown, all of which were old, but the natural outgrowth of such development.

In Equity. Suit for infringement of letters patent No. 449,106, issued March 31, 1891, to John J. Carty for improvements in telephone circuits and apparatus. On final hearing.

George P. Barton and Frederick P. Fish, for complainant.

Charles C. Bulkley and R. S. Taylor, for respondents.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. This is a bill filed by the Western Electric Company against the Anthracite Telephone Company and others, charging infringement of letters patent No. 449,106, now owned by complainant, applied for August 16, 1890, and granted March 31, 1891, to John J. Carty, for telephone circuit and apparatus. This patent has heretofore been considered by the courts of this circuit. In the case of Western Electric Co. v. Millheim Electric Tel. Co. (C. C.) 88 Fed. 505, the patent was held valid in an opinion delivered by Buffington, J. This decree was affirmed by the circuit court of appeals, in an opinion reported in 37 C. C. A. 38, 95 Fed. 152, delivered by Kirkpatrick, J., the remaining members of the court, Acheson and Dallas, JJ., concurring. Later, the present bill was filed, and a preliminary injunction on the adjudged patent sought against the respondents. On hearing such motion, Judge Acheson refused a preliminary injunction in an opinion found at 100 Fed. 301. In addition to other grounds thereto moving the court, including the fact that in the Millheim Case the court had not been required to, and had not in fact, passed upon or defined the scope of the claims, it was there said:

"Enough, however, here appears to justify a refusal of a preliminary injunction unless the adjudication in the Millheim Case is to be considered as conclusive against the defense of prior use at this preliminary stage of the case. But the proofs before the court disclose circumstances connected with that adjudication which, I think, ought to deprive it of such effect. It appears that the American Bell Telephone Company was and is the owner of more than one-half of the capital stock of the Western Electric Company, the plaintiffs in the Millheim Case and in this suit, and that by virtue of

such controlling ownership and also by reason of contract relations between these companies, said two companies were and are jointly interested in this litigation on the Carty patent, their common interest being to sustain the patent. Now it further appears that, pending the suit in the Millheim Case, the local representative of said Bell Telephone Company, acting in the interest of that company, and for it, bought out the Millheim Telephone Company and all its property. The negotiations for this purpose began in January, 1898. The terms of sale were settled on February 10th. and the transaction was consummated by transfer and delivery of possession in March, 1898, when the alleged infringing apparatus was taken out by the Millheim lines and replaced by other apparatus. It seems to me from the evidence that a real controversy between the Western Electric Company and the Millheim Electric Telephone Company no longer existed when the Millheim Case was heard in the circuit court on February 17, 1898. Certainly, there was no such dispute when that court made its decision on July 18, 1898. It may, I think, be affirmed confidently that, if the learned judge who sat in the circuit court had known the facts, he would not have heard or decided the Millheim Case, and that the court of appeals would have dismissed the appeal had the facts been brought to its notice. *Lord v. Veanie*, 8 How. 251, 12 L. Ed. 1067; *Cleveland v. Chamberlain*, 1 Black, 419, 17 L. Ed. 93; *East Tennessee, V. & G. R. Co. v. Southern Tel. Co.*, 125 U. S. 695, 8 Sup. Ct. 1891, 31 L. Ed. 853."

Subsequently, much testimony was taken in this case, and it came up for final hearing before Judges Acheson and Buffington. Being fully advised of the facts on such hearing, this court adheres to the view above expressed, that the prior decision of this court, reported at 88 Fed. 505, and affirmed by the circuit court of appeals, is not conclusive in the present case.

As the general nature of telephone party lines and the difference between series and multiple systems are quite fully set forth in the prior opinions, they need not be here detailed at length. Suffice it to say the Carty device is of the multiple circuit construction, and at each station is a permanent bridge, in which is seated a bell magnet, with a high coefficient of self-induction, and of marked impedance. There are also two other bridges, normally open, and closed only when the station is in use. The telephone bridge circuit, normally open, is closed in multiple arc with its own bell magnet, and, of course, with all others in the line, when in use. The generator call circuit, normally open, when used, forms a second bridge or cross connection between the wires in parallel circuit with the bridge circuit of its own bell and those of all others in the line. In operation, the tendency of the call current to short-circuit is counteracted by using a bell magnet of high self-induction and impedance. This not only prevents short-circuiting, but effects a more even current distribution through the bell magnets of the entire system. By means of the numerous windings of the bell magnets, the small portion of the call current passing exerts a marked magnifying effect on the cores and a spirited working of the call signal. Does such combination involve patentable novelty? The solution of this question turns on whether the placing in combination of these elements all of which, individually, were old in the art, involved inventive genius, or was the natural advance incident to the application of electrical engineering skill to the solution of recognized difficulties. In that connection, it will be observed the general principles applicable to series and multiple-arc distribution of currents

were known and utilized prior to Carty's alleged invention, and that in a multiple-arc system the current divided itself among parallel bridges in proportion to their several resistances. Moreover, it was known that by the use of magnets of high impedance certain currents would, and certain would not, be allowed to pass. So also the difference between voice currents and generator call currents in telephoning was appreciated, and the fact that high impedance magnets were opaque to the former, but not to the latter. Now, wherein does the alleged invention lie in Carty's arrangement? We take, as fairly representative of complainant's contention, the statement of Mr. McBerty, an officer of the complainant company and an expert witness by it called:

"The invention of the patent in suit is a many-station or party telephone line, in which the parts, the different signaling and speech transmitting instruments, are so adapted and arranged with relation to each other, both at each and at all of the stations, that they work harmoniously, each without impairing the efficiency of the other. The central idea of the invention is found in the connection of the different instruments in multiple; the parts at each station are connected in multiple at the station, and the different stations are connected in multiple with the line conductors. As this was not possible with the apparatus arranged for serial connection, the different appliances for the substation were also modified by Carty to adapt them to one another in their new relations in the circuit, and, indeed, to make the new arrangement possible; and in the case of the call bell particularly, a new appliance was provided of high resistance and of very high impedance or self-induction. A bell was constructed with long magnets, with more iron than usual, and with a great number of turns of fine wire, the construction resulting in self-induction so great as to prevent the transmission of telephone currents through it in its place in the circuit. The self-induction of a magnet results from the same condition which makes it a magnet and enables it to do work; and here in Carty's invention this quality which, in the series arrangement, had limited the construction of party lines and impaired their usefulness, is taken advantage of, amplified, and utilized to construct a bell which may be connected in a bridge of a telephone circuit without forming a diverting path for telephone currents."

It will thus be seen that according to Mr. McBerty the central idea of the invention was the connection of the different elements in multiple at each station and the different stations in multiple with the line conductors. That is, Carty put each of the three essentials of a station, viz., call, voice, and signal apparatus, in its own bridge, and he placed the station itself in bridge with the line conductors. The serial apparatus of the call and voice apparatus were modified to adapt them to the new multiple relation, and "in the case of the call bell particularly a new appliance was provided, of high resistance and of very high impedance or self-induction." Statements made by Mr. Carty himself both in an address delivered September 9, 1890, at the Detroit convention of the National Telephone Exchange Association, and also in a letter of November 1, 1890, to the London Electrical Review commenting on such address, show wherein he considered his invention did, and wherein it did not, lie. In his judgment at that time it did not lie in bridging. His address was on bridging bells, but bridging he explicitly disavows. He then said:

"We do not want to make any contention for a patent on bridging. Bridging apparatus is not new. It was advocated in a paper read at Minneapolis last year, and one of the first things that Mr. Hibbard did in the

long-distance company was to throw out the looping arrangement and bridge the operators in."

In his letters he says:

"I would call your attention to the fact that, as shown by the official report of the convention proceedings and all published accounts of my remarks, I did not claim any novelty for the bridging system per se, being well aware that it had been in use for years, both in Europe and America."

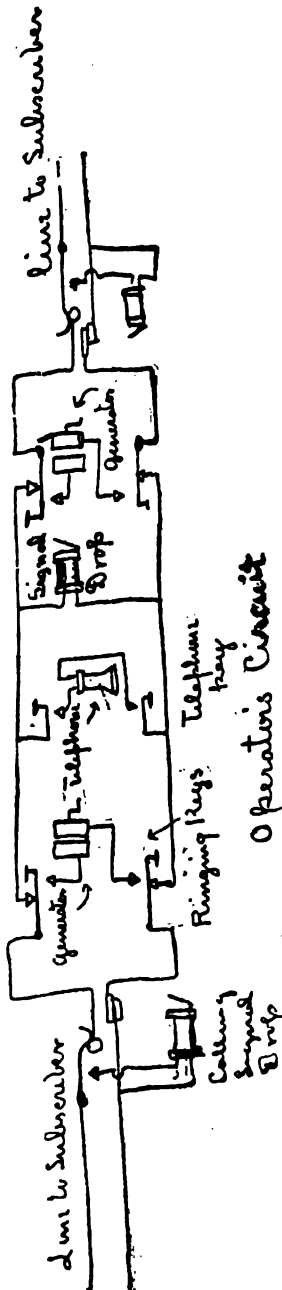
Wherein his invention did lie, he thus states in the Detroit convention address:

"The bell is on exhibition in the rear of this hall. It is a magnetic bell that is much simpler than any yet designed. There is no bottom contact on it, and the bell rings equally well whether the telephone is on the hook or off. The construction of that bell is very little different from some other bells that are made to do the work, but when you come to use 10 or 15 stations on a line you have got to have exactly that construction, and it is such an important matter to the licensee that we are making great effort to get a patent upon it. In designing that we not only have an idea of our immediate wants, but we aimed to get a bell that we could say would work on any line up to 20 stations."

This view he confirms in another part of his London letter, where he says:

"My invention, however, relates to a specially designed bridging magneto bell, by means of which the talking and signaling on a line containing 20 stations equipped with this bell are equally as good as with a line containing only 2 stations. These results are not attainable with the ordinary form of magneto bell. The details of the construction of my bell were not described by me at the convention, as an application for patent rights was then pending in the United States patent office."

It will be noted that the patent in suit is not for a magneto bell, but for a combination of which such bell is an element. These statements are not here cited as constituting an estoppel as against Carty, but they have an important bearing on the statements in his subsequent testimony claiming a broader scope for his improvement. Moreover, the accuracy of this earlier statement is, we think, supported by other testimony. In testing the alleged patentable novelty of this improvement, the exceedingly rapid development of the art is a factor to be considered. Once it was started, the country was strung with wires with unparalleled rapidity. In this hasty development, attention was naturally first given to city systems provided with exchanges and to long-distance lines uniting large cities. Rural and side lines were of less importance, and naturally problems incident to the lines in and connecting large commercial centers demanded and received the earliest and best telephonic engineering study. Whatever advances were made in these long-distance and exchange systems would naturally be extended later to the development of the less important lines. This reasonable and to be expected course of events we see strikingly exemplified in the present case. But while we naturally look to the exchange and the long-distance line for such development, and in fact find it there existing, the initial development therein made, and the devices used in such systems, were not called to our attention in the Millheim Case. Taking up first the exchange system, we find there in use the operator's cord circuit, shown in the accompanying sketch:



A cord circuit is one of several such fixtures at each operator's table before a switch board in a central office. Its purpose is to connect lines of subscribers for conversation. The method of its use is as follows: At the left of the above sketch is a subscriber's annunciator or calling signal drop. This is in the subscriber's, and not in the operator's, circuit. When the subscriber calls the central operator she plugs into a spring-jack on the board, thus cutting out the calling subscriber's annunciator and connecting her cord circuit with his line. At the center of the cord circuit, and normally disconnected from the line at both terminals, but adapted to be connected by spanning the line, is her telephone. By pressing on buttons above and below, she connected her telephone with both sides of her cord circuit and inquired for the number wanted. Having learned such number, she then inserts the right-hand plug of her cord circuit into the spring-jack of the desired subscriber. At the right of the cord circuit, normally disconnected from the line at both terminals, but adapted to be connected therewith by spanning the line, is a call generator. By pressing the buttons as before she connects the generator with the two sides of the line of the subscriber to be called, and at the same time, by breaking the contacts with the cord circuit lines, she disconnects the remainder of the cord circuit from the generator, and by operating the generator thus sends a call to the desired subscriber alone. She then disconnects the generator and thus restores the contacts between her cord circuit and the line of the subscriber called. In this situation, which is the condition shown in the sketch, the lines of the two subscribers are connected by a continuous line through the cord circuit. But so long as this condition continues, both subscribers are powerless to break their continuous connection and put themselves in a position to communicate with other subscribers. To do this it is apparent that the agency of the central operator must be invoked, and the apparatus by which this is done must be such that, while it is in a permanent permissible operative relation as a signaling apparatus,

it must meanwhile be opaque to the voice currents of the conversing subscribers. Such result was effectively secured by the device in the sketch marked "Signal Drop," and known as a "clearing-out" annunciator. If the electro-magnet which operates the signal drop was of low impedance, the voice current would short-circuit, and conversation would be unsatisfactory; hence one of high impedance was used, and prevented such result. At the same time the signaling current, either an alternating generator current of low frequency or a steady battery one, crosses freely and signals. The use of these signal drops, and the functional effects secured by them, are clearly pointed out by different witnesses. Mr. Dunbar, an expert for respondents, says:

"The disconnecting annunciator was normally bridged across the main wires of the circuit ready to receive a disconnecting signal sent over the line by either of the connected subscribers, and was thus bridged across the two wires of the main line while conversation was taking place between the two subscribers. This disconnecting annunciator was wound to a high resistance and high inductance, so that but little of the telephone current would be shunted or short-circuited through this path, and also so that this disconnecting annunciator would readily respond to the generator currents sent over this same main line from either subscriber's station. These disconnecting annunciators were used to give a visual indication to the operator, by the releasing of a shutter through the agency of an armature attracted by the high-wound magnet of the annunciator. Such visual signals were, of course, better adapted for attracting the attention of the operator at the central office than the bells used at the subscriber's stations to attract the attention of the subscribers."

Thomas D. Lockwood is an officer of the complainant company, and was called as a witness in its behalf, and acted as attorney for the applicant in preparing the application for and specifications of the patent in suit. He testified in the interference case of Kellogg v. Scribner v. Pickernell, No. 15,754, and his testimony, which Mr. Lockwood discussed when called as a witness in the present case, is quoted by Mr. Dunbar, as follows:

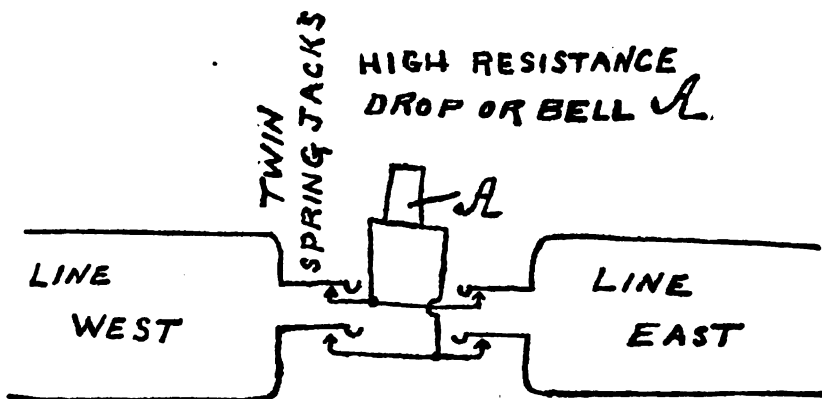
"Interrogatory 185. When did you first know of the use in any switch board of annunciators whose cores were wound to a resistance of 500 ohms, and when, if ever, were coils of that description used in the Boston board, and when, if they were, and you know, was it determined to use such coils in that board? A. I suppose that although the resistance of 500 ohms precisely is mentioned in the question, that figure as there given means virtually any high resistance for such annunciators,—say between 400 and 1,000 ohms,—and I will answer accordingly. The first case of which I know is that of the Paris exchange, and I knew of this in 1884. The resistance of the annunciators was about 400 ohms. Later, when metallic circuit switch boards were adopted in this country and used on a large scale, the first instance being the Cortlandt street, New York, exchange switch board, it became evident very shortly after that switch board was put in operation that talking was unduly weakened by having clearing-out annunciators in the talking circuit formed of any two lines, and that if clearing-out annunciators were to be used or retained in use they must be placed in a bridge or in a branch to earth (the latter in the case of grounded lines); and to the end that when so placed in bridge or branch circuit they would not carry off a large portion of the talking current to the detriment of the distant telephone, they must be made of high resistance."

Mr. Pickernell, also an officer of the complainant company, says:

"Experimental drops of high resistance were first used some time subsequent to April 8, 1889. The high-resistance bridging drop at toll boards was adopted in the summer of 1889."

The significance of the relation of this prior structure to Carty's apparatus will be seen from the following considerations: It shows the prior use for signaling of a magnet of such high impedance and inductance as to make it opaque to voice currents; such magnet is placed in bridge; the call mechanism, as well of the subscribers as of the central operator, was not in series with the signaling apparatus of the cord circuit. That these signals were visible instead of audible is a matter of mechanical detail; that they were used to end a conversation, and not to open it, makes no difference in principle. They show the use for signaling of a high impedance bell, opaque to voice currents and in bridge.

We also find in the prior art the apparatus used for signaling intermediate stations of long-distance lines, and shown in the accompanying sketch:



Such intermediate station had a drop or signaling bell permanently bridged on the line. It was used to signal the station operator, so that connection could be made with a local subscriber. Being in constant normal operative relation it stood ready for use when needed, but being of high impedance and self-induction it was opaque to the voice currents passing between the principal stations. The cord circuit of the local operator formed the remainder of her set. When the operator was signaled, she plugged into the line, and that brought her cord circuit with its telephone and generator into operative connection with the line. It will be noted the telephone was out of connection with the line as in the Carty device. The operator in the long-distance station brought it in by pressure on buttons or the like, while in Carty's device it was brought in by the subscriber removing it from the hook. These differences were merely mechanical, as were also those incident to the generator. Both were normally disconnected; when in use both were in bridge. The functions of this device and its use prior to the Carty patent are shown in the testimony of Mr. Pickernell, who says:

"High resistance magnets were first used at intermediate stations some time after November 14, 1899. I can't state just how long after it was. I find that on November 14th I advised the manufacturer of the magnets

for the use at intermediate stations that the sample that was then submitted to my approval was defective, and I returned this sample on that date for correction. It probably took several days to correct the sample, and probably several weeks to manufacture a lot of bells."

The witness further testified in reference to the foregoing sketch that the bell or drop marked "A" was of high resistance and high self-induction; that it was used for signaling an operator at an intermediate station (as a line signal); that "this drop was made of high resistance and high self-induction so as to prevent the passage or shunting of the telephone current when the circuit was used for transmitting speech between the terminal stations." The proofs established these facts: The signaling bells were of high impedance and high self-induction; they were mounted in bridge; they were in bridge alone; they were used for initial signaling,—conditions akin to those of Carty's system. Indeed, that the whole telephonic art was in a state of rapid but regular development; that the two devices described were the natural outgrowth of such progress; and that Carty's device was one of the regular steps of such advance when party lines came to receive their due share of skilled electrical attention,—is clear. Some phases of such development are shown in the public addresses made by Messrs. Pickernell, Hibbard, and Carty, their testimony, and the part they bore in such advance. These three trained electrical engineers were all in the employment of one company, and engaged in the introduction of long-distance lines in the East. They joined in the preparation of a paper entitled "New Era in Telephony," read before the Minneapolis convention of the National Telephone Exchange Association, held September 11, 1899, and composed of electrical experts. The substitution for grounded lines of metallic circuits constituted the "new era" to which the paper referred. To this change and its attendant problems the highest electrical thought was given, and the change naturally caused many advances in constructive and operative methods. Among other elements was the multiple party line. This paper, which is printed in full in the *Western Electrician* of September 21, 1899, after discussing the advantages of metallic circuits, refers to the subject of party lines as follows:

"With the extension of metallic circuits it is often asked how they may be utilized for the service of two or more subscribers on the same circuit. Probably the best results are accomplished by bridging the different instruments onto the two sides of the metallic circuit, using a ringer magnet at each instrument of high resistance and retardation. By this arrangement the electrical balance is preserved, and no alteration in the ordinary form of operating apparatus is made necessary. It has been the practice heretofore to loop intermediate sets of instruments into a circuit. At first this practice was persisted in when metallic circuits were introduced, additional instruments being looped into one side of the circuit. Such an arrangement, however, destroys the balance, and the instrument so connected will be subject to disturbance as loud as the line is capable of producing, and it will also be a source of disturbance to the other instruments in the circuits. By connecting all instruments, however, in multiple arc, bridging across the circuit, nothing is lost in transmission, if the coils have sufficient retardation, and the electrical balance necessary to the proper working of the system is preserved."

The disclosures of these three trained men to their fellow electricians are important in this case. The long-distance lines with which they were associated represented the highest state of the art. The high impedance electro-magnet was long before known. Mr. Lockwood, in the interference case quoted elsewhere, says:

"But as early as 1884 it was seen that by properly placing the retardation coils, or coils which inclosed or were inclosed by iron in or in relation to telephone circuits, this impedance, which theretofore had been an unalloyed evil, might be made useful by causing it, in complicated systems of telephone circuits, to guide telephonic currents into routes where they were desired, and to prevent them from passing into portions of the systems of circuits where they were not desired. * * *"

But while its theoretical capacity was known, it was now being put into practical use in these metallic circuits in clearing-out drops and line annunciators. It nowhere appears that these magnets had been applied to any metallic circuit multiple party lines for individual subscribers, or, indeed, that any such lines existed. But these men, from their experience with the metallic circuits of the new era, were so confident of the possibility of applying to party lines the same general practices they had tested on the long-distance lines that they felt even then justified in confidently defining to their fellow engineers the means by which the party line problem would be worked out. At that very time they were in the midst of the advance. Mr. Pickernell says:

"Experimental drops of high resistance were first used some time subsequent to April 8, 1889. The high-resistance bridging drop at toll boards was adopted in the summer of 1889."

It is true he also says:

"High resistance magnets were first used at intermediate stations some time after November 14, 1889. I look upon the paper entitled a 'New Era in Telephony,' prepared by Messrs. Carty, Hibbard, and myself, as being in the nature of a prophecy, for I am certain that the high resistance magnets were not used prior to the above date."

But the importance of the disclosure is increased, not lessened, by the fact that it was a prophecy. The subsequent successful application of the general principles of the disclosures to successfully signal intermediate stations shows the importance and the truth of the prophecy. Now, it seems to us that the Minneapolis instructions were the lines along which Carty subsequently worked, but the way was clearly pointed out by the joint article of the three men. Mr. McBerty, as we have seen, says, "The central idea of the invention is found in the connection of the different instruments in multiple;" but this was but carrying out the Minneapolis instruction. The broad principle was embodied in the cord circuit and the long-distance intermediate station, both of which are clearly shown by the proofs to have been in use prior to Carty's alleged invention. The application of this principle to party lines lay in engineering skill, not inventive genius. Hibbard's work concerned the improvement of ringer drops, while Carty's concerned party lines. Hibbard says:

"I was interested at that time in the development of the bridging drop, and bridging bells were first put into operation by others. * * * In this article the methods which had experimentally been found to be the best up to that time for long-distance work were recommended for local work. * * * The plan of bridging the ringers was proposed, I think, by Mr. Carty."

In view of the quite explicit directions for bridging embodied in this article, and in view of the successful use of magnets of high resistance and self-induction in the cord circuit and long-distance station, there would seem to be little question but that any one of these trained engineers if directed to correct the recognized evils of party line systems would have done so in the same engineering lines followed by Carty. If in carrying out these broader general principles he invented, as he said in his London letter, "a specially designed bridging magneto bell," he was entitled to patent protection therefor, but the invention of such a bell did not warrant him laying claim to the broad principle of connecting the different instruments in multiple. In view of the prior development of this art evidenced by the devices to which we have referred in detail, and the definite prior knowledge of the electrical profession of the principles of bridging, multiple construction, and the use of magnets of high impedance and self-induction for signaling purposes, and to prevent the shunt and loss of voice currents, we are of opinion that the combination shown in Carty's patent involved no patentable novelty. Such conclusion is not at variance with the opinion in the Millheim Case, 88 Fed. 509, or of the circuit court of appeals. Those cases were rightly decided on the facts before the courts, but the actual state of the art was not then called to the court's attention. It was there found that every element of Carty's device was, in itself and individually, considered old. The novelty lay in their combination; for it was not shown any such combination had been made before. It was said:

"The call signaling apparatus of the Carty system is so vital to its use that either it or its substantial equivalent should be found in the alleged anticipation to constitute it a real anticipation."

We now find that there were in existence in the clearing-out drops and the signaling apparatus of the long-distance lines, such application of the principles on which Carty's combination rests that their application to party lines was but the natural and to be expected advance in the progressive art to which they appertained. To use, with some changes, the language of another (*Atlantic Works v. Brady*, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438), we may say that the development of this, as of every great industry, has developed a constant demand for new appliances, which the ordinary skill of those versed in such branch has generally been adequate to devise, and which devising is the natural outgrowth of such development. Each forward step prepares the way for another, and to burden a great industry with a monopoly to each improver for every step thus made, except where marked by an advance greater than mere engineering skill, is unjust in principle and hostile to progress. As our conclusion that the Carty patent is invalid for lack of patentable invention goes to the root of the case and is decisive against the complainant, we

do not think it necessary for us to discuss or pass on the other serious defenses to this bill, namely, the defense of prior use at Crown Point and Merrillville, Ind., and on the Wilmington Coal line in Chicago, and the defense of noninfringement.

ACHESON, Circuit Judge (concurring). The final hearing of this case took place at Pittsburg, and at my request Judge BUFFINGTON sat with me, and has prepared the opinion of the court which I file herewith. I fully concur in the views Judge BUFFINGTON has expressed, and accordingly a decree will be entered dismissing the bill of complaint, with costs to the defendants.

MACON KNITTING CO. et al. v. LEICESTER & CONTINENTAL MILLS CO.

(Circuit Court, E. D. Pennsylvania. February 7, 1902.)

No. 16.

1. CONTRACTS—CONSTRUCTION—DEFENSES TO ACTION FOR BREACH.

Plaintiffs, who were owners of certain patents relating to knitting machines, entered into a contract with defendant corporation, which was a manufacturer of knitted goods, by which defendant was given an exclusive license to use the patented machines for certain purposes during the life of the patents, and to make machines for its use, plaintiffs to receive in payment stock and bonds of defendant. Plaintiffs were also to make and sell to defendant a certain number of the machines. The contract contained a clause providing that, in the event of any suit or suits by or against either of the parties involving the patents or inventions, "the costs and expenses attending such suit or suits on behalf of any or all of the parties hereto shall be borne and paid equally by the respective parties." A suit was brought against defendant, on the ground that the machines infringed another patent, and plaintiffs, by leave of court, intervened and defended the same. *Held*, that neither the fact that the machines were held in such suit to be infringements, nor that the intervention was made without consultation with defendant, which had employed counsel to represent it in the suit, relieved it from its obligation under the contract to pay one-half the costs and expenses incurred by plaintiffs in defending the suit.

2. SAME.

Defendant could not plead, as a defense to an action to recover its share of such costs and expenses, that the machines furnished by plaintiffs were not in accordance with the contract, where another suit was pending between the parties in which such matter was in issue and could be fully determined.

At Law. Rule for judgment for want of a sufficient affidavit of defense.

Hector T. Fenton, for plaintiffs.

Joseph De F. Junkin, for defendant.

J. B. McPHERSON, District Judge. This suit is brought upon a written contract, entered into on February 10, 1896, by the parties plaintiff and defendant hereto, of which the following is a copy:

"This agreement, made and entered into this tenth day of February, A. D. 1896, by and between Joseph Bennor, of the city of Macon, in the county of

Bibb and state of Georgia, and the Macon Knitting Company, a corporation organized under the laws of the said state, and having its principal place of business in Macon aforesaid, parties of the first part, and the Leicester Mills Company, a corporation organized under the laws of the state of New Jersey, and having its principal place of business in Philadelphia, in the state of Pennsylvania, party of the second part, witnesseth: Whereas, letters patent of the United States No. 534,248, dated February 19, 1895, for an improvement in stockings and the art of manufacturing same, were granted to the said Joseph Bennor; and whereas, certain applications for letters patent of the United States were filed by the said Joseph Bennor for certain improvements in straight knitting machines for manufacturing fashioned hosiery, as follows: Serial No. 515,911, filed June 28, 1894, and allowed January 2, 1896; serial No. 517,970, filed July 19, 1894, and allowed January 2, 1896; and serial No. 566,416, filed October 21, 1896, and allowed November 18, 1896; and whereas, by an instrument of writing dated September 14, 1894, the said Macon Knitting Company did acquire from the said Joseph Bennor an undivided one-half part of the whole right, title, and interest in and to, all and singular, the said inventions and letters patent; and whereas, the party of the second part is desirous of manufacturing knitting machines containing said patented improvements in the United States, and of acquiring for the same territory the exclusive right to manufacture thereon knitted stockings of wool, worsted, and merino, but of no other material; under and in accordance with the said patent 534,248, together with other knitted goods of wool, worsted, and merino, but of no other material; and has agreed to pay the parties of the first part thereof, as hereinafter provided: now, therefore, the parties hereto, for and in consideration of the premises, and of the sum of one dollar each to the other in hand paid at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, do covenant and agree to and with each other as follows, and for themselves, their respective heirs, executors, administrators, and successors: First. The parties of the first part hereby license and empower the party of the second part to manufacture in the United States of America for its own use therein, to the end of the terms for which said letters patent are or may be granted, knitting machines containing the above-mentioned patented improvements, granting it the sole right in such United States to use the said machines in the manufacture of knitted goods of wool, worsted, and merino, but of no other material, and for no other purpose or purposes. Second. The parties of the first part further agree to build and furnish to the party of the second part twenty (20) knitting machines of the construction set out in application, serial No. 566,416, aforesaid, which machines shall be built by the parties of the first part at the earliest date possible, and shall be furnished by them to the party of the second part at a price of ten per cent. (10%) above their actual cost of construction; it having been understood and agreed that the machines shall not exceed in price the sum of two hundred dollars (\$200) per machine; and that the party of the second part shall have the exclusive right to use the said twenty machines in the manufacture of knitted goods of wool, worsted, and merino, but of no other material, and for no other purpose or purposes. It is fully understood and agreed that the said machines shall be practically operative machines, and shall be built in a workmanlike manner, and that the parties of the first part shall furnish a capable man to instruct a competent person designated by the party of the second part, to operate the said machines, and shall furnish all proper and necessary information for the practical disposition and erection of said machines in the mills in Germantown, Philadelphia, of the party of the second part, cost of freight and placing ready to run to be paid by the party of the second part. Third. Upon the delivery and practical operation of the said twenty (20) machines, the party of the second part agrees to forthwith assign and transfer to the parties of the first part fifty (50) shares of the capital stock of the Leicester Mills Company, par value one hundred dollars (\$100) per share, together with bonds of the said company to the value of five thousand dollars (\$5,000), such bonds being secured by the mortgage now held in trust by the Provident Life and Trust Company of Philadelphia. Fourth. The party of the second part shall have

the privilege of constructing at its own expense, for the special use and purpose above recited, as many of the said machines embodying said patented improvements as it may desire to construct; and, in consideration of such privileges granted to it, the party of the second part agrees that on January 1, 1898, or prior to that time, if it shall have constructed eighty (80) of such machines, it will forthwith assign and transfer unto the parties of the first part one hundred (100) more shares of the capital stock of the said company of the said par value of one hundred (\$100) per share, together with an additional amount of the said bonds thereof, to the value of five thousand dollars (\$5,000). Fifth. It is further agreed between the parties hereto that, in the event of a suit or suits being brought by or against any or all of the parties hereto under or concerning the said letters patent and inventions, then and in that case the costs and expenses attending such suit or suits on behalf of any or all of the parties hereto shall be borne and paid equally by the respective parties; that is, one-half by the parties of the first part and one-half by the party of the second part. Sixth. It is mutually understood and agreed that Wilson H. Brown, of Philadelphia, Pennsylvania, vice president and treasurer of the said the Leicester Mills Company, personally guaranties to the parties of the first part, such guaranty being evidenced by his uniting in this agreement, that the aforesaid stock of the said company shall be valued at and be worth par, to wit, one hundred dollars (\$100) per share, on the first day of January, 1898; and, further, that, if the parties of the first part so elect, he, the said Brown, will purchase from them at par on January 1, 1898, five thousand dollars (\$5,000) of the said stock, and on January 1, 1899, five thousand dollars (\$5,000) more of the said stock, and on October 1, 1899, the remaining five thousand dollars (\$5,000) of the same."

In pursuance of this contract, some of the machines mentioned therein were furnished by the plaintiffs to the defendant, and other machines were built by the defendant itself, all being used for the manufacture of stockings. In 1898 the defendant was notified by John G. Powell and Edward Powell that these machines were infringing their patents, and not long afterwards a bill in equity to redress the infringement was filed by the Messrs. Powell in this court against the present defendant. Thereupon the present plaintiffs, having learned that the suit had been begun, filed the following petition for leave to intervene:

"The petition of the Macon Knitting Co., a corporation of the state of Georgia, and of Joseph Bennor, a citizen of the state of Pennsylvania, respectfully represent: (1) That on the 12th day of November, 1893, John G. Powell and Edward Powell brought their bill in equity in this court against the Leicester Mills Co., a corporation of the state of New Jersey, Wilson H. Brown, treasurer, and Everett H. Brown, secretary thereof, both residents of the city of Philadelphia, alleging in said bill that letters patent of the United States No. 510,964, dated December 19, 1893, for 'improvements in web-holding actuating mechanism for automatic knitting machines,' had been granted and issued to said complainants as assignees of said John G. Powell, the alleged inventor thereof; and charging therein that the defendants therein named had, after the grant and issue of said letters patent, made or caused to be made and used within the Eastern district of Pennsylvania web-holding mechanisms for automatic knitting machines similar to and in alleged infringement of said recited letters patent and the alleged exclusive rights of the complainants thereunder; and alleging also 'that the said defendants, without the license of the orators, and against their will, and in violation of their rights, have jointly procured and caused to be made for them, the said defendants, by the Macon Knitting Co., and one Joseph Bennor of Macon, Georgia, a large number of said infringing machines, and have used and intend to continue to use the said machines, within the Eastern district of Pennsylvania.' And your petitioners further aver that a subpoena ad respondendum issued upon said bill of complaint against said defendants named, which has been duly served, as

your petitioners are informed and believe, and is made returnable to the first Monday of December next, to wit, December 5, 1898. (2) And your petitioners further show that prior to February 10, 1896, they were and still are the owners of several letters patent of the United States for improvements in knitting machines and in the art or process of manufacturing hosiery, inter alia letters patent of the United States No. 534,248, dated February 19, 1896, Nos. 557,638, 557,639, and 557,641, all dated April 7, 1896; that on said 10th day of February, 1896, your petitioners entered into a certain written contract of agreement and license with the Leicester Mills Co. and Willson H. Brown, as the other parties thereto, wherein and whereby one of your petitioners, the Macon Knitting Co., agreed to make and deliver, and did during the summer and autumn of 1896, make and deliver unto the said Leicester Mills Co. twenty of said patented knitting machines, constructed and operating substantially as shown, described, and claimed in one or more of said four letters patent last above recited in this paragraph, belonging to your petitioners; and in and by said contract of license, dated February 10, 1896, the Leicester Mills Co. was authorized and licensed to use the same in its mills, and were authorized and licensed to build, for its own use, and it did subsequently build for its own use and used other like machines. (3) And your petitioners further aver that in and by said contract of license, dated February 10, 1896, the Leicester Mills Co. bound itself to pay to your petitioners, as consideration for said machines and license, certain large sums of money and other valuable securities, part of which has been delivered and paid, and part of which, to wit, the sum of fifteen thousand dollars in securities, or money to that amount, became due and payable by said defendants to your petitioners on the 1st day of January, 1898. That the said defendants defaulted in said last-mentioned delivery and payment, and your petitioners now have pending against said defendants a suit in the New Jersey chancery to enforce the defendants' compliance with said agreement and contract of license, which suit has been pending for over six months last past, is still pending, and is set for trial or hearing on the 12th day of December, 1898, next, at Trenton, in said state. (4) And your petitioners further aver that not a single one of said machines or any part thereof built for and delivered by your petitioners to said defendants, under said contract of license, or any like machines built thereafter by the defendants under said contract of license, contain any mechanism similar in whole or in part to the mechanism shown, described, and claimed in the plaintiffs' letters patent No. 510,934, on which this suit is founded, nor do said machines or any of them infringe any of plaintiffs' rights, under said letters patent or otherwise. (5) And your petitioners further aver that in and by said written agreement or license dated February 10, 1896, between your petitioners and the said defendants, it was expressly agreed, for the protection of both parties hereto, that in case any person or persons thereafter set up any claim, by suit or otherwise, that said machines to be built thereafter under said license, and which were licensed thereby, conflicted with or infringed any such rights, secured by patent or otherwise, that the same should be answered and defended at the joint expense of your petitioners and the said defendants; and your petitioners stood ready to defend against this bill of complaint in this cause and at their own proper expense, as provided and set forth in said contract of license. (6) And your petitioners further aver that they and the said defendants have a full and perfect defense to the bill of complaint in this cause, and that they have reason to fear and believe that the defendants intend to make default herein, or neglect to make defense, or by reason of negligently making less than the whole defense, and to plead such recovery against them in defense of your petitioners' claim against said defendants for the aforesaid unpaid balance of purchase money under said contract of license. (7) Your petitioners therefore pray leave to intervene in this suit, as parties defendant, and to appear and make defense, by way of answer or otherwise, both on behalf of themselves, for the causes aforesaid, and on behalf of the said defendants as their licensees under the several letters patent aforesaid."

Leave to intervene was granted by the circuit court, and thereafter the present plaintiffs defended the suit, which was so pro-

ceeded in before the circuit court and the circuit court of appeals that a decree was finally entered in favor of the complainants, thus establishing the fact that the machines referred to in the foregoing contract infringed the patents belonging to the Messrs. Powell. The suit now in hand is brought to recover half the costs and expenses incurred in that litigation, and there is no dispute concerning the correctness of the plaintiffs' bill, nor of the reasonableness of the charge therein made. The right to recover is denied solely upon the grounds set forth in the following affidavit of defense:

"Wilson H. Brown, being duly sworn, says: I am the treasurer of the Leicester and Continental Mills Company, defendant above, and the said corporation has a just, true, and complete defense to the whole of the plaintiffs' claim, as set forth in the statement of claim filed in the said case, of the following nature: On behalf of the defendant, I deny that it is indebted to the plaintiffs in any sum whatever arising out of the cause of action therein set forth. It is true that on or about February 10, 1896, the parties plaintiff and defendant herein did enter into the contract or agreement therein mentioned, copy of which is attached to the statement of claim, and which contains the clause fifth, quoted in the statement of claim, as follows: 'Fifth. It is further agreed between the parties hereto that, in the event of a suit or suits being brought by or against all of the parties hereto, under and concerning the said letters patent and inventions, then and in that case the costs and expenses attending such suit or suits on behalf of any or all of the parties hereto shall be borne and paid equally by the respective parties; that is, one-half by the parties of the first part and one-half by the party of the second part.' Defendant admits that during the years 1896 and 1897 some of the machines mentioned in the agreement were delivered to them and some were built by them, but they deny that they were able to operate any of the same under the terms of the agreement; that they discovered shortly after they began to use them that they were not 'practical operative machines, or built in a workmanlike manner,' as required by the agreement. In addition thereto, during the early part of the year 1898, they were notified by John G. Powell and Edward Powell that such machines were infringements upon letters patent of the same parties, and that they must cease operating the same and account to them to any use of the same already had, as well as damages. A careful investigation of the claims of Messrs. Powell was made by the officers of the defendant company, and it was found to be the case by them, and they were so advised by competent authority, that the machines which the plaintiffs had delivered to them were clearly infringements of the patents of the said Messrs. Powell, and that their use of the same had been in contravention of the rights of the said Messrs. Powell, and so they informed the plaintiffs. As alleged in the statement of claim, on or about November 12 the said John G. Powell and Edward Powell filed a bill in equity against this present defendant, to No. 20 of October session, 1898, in the circuit court of the United States in and for the Eastern district of Pennsylvania, alleging their ownership of the letters patent above referred to, and that the machines which were in the defendant's possession were in infringement of their rights, and praying for an injunction and damages. Defendant denies, as alleged in the statement of claim, that the plaintiffs in this present suit, 'on being notified by the defendant of the institution of said suit in equity, obtained leave to intervene, and did intervene, therein, and defend the same,' but they allege, on the contrary, that the record of the said suit in the circuit court of the United States shows that upon November 30, 1898, the present plaintiffs filed a petition for leave to intervene, and without any consultation whatever with the defendant corporation, or its officers, a copy of which petition is hereto attached and made part hereof, marked Exhibit 'A', and that upon the same day they inclosed a copy of the same in a letter to counsel for defendant corporation, a copy of which is also hereto attached marked Exhibit 'B.' It will be observed, by reading such petition, that the present plaintiffs therein

averred the filing of the said bill against the defendant corporation, and allege, in paragraph two of the petition, that they are the owners of certain letters patent, which are the ones specified in the said agreement between the parties hereto, of February 10, 1896, and they set up such agreement and the delivery of the machines to the defendant corporation; aver the payment of part of the consideration and the litigation concerning the balance of it; in paragraph four deny that any of such machines contain any mechanism which in any way infringes upon the mechanism of the said Messrs. Powell, and in paragraph five they aver: 'And your petitioners further aver that, in and by said written agreement or license dated February 10, 1896, between your petitioners and the said defendants, it was expressly agreed, for the protection of both parties hereto, that in case any person or persons thereafter set up any claim, by suit or otherwise, that said machines to be built thereafter under said license, and which were licensed thereby, conflicted with or infringed any such rights, secured by patent or otherwise, that the same should be answered and defended at the joint expense of your petitioners and the said defendants; and your petitioners stand ready to defend against the bill of complaint in this cause, and at their own proper expense, as provided and set forth in said contract of license. (6) And your petitioners further aver that they and the said defendants have a full and perfect defense to the bill of complaint in this cause, and that they have reason to fear and believe that the defendants intend to make default herein, or neglect to make sufficient and perfect defense herein; whereby judgment or decree may go against them by reason of such neglect to make defense, or by reason of negligently making less than the whole defense, and to plead such recovery against them in defense of your petitioners' claim against such defendants for the aforesaid unpaid balance of purchase money under said contract of license. (7) Your petitioners therefore pray leave to intervene in this suit, as parties defendant, and to appear and make defense by way of answer or otherwise both on behalf of themselves for the causes aforesaid and on behalf of the said defendants as their licensees under the several letters patent aforesaid.' Not having been aware of the fact that the plaintiffs had so intervened in the said cause of their own volition, on December 2nd the defendant notified the plaintiffs of the beginning of the said action of the Messrs. Powell, and offered them permission to intervene if they desired. It is further averred, on behalf of defendant, that it had no connection with the employment of counsel for the plaintiffs in this suit, but, previous to the filing of such petition for the intervention by the plaintiffs, did employ and retain Joseph De F. Junkin, Esq., and John G. Johnson, Esq., members of the bar of this city, in good standing, to appear and represent it in the matter, and the appearance of such counsel was duly filed of record when this petition for intervention was filed by the plaintiffs. The defendant company in no way agreed to be responsible for the plaintiffs' costs, or to pay any of the costs of such intervention, and it is advised, and so avers, that such costs and expenses as are claimed by the plaintiffs here were not within the contemplation of clause five of the agreement heretofore quoted, and upon which the plaintiffs relied. The suit by the Messrs. Powell was brought against the present defendant, and it employed competent counsel to represent it, whose appearance had been entered of record. Suit had not been brought against the present plaintiffs; they, of their own volition, intervened in the said cause, alleging, as a reason therefor, that they did so for their own protection as to some certain other cause, alleging, as quoted above, that they stood ready 'to defend against the bill of complaint in this cause and at their own proper expense.' The defendant is advised and avers that under such circumstances it is not liable for all or any of the costs and expenses incurred and alleged to have been paid by the plaintiffs, as set forth in their statement of claim. The petition for intervention was duly granted by the court, and on the return day thereof, December 5, 1898, the plaintiffs in the present cause were granted permission to intervene, without any answer being filed or opposition being made by any of the parties to the said suit. This cause was so proceeded with by the parties plaintiff and the said inter-

vening defendant that it was fully heard and the bill of the plaintiffs has been fully sustained, and the court has finally found that their patents were valid, and that the machines sold by the plaintiffs herein to the defendant were infringements upon the patents of Messrs. Powell. The defendant is advised and avers that, under such circumstances, the entire consideration for the agreement of tenth of February, 1896, between the parties hereto, has failed, and that it cannot be held legally liable for any costs incurred by the plaintiffs herein in defense of its patents."

The defense that the machines were not operative machines, or built in a workmanlike manner, is manifestly insufficient. Another suit is pending between the parties with reference to these machines, in which this defense is set up and can be fully considered; but, in any event, even if the defense were relevant here, the averment is too vague and indefinite to prevent judgment.

The remainder of the affidavit of defense is concerned with the suit brought by the Messrs. Powell, but I do not think it contains any answer to the fifth paragraph of the agreement, upon which the suit pending is brought, unless a sufficient answer is to be found in the averment that, when the present plaintiffs presented their petition to intervene, they stated to the court that they stood "ready to defend against the bill of complaint in this cause, and at their proper expense, as provided and set forth in said contract of license." The defendant therefore argues that, by reason of this statement in the petition to intervene, it in no way agreed to be responsible for the plaintiffs' costs in the bill in equity, or to pay any of the costs of such intervention, and that such costs and expenses as are now claimed by the plaintiffs are not within the contemplation of clause 5 of the foregoing agreement. I am unable to agree that this defense is well founded. It may perhaps be true that if, when the present plaintiffs intervened in the suit in equity they had expressly agreed to be bound for the whole of the costs and expenses of that litigation, they might be compelled to make good their proposition; but it is, I think, manifest that they offered to intervene under the contract, and not in opposition to its terms. There is no doubt that they wished to be in a position to control the defense. The reasons for thus wishing are stated in the petition to intervene, and were sufficient to induce the court to grant the request; but instead of offering unqualifiedly to carry on the suit at their own expense, they immediately and expressly modified the phrase by adding, "as provided and set forth in said contract of license." This can only refer to paragraph 5, and shows that the plaintiffs had no intention to bear the pecuniary burden alone, although they were ready, and indeed desirous, to assume the whole responsibility of conducting the defense.

Neither is there any equitable reason perceptible that should move the court to relieve the defendant from keeping its contract. The suit brought by the Messrs. Powell falls expressly within the language of paragraph 5. It is "a suit * * * brought * * * against (one) of the parties hereto * * * concerning the said letters patent and inventions;" and under such circumstances the agreement plainly declares that "the costs and expenses attending

such suit or suits * * * shall be borne and paid equally by the respective parties." It is manifest, I think, upon the face of the contract, that the present parties plaintiff and defendant were about to engage in a common enterprise, to which the patented inventions were believed to be important; and therefore, since both parties had a similar interest in the success of the enterprise, they provided that the validity of the inventions should be defended at their joint expense. It seems clear to me therefore that the present suit is well founded, and that the affidavit of defense fails to set forth a sufficient reason to prevent the entry of judgment.

The rule is made absolute.

UNITED STATES v. PRICE et al.

(District Court, S. D. Florida. December 21, 1901.)

1. BEST AND SECONDARY EVIDENCE—RES JUDICATA.

Where the evidence shows beyond question that the records of a case have been destroyed by no fault of the defendant, oral testimony may be admitted upon the plea of *res judicata*.

2. SAME—SUFFICIENCY.

The same testimony that would justify the re-establishment of a lost record should be accepted to support such plea.

Suit at Law upon Mail Contractor's Bond.

J. N. Stripling, U. S. Dist. Atty.

John W. Price, in pro. per.

LOCKE, District Judge. This suit was brought July 1, 1897, against the principal and sureties upon a mail contractor's bond executed June 25, 1867, in which the performance of the contract was to have been completed in 1871. Both sureties are now dead. The defendant pleads that the cause is *res judicata*, for that in the year 1873 it was finally adjudicated by this court at Jacksonville, Fla.; that suit was brought against the principal and sureties upon this bond, and judgment then and there rendered for the defendants.

It has been proven beyond any question of doubt that in May, 1891, the court house in Jacksonville, together with all of the records of the clerk's and district attorney's offices, was burned, and all the records and documents therein filed destroyed. The defendant has introduced oral testimony of the trial and determination of this case, the finding of the verdict, and entry of the judgment in his favor. If such testimony is admissible, the court must necessarily sustain the plea of *res judicata*.

The general rule, prohibiting the introduction of oral testimony in matters where record evidence should be produced, is well established, but to this there are numerous exceptions. *Minor v. Tillotson*, 7 Pet. 99, 8 L. Ed. 621; *Taylor v. Riggs*, 1 Pet. 591, 7 L. Ed. 275; *Greenl. Ev.* § 509, and numerous cases there cited; *Dunbar v. U. S.*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390. In this case the absence of record evidence is satisfactorily accounted for, as it is

proven beyond a possibility of a doubt that if there ever were originals of such a verdict and judgment they were destroyed and lost without any fault of the defendant.

The regular way to proceed in such an action would be to restore the lost record by a formal proceeding for that purpose. Can the effect of that lost record be reached in any other way? In the case of *Hogan v. Kurtz*, 94 U. S. 773, 24 L. Ed. 317, objection was made by the plaintiff that the introduction of parol evidence was permitted to establish a record of naturalization, and upon appeal the supreme court held that the assignment of error must be overruled, saying that proceedings of that kind were required to be recorded; but the records in that district had been destroyed many years ago, and whether or not the party was naturalized was properly left to the jury upon the parol evidence.

In this case a jury has been waived, and the findings of fact devolve upon the court. The parol evidence is positive in regard to the former trial, the term of the court, the circumstances and facts attending it, the evidence presented by the defendant of the performance of the contract entered into, the instructions to the jury upon which they found for the defendant, and the entry of the judgment in his favor. More than 25 years have elapsed, and both of the sureties upon the bond, and all of the witnesses by whom the performance of the contract could be proven, are dead. I consider it may well be said that, in view of the great lapse of time that the rights of the government have been permitted to rest without being enforced, the presumption is that there had been some determination of the matter, as testified to by the defendant. Had the same evidence that has been given in this case been given upon an application to re-establish the lost record of the judgment, it would have been the duty of the court to order such re-establishment. Would the law require that proceedings be instituted for the establishment of the record, where the same result could be reached by the very evidence now offered to establish the truth of that for which the record is only required? I do not consider that the prohibition against the introduction of secondary evidence demands it. It is therefore found that the oral testimony that has been offered by the defendant of the adjudication of the question now before the court, and the finding in his favor, is admissible, and sustains the plea.

This justifies a finding in favor of the defendant, and it is so ordered.

UNITED STATES v. POST.

(District Court, S. D. Florida. March 5, 1902.)

1. USE OF MAILS TO DEFRAUD—INDICTMENT.

An indictment under section 5480, Rev. St., as amended by Act March 2, 1889, which alleges that the defendant had devised a scheme to defraud by pretending and advertising that she could cure diseases and poverty by mental science, and further alleges that she was intending to induce persons to send her money for treatment, but fraudulently intending to get possession of such money, and fraudulently convert it to her own use, without rendering to the person sending the same any

service or thing of value, is insufficient to charge a crime, unless the power to perform what she pretended she could is denied, and that she did not believe that she could, or that she did not intend to render such service.

2. SAME.

All criminal pleadings require direct, positive, and affirmative allegations of every point necessary to be proven.

3. SAME—FRAUDULENT INTENT.

In this case the dishonest and fraudulent intentions of the defendant would be the question to be passed upon by the jury, and it should be clearly charged and stated.

Upon Demurrer and Motion to Quash the Indictment.

J. N. Stripling, U. S. Dist. Atty.

Bisbee & Bedell, O. T. Greene, and T. A. Ledwich, for defendant.

LOCKE, District Judge. The indictment presented for examination, after striking out surplus words and allegations, alleges, in substance: That one Helen Wilmans Post had devised a scheme to defraud. This scheme was this: She pretended she could cure all diseases and poverty by mental science, and as a part of the scheme she advertised and represented in certain pamphlets and circulars that she possessed the power by that method to effect cures of disease, weakness, and poverty, and would treat persons in their absence, and in such advertisements requested people to open correspondence with her for the purpose of receiving treatment, intending to induce persons to send her money for treatment, but fraudulently intending to get possession of such money, and fraudulently convert it to her own use, without rendering to the person sending the same any service or thing of value therefor; which scheme was to be effected by opening correspondence with divers persons by means of the post office establishment of the United States; and that she, on the 17th day of July, 1901, having devised said scheme to defraud, in and for executing the said scheme by means of the post office department, did unlawfully receive from the post office a certain letter, which had been conveyed by mail.

Following the views of the supreme court in the case of *Stokes v. U. S.*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667, it may be safely concluded that an indictment drawn under section 5480 of the Revised Statutes of the United States, as amended by Act March 2, 1889, must allege and charge three particular things: (1) That the defendant must have devised a scheme or artifice to defraud; (2) that he must have intended to effect this scheme by opening, or intending to open, correspondence with other people through the post office establishment of the United States, or by inducing other persons to open correspondence or communication with him by that means; and (3) in carrying out such scheme such person must have deposited a letter, packet, writing, circular, or advertisement in some post office of the United States, to be sent or delivered by said post office establishment, or have taken or received such therefrom.

The language of the indictment upon the second and third points is sufficiently clear, distinct, and positive to support the charge that any scheme devised was intended to be effected by opening correspondence through the post office establishment of the United States, and that a

letter was received and taken from the mails in furtherance of said scheme; but when we come to examine the allegations of the indictment as to the first and most important requirement, "that the person charged must have devised a scheme and artifice to defraud," a more difficult question presents itself. Not only must the indictment allege that the person had devised a scheme and artifice to defraud, but it must set out clearly and distinctly what that artifice was, wherein the fraud consisted, and the facts and circumstances by which it was to be accomplished. *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516.

The indictment in the present instance has alleged at great length the power which the defendant pretended to possess, and that she had advertised and represented what she claimed she could do. But nowhere in the indictment is alleged or declared her inability to do and perform all that she is alleged to have pretended, nor does it in any way negative the pretense which she is alleged to have made, or her belief or knowledge as to having that power. The only allegation declaring the scheme to be fraudulent is where the indictment alleges "the said Helen Wilmans Post, in the advertisements aforesaid, requested and solicited people to open correspondence and communication with her for the purpose of procuring and receiving her treatment by the process and method aforesaid, intending thereby to induce persons to open communication and correspondence with her, and send money to her in the name of Helen Wilmans, for the purpose of receiving the treatment by the means aforesaid, but fraudulently intending to get possession of such money as should be sent to her, and to fraudulently convert the same to her own use, without rendering to the person so sending the same any service or thing of value therefor."

The well-established principle of criminal pleading, which requires direct, positive, and affirmative allegations of every point necessary to be proven, is too well established to require extended consideration. Nothing in a criminal case can be charged by implication, intendment, or recital, but every fact necessary to constitute the crime must be directly and affirmatively alleged. In this case, as in all offenses of this character, the intention of the defendant is the very gist and substance of the fraud which must necessarily be embodied in the scheme or artifice as a foundation for the violation of the law. Without such fraudulent intention, it would be impossible to devise a scheme to defraud. The very term necessarily implies a fraudulent intention from the very inception of the scheme, and no indictment that does not negative the good faith and honest belief of the defendant can be sufficient. No matter how fraudulent or criminal any act or series of acts may appear by implication, or how repugnant to enlightened intelligence and morality it may appear by a general statement of a case, no person should be put upon trial upon issues not clearly alleged. In this case the dishonest and fraudulent intentions of the defendant would be the question to be passed upon by the jury, and should be clearly stated. *Durland v. U. S.*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709.

The only direct and positive assertion of defendant's acts, made in the indictment in this connection, is that she requested and solicited

people to open correspondence. There is no direct assertion of her intention, further than, by implication, that she was "fraudulently intending to get possession of such money and convert the same to her own use, without rendering to the person sending the same any service or thing of value therefor." The use of the word "fraudulently" is not alone a sufficient allegation of a fraudulent intent. The circumstances and declared intention must show the act to be such.

There was no pretense in the alleged advertisement or correspondence that the money received was not to be converted to the use of the defendant; therefore such conversion would not of itself be fraudulent. It was to be sent for that purpose, and other conditions must determine the integrity of such act. It was in the contemplation of the solicitation, as set forth in the scheme, that the money should be sent to the defendant for subsequent treatment to be given by her; therefore the conversion to her use without giving the treatment, or, in the language of the allegations of the indictment, "rendering any service or thing of value therefor," would not necessarily be a fraudulent practice, as it is not alleged that defendant did not intend to render any such treatment as she is alleged to have pretended she would at any time. *Durland v. U. S.*, supra. The limitation of value, as alleged in the indictment, in which nothing of any value was to be given, attaches to the service rendered as well as to the thing, and declares no measure by which the absence of value is to be determined. The defendant could not be found guilty if a service which had been promised, and which the jury might consider of no value, was rendered, unless it should be found that the defendant also knew and believed it to be of no value. Yet there is no allegation that no service was to be rendered, or that any service which might be rendered was not believed by her to be of value.

In view of these well-established principles, the allegations of the indictment are deemed insufficient to affirmatively declare an intention to defraud, and it is therefore considered that it does not sufficiently either negative the honesty of the pretenses of the defendant, or the intention to perform what was promised, and the motion to quash must be granted, and the demurrer sustained.

WHITE V. UNITED STATES.

(Circuit Court, S. D. New York. March 12, 1902.)

No. 2,963.

CUSTOMS DUTIES—CEILINGS PAINTED ON WOOD.

Ceilings, painted on wood taken from a palace in Italy, should be classified under Acts 1897, par. 454, as paintings in oil, and not under paragraph 208, as manufactures of wood not specially provided for.

Appeal by the Importer from a Decision of the Board of United States General Appraisers.

William B. Coughtry, for the importer.

Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The importations in question consist of three ceilings, painted on wood, taken from the Barberini Palace of Florence, Italy. They were assessed by the collector under paragraph 208 of the act of 1897 as "manufactures of wood, not specially provided for." The importer insists that they should have been classified under paragraph 454 as "paintings in oil." The evidence now before the court is practically undisputed that the ceilings in question are oil paintings on wood. The value of the wood as compared with the painting is infinitesimal. Within numerous prior decisions of this court it must be held that the importations are paintings.

The decision of the board of appraisers is reversed and the collector is advised to make a refund upon the importations in question of 15 per cent.

VEIL et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 11, 1902.)

No. 8,036.

CUSTOMS DUTIES—WOOLEN BANDS.

Woollen bands intended for the use of veterinary surgeons, to be applied to lame legs, are properly assessed under Act 1897, par. 366, as manufactures of wool, and not under paragraph 447, which provides for "harness, saddles and saddlery."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Howard T. Walden, for the importers.

W. Usher Parsons, Asst. U. S. Atty.

COXE, District Judge (orally). It is not disputed that the article in question is a woollen band. It was assessed by the collector under paragraph 366 of the act of 1897 as a manufacture of wool. The importer insists that it is better described by paragraph 447 of the same act, which provides for "harness, saddles and saddlery, or parts of either, in sets or in parts." I do not think it can be contended that "saddlery" is limited to articles of leather, because it appears that there is a saddle cloth and I suppose the court may take judicial notice that the surcingle is made of canvas. On the other hand I think the word "saddlery" should not be expanded to apply to these articles in suit, which belong more properly to the veterinary department. Saddlery, whatever else it may or may not mean, ought to be applied to the trappings of a well horse, a "going" horse, and not a sick one. This band is intended for the use of the veterinary surgeon to be applied to a lame leg, as a plaster might be applied to a bruise. Its use is analogous to a contrivance made to hold up a horse that has broken his leg. I do not think that it can be included within the word "saddlery."

As the importer has not succeeded in showing that the article in question can be properly classified under the term "saddlery" or parts thereof it follows that the decision of the board of appraisers must be affirmed.

HILLS BROS. CO. v. UNITED STATES.

(Circuit Court, S. D. New York. March 11, 1902.)

No. 3,068.

CUSTOMS DUTIES—LEMON PEEL.

Where lemons cut in two and thrown into casks of brine are imported, and when the merchandise reaches this country the pulp has left half of the lemon, and the fruit has been destroyed, it is properly classified under Act 1897, par. 267, as lemon peel, preserved, and not under paragraph 559 of the free list of the same act, as fruits in brine.

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Albert Comstock, for the importers.

D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). It seems to be conceded that the importations here consist of lemons cut in two and thrown into casks of brine, and that when the merchandise reaches this country a certain portion of the pulp of the lemon has come out or, as the only witness on the subject expressed it, "sloughed away"; in other words, the pulp has left the half of the lemon where it was in the port of export. I think the question must be determined having reference to the character of the merchandise when it enters this country. The collector can only concern himself with the merchandise that reaches this port. The question is what is the importer seeking to introduce into the United States? It seems to me very clear that he has not imported a lemon or two halves of a lemon, because the fruit, the fruity part, has been destroyed during the voyage, and what actually enters here is the peel, or perhaps more properly the rind, of the lemon. That which makes the lemon a fruit is gone and nothing is left to be utilized but the lemon peel.

The collector classified this merchandise under paragraph 267 of the tariff act of 1897, as "lemon peel, preserved"; but the importer insists that it is better described by paragraph 559 of the free list of the same act as "fruits in brine." My impression is very strong that the collector's paragraph is a much clearer and more definite description. I do not see how it can be said that the rind of a lemon, the peel of a lemon, is a fruit. It is not a fruit; it is a lemon peel, preserved. It is clear that it was the intention of congress in paragraph 559 of this act to admit free of duty fruits as fruits, and not the mere peel or rind.

It follows that the decision of the board of appraisers should be affirmed.

DE RONDE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 13, 1902.)

No. 2,938.

CUSTOMS DUTIES—CLASSIFICATION—PREPARATION OF TALLOW.

A preparation of tallow used, not as an assistant or a mordant, but simply for softening cotton cloth, is classifiable under Act 1897, § 6, as an "article manufactured, in whole or in part, not provided for in this act," and not under paragraph 32, as an "alizarin assistant, not specially provided for in this act."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Howard T. Walden, for the importers.

Charles D. Baker, Asst. U. S. Atty.

COXE, District Judge (orally). The collector classified the importation in question under paragraph 32 of the act of 1897, as an "alizarin assistant, not specially provided for in this act." The importers insist that it should be classified under section 6 of the same act as an "article manufactured, in whole or in part, not provided for in this act." The return of the appraiser was the only evidence presented before the board, and upon that return the board were entirely justified in finding that the collector's classification was correct. Since then, however, evidence has been taken in this court, which is wholly undisputed, and which establishes beyond doubt the fact that the collector's classification is erroneous. Upon the present testimony there can be no pretense that the importation is an alizarin assistant. It is a preparation of tallow, used not as an assistant or as a mordant, but simply for softening cotton cloth.

The decision of the board of appraisers is reversed.

BURR v. SMITH.

(Circuit Court, D. Indiana. February 18, 1902.)

No. 10,039.

1. RES JUDICATA—APPOINTMENT AND POWERS OF RECEIVER.

Where, in a suit by creditors against an insolvent corporation and its stockholders, a judgment is rendered against a stockholder who is a party and has been duly served with process, and a receiver is appointed with power to bring an action in his own name on such judgment in the courts of any other jurisdiction, as authorized by a statute of the state, the right of the receiver to sue on such judgment, as against the judgment defendant, is res judicata.

2. CORPORATIONS—STATUTORY LIABILITY OF STOCKHOLDERS—ENFORCEMENT EXTRA-TERRITORIALY.

Upon the principle of comity a federal court will recognize the right of a receiver appointed by a court of another state or jurisdiction, for the purpose of enforcing the liability of a stockholder for the benefit of the creditors of an insolvent corporation, to maintain an action therein in his own name against such stockholder to effectuate the purpose of his appointment, where such appointment was made and authority

to sue given pursuant to the statute which created the liability, and by a court of competent jurisdiction, and where such action will not violate the local policy or interfere with the rights of resident creditors.

At Law. On demurrer to complaint.

P. H. Rue and Herod & Herod, for plaintiff.

Miller, Elam & Fesler, for defendant.

BAKER, District Judge. The amended complaint, in a single paragraph, is an action on a judgment rendered by the court of common pleas of Warren county, Ohio. The complaint alleges that said court of common pleas was and is a court of general jurisdiction, duly created by the constitution and laws of Ohio; that on March 2, 1897, John, George L., and Thomas S. Harrison, partners as Harrison Bros. & Co., as creditors of the Eagle Paper Company, a corporation incorporated and organized under the laws of Ohio, for the use and benefit of themselves and all the other creditors thereof, brought an action in said court against the Eagle Paper Company and numerous other defendants, including the defendant herein, Sullivan N. Smith, which said defendants were alleged to be stockholders of said corporation, and all the stockholders thereof, and which said action was thus brought to enforce the payment by said defendants of their liability as such stockholders under the constitution and statute laws of said state for the debts of said corporation, and that the said statute laws of said state then required that such action should be brought by one or more creditors of the corporation for the use and benefit of all, and against all those liable as stockholders; that said plaintiffs afterwards caused lawful process to be issued in said action, and to be duly served on him, the said Sullivan N. Smith, on March 7, 1901, and that such proceedings were thereafter had in said action that on November 11, 1901, the said plaintiffs, for the use and benefit of themselves and all other creditors of said corporation, recovered judgment in said action against the defendant, Sullivan N. Smith, upon his liability as such stockholder, which judgment was then duly rendered and given by said court against said defendant for the sum of \$10,000; that it is now and was on said last-named day provided and enacted by the statute laws of said state of Ohio that said court may, in an action therein of the kind in which such judgment was rendered against the defendant herein as aforesaid, appoint a receiver to collect and enforce the judgment rendered therein, and may also authorize and direct such receiver to prosecute in his own name as receiver and in other jurisdictions such actions as might be necessary to collect such judgments; that on November 11, 1901, the plaintiff herein was, by an order duly made by said court in said action, appointed receiver therein, and was by said order of appointment directed by said court, upon his qualification as such receiver, to proceed without delay to demand and collect said judgment so rendered against the defendant herein, and was thereby expressly authorized and empowered, among other things, to commence and prosecute in his own name as such receiver, in any court of any state or of the United States, any and all actions, suits, or proceedings

which, in his judgment, might be necessary and proper to that end, and to report to said court his proceedings under said order without delay, and that he was thereafter and now is duly qualified as such receiver under said order of appointment; and that no part of said judgment has been paid, and there is now due thereon from the said defendant, Sullivan N. Smith, to the plaintiff herein the sum of \$10,000, with interest thereon from November 11, 1901.

The constitution of the state of Ohio (article 13, § 3) provides:

"Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock."

The statute of Ohio (Rev. St. 1890, §§ 3258, 3259), in force when the corporation was organized, enacts:

"The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable in addition to their stock in an amount equal to the stock by them subscribed or otherwise acquired, to the creditors of the corporation to secure the payment of the debts and liabilities of the corporation."

The statute in force at the time the action was brought in the Ohio court authorized a suit to be brought by one or more creditors to enforce such liability generally against all stockholders for the benefit of all creditors of the corporation, in which action the court is required to determine the indebtedness of the corporation and the amount payable by each stockholder. The statute in force at the time the defendant was served with process therein provided that, whenever a creditor sought to charge the stockholders on account of any liability created by law, he should file his complaint for that purpose in any common pleas court which possessed jurisdiction to enforce such liability; that the court should proceed as in other cases to cause an account to be taken of the property and obligations of such corporation, and might appoint one or more receivers; that if, on the taking of such account, it appeared that such corporation was insolvent and had not sufficient property or effects to satisfy its creditors, the court might proceed to ascertain the liabilities of the stockholders and enforce the same by its judgment; in all cases in which the stockholders were made parties to an action in which a judgment was rendered, if the property of the corporation was found insufficient to discharge its debts, the court should give notice to non-resident stockholders, as provided in sections 5048-5052, Rev. St. 1890, and should first proceed to compel each stockholder to pay the amount remaining unpaid on the shares of stock held by him. The statute (section 3260) further enacts: If the debts of the corporation remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers, and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment as in other cases. The court may authorize and direct the receiver to prosecute such actions in his own name as receiver as may be necessary in other jurisdictions, to collect the amount due from any officer or stockholder.

The defendant has demurred to the complaint on the ground that the same does not state facts sufficient to constitute a cause of action. The defendant, in support of his demurrer, earnestly contends that the plaintiff, as a receiver by appointment of an Ohio court, cannot maintain an action upon the judgment rendered in the creditors' suit against him, citing and relying on the authority of the case of *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164, and other cases in the state and federal courts following that decision.

The defendant was a stockholder in a corporation created under the constitution and laws of the state of Ohio. The constitution and statute laws of that state provided that each stockholder in such corporation should be liable to its creditors in an amount equal to the stock held by him. The liability of the stockholder is contractual. By the contract of subscription the stockholder impliedly agreed to pay the superadded liability if the assets of the corporation were insufficient to pay its debts. As a member of the corporation he also impliedly agreed to submit himself to the laws of the state creating the corporation. The laws of Ohio expressly provided that, in case the corporate assets proved insufficient to pay the corporate debts, the court should have the power to adjudge the amount payable by each stockholder on account of his liability as such stockholder. The statute also provided that in an action against a stockholder to enforce such liability the court should have authority to appoint a receiver, who should be empowered, in his own name, to maintain actions in other jurisdictions to collect the amount so found due and payable. The defendant was a party duly served with process in the action in the Ohio court in which the judgment in suit was rendered against him, and in which action the present plaintiff was appointed receiver, and as such receiver he was by the statute, and by the order of the court, empowered and directed, in his own name, to collect the judgment herein sued for. If the defendant conceived that that court had no rightful power to authorize the receiver then appointed to maintain a suit in another jurisdiction on the judgment then rendered against him, he ought then to have contested that question. In a court of competent jurisdiction it was adjudged that the receiver should have the right to maintain an action in his own name on the judgment in any other state or federal court. On what principle can the defendant now contest a question which, so far as he is concerned, is *res adjudicata*? Why is the decree of the Ohio court adjudging the plaintiff's right as receiver to maintain, in his own name, in another jurisdiction, a suit upon the judgment then rendered, less conclusive on the defendant than it is upon any other question in issue and adjudged by the court? The state of Ohio had the undoubted right to provide for the liability of the stockholders of domestic corporations, how the extent of that liability should be determined, and by whom its collection should be enforced. It has provided that this liability should be enforced by a receiver in his own name, both within and without the state. By his contract of subscription the defendant impliedly agreed that his liability might be enforced by an action in the name of a receiver duly appointed by a court of common pleas of the state of Ohio, when such receiver was clothed by the decree

of a competent court with that authority. The court of common pleas of Warren county, Ohio, had jurisdiction of the subject-matter, and it acquired jurisdiction of the person of the defendant by service of process upon him, and, pursuant to the statute of the state, it appointed the plaintiff as receiver, and adjudged that as such receiver in his own name he should have the right to maintain an action upon the judgment here in suit in any court of competent jurisdiction without the state of Ohio. When a state by its statute creates a liability unknown to the common law, can it be successfully contended that it may not determine by whom, and in whose name, that liability may be enforced? The statute of Ohio invested the receiver, when duly appointed, with the right to maintain a suit to enforce the stockholder's liability for the benefit of the creditors of the corporation, and on what principle of justice or comity can the courts in a sister state refuse to permit the receiver to maintain an action, to enforce such liability? Such a receiver is something more than an ordinary chancery receiver appointed to take possession of the property and collect the debts owing to a corporation or an individual. The present receiver was appointed to enforce for the benefit of creditors liabilities to which the corporation had no right or title. Formerly the primary object of a receiver's appointment was to preserve the fund or property so that it might be appropriated as the final decree of the court should direct. In recent times, however, both in England and in the United States, there has been a strong tendency towards enlarging the scope of the receiver's powers. The general rule as to the receiver's title is greatly modified in the case of a receiver appointed at the suit of judgment creditors. In such cases he is appointed, not alone for the purpose of preserving the property, but also to reduce property and effects into possession, and to distribute the proceeds among the creditors. Hence the receiver is usually given authority to maintain suits in his own name to enable him effectively to carry out the purpose of his appointment. Such authority is unquestionably effective within the jurisdiction of his appointment. "The rule in this country is said to be that receivers appointed by one jurisdiction are not entitled as of right to recognition in other jurisdictions, and that courts of equity cannot acquire extra-territorial jurisdiction over property or rights by the appointment of receivers. But expressions of this character have been considered to go too far, and the correct and current doctrine appears to be that under the principle of comity the courts of one jurisdiction will recognize the authority and permit the exercise of the functions of a receiver appointed in another jurisdiction, except in those cases where a court of the former jurisdiction finds that its own policy would be displaced or the rights of its own citizens invaded or impaired, and this seems to be especially true where such receiver is, by the terms of his appointment, to gather in the assets wherever found." 20 Am. & Eng. Enc. Law (1st Ed.) 65, 66. The doctrine thus stated is supported by reason and by the great weight of authority in the courts of the United States. The nature of the union between the states as members of a common government, the intimate and vital interests and relations, commercial as well as political, which bind

them together, should lead to a greater degree of comity between them than would be expected to exist between states wholly foreign to each other. This principle of comity between the states of the Union is now generally recognized. It is recognized by the courts of the state of Ohio. *Bank v. McLeod*, 38 Ohio St. 174. It is also recognized in the courts of this state (*Metzner v. Bauer*, 98 Ind. 425), where the court says that as a matter of comity receivers duly appointed and qualified in other states may, to the extent of their authority, maintain suits in the courts of this state. This doctrine is again affirmed in the case of *Catlin v. Silver Plate Co.*, 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338, where what is conceived to be the true doctrine is thus stated:

"While there are authorities of great weight which seem to hold that a receiver appointed in one jurisdiction will not be permitted to maintain a suit in a foreign state, the generally prevailing doctrine upon which all the decisions seem to be harmonious is that upon the principles of comity the courts of the jurisdiction in which the property or fund is situated will recognize the right of the receiver so far as to aid him in reducing it to possession, unless to do so would in some way violate the local policy or interfere with the rights of resident creditors."

The present suit, if it had been brought in a court of this state, would have been maintainable by the receiver in his own name. Why should it not be maintainable in a federal court exercising jurisdiction in the same state? The requisite diversity of citizenship is shown to exist, and the amount in controversy exceeds, exclusive of interest and costs, the sum of \$2,000. It was a wise policy of the constitution to give, in such cases, the plaintiff a choice of tribunals. Whenever a citizen of one state may go into the courts of another state, no reason is perceived why, if the case is one within the jurisdiction of a federal court, he may not go into that court.

But it is contended that the case of *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164, settles the doctrine the other way, and that its authority is binding on this court. No case is binding as an authority on any inferior court except in a case presenting a substantially similar state of facts. In that case one Camara recovered judgment in the supreme court of New York against Ferdinand Clark for \$4,688.40, upon which a *fi. fa.* was issued and returned *nulla bona*. Camara then filed a creditors' bill in the chancery court of New York, and upon due proceedings had therein Booth was appointed receiver August 3, 1842. Nothing was done by the receiver until 1851, when Booth, as receiver, reported that no effects of Clark had come to his knowledge except a claim upon Mexico, which had been adjudged to Clark by the United States commissioners under a treaty with Mexico, and that as receiver he was contesting it, and he asked from the court authority to proceed for that purpose, which was granted. On May 29, 1851, Booth, as receiver, filed his bill in the circuit court for the District of Columbia, reciting so much of the proceedings in the New York courts as was deemed necessary to support his bill. Clark answered the bill, and among other things alleged that, being a resident of the state of New Hampshire, he was, on March 22, 1843, on his own petition, adjudged a bankrupt, and that one Palmer was

duly appointed his assignee, and that on the death of Palmer one Hackett was duly appointed his assignee in succession. On page 328, 17 How., 15 L. Ed. 164, the court says:

"This suit is substantially between Hackett as the assignee of Clark in bankruptcy and Booth, the receiver under Camara's creditors' bill; that it may be determined by this court which of them has the official right to the Mexican fund for the distribution of it between the creditors of Clark, or whether Booth as receiver shall have from that fund a sufficient sum to pay Camara's entire debt, leaving the residue of it for distribution between Clark's other creditors."

Upon this statement of the case, the court stated the question for decision thus:

"The leading point in the case is the effect of the proceedings under the last to give a right to the receiver in virtue of a lien which he claims upon the property of the debtor to sue for and to recover any part of it, legal or equitable, without the jurisdiction of the state of New York. In other words, as an officer of a court of chancery, for a particular purpose, will he be recognized as such by a foreign judicial tribunal, and be allowed to take from the debtor a fund belonging to the debtor for its application to the payment of a particular creditor within the jurisdiction of the receiver's appointment, there being other creditors in the jurisdiction in which he now sues contesting his right to do so?"

It

The court correctly decided that under such circumstances the receiver could not maintain his suit. Under similar circumstances, no receiver would be permitted to maintain a suit in the courts of another jurisdiction, because to do so would be to interfere with the rights of domestic creditors. This case, however, is not authority for the doctrine that a receiver appointed for the purpose of enforcing the liability of a stockholder for the benefit of the creditors of an insolvent corporation may not maintain a suit in the courts of another jurisdiction to effectuate that purpose. What is said by Mr. Justice Wayne to the effect that a receiver cannot maintain suits in other jurisdictions was unnecessary to the decision of the case, and, on familiar principles, cannot be regarded as of binding authority. I cannot regard it as a binding authority on the question before me, because neither the policy of this state nor the interests of domestic creditors will be interfered with if it should be held that the receiver may maintain the present suit.

It would be unprofitable to comment upon or review the federal and state cases which follow the case of Booth v. Clark, cited by counsel for the defendant. The views herein expressed are supported by the recent cases of Insurance Co. v. Schultz, 25 C. C. A. 453, 80 Fed. 337; Hale v. Hardon, 37 C. C. A. 240, 95 Fed. 747; and Kirtley v. Holmes, 46 C. C. A. 102, 107 Fed. 1, 52 L. R. A. 738,—decided by the circuit court of appeals of the First, Fourth, and Sixth circuits, respectively.

It follows that the demurrer should be, and the same is, overruled, to which the defendant excepts.

THE NATHAN HALE.

THE DORIS.

(Circuit Court of Appeals, Second Circuit. January 7, 1902.)

No. 82.

1. COLLISION—OVERTAKING VESSELS—PRESUMPTION OF FAULT.

Under article 24 of the navigation act of 1890, which provides that "every vessel overtaking any other shall keep out of the way of the overtaken vessel," where a tug with a tow saw a schooner a quarter of a mile ahead, on nearly the same course, and overtook and passed her, but the tow, which was on a 200-fathom line, did not see the schooner until within 200 feet, and struck her directly astern, negligence must be inferred on the part of both tug and tow, unless there is evidence to warrant a finding that the schooner in some way brought about the collision.

2. SAME—EVIDENCE CONSIDERED.

Evidence considered, and *held* not to sustain a claim made by a tug and tow that a schooner which they overtook, not seeing the tow, changed her course after the tug had passed and ran into its wake, thus causing by such act a collision between her and the tow, which struck her directly astern.

Appeals from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the district court, Eastern district of New York (108 Fed. 552), holding the tug and the barge both liable for damages sustained by the schooner Florence Shay in consequence of a collision with the barge while in tow of the tug about 3 a. m. of August 22, 1900, in Hampton Roads. The stem of the barge struck the schooner directly on the stern, and the schooner coming around after the impact, her bow also came in contact with the barge. The following excerpt from the brief of the counsel for the tug briefly indicates the principal facts which are not in dispute: "The Florence Shay was a small, three-masted schooner, laden with coal, bound into Hampton Roads for an anchorage on account of the strong N. E. wind outside. The Nathan Hale was returning to the roads with the barge Doris in tow for the same reason. * * * The hawser between the tug and tow was about 200 fathoms in length, the tide was turning flood, the night good for seeing lights, and the wind moderate from the N. E. The steam tug, after passing Old Point Wharf on a course S. W. by W., and steering for the light on the Middle Ground, sighted the schooner a little upon her port bow, and about a quarter of a mile away. The schooner also sighted the steam tug over her starboard quarter, the tug showing her red and towing lights, when about a quarter of a mile away. When the steam tug observed the schooner, her course was changed to half a point to starboard, and the schooner's course was changed to half a point to port; the steam tug having the light of the Middle Ground just over her port bow, and the schooner having the same light just over her starboard bow. The tug passed the schooner on her starboard side at a distance variously estimated at from 300 feet to 300 yards. The collision occurred off Hampton Bar, the stem of the barge striking the stern of the schooner. The schooner at the time had up all her lower sails."

Samuel Park, for the Nathan Hale.

Le Roy S. Gove, for the Doris.

Nelson Zabriskie, for appellee.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

113 F.—55

PER CURIAM. The opinion of the district judge will be found in 108 Fed. 552. It contains an exhaustive discussion of the evidence, which it seems unnecessary to reproduce here. Some of the propositions of fact which he found are controverted, and it is contended that in working out suggested movements of the vessels he overlooked some elements which should have been considered; e. g., that a luffing up by the schooner when she was going almost before the wind would have increased her speed, and that a barge as heavy as the Doris could not have swung far out of the wake of the tug without changing the tug's heading. But these minuter details of the argument contained in the opinion need not be considered. The fundamental ground for the decision is found in the opening statement of the opinion:

"The first obvious fact is that a schooner, which had been seen by those on a tug 1,500 feet away, was struck squarely in her stern by the tow, which did not see the schooner until within about 200 feet of her. From this fact negligence should be inferred both on the part of the tug and the barge, unless there is some fact which should modify or avoid that conclusion."

Article 24 of the act of 1890, as it stood when the collision happened, reads as follows:

"Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel."

Whether the distance at which the tug passed was greater or less, whether the courses were diverging or converging, whether or not the tug failed to warn its tow to follow the slight change to starboard which it made, whether the tow swung more or less out of the wake, is not material to the question presented here. The tug saw the schooner a quarter of a mile off, and saw in what direction she was going. The tow failed to see her till within 200 feet. Both tug and tow were overtaking vessels, and the latter ran squarely into the schooner's stern. In view of the rule, the only question seems to be, is there evidence which will warrant the finding that the schooner in some way brought about this catastrophe? There is some suggestion of an insufficient light astern, but, if she had none at all there, that circumstance would be immaterial, since it was so light that the schooner was visible a quarter of a mile away. That, when she sighted the tug, she changed a half point to port, is not charged as a fault. It was a change in avoidance of collision greater than she was required to make. All the rule asked of her was that she should keep her course. The tug and barge claim that the "schooner changed her course to starboard in order to approach the anchorage grounds, not having observed the barge." There is no evidence to support this proposition. The witnesses from the schooner testify that she made no such change. No witness called by either party asserts that he saw her on any such course. She was not on it when the tug passed her, nor when the tow sighted her, nor when she was struck. It is a theory advanced to account for the collision, under the assumption that the tug passed at a safe distance, and that the barge kept in her wake. The mere fact of collision, however, equally well supports the inference that claimants' witnesses are mistaken as to both these propositions. **And in**

this, as in all such cases, great weight may fairly be given to the improbability that a vessel, whose master knows she is being overtaken by a vessel, which is in such a position that she cannot help but know she is herself overtaking, should make any such change, when, under the plain text of the rule, no new navigation on her part is called for, and all she has to do is to keep her course, and let all overtaking vessels keep out of her way. It is sought to overcome this suggestion by contending that, after the tug had passed, the master of the schooner, who did not see the tow, would be likely to change to starboard to make an anchorage near Hampton Bar. But in our opinion the evidence does not warrant such a conclusion. The master of the schooner testified that he was bound up towards Middle Ground for an anchorage, where there was a little shoal water, which was about two miles beyond the place of collision; that he never anchored down at the place of collision, the water being 12 to 14 fathoms there,—too deep for his class of vessel,—whereas where he usually anchored, and intended to at this time, there were four or five fathoms, right up to the north and eastward of the Middle Ground light, between Hampton Bar and Middle Ground light. The mate of the schooner, in response to a question where they intended to anchor, replied, "Oh, around Hampton Bar." The chart indicates a bar which runs from Old Point to Newport News. It is designated as "Hampton Bar," its westerly end, opposite Middle Ground light, being designated as "Newport News Bar." Between that and Middle Ground light the water is $3\frac{1}{2}$ to 5 fathoms. In answer to another question, he said they intended to anchor "somewhere on Hampton Bar to the eastward,—to southeast of us." Manifestly there is some clerical error in the record. To the "eastward" or "southeast" would be water beyond which the schooner had already passed. Further on in his cross-examination he stated that they made all ready for anchoring between the Capes and the Thimble; that at the time of collision they were all ready to let go the anchor; that they could not anchor at the place of collision, because there was too deep water; that they were intending to go up to the Middle Ground to anchor,—between Middle Ground and Hampton Bar,—in about 5 or 6 fathoms; and that in order to make the anchorage they would not have to change their course until they got a mile further up ("up-channel" he evidently meant), when a change from S. W. $\frac{1}{2}$ S. to W. by N. would bring them where they wanted to go. These witnesses evidently designated the whole bar as "Hampton Bar," ignoring the fact that the chart designates its westernmost end as "Newport News Bar." Reading the testimony with chart before us, we are clearly of the opinion that at the moment of collision the schooner was a mile short of the place where it would be necessary to change her course—even if there were no other vessel to be considered—in order to make the anchorage she was aiming for. In view of this circumstance, we cannot find, in the absence of any evidence of a change of course, that she turned sharply to starboard and ran into the wake of the tug.

The decree of the district court is affirmed, with interest and costs.

THE PROTECTOR.

THE GOLDEN AGE.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 5.

1. COLLISION—ERROR IN EXTREMIS.

An error in *extremis* cannot be urged in exculpation of a vessel whose prior negligence has brought about the situation in which a mistake in judgment is excusable.

2. SAME—TUG AND TOW—PASSING DISABLED VESSEL.

A tug passing down a stream with a schooner in tow, *held* in fault for a collision between her tow and another tug which had become disabled and was unmanageable, because she failed to see the disabled vessel, and note her condition or hear her alarm signals, until so close upon her that the collision could not be avoided.

Appeal from the District Court of the United States for the Southern District of New York.

Chas. D. Cleveland, for appellant.

Le Roy S. Gove, for the Golden Age.

Peter Alexander, for the Protector.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. The court below was of the opinion that the collision between the tug Golden Age and the schooner in tow of the tug Protector was an accident of navigation, happening without any specific fault on the part of either tug, and for that reason dismissed the libel of the schooner. Each tug alleged in its answer, and attempted to prove, that the schooner was improperly navigated, and that the collision would not have taken place if she had followed the movements of the Protector. The court below was of the opinion that these allegations were unfounded, and we are of the same opinion, being satisfied that the schooner was properly navigated. We also agree with the court below in the conclusion that the Golden Age was not at fault. The real question to be determined upon this appeal seems to be whether the Protector should be exonerated.

The collision took place in broad daylight, on Newtown creek, a stream at that part of it running east and west, and 250 feet wide. An ebb tide, setting to the westward, was running slowly. The Golden Age, a tug about 60 feet long, while backing towards mid-stream from the northerly shore, preparatory to throwing her bow around to the westerly to go down stream, caught a submerged log in her propeller, her stern being at that time about mid-channel, and distant from the drawbridge westerly something more than 150 feet. She had heard the signal indicating the intention of a vessel approaching the draw from the eastward to pass through, and when she became disabled sounded alarm whistles, and as she saw the vessel, which proved to be the Protector, entering the draw, sounded alarm whistles again. At that time the Protector was proceeding westwardly with the libellant's schooner in tow on a hawser of 60 feet. As she approached the draw she slowed down to half speed. In the meantime the Golden

Age was being carried by her previous momentum and the ebb tide slowly to the westward, and nearer to the southerly shore of the stream. The Protector did not observe the Golden Age until she was emerging from the draw. She proceeded towards her about 100 feet without changing her course or reducing her speed, and then attempted to avoid her by putting on full steam, and making a short turn to port, in order to pass between her and the southerly shore. She herself passed the Golden Age safely, but the schooner was brought into contact with the Golden Age a few feet aft of the forechains. The shock of the blow threw the schooner's bow towards the southerly side of the creek, and her bowsprit ran into a structure which pulled it out and caused other damage. The collision occurred about 300 feet to the westward of the bridge.

The testimony of the master of the Protector was to the effect that he had heard no alarm signals from the Golden Age; that he first saw the Golden Age just as the Protector got through the draw; and that he then blew two whistles, and got an alarm whistle in return, but did not discover that the Golden Age was disabled until he proceeded 100 or 125 feet further; and that he then noticed she had some sternway, but concluded to put on full speed and go to port, so as to pass between her and the southerly shore. According to his testimony, there was room for that maneuver, and no other was practicable.

After a careful study of the evidence in the record, we cannot resist the conclusion that the Golden Age should have been observed by the Protector before the latter entered the draw. Even though the Protector was not in fault because her attention was not attracted by the alarm whistles of the Golden Age, there were no obstacles to prevent the latter from being plainly seen from the time the Protector got within 100 feet of the draw. She was practically opposite the draw, and a short distance away, and had been observed moving backwards by the men upon the schooner before their vessel emerged from the draw. These men were presumably less likely to see her than those in charge of the navigation of the Protector, upon whom rested the duty of a more diligent observation. If the Protector had observed her before entering the draw, or even when entering it, she would have had sufficient opportunity, by the time she emerged from the draw, to discover her disabled condition and realize the danger of the situation. If on emerging from the draw the Protector had reversed and taken prompt measures to hold back her tow, we are satisfied the collision could have been avoided. There would probably have been a narrow margin of safety, but it is to be remembered that the tide would have been carrying the Golden Age further away from the Protector while the latter was engaged in holding back her tow. Doubtless at the time the Protector became actually aware that the Golden Age was incapacitated it was too late to take any effective measures to save collision. But the Protector must assume the consequences of failing to discover what she ought to have discovered. She cannot escape responsibility because when it was too late to avoid a collision she did all that skillful navigation required.

The case is one where a vessel in tow, without any fault on her part, has been brought by her tug into collision with another tug, and both

tugs have been relieved from responsibility, one upon a theory, which the facts seem to warrant, that she became disabled and was without fault, and the other upon the theory of an error in extremis. An error in extremis cannot be urged in exculpation of a vessel whose prior negligence has brought about the situation in which a mistake of judgment is excusable. *The Dexter*, 23 Wall. 69, 23 L. Ed. 84; *The Elizabeth Jones*, 112 U. S. 514, 5 Sup. Ct. 468, 28 L. Ed. 812.

The circumstances impose the burden upon the Protector of exonerating herself from fault by satisfactory proof that the collision was inevitable notwithstanding the exercise of proper skill and care on her part. The proofs do not satisfy that obligation.

The decree dismissing the libel as against the *Golden Age* is affirmed, with costs, and as to the Protector is reversed, with costs, and with instructions to the court below to decree for the libellant.

MAURER v. DICKERSON et al.

(Circuit Court of Appeals, Third Circuit. February 5, 1902.)

No. 21, September Term, 1901.

1. PATENTS—CONSTRUCTION OF CLAIMS—CHEMICAL PRODUCT.

A claim of a patent for a new chemical product, which is described with such clear marks of identification that it can readily be recognized aside from the process by which it is made, is not limited to the product of a particular process because such a process is described in the specification and is the only known process by which it can be produced.

2. SAME—VALIDITY AND INFRINGEMENT—PHENACETINE.

The Hinsberg patent, No. 400,086, for the chemical product known commercially as "Phenacetine," largely used in medicine since its production by the patentee, construed, and *held* not anticipated, valid, and infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Hector T. Fenton, for appellant.

Livingston Gifford, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This is an appeal by the defendant below from a decree (108 Fed. 233) against him upon a bill for the infringement of letters patent No. 400,086, granted March 26, 1889, to the *Farbenfabriken Vormals Fr. Bayer & Co.*, of Elberfeld, Germany, assignee of Oskar Hinsberg. The invention covered by this patent relates to a new pharmaceutical product, a new antipyretic and antineuralgic, known commercially as "Phenacetine," and chemically as "mono-acetyl-para-mido-phenetol." The specification contains a description of the new pharmaceutical product, and of the inventor's (Hinsberg's) process of production. The patent has a single claim, which is in the terms following:

"The product herein described, which has the following characteristics: It crystallizes in white leaves, melting at 135° centigrade; not coloring on

addition of acids or alkalies; is little soluble in cold water, more so in hot water; easy soluble in alcohol, ether, chloroform, or benzole; is without taste; and has the general composition $C_{10}H_{13}O_2N$."

In our consideration of the case we naturally first take up the 10th, 11th, 12th, 13th, 14th, and 15th assignments of error, all of which relate to the opening paragraph of the specification, which is as follows:

"My invention relates to the production of a new pharmaceutical product, a new antipyretic and antineuralgic, obtained by reducing nitro-phenetol, and melting the phenetidin-chlorhydrate thus formed with dried sodium acetate and acetic acid."

The appellant insists that this introductory paragraph must be read as comprehending the three known varieties of nitro-phenetol, namely, the meta, ortho, and para varieties, and hence that the paragraph is false and misleading, because, admittedly, only by the employment of the para variety, viz., para-nitro-phenetol, can the end product of the patent specified in the claim be obtained. But this opening paragraph does not affirm that the new pharmaceutical product can be obtained by reducing all nitro-phenetols, including the meta and ortho varieties. Nor is it open to any such interpretation when read, as it must be in connection with the context. Immediately after the introductory paragraph above quoted, we find in the specification this statement:

"In carrying out my process practically I proceed as follows: Fifty kilos of the potassium salt of para-nitro-phenol are mixed with three hundred kilos of alcohol, adding forty kilos of bromæthyl. The mixture is heated in an autoclave at a pressure of three to four atmospheres during about eight hours. At this time the reaction is finished, whereby para-nitro-phenetol is obtained according to the following equation."

And then follows a description in full, clear, concise, and exact terms of the successive steps of the inventor's process, whereby the "new mono-acetyl-para-mido-phenetol" is produced. The suggestion that the description commencing with the words, "in carrying out my process practically I proceed as follows," is only one specific example of the invention, is not to be accepted. There is nothing in the patent to support the suggestion. Undoubtedly the specification, as a whole, evinces that the invention is limited to the para product.

The expert testimony convincingly shows that it would be plain to every chemist reading this patent that the para variety of nitro-phenol is the starting material for the production of the new antipyretic and antineuralgic, mono-acetyl-para-mido-phenetol, or phenacetine, covered by the claim.

We cannot see that *Matheson v. Campbell*, 24 C. C. A. 384, 78 Fed. 910, decides anything favorable to the contention of this appellant. The facts there differed radically from the facts of this case. The Hinsberg patent, unlike the patent involved in *Matheson v. Campbell*, is distinctly limited to one individual product, fully described and unmistakably identified.

The eighth and ninth assignments of error may be considered together. They relate to the Hallock publication, and the proofs generally of the prior art, as showing (as is claimed) want of novelty

in the product of the Hinsberg patent, and that it was the result of mere laboratory selection, and not of invention or discovery.

Prof. Sadtler, who was the principal expert witness for the defendant, and testified at length as to anterior publications and the prior art, mentioned particularly the Hallock article and a publication by Wagner. However, comparing the body referred to by Wagner (the acetyl derivative of meta-phenetidin) with the product of the Hinsberg patent, he testified thus: "The two compounds are distinct bodies, although they are isomeric, and therefore both possess the formula $C_{10}H_{13}O_2N$." And when asked (XQ. 95), "Excepting these Hallock and Wagner references, you do not know of any other description of the product claimed in United States patent No. 400,086 [the patent in suit] in the literature prior to February, 1887, do you?" Prof. Sadtler answered, "I do not." Furthermore he testified as follows:

"XQ. 93. Please examine the same references again, and point out where such a body of the formula $C_{10}H_{13}O_2N$, and having the characteristics of crystallizing in white leaves and melting at $135^{\circ} C$, is described, and quote the same into this record. A. I have already stated in answer to XQ. 91 that the body referred to by Wagner was a different chemical substance from phenacetine, differing not only in melting point, but, probably, in some other characteristics. The body referred to by Hallock, which I consider the same substance as that now known as phenacetine, did not have either melting point or formula directly ascribed to it by Hallock. XQ. 94. It is therefore a fact, is it not, that none of the publications prior to February, 1887, cited by you, contain any description whatever of the product itself, which is claimed in the Hinsberg United States patent No. 400,086 [patent in suit]? A. As I have stated, the Wagner reference contains the exact formula that is cited in the description of the product in the Hinsberg patent, but, with the exception of this agreement on formula, I do not know of any other correspondence in properties with those mentioned in the patent. The Hallock article, referring to the acetyl compound of para-mido-phenetol, only agrees with the description in the Hinsberg patent in mentioning the product as a crystalline solid, leaving the other physical properties entirely unnoticed."

The quoted testimony of the defendant's chemical expert, which is corroborated by other evidence, really puts out of the case the Wagner publication as a pertinent reference, and also enables us to shorten our discussion of the proofs bearing on the prior art. The Hallock article, under the title, "Note on Para-Nitro and Para-Amido Phenetol," was published at Baltimore in the American Chemical Journal of 1879-1880. The object of Hallock's note seems to have been the correction of a supposed mistake of Cahours, a French chemist, who had treated phenetol with fuming nitric acid, obtaining both a solid and a liquid product. Hallock states that he repeated Cahours' "experiments with somewhat different results." Of the product of his first reaction Hallock says, "The product consisted of a solid and a liquid in varying proportions, according to the conditions of the nitration," but he nowhere shows the condition of nitration employed in his experiments. There is, indeed, much reason for believing that the Hallock article shows unskillful experimentation and also downright mistakes. For example, the oily liquid which Hallock assumed was para-monomido-phenetol he states boiled at 253° centigrade; but Dr. Schweitzer testifies that "para-monomido-phenetol boils at

244° centigrade, and a liquid boiling at 9° higher must be considered an absolutely different chemical individual"; and Dr. Chandler testifies to the same effect.

The only mention which Hallock makes of the crystalline solid which it is now said was phenacetine is found in the following paragraph, near the conclusion of his article: "These crystals, when treated with potassic hydrate, yield an oily liquid resembling aniline. It boils at 253° C. (uncorrected), and is doubtless para-monomidophenetol. A portion of the salt appears to suffer decomposition, so that the amount of oil obtained was very small. This oil combines, like aniline, directly with acetyl chloride to a crystalline solid. In combination with carbon disulphide, it also yields a solid body." Prof. Sadtler therefore was quite right in stating that the body referred to by Hallock "did not have either melting point or formula directly ascribed to it by Hallock," and that "the Hallock article referring to the acetyl compound of para-mido-phenetol only agrees with the description in the Hinsberg patent in mentioning the product as a crystalline solid, leaving the other physical properties entirely unnoted."

These statements of Prof. Sadtler are very significant. Hallock did not investigate the crystalline solid. He made no test to identify it or to determine its composition. No one could discover from his article the nature of the crystalline solid referred to. Such vague data as he furnished were wholly inconclusive. Evidently Hallock did not consider the crystalline solid as possessing any value whatever. He did not regard it as worthy of investigation. His mention of it imparted no useful knowledge to the public. Certainly Hallock's article did not give phenacetine to the world. If there was any phenacetine in the crystalline solid it was not discernible. The crystalline solid as a whole was a poisonous substance. This much can confidently be affirmed. But even with the increased knowledge of the last 20 years no one can now determine with certainty what were the constituents of the crystalline solid mentioned by Hallock. The evidence shows that it may have contained one or more of nine different substances.

We have no hesitation in holding that the Hallock publication, supplemented by the whole body of evidence of prior knowledge, did not disclose the product of the Hinsberg patent, whether that product be regarded in its relation to the art of pharmacy or as a mere chemical substance.

We are not able to accede to the proposition that the product of the patent in suit was the result of mere laboratory selection, and not of invention or discovery. From a careful study of this record, we are convinced that what Hinsberg did involved invention and discovery of a highly meritorious character. The Hinsberg patent describes and claims an entirely new pharmaceutical product, which has found a very extensive and most valuable use as a medicine. The proofs quite justify us in accepting as correct the following views expressed by the complainants' chemical expert, Dr. Schweitzer:

"Hinsberg's invention is the invention of a new product. This product had never been produced or described or known or found any application in

the arts before Hinsberg. Concerning the process of acetylation it is true that at the date of the Hinsberg patent other amines had, of course, been subjected to processes of acetylation, and it was generally believed that amines could be acetylated if means suitable to each case could be devised. Para-mono namido-phenetol had, however, never been subjected to such a process, and when Hinsberg found his process it resulted in a new and useful result, namely, a new product of surpassing utility, which result could not have been foreseen."

The seventh and sixteenth assignments of error involve the question of the date of Hinsberg's invention. We are of opinion that the court below did not err in accepting the date of the publication in the Centralblatt, namely, February 26, 1887, as the true date of Hinsberg's invention. That publication was put in evidence by the defendant himself. He may, indeed, have intended to use it for another purpose, but the publication was in the case as evidence for every legitimate purpose. Moreover, the defendant examined Prof. Sadtler in respect to the publication, and he testified as to its contents. Among other things he said:

"Perhaps I should add that the term 'acetphenetidln' is the synonym of mono-acetyl-para-mido-phenetol, and is the name by which Hinsberg called it in his Centralblatt article in 1887, and in the same article he called it ethylated and acetylated p-amido-phenol."

Again, the defendant stipulated as to the identity of the Hinsberg of the Centralblatt article with the Hinsberg of the patent in suit. We think that the Centralblatt article, even without Prof. Sadtler's testimony, sufficiently identified the subject-matter of the Hinsberg patent.

The view we have thus expressed under this head makes it unnecessary for us to consider the publications in the Rundschau for March and April, 1887; the Pharmaceutische Post of May and October, 1887; and the Journal of the Society of Chemical Industry of March 31, 1888.

The third and fourth assignments of error relate to the construction of the claim. The patent in suit describes a new product with such clear marks of identification that it can readily be recognized aside from the process for making it. The patent also describes a process for making it which was new, and up to the present time is the only known process by which it can be produced. Since, then, there was novelty both in the process and product, Hinsberg might have had one claim for the process and another claim for the product. *Rubber Co. v. Goodyear*, 9 Wall. 788, 796, 19 L. Ed. 566; *Merrill v. Yeomans*, 94 U. S. 568, 569, 24 L. Ed. 235. But he made the single claim quoted at the opening of this opinion. That claim, in terms, is for the described product, having certain distinguishing characteristics which are set forth in the claim with great fullness. In our judgment, it is very clear that the claim is not restricted to the product made by the described process, but covers the chemical individual, however produced. We know of no rule requiring a construction limiting a claim for a chemical product to the described process, because the evidence shows that it cannot be made in any other way than by the process recited. No warrant for such a rule is to be found either in the statute or in the decisions.

The 17th, 18th, 19th, and 20th assignments of error relate to the tests of identity specified in the claim, it being contended by the appellant that one of these tests, namely, "not coloring on addition of acids," is false, and the patent, therefore, void. The allegation is that the color test fails under the application of nitric acid. To sustain this defense, reliance is placed mainly, if not altogether, upon the testimony of Prof. Sadtler as to tests made by him, and an article by Hinsberg (the inventor) and Autenrieth published in the *Archiv der Pharmacie* in 1891.

It seems to us clear, under the language of the claim, "not coloring on the addition of acids," as well as under the proofs in the case, that if nitric acid is employed as a test it should be applied in such a manner as one skilled in the art would adopt for that purpose. It would not be a fair test, within the terms of the patent, to apply nitric acid at such a degree of strength as to destroy the phenacetine. The "addition" of an acid simply as a color test negatives the idea of such excess as to work decomposition or conversion of the phenacetine. Furthermore, the color test of the patent implies the use of acids under normal conditions and in the usual way. Hot acid is not suggested or implied, nor is a protracted test. These views are not only rational in themselves, but they have the support of the complainants' expert witnesses, Dr. Chandler and Dr. Schweitzer.

In respect to the color test mentioned in the patent, Dr. Chandler testified thus:

"I understand that the product of the patent is not colored when subjected to the action of acids in general, which simply act as acids, such as sulphuric, hydrochloric, acetic, etc., and nitric acid sufficiently dilute to act merely as an acid, but not strong enough to exert a peculiar action which no other acid can exert, and which it exerts only when strong enough to produce a nitro compound, by introducing into the substance in place of an atom of hydrogen the radical nitryl (NO), which no other acid in ordinary use contains."

Now, what the character of Prof. Sadtler's treatment of phenacetine with nitric acid was will appear from the citations from his testimony given below. Upon his examination in chief he said:

"I did find that ordinary nitric acid of U. S. Pharmacopoeial strength, either hot or cold, did change its color immediately. In fact, I found that ordinary nitric acid not only colors it a decided citron yellow, but it has an energetic chemical action upon it, developing heat, liberating nitrous fumes (N_2O_4), and changing it into a compound, which, upon cooling, crystallizes out in yellow needle-like crystals. I also found that on a short heating with the addition of hydrochloric acid some decomposition took place with liberation of para-amido-phenol, when the addition of a few drops of dilute solution of chromic acid caused a deep ruby color to appear."

Upon cross-examination Prof. Sadtler said:

"I have not tried it with the official dilute nitric acid of the Pharmacopoeia, as far as I know. XQ. 69. Is it not true that phenacetine must necessarily be converted into a nitro compound when, under the treatment with nitric acid, the yellow color appears? A. Yes; there must be some formation of the nitro-phenacetine, as far as I know, to produce the yellow color of the product."

At a later date, upon a re-examination in chief, Prof. Sadtler testified:

"I prepared some dilute nitric acid of the exact strength (10 per cent.) of the acidum nitricum dilutum (U. S. P.), and, putting some in a test tube, added to it some phenacetine Bayer, and, corking the tube to prevent evaporation of the liquid, left it in my laboratory in the cold. When I looked at it the next morning, it had stood seventeen hours. The liquid was yellowish throughout from the result of the action and the nitro-phenacetine dissolved, and, on examination of the portion undissolved in the bottom of the test tube, I recognized, under the lens, the change of a portion of the white phenacetine into the yellow crystals of the nitro-phenacetine. A second experiment made in a watch crystal, loosely covered, turned out the same way. Acidum nitricum dilutum will therefore act in the cold after some hours."

It is quite plain to us that these experiments of Prof. Sadtler were outside of the color test of the patent. They involved the use of strong nitric acid, which was destructive of the phenacetine, or the use of heat, or the standing of the phenacetine in cold acid for 17 hours. It is to be noted, too, that in the latter case the change of color was recognizable only under a lens.

Speaking of the color test of the patent, Dr. Schweitzer testified:

"In making this test, to add heat, or to take strong nitric acid, or to allow it to stand for seventeen hours, is, in either case, an abnormal mode of procedure, which no person skilled in the art would have adopted, and which is therefore not included within the description of the test in the claim as the same would have been understood by a person skilled in the art."

As the article in the *Archiv der Pharmacie* was published in 1891, subsequent to Hinsberg's assignment of his invention, and two years after the issue of the patent to his assignee, it may be doubted whether it was evidence against the complainants below for any purpose. But, waiving this point, upon an attentive reading of the article we do not see that it tends to prove the falsity of the color test recited in the claim. The article really discloses a new and additional test for the identification of phenacetine by its nitration. It states that "if finely powdered phenacetine is covered with 10 to 12 per cent. nitric acid, and heated a short time to boiling, the liquid takes a yellow to orange color, and at the same time the hitherto colorless phenacetine is changed into an intensely yellow colored nitro compound." Again, it is stated that the quantity of nitric acid thus used is about double that demanded by the theory, and that the mixture is to be heated to boiling, and shaken vigorously for some time. The article further states that the nitration can be effected by shaking up the finely powdered phenacetine with dilute nitric acid, and adding concentrated nitric acid in slight excess in small portions, and with energetic shaking. The directions in this publication, we think, show a test additional to, and not inconsistent with, the statements contained in the claim of the patent. The defense based on the alleged falsity of the tests of identity specified in the claim is not sustained by the proofs.

Under the remaining assignments of error, viz., the 1st, 2d, 5th, and 6th assignments, we are called on to consider only one other question, namely, that of infringement. That question is free from difficulty. The identity in all particulars of the article sold by the defendant with the product made in accordance with the patent in suit is clearly established by the proofs. The article sold by the de-

endant responds to all the tests specified in the claim of the Hinsberg patent. Upon this point there is no conflict of evidence. Infringement then is sufficiently shown, even if the claim were held to be limited, as the appellant contends it should be, to the product when made with the materials and by the process described in the specification. None the less conclusive, of course, is the proof of infringement under the broader construction we have given to the claim.

Upon the most patient investigation of the case, we are persuaded that the record is free from error, and that none of the assignments should be sustained.

The decree of the circuit court was right, and accordingly it is affirmed.

**AMERICAN ELECTRICAL NOVELTY & MANUFACTURING CO. v.
NEWGOLD et al.**

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 68.

1. PATENTS—VALIDITY—DESIGN FOR LAMP.

The Hitzelberger design patent, No. 29,939, for a portable lamp body, held void on the ground that the patentee was not the originator of the design shown.

2. SAME—INVENTION—ELECTRIC LAMP.

The Misell patent, No. 617,592, for an electric hand lamp, claim 3, covering a combination of devices all well known in the prior art, is void, as failing to show any patentably novel combination or element of construction.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity for infringement of patent No. 29,939, granted to Gustave F. Hitzelberger, January 3, 1899, for a design for a portable lamp body, and of patent No. 617,592, granted to David Misell, January 10, 1899, for an electrical device. See 99 Fed. 567.

Thos. Ewing, Jr., for appellant.

John Bogart, for appellees.

Before WALLACE, Circuit Judge, and TOWNSEND, District Judge.

TOWNSEND, District Judge. This is an appeal from a final decree of the United States circuit court for the Southern district of New York, which dismissed the bill. 108 Fed. 957. The bill alleges infringement of patent No. 29,939, granted to Gustave F. Hitzelberger, complainant's assignor, January 3, 1899, for a design for a portable lamp body, and of patent No. 617,592, granted January 10, 1899, to David Misell, complainant's assignor, for an electrical device. The decree dismissing the bill, in so far as the design patent is concerned, is affirmed on the opinion of the court below. Even if the article in question were the proper subject for a design patent, and if there were any patentable novelty therein, the record shows that Misell, and not Hitzelberger, was the first to make the design.

Infringement is alleged of the third claim only of the Misell patent. Said claim is as follows:

"The combination of a tubular casing, a reflector located in and protected by one end thereof, a lamp located in front of the reflector and within the casing, having one of its filament terminals extending rearwardly through the reflector to the rear side thereof, a cover for the opposite end of the casing connected with the opposite filament terminal, and a cylindrical battery contained within the casing, the cover when shoved home making contact with one pole and end of the battery, and forcing the opposite pole and end thereof into contact with the rearwardly extending filament terminal, substantially as described."

The history of the application for this patent in the patent office, and the prior art, show that the invention, if any, is a very narrow, one, and that it consists, as stated in the specification, merely "in the way of assembling the parts and in the manner of making the electrical connections, and in other details," as described and claimed.

Prior electric batteries, electric canes, electric stands, and bicycle and other portable electric lamps, disclose every element of the patented combination. Misell assembled the devices of the prior art in a single compact tubular structure, one end of which housed and protected a reflector and lamp. His chief object was to make the operation of inserting and replacing dry battery cells therein as simple as possible. His construction differed from the prior art in this respect, and, further, in function, by reason of its compactness, the absence of awkward projections, and the consequent adaptability to a variety of useful purposes as a portable, pocketable hand flash light or lamp capable of being held and operated in one hand, the light from which could be conveniently and accurately directed in a single beam to any desired point in the direction of the axis of the casing, and used for the examination of small and confined spaces. Magee patent, No. 572,431, shows a tubular casing inclosing in one end a reflector and lamp. Crowds patent, No. 618,057, shows a tubular casing containing a series of wet batteries, in which contact with the circuits is effected in substantially the same manner as in complainant's device. Meyer patent, No. 595,327, for an electrical lighter for burners, in shape, construction, and operation is strikingly similar to the patent in suit. If the incandescent lamp of Magee be substituted for the lighter in the Meyer device, it would practically embody the construction covered by the claim in suit. Various patents for electric canes, notably Leigh, British patent No. 8,350 of 1894, and Levi, British patent, No. 97 of 1892, show incandescent lamps in the head of the cane, with wet or dry batteries so arranged in the body of the cane as to flash or glow when the cane is placed in a certain position; and, finally, Bugg patent, No. 614,318, and Paget patent, No. 599,975, cover the identical construction of the claim in suit, except that, in order to adapt them for use on vehicles, the lamp is located at the side instead of at the end of the casing.

What change was required in these prior devices in order to produce the construction covered by the claim in suit? First, in the earlier patents, to substitute for the old wet battery the later commercial, improved dry battery, which the constructor found ready for his use. That this did not involve invention is shown by various patents. Sec-

ond, to elongate the Magee tubular casing, or cut off the electrical cane, and insert the dry battery at the rear end, or insert the Magee reflector and lamp in Paget. Complainant's expert admits that such a lamp would be substantially the lamp of defendants herein, and would come within the terms of the claim in suit. It is true that in complainant's lamp there is greater simplicity by reason of the absence of certain connections and adjustments shown in the structures of the prior art, but this result is due, not to any inventive skill of Misell, but to the superiority of the dry battery and its capacity for adjustment.

Complainant's lamp appears to be novel and unique in the mode of construction, by means of which the user may hold and operate it in one hand by a pressure upon the bar in the side of the tubular casing. But this element is nowhere referred to in the specifications or claims, and is not found in defendants' apparatus.

The conclusion reached is that the improved construction and increased utility of function of complainant's lamp over the structures of the prior art are either such as are due to elements not claimed by the patentee, or result from the use of novel devices not invented by him, and that the claim in suit fails to cover any patentably novel combination or element of construction.

The decree is affirmed.

THE LIVINGSTONE et al.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 83.

1. COLLISION—CONTRIBUTORY FAULT—BURDEN OF PROOF.

Where fault on the part of one vessel for a collision is established by uncontradicted testimony, and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel, but any reasonable doubt as to whether the fault of the latter contributed to the collision should be resolved in its favor.

2. SAME—STEAMERS MEETING—CONTRIBUTORY FAULT.

The steamers *Grand Traverse* and *Livingstone* met in Lake Erie in the early morning, shortly before daylight, being on practically parallel courses. The night was clear, and they saw each other when four miles apart. When a mile and a half apart, and again when a mile and a quarter of a mile, the *Traverse* signaled her intention to go to the right, each time porting half a point, but she received no answer to her signals, the last only being heard by the *Livingstone*, which thereupon starboarded her helm, and a collision resulted. When the last signal was given and heard the vessels were in a position of safety, and had the *Livingstone* ported, as she should have done, or even kept her course, there would have been no collision. *Held* that, the navigation of the *Traverse* having been correct in all respects, neither the fact that her port light had gone out, nor that her lookout had temporarily left his post after the vessels had sighted each other, could have misled the *Livingstone* or contributed to the collision, which was due solely to the *Livingstone's* change of course after the signal of the *Traverse* was heard and understood; nor was the *Traverse* chargeable with contributory fault in failing to stop and reverse in the brief time remaining after the unexpected change of course of the *Livingstone* first created a situation of danger.

Appeal from the District Court of the United States for the Western District of New York.

This cause comes here upon appeal by the owners of the Grand Traverse from a decree of the district court, Northern district of New York, holding both vessels in fault for a collision between the steam propeller Livingstone and the steam propeller Grand Traverse, and dividing the damages. 104 Fed. 918. The Livingstone did not appeal.

Harvey D. Goulder and John G. Milburn, for appellants.

C. E. Kremer, for appellee the Livingstone.

F. H. Canfield, for appellee Insurance Co.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

LACOMBE, Circuit Judge. The general facts of the collision are succinctly set forth in the opinion of the district judge, as follows:

"The collision occurred about half past five on the morning of October 19, 1896, when the steamers were on Lake Erie about a mile N. W. of Colchester Light, Ontario. The Traverse, a propeller 182 feet long and 33 feet beam, loaded with coal and merchandise, was proceeding up the lake on a voyage from Buffalo to Green Bay, Wis. Her course was W. by N. $\frac{1}{4}$ N. Her speed was about $8\frac{1}{2}$ miles an hour. The Livingstone, a propeller 280 feet in length and about 38 feet beam, loaded with corn, was proceeding down the lake on a voyage from Chicago to Buffalo. Her course was E. by S. $\frac{1}{2}$ S. Her speed was about $10\frac{1}{2}$ miles an hour. The two vessels were thus on substantially opposite courses. The wind was blowing fresh from the west. Though dark at the time of the collision it was clear, and objects could be seen at a considerable distance. It was almost daylight. About half a mile ahead of the Livingstone was the Peshtigo, a propeller smaller and slower than the Livingstone, bound down the lake, substantially on the same course. Just prior to the collision she passed the Traverse about a quarter of a mile to the northward. The members of her crew on watch at the time heard the signals given by the Traverse and saw the vessels when they came together. The collision occurred in the open lake, with plenty of room in which to maneuver, and with nothing in the condition of the wind or water to render navigation difficult."

As to the fault of the Livingstone, the district judge found:

"When the vessels first sighted each other they were about four miles distant. Their masthead lights were first seen. They were then meeting nearly end on, and rule 17 [which requires that each shall alter her course to starboard so that each shall pass on the port side of the other] became applicable. When about a mile and a half distant the Traverse saw the red and green lights of the Livingstone, and blew one blast, as required by rule 23, to indicate that she was going to the right. She ported half a point. This was correct seamanship. The Livingstone did not answer this signal, and continued on her course. The first mate of the Livingstone, who had charge of her navigation at the time, testifies that he did not hear this signal; in fact, no one on the Livingstone heard it, if the testimony of her crew is to be accepted. There is nothing at all improbable in this story. The whistle of the Traverse was clogged with water. Her mate testifies that he blew an unusually long time before he could get a distinct response, and as the wind was blowing the sound directly away from the Livingstone it is not surprising that it was not heard. When the vessels were from three-quarters of a mile to a mile apart, the Traverse, seeing at that time only the range and red light of the Livingstone, repeated the signal, and again ported half a point. There was no response from the Livingstone. When the distance had been reduced to a quarter of a mile, the Traverse blew a signal of one blast, and ported a third time. This signal was heard by the Livingstone, but still there was no answer. Assuming the Traverse to be guilty of all the faults charged against her, what

was the situation at the time the third signal was given? The vessels were then about a quarter of a mile apart. Each could be seen by the other without the aid of lights. The Livingstone knew that the Traverse was directing her course to starboard. She knew it from the signal, and it was perfectly obvious without the signal. * * * What then was the manifest duty of the Livingstone? There can be no doubt that she should have ported also. Even had she kept her course, there could have been no danger. There was but one thing possible for the Livingstone to do at this time to bring the boats into collision, namely, to starboard, and that was the one thing she did do. The proof establishes this proposition beyond a doubt."

It is unnecessary to discuss such proof here, for by not appealing the Livingstone has conceded that the court was correct in finding that she did starboard at this time, and that by such starboarding the collision was brought about. It was, no doubt, an amazingly stupid piece of navigation, but not unprecedented. Whether the mate called out "Starboard" when he meant to say, and possibly believed he did say, "Port," or whether the wheelsman heard the order "Starboard," and did the opposite, we do not know. Such things have happened before, and an appreciation of the extent of human infirmity, even among men experienced and ordinarily cautious, makes us unwilling to accept the theory of the court below that no navigator could have committed such an error (assuming him to be sane and not intoxicated) unless in some way or other the other vessel misled him. We approach the consideration of the faults charged against the Traverse, therefore, without the postulate that an accident of this character, where the one vessel is concededly guilty of such gross fault, "could hardly have occurred without the concurring carelessness of the other." On the contrary, we understand the rule as laid down by the supreme court to be that where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption, at least, adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor. *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84; *Ludvig Holberg*, 157 U. S. 60, 71, 15 Sup. Ct. 477, 39 L. Ed. 620; *The Umbria*, 166 U. S. 404, 409, 17 Sup. Ct. 610, 41 L. Ed. 1053.

The first fault charged against the Traverse is that she displayed no red light. The district judge discussed all the testimony on this branch of the case, and, giving the greater weight to that of the observers on the deck of the Livingstone, reached the conclusion that the Traverse was thus in fault. In our opinion, the testimony from the Livingstone is not as strong as it might be. Witnesses who observed the Traverse just after collision testified that there was no lantern before the red screen. Had they said the lantern was there and unlit, they would more strongly have corroborated the testimony of the navigator, whose evidence on other points the district court discredited, as we do. The evidence shows that the lantern was put in place at the proper hour, and was observed afterwards before collision. It may have gone out, but certainly it was not removed from the

screen before collision. However, we do not think it necessary to discuss the evidence on this branch of the case, nor, on the whole, are we disposed to reverse the finding that the *Traverse* was not displaying her red light; but we are unable to concur in the proposition that such fault was instrumental in producing the collision. The district court found that when the vessels were a quarter of a mile apart, and the third whistle of the *Traverse* was heard on the *Livingstone*, the vessels were in a position of safety, which could be made unsafe only by the starboarding of the *Livingstone*. Had the latter ported, or even held her course, there could have been no danger. The vessels would have passed each other with a broad margin of safety. The witnesses from the *Livingstone* unite in the proposition that the position then was one of safety, though some of them put the *Traverse* on their starboard instead of their port bow, and one of them, the mate, insisted that he ordered no change of wheel, and that none was made. As before stated, he was discredited by evidence from the deck of his own vessel, the wheelsman testifying that the mate ordered the wheel hard a-starboard; that he put it there, where it remained down to collision; and that the captain, coming on deck, then found it hard a-starboard, which the captain did not deny. The testimony overwhelmingly supports the proposition, stated in the opinion of the district court, that "the *Livingstone* took a sharp swing to port when the last signal was given from the *Traverse*, and when, * * * had she held her course or directed it to starboard, the accident would not have occurred. * * * If the *Livingstone* had not starboarded at this supreme moment, she would have passed the *Traverse* without difficulty." This is the only fault which the district court finds on the part of the *Livingstone*, and, that vessel not having appealed, the accuracy of that finding is conceded. But at the moment the last signal sounded, and before the mate of the *Livingstone* ordered her wheel hard a-starboard, the vessels were a quarter of a mile apart. He could see the *Traverse*, while her signal notified him as plainly as any lights would have done that she was directing her course to starboard. Indeed, when pressed upon cross-examination, this witness admitted that the one whistle heard by him gave him all the information needed, and that the absence of the red light made no difference. Of this statement it is said that it was made by a witness who did not commend himself to the court, and whose narrative in other particulars was found to be untruthful; but the situation itself gives sufficient support to this admission of the mate. Any intelligent man must have known from the whistle in what direction the *Traverse* was going to swing, and no light was needed to tell him that if he starboarded he would bring his own boat into peril. If failure by the *Traverse* to display a red light had put the vessels (as a consequence of navigation prior to sounding of the last signal) "in a position of danger, where the slightest fault might bring disaster," her failure in that regard might fairly be held to have contributed to the catastrophe. But it must be accepted that the position when the last signal sounded was one of safety, and that peril and disaster came thereafter only as the result of an amazing piece of stupidity in the navigation of the *Livingstone*.

For this reason we cannot hold that failure by the *Traverse* to display a red light was a fault contributing to the disaster.

It is further charged that the *Traverse* displayed no range light on her mizzen mast or main mast. The testimony to support this proposition is less persuasive than that touching the absence of a red light, but it need not be discussed, because, conceding the fault, it did not contribute to the accident, for the reasons already set forth.

It is further charged that the *Traverse* had no lookout. The facts are these: When the *Livingstone* was sighted the *Traverse* had on deck her navigator (the mate), wheelsman, and stationed lookout. The lookout saw the masthead lights of the *Livingstone* before the first signal, and reported them. He then took the wheelsman's place (the latter being sent aft to examine the log), and remained there till collision. No other vessel interfered in any way with the navigation of either of the colliding vessels. No other was visible except the *Peshtigo*, far out of reach, and which was also reported long before collision. The *Livingstone* was sighted and seen by all when miles away. Her colored lights were made out a mile and a half off, signal of one whistle blown to her, and the navigation of the *Traverse* conducted with reference to her. The view was clear and unobstructed, and, so far as the evidence shows, nothing of any character or description occurred concerning the approach of the *Livingstone* of which the navigator of the *Traverse* was not advised from personal observation. Under these circumstances, we are not prepared to say that the absence of a lookout contributed to the injury. *The Victory and The Plymothian*, 168 U. S. 429, 18 Sup. Ct. 149, 42 L. Ed. 519.

It is further charged as a fault that the *Traverse* did not stop and reverse. Under the findings of the district judge, in which we concur, the position of the two vessels was one of safety, until the unexpected starboarding of the *Livingstone*. Up to that time, therefore, no rule required the *Traverse* to stop and reverse, and afterwards she was so near the jaws of collision that, in view of the gross fault of the *Livingstone*, she should not be held liable for an error of judgment committed in the brief moment allowed her navigator to decide, especially as it seems highly probable that she would not thereby have averted collision.

The decree of the district court holding the *Grand Traverse* liable is reversed, with costs of this appeal, and cause remanded, with instructions to hold the *Livingstone* solely in fault.

WESTINGHOUSE ELECTRIC & MFG. CO. v. SARANAC LAKE ELECTRIC LIGHT CO.

SARANAC LAKE ELECTRIC LIGHT CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Second Circuit. January 14, 1902.)

No. 63.

1. PATENTS—ANTICIPATION—ELECTRICAL DISTRIBUTION.

The Kennedy reissue patent, No. 11,081 (original No. 407,294), for an improvement in the method of distributing and regulating alternating electric currents by secondary generators, is void because the acts and omissions of the patentee, after the date of the alleged invention, worked an abandonment and dedication of the same to the public.

2. SAME—VALIDITY—INFRINGEMENT.

The Stanley patent, No. 469,809, for a system of electrical distribution by means of an alternating current generator and converters, or secondary generators, connected with the main-line conductors in multiple, includes, as a part of the invention shown, the so-called "Stanley rule" for ascertaining the proper length of primary coil, and so construed it was neither anticipated nor lacking in invention; nor is such patent void for prior use of the device at Great Barrington, Mass., which it appears was essentially for experimental purposes. Claims 1 and 3 also held infringed.

3. SAME—PRIOR PUBLIC USE.

The fact that a charge is made for the product of a new device or combination where the price charged is not remunerative is not conclusive evidence of public use, although it raises a presumption against experimental use, which can be overcome only by clear and convincing evidence.

Appeal from the Circuit Court of the United States for the Northern District of New York.

These are cross appeals from a decree of the circuit court, Northern district of New York. 108 Fed. 221. Suit was brought by complainant upon reissued letters patent No. 11,031 to Rankin Kennedy, September 24, 1889, and letters patent No. 469,809, to William Stanley, March 1, 1892. The circuit court held the Kennedy patent void, and the first and third claims of the Stanley patent to be valid and infringed.

J. Edgar Bull and Fredk. P. Fish, for complainants.

M. B. Phillipp and Chas. E. Mitchell, for defendants.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

LACOMBE, Circuit Judge. The Kennedy patent is for an improvement in the method of distributing and regulating alternating electric currents by secondary generators. The patentee arranged secondary generators (transformers) in multiple. They had theretofore been arranged in series. When so arranged, they became self-regulating as to primary current and power; in other words, each transformer would take its proper share of current, varying according to the number of lights burning on it, so that the lights on one transformer were independent of the lights on another transformer. In the more technical language of the claim, the system "consists in producing in two or more derived circuits, constituting the primaries

of two or more secondary generators, a counter electro-motive force, which, when any secondary is open, is practically equal to the applied electro-motive force in its primary, and in controlling said electro-motive force by the current flowing in the corresponding secondary, when the secondary is closed in such manner that the current in the primary shall vary with, and be approximately inversely proportional to, the resistance in the secondary."

The judge who heard the cause at circuit held, among other things, that certain acts and omissions of Kennedy, taken together, worked an abandonment and dedication of his alleged invention to the public. We fully concur in his discussion of this branch of the case, which will be found in his opinion, and deem it unnecessary to add anything further, affirming so much of the decree as disposes of the Kennedy patent upon such opinion.

The patent to Stanley deals with the same branch of the electric art, and is an improvement on Kennedy's. After Kennedy had arranged his transformers in multiple, the lights on one transformer were independent of those on another, but nevertheless the candle power on any given transformer changed as the number of lamps lighted on that transformer varied. When more lamps were turned on the candle power of all went down, and when lamps were turned off the candle power of those remaining increased. Stanley's improvement was directed toward overcoming this defect.

The specification says:

"The factors of the operation of my system of distribution are employment of an alternating current generator supplying currents of approximately constant potential, main lines extending throughout the system of distribution, converters or transformers connected thereto, and translating devices located in the secondary circuits of the transformers, by the employment of which a sympathetic relation exists between the different operations of the system, to the end of maintaining a simple and accurate self-regulation, so that the absorption of energy by the generator is proportional to the energy usefully consumed. The current developed by the dynamo may be of as high potential as desired. * * * These converters may be of any construction, but are preferably constructed to have the greatest magnetic conductivity in their magnetic circuits. There are certain principles of construction which must be adhered to in the proportioning of the parts of the converter in order to secure the desired results, and which I will now state. It is necessary, in the first place, that the conductivity for magnetic force of the magnetic circuit of the converter shall be of so great value that when subject to all degrees of magnetization accruing from the various amounts of energy transformed its conductivity for magnetic force would be approximately the same. This point of construction is important for two reasons: First, the greatest economy of conversion is obtained when the rise and fall of magnetism in the core is proportional, as nearly as possible, to the rise and fall of the current in the primary coil, and this condition is attainable only by keeping the core far below the saturation point; and, second, the same condition secures the largest possible counter electro-motive force in the primary coils of the converters. This is indispensable for regulation, as hereinafter set forth. It is impossible to state the exact relation between the weight of the core and the strength of the current. I have found the minimum amount of iron necessary to produce satisfactory results to be one pound of iron for every twenty-five watts, which amount is equivalent to two pounds of iron per lamp, with the lamps heretofore generally used by me. * * * In the construction of the coils, P and S, the following principles are to be observed: The first thing to be determined is the length of the primary wire. This should be of such

length that, reacting self-inductively upon its own magnetic circuit, the average counter potential so produced approximately equals the potential applied to the primary circuit. When so constructed, an ammeter will practically show no current when the secondary circuit is open. To obtain these results in practice, I use the following method: I first choose the percentage of efficiency to be obtained. Then, having selected a type of magnetic circuit affording as great magnetic conductivity as possible, I apply such a length of primary conductor that acting self-inductively upon its core the difference of the counter potential and applied potential, multiplied by the current in the converter, shall equal the predetermined loss of energy inevitable in conversion, and vary the length of primary wire until the desired results are attained. It is obvious that the coefficients of induction in the dynamo and armature and converter may be made equal by energizing each circuit with the same induction. In the carrying out of my invention, it is possible to use the same coefficients of induction in the armature and the dynamo as are present in the primary circuit of the converter; but this equality is not necessary. Having by these means determined the length of the primary coil, the secondary is adapted to it in such a manner as to secure the desired potential according to the well-known laws affecting the operation of induction coils. I have usually related the potential of the secondary to the primary in the ratio of twenty to one. The size of the wire in the primary and secondary coils is in inverse proportion to their electro-motive forces."

The claims involved are:

"(1) In a system of electrical distribution, and in combination, an alternating current dynamo and converters electrically connected with the main-line conductors in multiple arc, and organized to transform the current in the main conductors into currents of less potential and greater quantity in the secondaries, each converter made with a primary coil containing such length of wire exposed to magneto-electric induction that, when operated by the dynamo with which it is to be used with its secondary circuit open, the electrical pressure and counter pressure in its primary circuit shall be equal with incandescent lamps or other translating devices in the secondary circuits; substantially as and for the purposes set forth." "(3) In a system of electrical distribution, and in combination, an alternating current dynamo and converters organized to transform the current generated by the dynamo into currents of less potential and greater quantity at or near the points of consumption, electrically connected with the main-line conductors in multiple arc, and having their primary circuits constantly closed, each converter adapted to the dynamo operating the system by making its primary coil of such length that, when supplied with its full proportionate share of the entire normal electro motive force of the machine, its secondary circuit being open, the electrical pressure and counter pressure in its primary circuit shall be approximately equal with translating devices in the secondary circuits of the converters to be cut out of the circuit when not in use, without the introduction of any resistance in the place of them, substantially as and for the purposes set forth."

As stated before, after the Kennedy improvement, a difficulty still existed in that the candle power went up or down as lamps on any particular transformer were turned on or off. Stanley suggested that the difficulty was due to an improper length of wire on the primary, and among much else he states precisely, specifically, and exactly what that length should be. The amount of wire for a given character of current supply cannot be stated in feet and inches, because it is, to some extent, dependent upon other things, such as the quality of iron employed in the core, the quality of copper used in the coils, the shape of the transformer, and the way the coils are applied. The Stanley patent, recognizing these variable elements, gives a rule applicable to all conditions. It says you may determine the proper length of the pri-

mary coil by connecting the transformer in circuit with the dynamo with which it is to be used, and then winding on wire until the loss indicated by the formula C^2R , with the secondary circuit open, equals a certain loss of energy.

The field of invention lies in that obscure and difficult art, which is so hard to be understood by those who have not constant practical experience with its phenomena, its laws, and its nomenclature, and deals with a branch of that art which is still evidently in dispute between those who have carefully studied it. It is fortunate, therefore, that we find the concession in defendant's brief that the rule above set forth for determining just what shall be the length of primary coil is not found in any prior patents or publications; for, with this concession, it is easy to determine from the record that there is no anticipation shown. It is contended, however, by the defendant that this so-called "Stanley rule" is no part of the invention claimed; that there is nothing in the claims requiring the rule to be considered as a part of the invention thereby covered; that it is merely in the nature of a recommendation, the patentee saying, "In practice I use the following method," being the so-called rule. The first claim (and in that respect the third claim uses similar language) prescribes for the primary coil "such length of wire exposed to magneto-electric induction that when operated by the dynamo with which it is to be used," under certain conditions, certain results will follow. Concededly the man skilled in the art would not have found in that art anything which would have told him precisely what that length of wire should be. The claim does not give any formula for determining what it should be, and, if the specification were equally silent, there might be some question as to whether Stanley had really contributed anything of importance to the art; certainly it would yet remain for others to inform the art just how to find out a length which would operate as indicated in the claim. But when the patentee in his claim enumerates as one element of his combination a wire of a length which will accomplish the result sought to be achieved, and his patent discloses a method for determining that length with mathematical exactness, his claim may fairly be sustained for the length thus shown, although it might be that some other length covered by the language of the claim, but not of the rule, would fall outside the claim. The "length of wire exposed," etc., "operated by," etc., "substantially as set forth," is the length of wire that the specification shows as the result of a given formula. The so-called "Stanley rule" is therefore a part of the invention disclosed and claimed in the patent,—indeed, it would seem to be the main part of that invention,—and, with the patent thus construed, the citations from the prior art show neither anticipation nor lack of invention. The whole argument of defendants on that branch of the case is so interwoven with the postulate that the Stanley rule is to be eliminated from the patent that when the postulate is not granted the argument becomes wholly unpersuasive.

The application for the Stanley patent was filed August 15, 1888, and defendant contends that prior to August 15, 1886, there was a public use by Stanley, at Great Barrington, Mass., of which town he was a resident, of a system of electrical distribution embodying the

combination of apparatus described and claimed in his patent. The testimony touching this alleged public use more than two years prior to application is voluminous, and the judge who heard the cause at circuit has reviewed it at length. The combination of apparatus was set up there, wires were strung, lights were lit in the premises of users in the town, and the plant run, with some intermissions, from March 16th to June 16th, when the dynamo broke down, and it was never operated again. A charge was made for lights, an extremely small one, insufficient to pay expenses, and intended really as a convenient way by which Stanley might avoid embroiling himself with his neighbors, as he probably would do if he gave free light to some and not to all. The plant was not large enough to furnish all the lights the town could use. The invention was of a character which required testing under conditions which could be found only when the test was made in public, and continued for a reasonable length of time, and, under the authorities, the charging of an unremunerative price for the product of the combination is not absolutely controlling, though it raises a presumption against experimental use, which can be overcome only by clear and convincing evidence. We concur with the judge at circuit in the conclusion that the use was experimental, and in the argument by which he reached that conclusion, except that we are inclined to attach little, if any, weight to the fact that the engine and generator were out of public view in an old mill, and the converters locked up. Such protection against the elements, and against tampering with important and dangerous parts of the apparatus, would be expected, even in purely commercial public use. The most persuasive evidence, in our opinion, is found in the circumstance that, when the Great Barrington plant broke down after its brief experience, the persons in control of the Westinghouse Company, for whose benefit (as assignee of the future patent) the combination of apparatus was kept at work, were still so unconvinced that the practical success of the system had been demonstrated that they expended thousands of dollars more in erecting another plant for a further use of the combination of apparatus at Lawrenceville,—a use that, concededly, was wholly experimental.

Infringement of the first and third claims is not substantially disputed, except upon the theory that the amount of iron contained in the cores of defendant's transformers is such as to take them out of the claims of the patent. The claims do not specify any particular amount of iron, but defendant contends that a statement in the specification (quoted above) to the effect that the minimum amount of iron should be "one pound of iron for every 25 watts" must be read into the claims. A careful perusal of the text of the specification shows this contention to be unsound. The patentee states that there are certain "principles of construction which must be adhered to" in proportioning the parts of the converter in order to secure the desired results; that "it is necessary" that the conductivity for magnetic force of the magnetic current of the converter shall be of so great value that, when subject to all degrees of magnetization accruing from the various amounts of energy transformed, its conductivity for magnetic force would be approximately the same; that "this point of construction is important, for

two reasons: First, the greatest economy of conversion is obtained where the rise and fall of magnetism in the core is proportional as nearly as possible to the rise and fall of the current in the primary coil, and this condition is attainable only by keeping the core far below the saturation point; and, second, the same condition secures the largest possible counter electro-motive force in the primary coils of the converters." "This," says the patentee in his specification, "is indispensable for regulation." Having thus set forth an "indispensable principle of construction," which may fairly be read into the claim, the patentee, in quite different language, states the precise proportion of iron to current which he has used successfully. "It is impossible," he says, "to state the exact relation between the weight of the core and the strength of the current. I have found the minimum amount of iron necessary to produce satisfactory results to be one pound of iron for every twenty-five watts, which amount is equivalent to two pounds of iron per lamp with the lamps heretofore generally used by me. Thus, in constructing a converter designed to supply twenty incandescent lamps, I use a core weighing about forty pounds." We are clearly of the opinion that defendants do not escape infringement of the first and third claims by reason of their using one pound of iron, instead of two, for a 50-watt lamp, so long as they adhere to the "indispensable principle" of construction set forth in the specification. Inasmuch as the proof shows that their construction does so adhere, their device infringes.

The decree of the circuit court is affirmed, with costs.

Memorandum on Motion for Reargument.

PER CURIAM. The motion for reargument is denied. It was supposed that upon the argument defendant's counsel practically conceded that the Stanley rule, as stated by the court, was not found in any prior patents or publications. If this supposition be incorrect, nevertheless we find in the record no prior patent or publication which states that one "may determine the proper length of the primary coil by connecting the transformer in circuit with the dynamo with which it is to be used, and then winding on wire until the loss indicated by the formula C^2R , with the secondary circuit open, equals a certain loss of energy." As to infringement, this court in sustaining the circuit court did not deem it necessary to add anything to the opinion below.

In re BEAVER COAL CO.

(Circuit Court of Appeals, Ninth Circuit. March 8, 1902.)

No. 740.

BANKRUPTCY—LIENS—VALIDITY.

Bankr. Act 1898, § 67f, providing that "all levies, judgments, attachments or other liens" obtained through legal proceedings against an insolvent within four months prior to the filing of a petition in bankruptcy against him shall be void if he is adjudged bankrupt, does not

invalidate a lien obtained by the levy of an attachment more than four months prior to the bankruptcy proceedings, though dependent for enforcement on a judgment obtained within four months.

Petition to Review the Order and Judgment of the District Court of the United States for the District of Oregon.

See 110 Fed. 630.

On December 18, 1899, Alexander H. Kerr, the appellee herein, brought an action in the circuit court of the state of Oregon for Coos county against the Beaver Coal Company to recover \$4,008.41, with interest and costs, and on the same day caused a writ of attachment to be issued in said action, and under said writ the sheriff seized certain personal property of the defendant in the action. On May 19, 1900, judgment was duly rendered in favor of the plaintiff for \$4,233.66 and costs and disbursements, and the judgment entry contained an order directing the sale of the attached property to satisfy said judgment. On June 21, 1900, a petition in involuntary bankruptcy was filed against the Beaver Coal Company, and on August 3, 1900, it was adjudged a bankrupt. The appellee filed his claim against the estate of the bankrupt, asserting priority against the proceeds of the attached property. It was adjudged to have such priority, and from the decision of the district court so ruling the present appeal is taken.

W. W. Cotton, J. N. Teal, Wirt Minor, and Joseph Kirk, for petitioner.

Thomas G. Greene, Cecil H. Bauer, and William D. Fenton, for claimant.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The attachment was issued and levied more than four months prior to the institution of the proceedings in bankruptcy, but the judgment was made and entered within less than four months prior to such proceedings. The question presented on the appeal is whether the appellee's lien was dissolved by the proceedings in bankruptcy, by virtue of section 67f of the bankruptcy act, which provides as follows:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same."

The appellee undoubtedly obtained a lien by virtue of his attachment. Under the statute of Oregon, the attached property is held as security for the judgment, and the law goes so far as to provide that, as against third persons, the attaching creditor "shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached." Hill's Ann. Laws Or. § 150. Was the lien so obtained by the attachment lost or merged in the judgment, so that it can be said that the lien under which the appellee made his claim against the bankrupt estate was "obtained" by the judgment? If so, under the plain provision of the bankruptcy act it must be declared null and void. It is not disputed that, if no judgment had been taken, the attachment lien would have been at the time of the institution of the

proceedings in bankruptcy a valid and subsisting lien, for it had been obtained more than four months prior to such proceedings. We do not think the lien thus obtained was lost by reducing the claim to a judgment. By the law of Oregon, the lien of an attachment upon personal property is enforced by a provision in the judgment entry directing the sale of the attached property. The judgment order so made does not create a new lien nor discharge the old. It directs only the enforcement of the lien. It is similar in its nature to a decree for the foreclosure of a mortgage. It sustains the attachment lien, and subjects the attached property to its satisfaction. Construing the language above quoted from section 67f, we think it refers solely to liens, and that it does not mean that all judgments rendered within four months prior to bankruptcy shall be null and void. The use of the words "judgments * * * or other liens" indicates that it was the purpose of the act to avoid liens only which were obtained by judicial proceedings within the prescribed time, and not to declare void judgments as such. This view is in harmony with other provisions of the bankruptcy law. Judgments rendered, even after bankruptcy, are sustained as determining the claim thereby adjudged. Section 63a. In brief, the intention of the act was to set aside preference liens obtained by legal proceedings within four months prior to bankruptcy. The lien in the present case was "obtained" by the attachment. The bankruptcy law recognizes all valid liens that existed four months prior to bankruptcy proceedings. The attachment lien was not discharged nor was its nature altered by the judgment. It required no judgment or levy to make it good as a lien. It would have remained a valid lien if no judgment had been taken. No lien was "obtained" by the judgment, and none was lost thereby.

We are aware of decisions which are not in harmony with this view. In *re Lesser* (D. C.) 108 Fed. 201, Brown, district judge, held that the provisional lien acquired by an attachment more than four months prior to the filing of a voluntary petition in bankruptcy by the defendant is discharged where the judgment is not obtained until within four months prior to the filing of the petition. The court, in reaching this conclusion, was moved by the consideration that the attachment lien, under the laws of Connecticut, was but a provisional lien, only to be made effective through a judgment, levy, or demand, and by the opinion entertained by the court that all judgments obtained within the prescribed period were within the ban of the statute, and that unless a valid judgment could be rendered, and a valid levy could be made, no method remained to enforce the provisional lien. So, in *Re Johnson* (D. C.) 108 Fed. 373, Wheeler, district judge, held that the lien provided for under the statutes of Vermont does not become perfect as a charge upon the attached property until the recovery of the judgment and the taking in execution, and that, since the statute declares such judgment and levy void, a creditor, without them, has no perfect lien, and that the judgment and levy are wholly inoperative to perfect what was theretofore an imperfect lien. Lowell, district judge, however, in *Re Blair* (D. C.) 108 Fed. 529, held that by the statutes of Massachusetts an attachment creates a lien, and that the purpose of section 67f is to declare void only liens obtained by judgments, attach-

ments, or other legal proceedings, within the prescribed period prior to bankruptcy. Said the court:

"Where, however, the lien is created by the attachment, the judgment and levy create no new or additional lien, but only enforce a lien already existing. Hence in this case the levy and execution did not affect the property attached with a lien avoided by the bankrupt act, but only enforced a lien already existing, which lien the bankrupt act expressly protected."

With these views, and with those of the court herein appealed from, we agree.

The judgment of the district court is affirmed.

TREAT, Internal Revenue Collector, v. TOILMAN.

(Circuit Court of Appeals, Second Circuit. February 28, 1902.)

No. 61.

1. POWER OF ATTORNEY—DEFINITION.

A power of attorney is an instrument by which the authority of an attorney in fact or private attorney is set forth.

2. WARRANT OF ATTORNEY—DEFINITION.

A warrant of attorney is an instrument authorizing an attorney at law to appear in behalf of its maker, or confess judgment against him.

3. INTERNAL REVENUE—STAMP TAX—WARRANT TO CONFESS JUDGMENT.

A provision in a note authorizing any attorney at law to appear in court on behalf of its maker and confess judgment against him is a warrant of attorney, and not a power of attorney, and is not within War Revenue Act June 13, 1898, requiring stamps on powers of attorney to sell or convey real estate and perform other acts.

In Error to the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a judgment entered in favor of the plaintiff in a cause tried in the circuit court for the Southern district of New York (106 Fed. 679) upon an agreed state of facts, the substantial portions of which are as follows:

The defendant is the collector of internal revenue of the United States in this district. The plaintiff made loans of divers sums of money to various persons, from whom he received 1,025 instruments or memoranda in writing, commonly known as "judgment notes," of which the following is a copy in blank:

"New York, ———, 189—.

"——— after date, for value received, I promise to pay, to the order of myself, ——— dollars, at room A, St. Paul Building, 220 Broadway, with interest at 6 per cent. per annum after maturity. And to secure the payment of said amount I hereby authorize, irrevocably, any attorney of any court of record to appear for me in such court, in term time or vacation, or before any justice of the peace, at any time hereafter, and confess a judgment, without process, in favor of the holder of this note, for such amount as may appear to be unpaid thereon, together with costs and ten dollars attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon such judgment; hereby ratifying and confirming all that my said attorney may do by virtue thereof.

"\$———."

The action is brought to recover the sum of \$269.06, with interest from August 10, 1899, paid, as alleged, under protest, to the collector of internal

revenue by the plaintiff. It represents the value of \$1,025 revenue stamps, of the denomination of 25 cents each, with interest, affixed to 1,025 instruments in writing, which the government contends contains, not only a promissory note, but a power of attorney. The plaintiff did affix a two cent stamp to each of the promissory notes, but failed to affix the 25 cent stamp to the remainder of the instrument in writing, which the government contends is a power of attorney, and therefore taxable. The demand for the payment of the sum now sought to be recovered was made by the collector of internal revenue for the Second district, under and pursuant to the provisions of the act of congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes." The specific portion of the act relied upon by the collector in exacting payment of the tax, and now relied upon by him in defending this suit for refund, is that portion of Schedule A which reads as follows: "Power of attorney to sell and convey real estate or to rent or lease the same, receive or collect rent, sell or transfer any stock, bonds, scrip, or for the collection of any dividends or interest thereon, or to perform any and all other acts not hereinabove specified, twenty-five cents: provided, that no stamps shall be required upon any papers necessary to be used for the collection of claims from the United States, for pensions, back pay bounty, or for property lost in the military or naval service." The government contended that under the provision, "or to perform any and all other acts not hereinabove specified," the defendant was justified in exacting the payment of said 25-cent stamp tax. The court held that said instrument comprised a promissory note, and a separable clause providing for the entry of judgment on said note in case of nonpayment, and that the latter was not a power of attorney, within the meaning of said section, but was rather what is known as a "warrant of attorney."

Arthur M. King, for plaintiff in error.

Before WALLACE, Circuit Judge, and TOWNSEND, District Judge

TOWNSEND, District Judge (after stating the facts). The legislative intent, as disclosed by the special provisions of said schedule, appears to have been to tax those instruments by which one individual authorizes another to act on his behalf, either at meetings of corporations, or in the transaction of certain classes of business relating to real estate or corporate securities, or claims against the United States not enumerated in said proviso. The general clause, "or to perform any or all other acts not hereinabove specified," should, therefore, be interpreted, under the doctrine of *noscitur a sociis*, to refer to other classes of business of the same general character as those specifically enumerated. All of the acts within the scope of this classification are such as may be performed by any layman as an attorney in fact. The acts authorized under the instrument in question are confined to the exercise by an attorney at law of a court of record of his duties as an officer of the court in the proceedings taken in such court by virtue of his retainer. Such an instrument has always been recognized as a warrant of attorney, or evidence of authority to such attorney to represent the party as such officer of court in such a proceeding. The distinction between powers of attorney and warrants of attorney is clearly set forth in text-books and the decisions of the courts. A power of attorney is an instrument by which the authority of an attorney in fact or private attorney is set forth. By attorney in fact is meant one who is given authority by his principal to do a particular act not of a legal character. A warrant of attorney is an instrument authorizing an at-

torney at law to appear in an action on behalf of the maker or to confess judgment against him. An attorney at law is employed to appear for parties to actions or other judicial proceedings, and is an officer of the court. And. Law Dict. pp. 92-94; 18 Am. & Eng. Enc. Law, p. 871; 28 Am. & Eng. Enc. Law, p. 685; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589. It would seem that congress could not have intended by such general words to impose a tax upon this class of official acts done in the course of judicial proceedings. Such a tax, for the purpose of revenue, should not be extended by general or ambiguous words to embrace transactions without its expressed scope. Boyd v. Hood, 57 Pa. 98; Smith v. Waters, 25 Ind. 397.

This conclusion is strengthened by the fact that no case has been cited in which such warrants have been taxed. The provisions of the section in question accord with the provisions of preceding acts of a similar character.

The original federal internal revenue act, in enumerating the instruments required to be stamped, says:

"Any bonds, bills single or penal, foreign or inland bills of exchange, promissory note, or other note for the security of money, * * * any letter of attorney, except for invalid pensions, or to obtain or sell warrants, for land granted by the United States as bounty for military services performed in the late war." 5th Cong. Sess. July 6, 1797, c. 11, § 1 (1 Stat. 527).

The question as to the scope of this act was raised in Davis v. Ostrander, 1 Johns. Cas. 106. The court there decided that an arbitration bond was not within the provisions of said act. A note to this case reads as follows:

"On application of the clerk for the direction of the court, on the question whether powers of attorney in suits pending in court ought to be received without being stamped, the court said that such powers need not be stamped, and that the above-mentioned act applied to general letters of attorney only."

The clause in question, then, embodies a warrant of attorney, or evidence to the court of a retainer whereby a party to a pending cause has substituted an officer of court as his representative before the court in said cause. Such a warrant does not constitute said officer of court an agent or attorney in fact to carry on business, and is not within the provisions of this statute which authorizes the taxation of powers of attorney.

The decision is affirmed.

BRADFORD GLYCERINE CO. v. KIZER.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1902.)

No. 1,024.

1. EVIDENCE—OPINION—QUALIFICATION OF EXPERT.

A professor of chemistry, otherwise qualified as an expert, is not disqualified from giving his opinion as to the cause of an explosion of nitroglycerine, in answer to a hypothetical question, by the fact that he has had no practical experience in its manufacture.

2. SAME—SUBJECTS OF EXPERT TESTIMONY—MATTERS IN ISSUE.

Whether a plaintiff was guilty of contributory negligence, under the facts shown by the evidence, is a question for the jury, and a witness

cannot properly be permitted to express his opinion thereon in answer to a hypothetical question.

3. SAME—COMPETENCY OF EXPERT—DISCRETION OF COURT.

Whether a witness is qualified to testify to a matter of opinion is a preliminary question, the determination of which rests largely in the discretion of the trial judge, and his decision is conclusive, unless clearly shown to be erroneous in matter of law.

4. APPEAL—REVIEW—EXCEPTIONS.

A charge to which no exception was taken at the time cannot be reviewed on a writ of error.

5. MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—FACTS RAISING PRESUMPTION OF NEGLIGENCE.

Where, in an action by a servant against the master to recover for an injury caused by an explosion of nitroglycerine, manufactured by defendant, it was an undisputed fact that the nitroglycerine exploded spontaneously, and there was evidence tending to show that if pure and properly made it would not so explode, but that it would if impure, it was not error to charge that, if the jury found such to be the fact, then a presumption of impurity arose from the fact of the explosion.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

The defendant in error, plaintiff below, hereafter called the plaintiff, brought this action against the plaintiff in error, defendant below, hereafter called the defendant, to recover damages sustained on account of an accident caused by the explosion of nitroglycerine. The defendant was engaged in manufacturing and exploding nitroglycerine in oil and gas wells. The plaintiff, for some time before and at the time of the accident, was at work for the defendant as an oil-well shooter. It was his duty to haul the nitroglycerine from the magazine of the defendant, where it was stored, to oil and gas wells, place it in tin shells, lower it to the bottom of the well, and there explode it by dropping a heavy weight upon it. It is necessary that such nitroglycerine should be properly manufactured, and the materials composing it should be in proper proportions, and the nitroglycerine thoroughly washed in order to prevent spontaneous combustion. The plaintiff, at the time of the accident, had removed from the wagon in which he had brought it to the well the nitroglycerine, which was contained in cans. He had put a part of it into the tin shells, which he had lowered into the well, and the cans from which this nitroglycerine had been taken were returned to the wagon. While preparing to uncork another can in the derrick he heard a hissing sound in the wagon, and, glancing up, saw a blaze coming from one of the empty cans, and ran out of the derrick just as an explosion took place, which threw him down, injuring him about the head and body, where he was struck by pieces from the exploding cans. The negligence averred is furnishing nitroglycerine which had been improperly manufactured by the defendant, and was therefore likely to explode when handled in the usual way. The defendant claimed that the plaintiff was guilty of contributory negligence in using leaky cans and allowing his wagon to become saturated with the fluid. There was evidence that impure nitroglycerine would explode spontaneously, but that pure nitroglycerine would not so explode, and four witnesses were asked the following question by plaintiff's counsel: "Supposing a nitroglycerine shooter had brought in his wagon to an oil well a number of cans of nitroglycerine, and after having emptied the nitroglycerine therefrom in the month of August, and after said cans had been so opened and emptied, and were replaced in the wagon, and without coming in contact with any substance whatever, except the air, a blaze is generated, and appears upon and issuing from said cans, and the cans explode; to what, in your opinion, based upon your knowledge and experience, as above stated by you, would said blaze and explosion be attributed?" Allowing this question to be answered is alleged as error. The defendant placed a witness on the stand, and asked him whether, in his opinion, it was ordinary care and prudence in that business for a shooter, when the

sun was shining, to allow his wagon, in the condition it was usually in, to stand open when he had taken out the cans, and whether, in his opinion, it would be likely to cause the substance inside to take fire. The answers to these questions were excluded on the ground that the witness was not shown to be qualified to answer them, and the court's ruling in that regard is alleged as error. Exceptions were also taken to the charge of the court to the jury, which rendered a verdict for the plaintiff, and the judgment is brought here for review on writ of error.

G. Harmon, for plaintiff in error.

B. F. James, for defendant in error.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

WANTY, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The assignments of error relating to the testimony of the four expert witnesses for plaintiff, except that of the witness Young, cannot be considered, as no objection was made on the trial to the testimony of two of them, and to one there was only a general objection, without giving any reason for it. The objection to the answer of the witness Young to this hypothetical question was "that the witness had not been shown to have any practical knowledge of the question." This witness, sworn as an expert, was at the time of giving his testimony, and for the preceding fourteen years had been, filling the chair of advanced chemistry in the Ohio Normal University. He showed that he had studied the subject of nitroglycerine, gave the formula by which it was manufactured, and his testimony agreed with that of the manufacturers and the other chemists, to whose testimony no objection was made. He qualified as an expert, the question asked him was a hypothetical one, and his lack of practical experience was no ground for its exclusion. *Bierce v. Stocking*, 11 Gray, 174; 12 Am. & Eng. Enc. Law, 433.

2. The question propounded to the witness Smith, asking whether, in his opinion, it was ordinary care and prudence in that business for a shooter, when the sun was shining, to allow his wagon, in the condition it was usually in, to stand open, when he had taken out the cans, was properly excluded, as it called for the determination of an issue which was for the jury. If he had been qualified, he could have sworn to the chemical action of the sun's rays on the nitroglycerine in the wagon, but it would not be for him to say whether such exposure was negligence, as that was an inference to be drawn from the circumstances proven. *Motey v. Granite Co.*, 20 C. C. A. 366, 74 Fed. 155-159, and cases there cited. The other question was properly excluded on the ground that the witness was not shown to be qualified to answer it. He was a well-shooter, and had had considerable experience, but it was not shown that he had peculiar knowledge of any chemical action that might be produced by the sun's rays upon the substance in the wagon. It was urged that his long experience in handling nitroglycerine and assisting in its manufacture qualified him to express an opinion, but such qualification is a question for the trial judge, and its determination is very largely in his discretion. *Mr. Justice Gray, in Manufacturing Co. v. Phelps*, 130 U. S. 520-527, 9 Sup. Ct. 601, 603, 32 L. Ed.

1035, thus tersely states the rule: "Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial, and his decision of it is conclusive, unless clearly shown to be erroneous in matter of law. *Perkins v. Stickney*, 132 Mass. 217, and cases cited; *Sorg v. Congregation*, 63 Pa. 156." See, also, *Spring Co. v. Edgar*, 99 U. S. 645-658, 25 L. Ed. 487, and cases cited.

3. The defendant complains here of the charge of the court on the question of contributory negligence, but the charge given accords substantially with the request made by the defendant, and correctly stated the law; but if it had not been requested, and had not correctly stated the law, no exception having been taken at the time, it could not be reviewed here.

4. There was no proof on the subject of how the nitroglycerine in question in this case was made. A number of witnesses swore that pure nitroglycerine will not explode spontaneously, and that impure nitroglycerine will so explode. The court charged the jury that if they believed from the evidence that pure nitroglycerine would not explode spontaneously, and that this nitroglycerine did so explode, they could take the fact of the explosion into consideration in determining the question as to the purity of the nitroglycerine; but that in considering that question, if they found that pure nitroglycerine would explode as well as impure nitroglycerine, the fact of the explosion could not be considered as bearing upon the question of purity, which instruction was immediately followed by the instruction complained of, which is:

"When there is, as in this case, an explosion of this nitroglycerine, there is a presumption arises that it was from some inherent defect, something in the character of the nitroglycerine itself, due to surplus acid or some other cause, that made it explode, without the intervention of any other agency. Now, that being the presumption, unless that is explained by the evidence, you are warranted in coming to the conclusion that the defendant furnished the plaintiff with impure nitroglycerine, and in that departed from his duty as an employer."

When the jury returned for further instructions this part of the charge was practically repeated, and the defendant complains that after the fact of the explosion, which was admitted, appeared in the case, it erroneously placed upon him the burden of proving that he was free from negligence. Under the evidence in this case, there could be no claim that the cause of the accident could not be accounted for.

It was accounted for if nitroglycerine, when properly manufactured, could not explode spontaneously, and this nitroglycerine did so explode. The jury were compelled to find the other necessary facts before they could infer negligence from the explosion. When that *prima facie* case was made, the burden of rebutting it was upon the defendant. The case does not come within the rule that the fact of accident carries with it no presumption of negligence on the part of the employer, laid down in *Railroad Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, and *Patton v. Railway Co.*, 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361, nor within the cases in the state courts referred to in defendant's brief. Under the facts in this case, negligence in the

manufacture of the nitroglycerine would be presumed in the absence of evidence showing care in the manufacture of it, as the explosion raises a presumption of negligence, if there is no explanation of the real cause for such explosion. *Judson v. Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146, and the note to the same case in 29 L. R. A. 718; *Schoepper v. Chemical Co.*, 113 Mich. 582, 71 N. W. 1081.

We find no error, and the judgment is affirmed.

FONG MEY YUK v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1902.)

No. 716.

CHINESE—FAILURE TO OBTAIN CERTIFICATE OF RESIDENCE—DEPORTATION—JURISDICTION.

Act Cong. May 5, 1892, gives a commissioner jurisdiction to hear the charge against a Chinaman of being in the country without a certificate of residence, though section 6, providing for issuance of such certificates to Chinamen, declares that one not obtaining a certificate within a certain time shall be adjudged to be unlawfully in the country, and shall be arrested and taken before a United States "judge"; the act, after continuing in force, by section 1, all laws prohibiting and regulating the coming in of Chinamen, and declaring, by section 2, that any Chinamen adjudged under any of said laws not entitled to remain in the country shall be deported, providing, by section 3, that any Chinaman arrested under "this act, or the acts hereby extended," shall be adjudged unlawfully in the country, unless he shall establish his right to remain to the satisfaction of "such justice, judge, or commissioner"; and Act Cong. March 3, 1901 (31 Stat. 1003), providing that the district attorney may designate the commissioner before whom a Chinaman, arrested for being unlawfully in the country or having unlawfully entered, shall be taken for hearing.

Appeal from the District Court of the United States for the Northern District of California.

The appeal in this case is taken from the judgment of the district court affirming an order of deportation of the appellant, Fong Mey Yuk, who was arrested at San Francisco on April 20, 1901, upon a warrant issued by a United States commissioner upon a complaint sworn to and lodged with said commissioner charging the appellant with being a Chinese manual laborer without the certificate of residence required by the act of congress entitled "An act to prohibit the coming of Chinese persons into the United States." approved May 5, 1892, and the act amendatory, approved November 3, 1893. On May 2, 1901, the appellant was brought to trial before said commissioner. Upon the evidence adduced, the commissioner made his findings and judgment of deportation, holding that the appellant is a Chinese manual laborer and a subject of the empire of China, and that she was found within the limits of the United States without the certificate of residence required by said acts, and that she had not shown that she had been unable to obtain such certificate for any of the reasons which the act specifies as excuses therefor.

Lyman I. Mowry, for appellant.

Marshall B. Woodworth, U. S. Atty., and Benjamin L. McKinley, for the United States.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The appeal presents two questions—First, had the United States commissioner jurisdiction to hear and determine the charge set forth in the complaint? And, second, was the evidence sufficient to justify his judgment? Section 12 of the act of May 6, 1882, provides that any Chinese person found unlawfully within the United States shall be deported to the country whence he came, after being brought before some “justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to be or remain in the United States.” Section 12 of the act of July 5, 1884, provides substantially the same remedy as that of the act of May 6, 1882. Section 13 of the act of September 13, 1888, provides that any Chinese person found unlawfully in the United States may be arrested upon a warrant issued upon a complaint under oath “by any justice, judge, or commissioner of any United States court,” and when convicted upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, shall be removed to the country whence he came. Section 2 of the act of May 5, 1892, provides “that any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China.” The previous acts had required that such person be removed to the country whence he came. Section 6 makes provision for the issuance of certificates of residence to Chinese persons lawfully in the United States, and enacts that “any Chinese laborer within the limits of the United States who shall neglect, fail or refuse to comply with the provisions of this act, or who after one year from the passage thereof shall be found within the jurisdiction of the United States without such certificate of residence, shall be decreed and adjudged to be unlawfully within the United States and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies and taken before a United States judge.” It is contended that all the prior legislation referred to Chinese who unlawfully entered the United States, and that by the act of 1892 provision was made for the deportation of a different class,—those who, although they had entered lawfully, had failed to acquire the right to remain, and were therefore unlawfully within the United States; and it is contended that as to this second class the jurisdiction to order deportation is conferred only upon “a United States judge.” Section 1 of the act of May 5, 1892, provides: “All laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act.” Those laws, so continued in force, it may be conceded have reference to prohibiting and regulating the coming into this country of Chinese

persons and persons of Chinese descent, and not the deportation of Chinese persons found to be unlawfully within the country. There would be no authority in the act of May 5, 1892, for the present proceeding, were it not for section 3, which provides as follows: "That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States." That section declares in plain terms that a proceeding may be instituted before a commissioner against any Chinese arrested under the provisions of the act of May 5, 1892. It has the effect to enlarge the provision of section 6, and to enact that the proceeding may be not only before a United States judge, but that it may be before a justice, judge, or commissioner. If there be any doubt that this is the true construction of the act, it is dispelled by the act of March 3, 1901 (31 Stat. 1093), which provides as follows: "That it shall be lawful for the district attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States or having unlawfully entered the United States to designate the United States commissioner within such district before whom such Chinese person shall be taken for hearing."

We find no ground for holding that the evidence is insufficient to justify the findings, judgment, and order of deportation. The commissioner saw the witnesses, heard their testimony, and reached the conclusion that the appellant was born in China, and that she was a laborer, and that she had not procured the certificate entitling her to remain in this country, as provided by law. There is no contention that in so holding he was guided by any erroneous view of the law or the evidence. Such being the case, we would not be justified in disturbing his conclusion, even if we deemed it contrary to the weight of the evidence, which we do not. The burden of proof rested upon the appellant to prove to the "satisfaction of the court" the facts upon which depended her right to remain in the United States. This she failed to do.

The judgment of the district court is affirmed.

ST. LOUIS MIN. & MILL. CO. OF MONTANA et al. v. MONTANA MIN. CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. March 10, 1902.)

No. 714.

MINING—EXTRALATERAL RIGHTS.

The owner of a mining claim given by Rev. St. § 2322, the right to possession of surface and everything within his claim, except veins having their apices in the surface of another claim, and also given the right to follow into adjoining claims veins having their apices in his claim, cannot tunnel from his claim through an adjoining patented claim till he strikes a vein therein having its apex in his claim; section 2319

declaring "the lands" in which minerals are found open to purchase, and section 2325 authorizing a patent for "any land" located for minerals, indicating that the patent is a grant of the land, with the rights incident to common land ownership.

Appeal from the Circuit Court of the United States for the District of Montana.

Toole & Bach, for appellants.

W. E. Cullen, E. C. Day, and W. E. Cullen, Jr., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The St. Louis Mining & Milling Company is the owner of the St. Louis lode mining claim, and the Montana Mining Company, Limited, the appellee, is the owner of the Nine Hour lode mining claim, which adjoins the St. Louis claim on the east. The appellants were proceeding to drift a tunnel 260 feet underground horizontally from the St. Louis claim eastward, and into the Nine Hour claim, for the purpose of reaching and mining a lode which had its apex in the St. Louis claim, and which they had the right to pursue on its downward course, as it passed with its dip to the eastward out of their side line into the Nine Hour claim. It was stipulated that the tunnel, if projected in the course in which it was being drifted, would reach the vein or lode which had its apex within the St. Louis claim, and that in the course of its progress there would be encountered no other vein, lode, or ledge. At the suit of the owner of the Nine Hour claim, the circuit court enjoined the appellants from proceeding further with said tunnel. From that decree the present appeal is taken.

The case involves the interesting question whether the owner of a mining claim who has the right to pursue beyond the side lines of his claim a vein or lode which has its apex within his own claim is confined in his right to operations within or upon the vein itself, and is without authority to otherwise enter the adjoining claim. The appellants contend that a patent for a mining claim by its terms conveys only the surface of the claim, together with all veins, lodes, or ledges having their tops or apices within the surface boundaries thereof, and that the granting words of the appellee's patent circumscribe the right of the grantee thereof to the precise estate granted, and that since the mining law confers the general right to explore and purchase the mineral lands of the United States the appellants, in this instance, have the right to explore within the Nine Hour claim, and thereby to reach their own property, so long as they interfere with no right granted to the owners of the latter claim. It is true that the statute (section 2322, Rev. St.), and the patents thereupon issued, confer upon the locators of mining claims in terms only "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the

vertical side lines of such surface locations"; and that the statute further specifies that such locators, notwithstanding their extralateral rights, shall have no authority to enter upon the surface of a claim owned or possessed by another. But the appellants must find in the same statute the full measure of their own right. What are the rights that are given by the patent to the owners of the St. Louis claim? They are given the right of possession of the surface and of everything within their own claim, except the veins or lodes therein, which may have their apices in the surface of another claim, so as to give the owner of the latter extralateral rights, and they are given the right to follow outside of their side lines and into adjoining claims all veins or lodes which have their apices in their own claims, so as to confer extralateral rights. This is their right, and no more. There is no warrant for saying that they have any general right of exploration within land of an adjoining patented claim, whether upon or below the surface. The right of exploration is given for the purpose of making discovery of mineral. Of what avail would be the right of exploration if no benefit could be obtained from discovery made thereby? The ground covered by a subsisting, valid mineral location is open to exploration only by the owner thereof. The statute gives the appellants the right to follow the vein which they were seeking to reach by the tunnel, but it confers upon them no right to approach it from any point other than from the vein or lode itself. The mining laws, as we construe them, grant to a mineral locator more than the mere right to the surface of his claim and to the veins or lodes which have their apices therein. The statute (section 2319) declares "the lands" in which valuable mineral deposits are found to be open to occupation and purchase; and section 2325 provides that "a patent for any land claimed and located for valuable deposits may be obtained in the following manner." These provisions tend to indicate that the patent when issued is a grant of land with all the rights incident to common-law ownership. The reason for specifying in the description of the grant the "veins, lodes, and ledges" is for the purpose of defining what is granted in addition to the land, namely, the right to pursue such veins, lodes, and ledges extralaterally in case they depart from the perpendicular and extend beyond the side lines of the claim. This view is in accord with the trend of all the decisions to which our attention has been directed. In *Copper Co. v. Heinze*, 64 Pac. 326, 53 L. R. A. 491, the supreme court of Montana held, in substance, that the owner of a mining claim is prima facie the owner of a vein or lode found at a depth of 1,300 feet within the vertical planes of the lines of his own claim, and that that presumption would prevail until it was shown that the vein had its outcrop in the surface of some other located claim in such a way as to give to the owners of the latter the right to pursue it on its downward course. The court said:

"Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines ex-

tending in their own direction, when it departs beyond the vertical planes of the side lines, is an expansion of the rights which would be conferred by a common-law grant."

Of similar import is *State v. District Court of Second Judicial Dist. of Silver Bow Co. (Mont.)* 65 Pac. 1020.

In *Doe v. Waterloo Min. Co. (C. C.)* 54 Fed. 935, Judge Ross said:

"Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at common law."

In *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C.)* 63 Fed. 540, Judge Hawley said:

"Hands off of any and every thing within my surface lines, extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim."

We find no error in the decree of the circuit court. The decree is affirmed.

UNITED STATES v. VAN WINKLE.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1902.)

No. 733.

1. MINERAL LANDS—CUTTING TIMBER—CHARACTER OF LAND—DETERMINATION—MAPS—ADMISSIBILITY.

On an issue whether public land on which timber was cut by defendant was mineral land, within Act Cong. June 3, 1878, authorizing residents of certain mineral districts to cut timber on mineral lands, a geological map of the territory in which the lands were located, issued by authority of Interior department, was admissible for use in connection with the evidence of witnesses, and to show the general nature of the land described, its elevation and surroundings, and its situation with relation to lands proven to be mineral, where not in any way purporting to show the nature of the land in controversy, or to indicate that it was mineral.

2. SAME—PUBLIC RECORDS—HARMLESS ERROR.

The admission of a certified copy of the "general description of the survey" of the township in which the land in controversy was situated, containing no reference to the particular land, but referring in general terms to the township, stating that it was mountainous, and that considerable placer mining had been done along a certain creek, and expressing the opinion that undeveloped quartz ledges existed in the ridges, even if error, could not have prejudiced plaintiff.

3. SAME—DIRECTION OF VERDICT.

There being evidence that in cutting the timber defendant acted under what he believed to be the lawful authority of the United States, a request that the court direct a verdict for the United States for the full amount prayed for, on the ground that it had been proven that the lands were public lands, and that defendant had cut the timber without authority, was properly refused, because ignoring defendant's good faith.

4. SAME—MEASURE OF DAMAGES.

In case defendant cut the timber in good faith, he was only liable for the value of the timber as cut, and not as manufactured.

In Error to the Circuit Court of the United States for the District of Idaho.

The United States brought an action against Isaac Van Winkle, the defendant in error, to recover the value of 90,000 feet of lumber, of the manu-

factured value of \$7 per thousand feet, which lumber and logs were alleged to have been wrongfully and unlawfully cut from the public domain of the United States in the land district of Boise, Idaho. The defendant in error set up the defense that the lands from which said lumber and sawlogs were cut was mineral land of the United States, within the meaning of the act of Congress approved June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada and the territories to fell and remove timber on the public domain for mining and domestic purposes," section 1 of which provides as follows: "That all citizens of the United States and other persons, bona fide residents of the states of Colorado or Nevada or either of the territories of New Mexico, Arizona, Wyoming, Dakota, Idaho or Montana, and all other mineral districts of the United States, shall be and are hereby authorized and permitted to fell and remove for building, agricultural, mining or other domestic purposes any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under the existing laws of the United States except for mineral entry, in either of said states, territories or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: provided, the provisions of this act shall not extend to railroad corporations." The jury returned a verdict for the plaintiff in error for the sum of \$35.

R. V. Cozier, for the United States.

Fremont Wood and S. H. Hays, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

We are precluded from considering the interesting and important question principally discussed in the brief of the plaintiff in error, whether the circuit court erred in the instructions given and refused to the jury concerning the meaning of the words "mineral lands," as used in the statute of June 3, 1878, for the reason that it appears from the record that no exception was taken to the instructions so given or refused. There remain, therefore, for our consideration, only the rulings of the court in admitting certain documentary evidence, and in denying the request of the plaintiff in error for peremptory instruction to the jury to find a verdict in its favor. The defendant in error, to support his defense, offered in evidence a geological map of Boise Basin, in which were located the lands from which the timber was cut, the map having been issued by the authority of the department of the interior as "Part III., P. 1, XCVI., 16th Annual Report of the Director of Geological Survey." It was admitted in evidence, over the objection of the plaintiff in error, that it was incompetent and hearsay. The map was identified, and shown to be substantially correct, so far as it represented the location of mines thereon. It was used in connection with the evidence of several witnesses. We think it was admissible for that purpose, as well as for the purpose of showing the general nature of the land described in the complaint, its elevation and surroundings, and its situation with relation to lands which were proven to be mineral. It does not in any way purport to show the nature of the precise land in controversy, or to indicate that it was mineral land. We are unable to perceive how its admission in evidence could have been harmful or prejudicial to the plaintiff in error.

Error is assigned to the admission of the certified copy made by the surveyor general of Idaho of the "General Description of the Survey" of the township in which the lands are situated. The general description so admitted in evidence contains no reference to the particular land which is the subject of the suit. It refers in general terms to the township in which the land is situated, states that it is mountainous, etc., and that there has been a great deal of placer mining 'done along Grimes creek, and expresses the opinion that undeveloped quartz ledges exist in the ridges. We are inclined to the opinion that in an action such as this, where the nature of the land in controversy was a question in issue involved, reference might properly be had to the records of the land office as *prima facie* evidence, at least, of their character; but, in any view of this particular evidence, the plaintiff in error could not have been injured by its admission.

Nor was the plaintiff in error entitled to a peremptory instruction to the jury to find a verdict as requested. The request was that the court direct a verdict for the plaintiff for the full amount prayed for in the complaint, upon the ground that it had been proven that the lands were public lands, and that the defendant had not only entered and cut timber of the quantity and value manufactured, as charged in the complaint, but that he had done so without authority from the plaintiff in error, and without effort or attempt to comply with the rules and regulations of the secretary of the interior governing the cutting of timber from the public lands. This instruction, as asked for, ignores the right of the jury to take into consideration the question of the good faith of the defendant in error in cutting the timber as he did upon the public lands. There was evidence that in cutting the timber he acted under what he believed to be the lawful authority of the United States. Such being the case, it was the province of the jury to determine whether his action was in good faith, and to measure the damages accordingly. If he acted in good faith, the law required the verdict of the jury to be for the value of the timber as cut, and not as manufactured. *Gentry v. U. S.*, 41 C. C. A. 185, 101 Fed. 51. In the charge which was given by the court, the jury was instructed that in fact the defendant had not complied with the rules and regulations of the secretary of the interior concerning the cutting of timber upon government lands. From the amount of the verdict, which was \$35, it is evident that the jury found that the timber was cut in good faith.

We find no error for which the judgment should be reversed. It is accordingly affirmed.

RABE V. CONSOLIDATED ICE CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 32.

1. MASTER AND SERVANT—GUARDING MACHINERY—FACTORY—WHAT CONSTITUTES—COMMERCIAL ICE HOUSE.

A commercial ice house, which is extensively equipped with machinery, and in which numerous operators are employed, is a "factory," within Laws N. Y. 1897, c. 415, providing that "shafting, set screws and machinery of every description shall be properly guarded" by the owners

of factories where machinery is used, and declaring that the term "factory" shall be construed to include also a "mill, workshop or other manufacturing or business establishment where one or more persons are employed at labor."

2. SAME—HARMLESS ERROR.

Error in charging that the factory statute had no application to a commercial ice house was harmless, where the court further charged that it was a rule of common law, irrespective of statute, that machinery must be safe, and that in the case of a set screw (the instrument by which plaintiff was injured) it might be dangerous or safe according to its situation, and according to the parties called on to work on the machine, and therefore left to the jury to determine as a question of fact whether the screw was dangerous or safe, the state courts having construed the statute as not imposing duties on an employer greater than those imposed by the common law, etc.

In Error to the Circuit Court of the United States for the District of New York.

John S. Wolfe, for plaintiff in error.

Thomas D. Adams, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error was the plaintiff in the court below, and brought this action to recover damages for personal injuries alleged to have been received by the negligence of the defendant. He was an employé of the defendant, assigned to attend certain friction apparatus in the elevator room connected with the defendant's ice house. In the same room, but at some little distance from his post of duty, there was a revolving shaft having a collar and a projecting set screw. The plaintiff had no duties with respect to this part of the apparatus, or which would take him to the place at which the collar and set screw were. Nor did any of the employés have any occasion to go there except to oil or repair the apparatus when the shaft was not in motion. While the plaintiff was attending to his ordinary duties, he observed a rope winding upon the shaft near the set screw, which had been thrown there by the inadvertence or carelessness of some of the employés, and as the rope endangered the apparatus the plaintiff immediately went to it, and attempted to remove it. In the attempt he was badly hurt, the set screw being the cause, or a contributory cause, of the accident.

By statute (Laws N. Y. 1897, c. 415) it is provided, among other things, that "shafting, set screws and machinery of every description shall be properly guarded" by the owners of factories where machinery is used. The statute declares that the term "factory" shall be construed to include also "mill, workshop or other manufacturing or business establishment where one or more persons are employed at labor."

It is insisted for the plaintiff in error that upon the trial of the action the court below erred in instructing the jury that the factory statute had no application to the case, and the only assignment of error is based upon the exception taken to that part of the judge's charge. The material part of the judge's charge was as follows:

"The controversy upon the part of the plaintiff is based upon the negligence of the defendant in failing to guard the set screw at the free end of this revolving shaft, and in that connection the law of the state of New York of 1897 has been called to your attention, which I think has been correctly stated as providing that all set screws in manufactories where operatives are employed shall be guarded. Of course, you appreciate just what this set screw is. In this case it was placed there to fasten a collar so that it would not revolve,—so that it would stay upon the larger motive power shaft,—which, according to the testimony, was revolving at the rate of from 42 to 125 revolutions a minute. The head of the screw protrudes above the collar, and when rapidly revolving it may not be seen by the operative. It is in such a situation that it would be apt to catch upon anything that was thrown in its way. This law provides that such set screws shall be guarded, but I think I will charge you, as a matter of law, that the law of the state of New York in this regard has no application whatever to this controversy for many reasons which it is unnecessary for me to detain you with. As I have said before, it is a rule of common law, irrespective of any statute of the state, that machinery must be safe. In the case of a set screw, it may be dangerous or safe according to the locality in which it is placed, and according to the parties who are called upon to work upon the machine; and that, I think, is a question which, under all the circumstances of the case, should be submitted to you to determine. Of course, if this set screw was guarded, as some set screws are guarded, by a hood placed over it, and kept in position by a sunken screw, it could not have caught upon the rope, or the rope could not have caught upon it, and it is the contention of the plaintiff that it was the failure to provide a proper guard for the set screw that caused the accident. On the other hand, the defendant insists that this screw was guarded properly, even within the rule of the statute of the state; guarded by reason of its position; guarded because it was in a place where the plaintiff had no right or occasion to go when occupying his position by the lever, and where no one went except to oil the machinery at this particular point. There was an opening through which the elevator passed (4x6 feet), and the opening was filled with machinery to a certain extent. Upon the extreme southern end of the shed was this small platform or space 18 to 20 inches wide between the opening and the end wall. It was there that the free end of the shaft revolved, and it is said that being in that position, no one having any occasion to go there, that it was in fact guarded, and as safe as if the set screw had been on the outside of the extreme southern wall of the building. This is a question which, I think, under the evidence in the case, is for you to determine."

We think that a commercial ice house, which is extensively equipped with machinery, and in which numerous operatives are employed, is a factory, within the meaning of the statute. The purpose of the statute is to throw a safeguard around the workmen employed in business establishments where machinery is in use which may endanger those who are likely to be brought into contact with it, and to whom its presence, if it is not protected, is a constant menace. So far as is consistent with the language of the statute, that purpose should be given effect. The language is sufficiently comprehensive to include a commercial ice house. By the statutory definition, a factory includes, not only a manufacturing establishment, but a business establishment where one or more persons are employed at labor, and the particular enumeration preceding the term, "or other manufacturing or business establishments," is too meager to restrict the meaning of the term by the application of the rule ejusdem generis. We think, however, that no error prejudicial to the plaintiff was committed by the trial judge in his instructions. In *Freeman v. Mills Co.*, 70 Hun, 530, 24 N. Y. Supp. 403, affirmed

142 N. Y. 639, 37 N. E. 567, the court, in adverting to this statute, said:

"The duty prescribed by the statute is not more or greater than the common-law duty of an employer to employes to provide a safe place in which, and proper machinery with which, to work, and the defendant's liability to the person injured, by reason of the statute not being complied with, is not an absolute one, but is subject to the same limitations and restrictions as is the common-law liability for not furnishing a safe place and proper machinery."

In *Knisley v. Pratt*, 148 N. Y. 375, 42 N. E. 986, 32 L. R. A. 367, the court observed in its opinion that the statute does not "in terms give a cause of action to one suffering an injury by reason of the failure of the employer to discharge his duty thereunder. An action for such injury is the ordinary common-law action for negligence, and subject to the rules of the common law." In *Glens Falls Portland Cement Co. v. Travellers' Ins. Co.*, 162 N. Y. 403, 56 N. E. 897, the court used this language:

"The manifest purpose of the enactment was only to give more force to the existing rule that masters should provide a reasonably safe place in which their servants are called upon to work. We think, however, that the legislature could not have intended that every piece of machinery in a large building should be covered or guarded. This would be impracticable. * * * The statute does not attempt to specify how machinery shall be guarded otherwise than as 'properly guarded.' The necessity for the guard, and the character and description of the guard, must, of necessity, depend upon the situation, nature, and dangerous character of the machinery, and in each case becomes a question of fact."

The construction placed upon the statute by the state courts is authoritative in the federal courts. Adopting this construction, it is plain that the trial judge presented to the jury as fully and adequately the rules for their proper guidance in considering the case as he would if he had instructed them that the statute was applicable. No complaint has been made of the instruction to them in regard to the duty of an employer to provide a safe place and safe machinery, and after these instructions he then left it to the jury to determine as a question of fact whether, in view of the location and circumstances, the set screw was dangerous or safe, although not specifically protected. This was equivalent to instructing them to find whether it was "properly protected," within the requirement of the statute,—a question which, according to the language of the court of appeals, depends upon "the situation, nature, and dangerous character of the machinery," and is to be decided in each case as a question of fact.

The judgment should be affirmed, and it is accordingly so ordered.

BRADY v. WESTERN UNION TEL. CO.

(Circuit Court of Appeals, Sixth Circuit. February 10, 1902.)

No. 1,004.

1. MASTER AND SERVANT—INJURY TO SERVANT—INCOMPETENCY OF FELLOW SERVANT.

A master owes the duty of using proper diligence in the employment of competent men to perform the duties for which they are engaged, and he cannot escape this responsibility by delegating his duty to an agent who is a fellow servant of the injured employé, and after the employment of the servant it is the duty of the master to keep himself advised as to his fitness.

2. SAME—INJURY THROUGH INCOMPETENCY OF FELLOW SERVANT—SUFFICIENCY OF PROOF.

To entitle a servant to recover from the master for an injury on the ground that it resulted from the negligence of an incompetent fellow servant, for whose employment or retention in the service defendant was chargeable with negligence, it must be definitely shown that it was in fact the negligence of such person which caused the injury. Proof which goes no further than to show his known incompetency, and that the act of negligence was committed either by him or by another fellow servant, does not warrant an inference that the negligence was his, and is insufficient to fix liability on defendant.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

The evidence in this case showed that the plaintiff was in the employ of the defendant as one of four linemen, whose business it was to carry the wire from the ground and fasten it by means of a tie wire to the glass insulators on the poles at a height of from 30 to 35 feet. It was shown that when the main wire was in position it was the duty of an employé, called a "jackman," to tighten it on receiving the proper signal from the linemen when they were ready. The manner of giving this signal was for the lineman farthest from the jackman to signal the lineman nearest to himself, who in turn passed the signal, when he was ready, to the second lineman, who, when he was prepared, signaled the lineman nearest to the jackman, from whom the jackman received the signal, which indicated that all of the linemen were ready to have the wire tightened, and upon that signal he tightened it. The evidence tended to show that the jackman was an unfit man for his position on account of having been addicted to the excessive use of intoxicating liquors for many years, and on account of his carelessness in tightening the wires on a number of occasions preceding the accident without signals from the linemen on the poles; and that the foreman, who had authority to hire and discharge the jackman, knew of his incompetency. The plaintiff on the morning of January 25, 1899, was tying the wire on the second pole from the jackman, and before he was ready, and before he had given any signal, and while reaching for his wrench, the wire was tightened, throwing into his face the tie wire, one end of which struck his eye and put it out, to recover damages for which injury this action was begun. On the conclusion of the plaintiff's evidence the trial judge directed a verdict for the defendant, and to review the judgment on that verdict the case is brought here on writ of error.

Edward McNamara (Harrison Geer and David E. Heineman, of counsel), for plaintiff in error.

C. A. Kent, for defendant in error.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

WANTY, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

It is settled law in the federal courts that the master owes the duty of using proper diligence in the employment of competent men to perform the duties for which they are engaged, and that he cannot escape this responsibility by delegating his duty to an agent who is a fellow servant of the injured employé; and after the employment of the servant it is the duty of the master to keep himself advised as to his fitness, so that an incompetent person may not continue in the service to endanger the lives and limbs of his fellow servants. *Railroad Co. v. Henthorne*, 19 C. C. A. 623, 73 Fed. 634, and the large number of cases cited in that opinion by Judge Taft. The evidence in this case, however, does not show that the negligence of this jackman caused the injury. The plaintiff testified that he had given no signal before the wire was pulled by the jackman. But it appears that the jackman should receive the signal from the lineman nearest to him, who occupied the pole between the plaintiff and the jackman. There is no evidence showing that the lineman next to the jackman had not transmitted the signal, although the evidence is clear that he had not received the signal from the plaintiff. It is possible that the jackman did not receive this signal, but it was necessary to show that he did not before the plaintiff could recover. If he did receive the signal, it was his duty to tighten the wire, as he did, and the defendant could not be charged with negligence. It is not sufficient to show that an accident has occurred, and that it may have been caused by the negligence of an incompetent servant, for whose employment and retention in his service the master is liable, but the fact must be shown. In this case the court would not have been justified in allowing the jury to infer the absence of a signal when it could have been shown by positive proof if the signal had not been given. In *Patton v. Railway Co.*, 179 U. S. 658-663, 21 Sup. Ct. 275, 277, 45 L. Ed. 361, the court says:

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. *Railway Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. * * * It is not sufficient for the employé to show that the employer may have been guilty of negligence,—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In the absence of proof of the tightening of this wire before receiving the proper signal, which was a necessary fact, the court would not have been justified in submitting the case to the jury, and it is

not necessary to notice the other questions discussed by counsel at the hearing.

The judgment is affirmed.

In re IVES.

(Circuit Court of Appeals, Sixth Circuit. February 10, 1902.)

No. 1,006.

1. BANKRUPTCY—MODE OF REVIEW—APPEALABLE ORDERS.

An order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication in bankruptcy is not a judgment from which an appeal will lie under the provisions of Bankr. Act 1898, § 25, but is reviewable by petition under section 24b.¹

2. SAME—COURT OF BANKRUPTCY—POWER TO VACATE ORDERS.

For the purposes of bankruptcy jurisdiction under Bankr. Act 1898 a district court is always open, and has no separate terms. The proceedings in a pending suit are therefore continuous from the filing of the petition to the closing of the estate, and at all times open for re-examination, and upon proper application and showing any order made during the progress of the case may be set aside, provided rights have not become vested under it which will be disturbed by its vacation.

3. SAME—PETITION TO VACATE ADJUDICATION—RIGHT OF CREDITOR TO MAINTAIN.

A creditor has no right to oppose an adjudication in bankruptcy except such as is expressly given him by the statute, and Bankr. Act 1898 gives him no right to contest an adjudication upon a voluntary petition. He cannot, therefore, maintain a petition to vacate an adjudication in such case after it is made.

4. SAME—LACHES.

A creditor of a bankrupt firm, even if entitled to maintain a petition to vacate the adjudication, cannot do so after the lapse of eight months, during which other rights have intervened, and without showing a good reason for the delay; and an allegation that the facts stated in the petition have become known to him "only recently" is insufficient.

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Michigan, in Bankruptcy.

In the matter of the petition of Adolph Feldheim and Leo M. Butzel to review an order of the district court. III Fed. 495.

On September 11, 1900, a voluntary petition in bankruptcy was filed in the district court of the United States for the Eastern district of Michigan on behalf of the firm of A. Ives & Sons, which firm was composed of Albert Ives, Sr., Albert Ives, Jr., and Butler Ives. This petition was signed by Albert Ives, Jr. and Butler Ives, and by Albert Ives, Sr., by Mrs. Mary Ives Cowlan, his daughter, by authority of a power of attorney dated September 10, 1900, giving her general power to sign and execute all papers, and particularly the petition in bankruptcy which was filed. This petition asked that the firm and the individual members thereof be adjudicated bankrupts, and they were so adjudicated. One Henry A. Harman was appointed trustee, and on the 27th of October, 1900, he filed a bill in the circuit court for the county of Wayne, Mich., in chancery, setting forth the bankruptcy proceedings, and asking that a transfer of certain negotiable paper and assets placed in the hands of the petitioner Leo M. Butzel, as trustee, to secure a debt of

¹Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

\$25,000 to Albert Feldhelm, the other petitioner here, within four months of the filing of said petition in bankruptcy, be set aside. The subpoena in that suit was served on these petitioners, who filed an answer. On March 26, 1901, Albert Ives, Sr., died, and Albert Ives, Jr., was appointed administrator of his estate. On June 5, 1901, these petitioners filed a petition in the district court, charging that Albert Ives, Sr., at the time he executed the power of attorney, and at the time of the institution of the proceedings in bankruptcy and the adjudication, was mentally incompetent, and for that reason the proceedings, so far as they pertain to the firm of A. Ives & Sons and to the estate of Albert Ives, Sr., are void, and asking that the adjudication, so far as it relates to the firm and the estate of Albert Ives, Sr., be set aside, and the appointment of the trustee vacated. The delay in filing their petition is sought to be excused by the petitioners by saying "that the facts in reference to the matters herein contained have become known to them only recently, and they thereupon have begun this proceeding." To this petition the trustee and Albert Ives, Jr., administrator of the estate of Albert Ives, Sr., filed a demurrer, which was sustained by the court, and the petition dismissed. To review that order this petition has been filed.

H. E. Spalding, for petitioners.

Thomas A. E. Weadock, for trustee in bankruptcy.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

WANTY, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The trustee urges in this court that the remedy of the petitioners, if any, is by an appeal from the order sustaining the demurrer, and that the 10 days provided for an appeal expired before the petition here was filed. Section 25 of the bankruptcy act of 1898 provides that appeals may be taken in bankruptcy proceedings to the circuit court of appeals from judgments adjudging or refusing to adjudge the defendant a bankrupt, granting or denying a discharge, and allowing or rejecting a debt or claim of \$500 or over, and that such appeals shall be taken within 10 days after the judgments appealed from have been rendered. An order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication is not referred to in this section, and is not a judgment from which an appeal will lie, within its purview. It rather comes within section 24, authorizing the circuit court of appeals "to superintend and revise in matters of law proceedings of the several inferior courts of bankruptcy within their jurisdiction," which provides a summary mode of reviewing the orders of the bankruptcy courts upon questions of law on petitions filed in the appellate court by parties aggrieved. *Courier-Journal Job-Printing Co. v. Schaffer-Meyer Brewing Co.*, 41 C. C. A. 614, 101 Fed. 699; *In re Seebold*, 45 C. C. A. 117, 105 Fed. 910; and the large number of cases in the note in *Re Eggert*, 43 C. C. A. 12-15.

2. The petition shows that several terms of court intervened between the adjudication sought to be vacated and the filing of the petition, and it is urged that an adjudication in bankruptcy is under the control of the court only during the term at which it is made, and can be set aside or modified only during that term; that it, like all other judgments, passes beyond the power of the court when the term at which it was made closes, unless steps are taken during that term to vacate

or correct it. The supreme court of the United States has, in strong language, expressed this view in all cases coming within the principle of the cases it was considering when the expressions were made, and that view is not open to question. *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797; *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013. But in section 2 the bankruptcy act seems to contemplate that from the filing of the petition to the closing of the estate the proceeding shall be continuous, and a court of bankruptcy always open, like surrogate and probate courts, where estates are administered, and which have no terms. It provides that matters arising in a bankruptcy proceeding may be heard in vacation or term time, and orders allowing or disallowing claims may be reconsidered, closed estates reopened, and compositions and discharges set aside. It has been held by the supreme court that under the bankruptcy act of 1867 the district court, for all purposes of its bankruptcy jurisdiction, is always open, and has no separate terms; that the proceedings in a pending suit are, therefore, at all times open for re-examination upon application therefor in appropriate form, and that any order made in the progress of the case may be subsequently set aside and vacated upon proper showing, provided rights have not become vested under it which will be disturbed by its vacation; and it is held that application for such re-examination will not have the effect of a new suit, but of a proceeding in an old one. *Sandusky v. Bank*, 23 Wall. 289, 23 L. Ed. 155. This language used in reference to the act of 1867 was said by this court to be applicable to the present bankruptcy act in *Re Lemon & Gale Co.* (C. C. A.) 112 Fed. 296. We are of opinion, therefore, that the question presented by the petition was open, and the court below had power to determine it, although several terms of the district court had expired since the adjudication.

3. This brings us to the question whether a creditor may have an adjudication of bankruptcy against a firm and one of the individuals composing it, made upon the voluntary petition of all the partners, set aside, because at the time the petition was filed and the adjudication made one member of the firm was non compos mentis. Section 5c provides that "the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners, and of the administration of the partnership and individual property." The court acquires jurisdiction of the proceeding on the filing of the petition. If it is filed by all the partners, the adjudication is made at once; if by less than all, the partner who refuses to join in the petition may oppose the adjudication as he might if the proceeding was involuntary, and he may make every defense open to a debtor upon such a petition. It is open to him or his personal representatives to move to set aside an adjudication after it has been made; but a creditor has no right to oppose an adjudication in bankruptcy except such right may be expressly given to him by the statute. Under the act of 1867 it was held that in a case where the court acquired jurisdiction no creditor could oppose the adjudication nor move to set it aside. *In re Bush*, 4 Fed. Cas. 879 (No. 2,222); *Karr v. Whitaker*, 14 Fed. Cas. 133 (No. 7,613). Act 1898, § 18b, provides that

in involuntary cases "the bankrupt or any creditor may appear and plead to the petition within ten days after the return day," thus expressly giving him the right to contest an adjudication. In voluntary cases the statute makes no such provision, and he has no such right. If he could not contest the adjudication, he had no right to petition for its vacation after it was made. We are cited to the opinion of Judge Coxe in *Re Altman* (D. C.) 95 Fed. 263, which, it is claimed, expresses a different view. He says: "Assuming that a creditor is in a position to raise the objection in limine that a partnership petition cannot be filed in the circumstances shown, it will be time enough to consider the question when proper papers are before the court." The question under consideration was not the same, and the dictum there is not contrary to the view here taken.

4. There is no sufficient excuse given for the delay of these petitioners in making the application to vacate the order of adjudication. That order was made on the 11th day of September, 1900. The trustee, on the 27th day of October following, filed a bill in the circuit court for the county of Wayne, Mich., in chancery, setting forth the bankruptcy proceedings, and asking that a transfer of certain property to these petitioners be set aside. On March 20, 1901, Albert Ives, Sr., died, and the petition below, setting up his mental incompetency at the time he executed the power of attorney and the institution of the proceedings in bankruptcy and the adjudication, was not filed until June 5, 1901. The only excuse given for the delay is that the facts in reference to the matters contained in the petition have become known to the petitioners only recently, without giving any date. This statement is insufficient. The petitioners must have known of the adjudication in October, 1900, and it is not shown that at that time they were not aware of the facts on which it is now sought to vacate that adjudication. Each case must be judged on its own peculiar facts, but one may not stand by and wait until his opponent has died, voidable security has become unassailable, and other rights have intervened, before making an application to set aside an adjudication in bankruptcy, even if he is in a position to make such application.

We think the petitioners had no right, as creditors, to file their petition asking that the adjudication be set aside; and, if they had had that right, they would have lost it by their unexplained delay. The order sustaining the demurrer was properly made, and is affirmed.

HILL et al. v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. March 17, 1902.)

No. 696.

1. FEDERAL COURTS—CONFORMITY TO STATE PRACTICE.

Rev. St. § 914, requiring the practice in the federal courts to conform as nearly as may be to the state practice, was not designed to abolish in the federal courts the distinction between actions at law and suits in equity.

2 RELEASE—AVOIDANCE FOR FRAUD—CONDITIONS PRECEDENT.

A party executing a release to a railroad company for a claim for personal injuries cannot avoid it, as obtained by false and fraudulent representations, unless he first returns or offers to return the money received as the consideration for its execution.

In Error to the Circuit Court of the United States for the Northern District of Washington.

Lewis, Hardin & Albertson, for plaintiffs in error.

B. S. Grosscup, for defendant in error.

Before McKENNA, Circuit Justice, and GILBERT and ROSS, Circuit Judges.

ROSS, Circuit Judge. This was an action at law, commenced in one of the courts of the state of Washington to recover damages growing out of the death of Alexander H. Hill, who was the husband of one of the plaintiffs and the father of the other, alleged to have been caused by the negligence of the defendant railroad company, on whose motion the case was transferred to the court below. The deceased was a brakeman, and was on top of a car as the train was passing along a portion of the track between a tunnel and a snowshed, from which position he was thrown and killed in entering the shed. The defendant answered, denying any negligence on its part, alleging that the decedent's death was caused by his own negligence, and as an affirmative defense set up that on and prior to July 8, 1897, the plaintiffs' claims for damages growing out of the death of the deceased were taken up and discussed between the defendant and the plaintiff Teresa Hill, "as an individual and as the surviving widow of said Alexander H. Hill, and also as the guardian of Maud Isabel Hill" (the other plaintiff), resulting in a compromise and settlement between the parties, by the terms of which it was agreed that \$700 should be paid to her as the surviving widow of the deceased, and \$500 as the guardian of his minor child, Maud Isabel, in full satisfaction of all damages occasioned by the death of Alexander H. Hill, which respective sums of money were so paid by the defendant railroad company, in consideration of which the plaintiff Teresa Hill thereupon executed two releases and satisfactions in writing,—one on her own behalf, and the other for and on behalf of her ward, Maud Isabel Hill, being thereto authorized by the probate court, which had appointed her such guardian. Each of the releases expressly states that the plaintiff Teresa Hill was fully informed in respect to all of the facts attending the accident by which the deceased lost his life, which facts had been stated to counsel, who advised the compromise and settlement of the claims for damages, and that the moneys so paid by the defendant railway company and received by her were in full satisfaction of the claims. To this affirmative defense the plaintiffs filed in the court below a reply, in which was admitted the execution of the releases in pursuance of the alleged compromise agreement, and the payment and receipt of the respective sums of money as alleged in the defendant's answer, but which denied that the money was received by the plaintiff Teresa Hill, either as guardian or in her own right, "by or with the advice of counsel," or that she had at the

time of the execution of the releases full knowledge as to the manner in which the accident occurred, and by way of new matter, and as a further and affirmative reply to the affirmative defense of the defendant company, the plaintiff alleged that after the death of her husband, acting for herself and their minor child, the plaintiff Teresa seasonably and diligently investigated to the best of her ability the facts and circumstances surrounding the accident; that she had no means at or after the time of the accident of ascertaining whether warning devices, called "telltales," were suspended in their proper place across the track of the defendant's road over which the train on which the deceased was a brakeman had to pass in going from the tunnel to the snowshed, except from the statements of employes of the defendant company, for the reason that within a few hours after the accident telltales were placed across the track at the point referred to, of which fact the plaintiffs were kept in ignorance by the express direction of the defendant company; that at the time of the accident no such telltales or other warning devices were in place, of which fact the plaintiffs were likewise kept in ignorance; that after the accident the agent of the defendant company having in charge the settlement of such claims for damages persistently sought a compromise and settlement of the plaintiffs' claims, and in so doing repeatedly represented to the plaintiff Teresa that the telltales were in their proper place at the time of the accident, and that the deceased was thereby seasonably warned of his proximity to the mouth of the snowshed, and that his death was solely due to his failure to heed the warning thus given; that these and other like representations were wholly false, and so known to be, by the defendant company's agent, and were so made for the fraudulent purpose of securing a compromise and settlement of the plaintiffs' claims; and that it was solely by reason of such fraudulent representations, relied on by the plaintiffs as being true, that the settlement was agreed to and the releases executed. The reply also alleges that the proceedings in the probate court in respect to the authorization and confirmation of the settlement of the claim of the minor plaintiff for damages were taken by the attorneys for the defendant company, and were never examined by any attorney for either of the plaintiffs. It admits it to be true that the plaintiff Teresa Hill consulted counsel shortly after the accident in regard to the liability of the defendant company, and that "upon the facts of the case as they then appeared to her, and as they had been represented to her" by the defendant, her counsel advised that it was doubtful whether the defendant was liable; but that the true facts were not then known to her or her counsel, and were not discovered until a few days before the commencement of this action. The reply of the plaintiffs to the affirmative defense of the defendant contains no averment of a tender of the money received by them upon the compromise and settlement, nor any offer to return the money so received, but does aver a willingness on the part of the plaintiffs "to deduct from the amount to which they are entitled by reason of their damages as set forth in the complaint (alleged to be \$20,000 in all) said sum of \$700 and said sum of \$500, together with interest thereon at the legal rate from July 8, A. D. 1897, and hereby credit said sums, with interest, upon their claims against said defendant for the afore-

said damages." The court below (104 Fed. 754) sustained a demurrer to the reply, which ruling presents the question for decision.

It is conceded that under the provisions of the statute of the state of Washington, as well as a number of other states, a release of a right of action may be avoided in an action at law by showing that it was obtained by means of false and fraudulent representations; and the position is taken on behalf of the plaintiffs in error that the same right exists in the federal courts by virtue of section 914 of the Revised Statutes, which provides that:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit and district courts are held, any rule of court to the contrary notwithstanding."

It is thoroughly settled that it was not the design of this section to abolish, in the federal courts, the distinction between actions at law and suits in equity. *Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873; *Sheffield v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; *Lindsay v. Bank*, 156 U. S. 485, 15 Sup. Ct. 472, 39 L. Ed. 505; *Shampeau v. Lumber Co. (C. C.)* 42 Fed. 760; *Johnson v. Granite Co. (C. C.)* 53 Fed. 569; *Messinger v. Insurance Co. (C. C.)* 59 Fed. 529; *Vandervelden v. Railroad Co. (C. C.)* 61 Fed. 54; *In re Foley (C. C.)* 76 Fed. 390; *Kosztelnik v. Iron Co. (C. C.)* 91 Fed. 606. It is true that in an action at law in a federal court a release, with or without seal, or any deed to which the plea of non est factum may apply, is subject to annulment upon proof of fraud in the execution of the instrument; and in the late case of *Wagner v. Insurance Co.*, 33 C. C. A. 121, 90 Fed. 395, the circuit court of appeals for the Sixth circuit held that where, as in the present case, the issue involves simply a question of fraud between the parties, it is proper, in an action at law, for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud is in the execution or in misrepresentation as to material facts inducing the execution. That ruling seems to be in conflict with the cases of *George v. Tate*, 102 U. S. 564-570, 26 L. Ed. 232; *Hartshorn v. Day*, 19 How. 211, 222, 15 L. Ed. 605; *Ivinson v. Hutton*, 98 U. S. 82, 25 L. Ed. 66; *Shampeau v. Lumber Co. (C. C.)* 42 Fed. 760; *Johnson v. Granite Co. (C. C.)* 53 Fed. 569; *Vandervelden v. Railroad Co. (C. C.)* 61 Fed. 54; *Kosztelnik v. Iron Co. (C. C.)* 91 Fed. 606,—relied on, among others, by counsel for the defendant in error. We find it unnecessary in this case to decide whether the question of fraud leading up to and inducing the execution of such instruments may be inquired into and determined in an action at law in a federal court, for the reason that, conceding that it may be, good faith and fair dealing would require the plaintiff, as a condition precedent to the presentation and maintenance of such an issue, to return or offer to return the money received in consideration of the instruments. In considering a similar question the court, in the case of *Barker v. Railroad Co. (C. C.)* 65 Fed. 460, said:

"But there is another insurmountable obstacle in the complainant's way upon this feature of this case, and that is, although she desires to set aside the contract of release, she still retains the consideration and has never offered to return it. Where a party attempts to rescind a contract, the rescission must be complete. He cannot affirm it in part and reject it in part. Common honesty would require him, seeking to escape the burdens of the contract, to return the benefits which he has received. This is not only a rule of common honesty and fairness, but has been recognized by the courts from time immemorial. There are some few exceptions where railroads have been involved, but they simply illustrate that courts sometimes give way to sentiment, and allow compassion and sympathy to rule, instead of tranquil judgment; and these offers of restitution should come promptly, not reluctantly or tardily. To withhold a restitution is to exhibit a want of confidence in the integrity and justness of his case, who complains of a contract, and seeks to set it aside because of fraud. *Vandervelden v. Railroad Co.* (C. C.) 61 Fed. 54; *Johnson v. Granite Co.* (C. O.) 53 Fed. 569; *Gould v. Bank*, 86 N. Y. 75; *Cobb v. Hatfield*, 46 N. Y. 583; *Thayer v. Turner*, 8 Metc. (Mass.) 550; *Kimball v. Cunningham*, 4 Mass. 502, 3 Am. Dec. 230; *Doane v. Lockwood*, 115 Ill. 490, 4 N. E. 500; *Railway Co. v. Hayes* (Ga.) 10 S. E. 350; *Burton v. Stewart*, 3 Wend. 236, 20 Am. Dec. 692; *Bain v. Wilson*, 1 J. J. Marsh. 202; *Jarrett v. Morton*, 44 Mo. 275; *Hart v. Handlin*, 43 Mo. 171; *Estes v. Reynolds*, 75 Mo. 563; *Kerr, Fraud & M.* 366."

And in *Vandervelden v. Railroad Co.* (C. C.) 61 Fed. 54, the court applies the general rule, and refers to a class of cases where it may not be necessary, by reason of the peculiar facts, to enforce it strictly. It is there said:

"It is not questioned that the general rule is that where a party seeks to rescind a contract on the ground of mistake or fraud, and thereby seeks to relieve himself of the burdens imposed by the contract, he should not be permitted to retain the benefits of the contract to the detriment of the other party to the transaction. Seeking equity, he must do equity. Therefore the ordinary rule is that as a prerequisite to invoking the action of the court for the purpose of setting aside a contract, and thereby being relieved of the burdens thereof, the plaintiff must, so far as is reasonably within his power, place or offer to place the other party in the position he would have occupied if the contract had not been entered into. In short, if he would escape the burdens, he must give up the benefits of the contract. The acts to be performed in the observance of this general rule are, of necessity, dependent upon the circumstances of the particular case. A court of equity is not insistent as to matters of form, if the substance of the duty is performed, and, furthermore, a court of equity can give due weight to exceptional cases which may demand an exceptional rule. The purpose of the general rule is to enable the court to do justice to both parties, so that, if the contract is set aside at the request of one party, the court may be able to restore the other party to the position he occupied before the contract was entered into, or otherwise the court may be made the instrument whereby great wrong may be wrought, in that the one party is freed from the performance of the contract on his part without being compelled to restore or account for the money or other thing of value which he received by means of the contract which he now repudiates. If the contract is of such a nature that by means thereof one party thereto is induced to pay a given sum of money to the other, which he would not have paid except for the inducement of the contract, and, after the payment of the money, the party receiving the money seeks to rescind the contract, it is clear that in justice and equity he should be required to repay the money as a condition of rescission. There is a class of cases wherein the facts are such that the court, without a repayment or tender on part of the plaintiff, has it within its power to protect fully the interests of the other party in case of rescission, and in such cases the court may proceed to a hearing without requiring repayment or a tender. Illustrations of this class of cases may be found in *Thackrah v. Haas*, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486, and *Billings v. Smelting*

Co., 3 C. C. A. 69, 52 Fed. 250. * * * If the judgment was adverse to him on that question, he would still have in his possession the money paid him to procure a settlement, and thus, in effect, the company would have been deprived of all the benefits of the settlement, without having secured to it the return of the money which it paid to secure the settlement. Cases have been cited in which it seems to be held that of this result the company cannot complain, upon the theory that the company had agreed that the plaintiff should in any event receive the sum paid him. This theory is not sustainable upon any fair consideration of the facts, nor in accordance with the well-recognized principles touching the settlement of disputed claims."

No fact is alleged in the reply that brings this within the case of *Thackrah v. Haas*, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486, and like cases. Whatever exceptions there may be to the general rule certainly should not embrace a case like the present one, where a trial might establish that the plaintiffs have no valid claim, and at the same time leave the defendant's money in the plaintiffs' pockets.

The judgment is affirmed.

KAUFMANN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 123.

1. WASHED REVENUE STAMPS—SALE—EVIDENCE—SUFFICIENCY.

One whom defendant knew to be a dealer in washed revenue stamps asked him to assist in finding purchasers for stamps which such dealer said were a part of the estate left by his deceased uncle. Defendant repeatedly declared he would have nothing to do with washed stamps, and was assured that they were genuine. Defendant found a man who agreed to assist in selling the stamps at 50 per cent. discount, after such dealer had furnished three "samples" which were genuine. The dealer gave defendant an envelope said to contain \$663 in stamps, for which \$331.50 was expected, and defendant handed the envelope, unopened, to the one who had agreed to assist in selling. The stamps were then taken to another man, who was about to sell them, when they were seized. Defendant was indicted for knowingly having in his possession and offering for sale washed and restored revenue stamps. There was some testimony that it is a custom for genuine stamps to be sold in the neighborhood when these were offered at large discounts. *Held*, that the evidence was sufficient to justify a conviction.

2. SAME—INSTRUCTIONS—SOURCE OF INFORMATION.

Defendant's requests to instruct the jury that, before they could render a verdict of guilty, they must be satisfied beyond a reasonable doubt that he had inspected the stamps, and had seen that they were canceled and washed, or else there must be proof that such dealer had told defendant that the stamps were washed and canceled, were properly refused.

3. APPEAL—EXCEPTIONS—GENERAL.

An exception reserved "to the court's refusal to charge such of the requests as were not charged" does not raise any point for review as to any of the charges so refused.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of conviction of the circuit court for the Southern district of New

York, entered upon the verdict of a jury rendered October 15, 1901, upon an indictment charging defendant with the crime of knowingly having in his possession washed and restored adhesive documentary revenue stamps, and of willingly and knowingly offering the same for sale.

Chas. A. Bacon, for plaintiff in error.

W. N. Parsons, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The brief filed for defendant concedes that there is no dispute upon the substantive facts. Defendant, not long before the transaction on which the indictment was founded, met and had several interviews with one Miller, whom he had met before. According to his story, in one of these interviews Miller asked him if he did not have an acquaintance among the members of the Exchanges who used revenue stamps, and if he could not dispose of some revenue stamps owned by him. The explanation that Miller gave to Kaufmann for his possession of them was that he had obtained them from the estate of a deceased uncle. He further told Kaufmann, as defendant testified, that the stamps were in the original form in sheets, that some of them were in full sheets as they came from the government, that none of them were unattached, and that they were in the original form, with the original gum. Thereupon defendant had an interview with one Groff, manager of a broker's office in New York City, and asked him if he could dispose of some revenue stamps on the Consolidated Exchange. After one or more interviews with the two men separately, in which Miller agreed to sell at a discount of 50 per cent., and Groff said he could dispose of them at that figure, defendant, at Groff's suggestion, asked Miller to furnish samples. The latter gave them two \$3 stamps and one \$1 stamp, which he examined and showed to a stamp dealer, and which apparently were genuine. On March 5, 1901, Miller met defendant and one McComish, who had agreed to assist in selling the stamps, at the entrance of No. 47 Broadway, and Miller and defendant then crossed the street to No. 60 Broadway (the Consolidated Stock Exchange), where Miller handed an envelope or package to defendant, who thereupon handed the same to McComish; Miller informing McComish that the same contained \$663 in stamps, and that he expected to receive \$331.50 for the same. McComish took the stamps to one Casper Hauser, who inspected the stamps and was about to sell them, when they were seized by a revenue officer. There was uncontradicted and satisfactory evidence that in said envelope or package were washed and restored adhesive documentary revenue stamps.

Defendant's counsel frankly concedes that the only matter in dispute is whether or not defendant knew, or was bound by the circumstances to know, that the stamps contained in said envelope or package were washed and restored adhesive documentary revenue stamps. The jury found that he knew, or was bound to know, that the stamps were of that character. That verdict was rendered after a charge which instructed them that this was the vital point in the

case, and that they must find beyond a reasonable doubt with reference to every element of the charge named. Over and over again they were instructed that they could not convict unless they were satisfied beyond reasonable doubt that the defendant had committed the precise offense. The very last instruction was a request to charge, submitted by defendant, and charged as requested:

"The jury must be satisfied beyond a reasonable doubt that the said stamps were canceled before the delivery to Groff; and if the jury are not so satisfied, but are satisfied only that the defendant believed that there was something wrong about the said stamps, then the defendant must be acquitted."

An exception was duly reserved to a refusal to direct a verdict of acquittal, and the point is thus presented here.

Some effort is made in the brief to sustain the proposition that the evidence fairly warranted a conclusion that defendant was innocently ignorant of the fact that there was anything wrong with the stamps, and that he believed they were genuine, and their purchase and sale at 50 per cent. discount a perfectly legitimate transaction. In support of this reference is made to Miller's story of his deceased uncle, to the genuineness of the three stamps he offered "as a sample," and to some testimony to the effect that it is a custom for good genuine original stamps to be sold in the neighborhood of broker's offices at large discounts. The jury evidently apprehended quite accurately what this testimony of men who had bought stamps at a discount really imported. It is unnecessary to discuss the proposition whether or not any intelligent mind could be reasonably credited with the belief that genuine stamps would be offered at 50 per cent. discount and required for their sale the amount of secret negotiation which characterized this transaction. It is suggested, however, that defendant supposed that the stamps which Miller had for sale were stolen, rather than washed. Of course, if he really believed they were stolen, it cannot be said he knew they were washed; and, if the circumstances were such as to warrant either belief equally, the jury would not be warranted in finding that he entertained the one, rather than the other. But we entertain no doubt at all, upon the evidence, that defendant really believed, as he had good grounds to believe, that the stamps were washed and restored.

At the outset it must be assumed that he knew there was something wrong with them,—that they were either forged, or stolen, or washed. The proposition that he supposed otherwise is absurd. The circumstances so challenged his intellect that he could not dull it sufficiently to reject the conviction thus forced upon him. It is to be expected, from the difficulties and dangers attending their production, that forged revenue stamps are less likely to be met with than stolen or washed ones. The three offenses of which the stamps might have been the corpus are of very different grade in the opinion of the average man. There are individuals who would not plunder their neighbors by stealing their property, but who would be troubled with no more conscientious scruples about restoring a used stamp than they would about deceiving a customs inspector. That defendant must have known there was something wrong with the stamps hardly admits of

question, and it was far more natural that he should suppose them to be washed stamps, rather than stolen or forged stamps. If this were all, it would, perhaps, not warrant a jury in holding that the element of precise knowledge was established beyond reasonable doubt; but the statements made by the defendant on the witness stand so clearly indicate what was really in his mind at the time of his receipt and delivery of the envelope as to eliminate all doubt. He had heard general talk around the streets about washed stamps, the papers were full of it, there had been several convictions for dealing in them, and he knew the selling of washed stamps was going on. He knew Miller dealt in washed stamps, because he first made his acquaintance in Ludlow Street jail, where Miller was incarcerated "for something in connection with washed stamps." He knew Miller had been convicted of the offense. At the very outset, and repeatedly during his interviews with Miller, he told the latter "he would have nothing to do with a washed revenue stamp." He told him he "didn't want to have anything to do with washed stamps, and told him so in terms he could not have misunderstood." He admitted that he himself would not know a good stamp from a washed one. His volunteered protest against washed stamps shows that it was just such stamps that he was expecting to get from Miller. He testified, further, that he relied entirely on Miller's statements that these were genuine unused stamps which had come to the latter from his uncle's estate, and which were in sheets (a statement defendant seems to have been careful not to try and verify); but the jury was under no obligation to credit these latter statements. We are troubled with no more doubt than they were in reaching the conclusion that, knowing Miller to be a dealer in washed stamps, he expected to get washed stamps from him, and that, despite all his protestations against having anything to do with them, he really believed such stamps were in the package he handled.

Error is assigned to the refusal of the court to charge certain requests. The general form of the exception reserved at the trial would fairly preclude any discussion of these assignments. They are, however, without merit. The second request reads as follows:

"The jury must be satisfied from the testimony beyond a reasonable doubt that the defendant had inspected the said stamps, and had seen that they were canceled and washed, prior to the delivery of said stamps to the witness Groff, before they can render a verdict of guilty against the defendant."

The seventh request reads:

"The jury must be satisfied beyond a reasonable doubt that the defendant either actually inspected the stamps before he delivered them to Groff, and thus knew them to be washed and canceled, or else there must be proof that Miller had told him that the said stamps were washed and canceled before he delivered them to Groff."

The difficulty with both these requests is that defendant might have acquired knowledge as to the character of the stamps otherwise than by himself inspecting them or by the statements of Miller.

Error is assigned that the judge, having charged the fifth request as prayed, further charged the jury as to defendant's means of knowledge. No exception raises this point; the only one reserved being

"to the court's refusal to charge such of the requests as were not charged."

The judgment is affirmed.

MANHATTAN OIL CO. v. RICHARDSON LUBRICATING CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

Nos. 78, 79.

1. **CONTRACTS—MUTUALITY.**

A contract whereby defendant agreed to sell, and plaintiff agreed to buy, all the oil "they may require for their own use for a period of twelve months from the date hereof," was not void for want of mutuality.¹

2. **SAME—CERTAINTY.**

The fact that the quantity of oil to be sold and bought was not definitely determined at the date of the contract, but was to be ascertained by extrinsic evidence, was immaterial.

3. **SAME—CONSTRUCTION.**

The contract obligated defendant to sell only so much oil as plaintiff might require for its own use for the purpose intended within the year, and not as much as it might require within a reasonable period after the expiration of the year.

4. **REFUSAL OF NEW TRIAL—REVIEW.**

The circuit court of appeals cannot review the discretion of the court below in refusing a new trial sought on the ground that the verdict was against the evidence.

In Error to the Circuit Court of the United States for the Southern District of New York.

Chas. De H. Brower, for plaintiff.

Delos McCurdy, for defendant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The Richardson Lubricating Company, the plaintiff in the court below, and the Manhattan Oil Company, the defendant in the court below, have each brought a writ of error to review a judgment for the plaintiff rendered upon the verdict of a jury.

The action was brought to recover damages for the breach by the defendant of a written contract between the parties dated December 30, 1898, the material provisions of which read as follows:

"The Manhattan Oil Co. agrees to sell to the Richardson Lubricating Co., and the Richardson Lubricating Co. agrees to buy of the Manhattan Oil Co., all the 28° and 30° paraffine oil and asphalt oil they may require for their own use for a period of twelve months from the date hereof. Quality of the oil is to be of the Manhattan Oil Company's best grade; price to be 3½ cents per gallon and 28 gravity paraffine oil, 3 cents for 30 gravity paraffine oil, and 2 cents for asphalt oil, free on board cars at Gallatea, Ohio, in bulk; payments to be made 60 days from the date of invoice; shipments to be made in the tank cars of the Manhattan Oil Co. within six days of the receipt of the order, or earlier if possible."

¹ Mutuality in contracts, see note to Oil Co. v. Kirk, 15 C. C. A. 543.

Plaintiff was a manufacturer of lubricating greases and compounded oils, and during the year preceding the contract had purchased oils of the defendant for its manufacturing uses.

It was proved upon the trial that the defendant complied with the contract and made deliveries of oil as ordered by the plaintiff until November, 1899, but thereafter refused to deliver 1,020,000 gallons ordered within the year. Evidence was given for the plaintiff of a tender of the contract price and a formal demand for the delivery of the oil made on the 29th day of December, 1899, and a refusal by the defendant. Evidence was also given for the plaintiff showing the daily capacity of its concern for the consumption of such oil as was ordered, and the market price in December, 1899.

The defendant did not introduce any evidence, and, at the close of the plaintiff's case, requested the court to instruct the jury to render a verdict for the defendant. This was refused, and the defendant excepted. The trial judge instructed the jury, in substance, that the defendant was entitled to recover the difference between the contract price of the oil ordered and the market price at the times when the oil should have been delivered, but that plaintiff was only entitled to order such quantity as it could use within the year ending December 30, 1899, and that, according to the true construction of the contract, the defendant did not undertake to sell any oil which might be required by the defendant for its use after the expiration of the year, but did undertake to sell the quantity their business would require for the 12 months. The plaintiff requested an instruction that "the only limitations upon the amount of oil which the plaintiff was entitled to order for its own use were the ability of the plaintiff to pay therefor, and the capacity of the plaintiff's works to use within a reasonable period after December 30, 1899." The instruction was refused, and the plaintiff excepted.

The exceptions which have been referred to are the basis of the assignments of error of the respective parties, and the rulings to which they were taken may properly be considered in the order in which they were made. It is insisted for the Manhattan Oil Company that the contract was invalid for want of mutuality, and consequently that the trial judge should have directed a verdict for the defendant. If the contract did not obligate the plaintiff to take any specified quantity of oil, manifestly there was no consideration for the promise of the defendant. But in consideration of the defendant's promise to sell, the plaintiff promised to buy all the oil it should require for its own use for a specified period of time. Read in the light of the previous business relations of the parties, it is plain that by this was meant that it should buy what oil it should require for its use in its manufacturing business. This is a very different promise from one to buy what it might desire, or from a mere option to buy. If it had bought oil from any other dealer for use in its business during the 12 months, its promise would have been broken, and the defendant could have recovered damages for any loss accruing. The mutual obligation of the parties to perform the contract constituted a consideration for the promise of each. It is quite immaterial that the quantity of oil to be sold and bought was not definitely determined at the date of the con-

tract, but was to be ascertained by extrinsic evidence. The contract is quite analogous to that which was considered in *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218. In that case the plaintiff made a proposition by letter to the defendant to furnish all the steamers of the defendant's line with coal for a designated period at a specified price per ton, and the defendant accepted the offer; and, although the quantity to be furnished was not otherwise designated, the court declared that, notwithstanding the quantity was indefinite at the time of the contract, it was nevertheless determinable by the terms of the contract, and therefore certain, within the maxim, "*certum est quod certum reddi potest.*"

We are satisfied that the trial judge placed a proper construction upon the contract in his instructions to the jury when he limited the obligation of the defendant to one to sell the plaintiff only so much oil as the plaintiff should require for use in its manufacturing business within the year. To have extended it to an obligation to sell as much as the plaintiff might require to use within a reasonable period after the expiration of the year would have been to make a new contract for the parties. By the contract the plaintiff was at liberty to use more or less, so long as it observed good faith, and did not reduce or increase its consumption beyond the legitimate requirements of its manufacturing business. *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Staver Carriage Co. v. Park Steel Co.*, 43 C. C. A. 471, 104 Fed. 200. The terms of the contract in this respect were wide, and placed the defendant measurably at the mercy of the plaintiff, and they ought not to be enlarged beyond their necessary import. The adjudications cited by counsel in support of a different construction (*Barber Asphalt Pav. Co. v. Standard Asphalt Co.*, 39 App. Div. 617, 58 N. Y. Supp. 405, and *Whitehouse v. Gas Co.*, 17 Law J. C. P. 237) are not instructive, as the different phraseology of the contracts differentiates each of those cases from the present.

The assignments of error which have been considered are the only ones that merit notice. The rule that this court cannot review the exercise of discretion by the court below in refusing a new trial because the verdict was against the weight of evidence has been so frequently reiterated that it would seem that assignments of error based upon the denial of such a motion should no longer be urged.

The judgment is affirmed.

HUGHES v. PENNSYLVANIA R. CO. et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 88.

COLLISION—Fog—Tug and Tow—Negligence of Tug.

A tug, having in charge eight canal boats in three tiers, tied them up on reaching a pier in the East river at about 1 a. m., to await a favorable condition of the tide before proceeding further. The night was then clear, and the tug left the tow to engage in other work. At 3 o'clock a fog came on, and later in the morning became very dense. The canal boats, when left, tailed down the river with the ebb tide, but

when the tide rose gradually swung out across stream, and, while lying thus, about 6:30 a. m., a ferryboat collided with one of the canal boats and injured it. When the fog began to rise, the tug was a very short distance from the tow, and had only two light boats in charge, and could have returned to the tow. *Held* negligence on the part of the tug, and that it was liable for the injury.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal by both respondents from a decree of the district court (93 Fed. 510) holding the defendant railway company solely responsible for the damages resulting from a collision between libellant's canal boat F. B. Morris and a ferryboat alleged to be owned by the Pennsylvania Annex. The appeal of the last-named respondent was evidently taken through some oversight, inasmuch as the district court dismissed the libel as to it. It was not argued here, and may be disregarded.

H. G. Ward, for appellants.

Le Roy S. Gove, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The facts are as follows: The libellant's canal boat F. B. Morris, loaded with coal, and bound from South Amboy to 138th street, Harlem river, was in tow of the Pennsylvania Railroad Company's tug Media on February 9, 1898. There were eight boats in the tow in three tiers, and the Morris was the outside port boat in the second tier. At about 1 a. m., the tide being then ebb, the tug tied up the flotilla at Pier 5, East river, by fastening the head tier, leaving the tow tailing down the river on the ebb tide. Thereupon the tug left the tow in order to engage in other work, picking up light boats, and towing them down to a stake boat off Liberty Island. It was the intention of the master of the tug to return to the tow after the tide turned, and avail of the flood to take it to its destination. While the tug was thus absent, the tide turned, and in consequence the tow, instead of tailing down stream, gradually swung out across stream, and the Morris, which had been an inshore boat, became outside boat lying out in the river more than the length of the first tier beyond the end of the dock. It was foggy when the tow began to swing outward, and the fog subsequently grew very dense. While lying thus, about 6:30 a. m., the ferryboat Annex No. 5, running around the Battery on her way to Brooklyn, collided with the Morris. The district judge held the ferryboat free from fault, and no appeal challenges the accuracy of that conclusion. The claim against the tug is for negligent towage, for not showing the proper measure of care for the boats in her charge. As to the tying up of the tow at the pier to await favorable tide, it is urged that it is the practice and custom of tugs so to do; that it was what the tow expected would be done; and that it was for the benefit of both parties that during the interval the tug should go about other business, because by thus using all her time it is to be assumed that towing is made cheaper. It is not necessary to discuss these propositions, because, conceding them to be correct, the tug was nevertheless negligent under the facts of this par-

ticular case. When the tow was tied up at 1 a. m., the weather was clear and fine. So long as the tow remained tailing down so as to be close to the ends of the piers, it was in a position of safety. Even after it had swung out into the stream it would probably meet with no misadventure so long as the weather continued clear, so that it could be seen by navigating vessels. But if, while it was thus swung out, it should become shrouded in fog, its position would be perilous. When the tug left the tow at about 1:30 a. m., the night was clear, and the tide was ebb. The only evidence in the record indicates that the tide began to change about half past 3 or 4 in the morning. Whether it turned then or later, the master of the tug knew it would turn, and further knew that, when it did turn, the tow, being fastened only at the head, would inevitably swing out across the stream. The evidence shows that indications of fog began about 3 a. m.; that the fog gradually increased; that at 3:30 it was thicker, but objects could still be seen; that by 4 a. m., or shortly after, it had increased so much as to make navigation dangerous. The tug went off, as was said before, in search of light boats. It found one at 55th street, another somewhere else in the North River, and when it began to get foggy in the North river, the tug, with these two light boats in tow, was about opposite the Pennsylvania ferry at Cortland street. The master thereupon proceeded with the two light boats to the stake boat off Liberty Island. He arrived there about 4 a. m., by which time it was very thick, and getting thicker; so bad that he did not think it safe to run, wherefore he remained at the stake boat (the fog continuing) until he turned in at 7 a. m. When the fog began to rise and thicken, the tug was a very short distance from where it had left the flotilla. It had only two light boats in charge. The weather was still clear enough to navigate with safety. The master knew that the turn of the tide would swing the flotilla out into the stream, and that the fog, should it continue to thicken, would put the boats composing it in a position of peril. He might have tied up the light boats, or have carried them with him, and, returning to Pier 5, East river, have then either tied up the boats so they would not swing, or have expedited the swing till they tailed up stream, or have stood by them and sounded signals, which would have secured their safety. His failure to do so under the circumstances shows a lack of ordinary prudence, which abundantly sustains the charge of negligence in looking after the tow. When the colliding ferryboat was held to be free from fault, the question whether some one or other of the boats in the flotilla should have made her presence known by sound signals of some kind became an academic one, and need not be discussed.

The decree of the district court is affirmed, with interest and costs.

STEWART, HOWE & MAY CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 28.

CUSTOMS DUTIES—VELVET CORD—CORDUROY.

A pile fabric, commercially known as "velvet cord," "ribbed velvet," or "corded velvet," is not "corduroy composed of cotton or other vegetable fiber," within Tariff Act 1897, par. 315, and is not assessable as such.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The case comes here upon appeal from a decision of the circuit court, Southern district of New York (107 Fed. 267), affirming a decision of the board of general appraisers which sustained the action of the collector of the port of New York in classifying certain cotton goods for duty.

A. P. Ketchum, for appellant.

Chas. D. Baker, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The relevant paragraph of the tariff act of 1897 reads as follows:

"(315) Plushes, velvets, velveteens, corduroys and all pile fabrics, cut or uncut; any of the foregoing composed of cotton or other vegetable fiber, not bleached, dyed, colored, stained, painted or printed, nine cents per square yard and twenty-five per centum ad valorem; if bleached, dyed, colored, stained, painted or printed, twelve cents per square yard and twenty-five per centum ad valorem: provided, that corduroys composed of cotton or other vegetable fiber, weighing seven ounces or over per square yard, shall pay a duty of eighteen cents per square yard and twenty-five per centum ad valorem: provided further, that manufactures or articles in any form, including such as are commonly known as bias dress facings or skirt bindings, made or cut from plushes, velvets, velveteens, corduroys, or other pile fabrics composed of cotton or other vegetable fiber, shall be subject to the foregoing rates of duty, and in addition thereto ten per centum ad valorem: provided further, that none of the articles or fabrics provided for in this paragraph shall pay a less rate of duty than forty-seven and one-half per centum ad valorem."

The goods weigh over seven ounces per square yard. It is not disputed that they are pile fabrics, and dutiable under the first part of this paragraph, if they are not dutiable under the proviso, as corduroys. They are invoiced as "black cotton velvet cords," are made of cotton, with a fine rib, and are chiefly used for women's skirts, sometimes for making women's jackets, and also for boys' wearing apparel. They have been imported for the past ten years, and have been sold variously under the names of "velvet cords," "ribbed velvets," or "corded velvets." The board found the evidence conflicting, and held that it would seem to be better capable of being harmonized on the theory that a "velvet cord" is a species of corduroy, and the circuit court concurred with them. We are unable to reach the same conclusion. If the evidence of the retail salesmen be disregarded,—and certainly it is unpersuasive, since their transactions are not with the trade, but

only with the consumer, who is ignorant of trade names and trade classification,—the evidence will not be found to be so conflicting. *Morrison v. Miller* (C. C.) 37 Fed. 82; *Hills Bros. Co. v. U. S.*, 39 C. C. A. 500, 99 Fed. 264. These goods are never bought or sold as corduroys, though that circumstance would be immaterial if they were in fact corduroys. They are not within the definition of "corduroy" given in the *Century Dictionary*, which describes a thick stuff especially used for the outer garments of men engaged in rough labor, field sports, and the like. These goods are never so used, and are not fit for such use. It seems to have been assumed below that the word "cords" is an abbreviation of "corduroy," the latter word being a generic term covering a group of several species. Reference to these words in the *New English Dictionary* of the *Philological Society*, however, shows that "cords" came first into use, and "corduroy" or "corde du roy" was a term of subsequent invention. The specifications of *Woostenholm's patent*, No. 1,123, of 1776 (cited in this dictionary), speaks of "velveteen cords," and of nearly everything of the fustian kind, but does not mention corduroy. The first use of the latter word seems to be more than 10 years later. Evidently the broader word of the two is "cords." The most significant fact in proof—and it is not disputed—is that the goods imported (Exhibit 1) differ from what all concede to be a corduroy (Exhibit A), not only in the kind of yarn and thread used, the width of the goods, and the quality of the cotton, but also in the method of manufacture. They are made on different looms. The corduroy is cut by machinery; the velvet cord, by hand. Velvet cord is made on a velvet loom. A loom used to make corduroys could not be used to make ribbed velvets "without considerable alteration, which would be very costly, and would not be worth while doing. It is not done." Exhibit 1 is made on an ordinary velvet or velveteen loom. Exhibit A is made on a corduroy loom,—a much heavier loom. Corduroys, in fact, are not made by the manufacturers who make velvet cords, nor velvet cords by the manufacturers who make corduroy. The evidence shows them to be different articles, the dictionaries do not indicate that the same word covers both, and we do not find the evidence persuasive to the conclusion that commercial usage knows the velvet cord as a variety of corduroy.

The decision of the circuit court is reversed.

**SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO. v.
STANISLAUS COUNTY et al.**

(Circuit Court, N. D. California. January 6, 1902.)

No. 12,257.

1. STATES—LIMITATION OF POWERS—REPEAL OR AMENDMENT OF CORPORATION LAWS.

The power of a state, reserved by its constitution, to alter, amend, or repeal general laws concerning corporations, is subordinate to, and limited by, the provisions of the federal constitution inhibiting laws impairing the obligations of contracts, depriving persons of property without due process of law, or denying the equal protection of the laws. Rights acquired and capital invested by a corporation or its stockholders in the lawful exercise of powers conferred by such laws are within the protection of such constitutional provisions, and cannot be arbitrarily destroyed by subsequent state legislation.

2. IRRIGATION COMPANIES—REGULATION OF RATES—CALIFORNIA STATUTES.

Act Cal. May 14, 1862 (St. 1862, p. 540), amending the general incorporation law of 1853, and providing for the "incorporation of canal companies and the construction of canals," gives companies incorporated thereunder the right to charge and collect rentals or tolls for water, subject to regulation by county boards, but provides that the rates shall not be reduced by such boards so low as to yield to the stockholders less than a certain per cent. "upon the capital actually invested." Act March 12, 1885 (St. 1885, p. 95), to regulate and control the sale, rental, and distribution of appropriated water in the state, requires county boards, on petition, to fix rates to be charged by any distributor of water in the county, outside of cities and towns. It provides that the board shall "estimate the value of all property actually used and useful to the appropriation and furnishing of such water," estimate the reasonable annual expenses of the person or corporation whose franchise is controlled, and adjust the net annual receipts and profits so that they may be not less than 6 nor more than 18 per cent. "upon the value of property actually used and useful." It further provides that in fixing rates "said board may take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that such rates shall be equal, reasonable, and just, both to such corporations and to said inhabitants." *Held*, that assuming that under the later act the value to be estimated by the board was the actual cash value at the time, thus fixing a different basis for the rates established than that provided by the earlier act, it could not be construed, as applied to a corporation organized under the act of 1862, to authorize the board to ignore the capital "actually invested," which would result in many cases in impairing the obligation of the contract created by the company's charter, as well as depriving it of property without due process of law, but that as to such companies it was the duty of the board, under its power to take into estimation all other pertinent facts, to consider the capital actually invested, at least in the property actually used and useful, and to fix such rates, within the limits prescribed by the act, as should be reasonable with reference to such investment.

3. CORPORATIONS—CHARTER RIGHTS—EFFECT OF NONUSER.

A statutory right embraced in the charter of a corporation must be reduced to possession to secure the constitutional protection against alteration or repeal. Where an irrigation company, organized under Act Cal. May 14, 1862 (St. 1862, p. 540), which provided that county boards should not reduce the rates of such companies "so low as to yield to the stockholders less than 1½ per cent. per month upon the capital actually invested," in fixing its own rates, which it did for 25 years, never made them so high as to yield such per cent. to its stockholders,

its constitutional rights are not impaired by a subsequent statute authorizing county boards to fix rates below the minimum prescribed in the incorporation act.

In Equity. Suit to enjoin the enforcement of water rates established by the board of supervisors of defendant county, to be charged by complainant. On final hearing.

G. W. McEnerney and W. B. Treadwell, for complainant.

C. A. Stonesifer and L. W. Fulkerth, for defendants.

MORROW, Circuit Judge. This is a suit in equity, brought on September 29, 1896, to enjoin the defendants from enforcing an order of the board of supervisors of Stanislaus county fixing the rates to be charged by the complainant for water distributed by it, and to declare said order null and void. It is alleged in the bill that the complainant is a corporation organized under the laws of California in September, 1871, in accordance with the provisions of an act of the legislature of the state of California entitled "An act to provide for the formation of corporations for certain purposes," approved April 14, 1853 (St. 1853, p. 87), as amended by the act approved May 14, 1862, entitled "An act to authorize the incorporation of canal companies, and the construction of canals" (St. 1862, p. 540); that the defendant the county of Stanislaus is one of the political subdivisions of the state of California and within the Northern district of California; that the board of supervisors of said county of Stanislaus is the governing or legislative body of said county, and that the defendants George W. Toombs, Charles H. Osler, James Alfred Davis, Thomas J. Carmichael, and Joseph P. Barnes were at all the times stated in the bill the duly elected, qualified, and acting members of the said board, and citizens and residents of the Northern district of California. It is alleged that for more than 10 years past the complainant has been engaged in the business of appropriating water for irrigation, sale, rental, and distribution, for hire, and has for the last 10 years maintained, and now maintains, a canal through the counties of Fresno, Merced, and Stanislaus, in the state of California, in which it carries its water to the takers and consumers thereof; that complainant is now, and for 10 years last past has been, the owner of the right to take the whole flow of water of the San Joaquin river through the left bank of said stream at its junction with Fresno Slough, and has for the last 10 years appropriated said water, for sale, rental, and distribution to its customers, by means of a canal running from the point of appropriation through the counties of Fresno and Merced and a large part of the county of Stanislaus, which canal was, on January 1, 1896, and now is, including its lateral and parallel branches, 120¾ miles in length; that of this length of canal 11⁷/₁₀ miles are within the boundaries of the defendant county of Stanislaus. It is alleged that the reasonable value of these canals, ditches, flumes, water chutes, and other property actually used in the appropriation and furnishing of said water is of the amount of \$1,000,000; and that the right of appropriation of said water acquired by the complainant more than 20 years ago, ever since held by it, and necessary to enable it to sup-

ply water to its customers in the counties aforesaid, is of the reasonable value of \$500,000. It is further alleged that the complainant has a capital stock of 100,000 shares of the par value of \$100 per share, on each of which the sum of \$10 has been paid up, and which stock is held by divers persons; that on January 1, 1896, and thereafter until the adoption of the pretended regulation by the defendants, the rates charged by complainant to its customers in the said counties were as follows: For irrigating alfalfa, trees, and vines, \$2.50 per acre per annum; cereals, \$2 per acre; gardens, \$5 per acre; for water for sheep, hogs, or goats, \$10 per 1,000 per month; for horses, cattle, mules, and live stock generally, \$40 per 1,000 per month. After setting out the total gross receipts and expenditures of the complainant for the years 1887 to 1895, inclusive, the bill alleges that the average gross receipts of the complainant during the said nine years have been \$54,734.15 per annum, and the average cost of the maintenance of the said property \$22,045.16 per annum; that the net returns for the said nine years have amounted to a fraction over 2 per cent. per annum on the value of the property actually and necessarily used in appropriating and furnishing such water by complainant to its customers, have never reached $3\frac{1}{2}$ per cent. of such value, and have never amounted to 5 per cent. per annum on the value of the canals, ditches, flumes, water chutes, and all other property actually used in the appropriation and furnishing of such water exclusive of the value of the right of appropriation. It is alleged that the operations of the complainant in the conduct of said business have been characterized by the strictest prudence and economy, and that the rates charged to its customers were and are fair and reasonable. It is further alleged that on March 10, 1896, a petition was filed in the office of the board of supervisors of the county of Stanislaus, signed by 25 persons claiming to be inhabitants and taxpayers of said county, asking the said board to regulate and control the rates of compensation to be collected by complainant from the sale, rental, and distribution of the water owned by complainant to the inhabitants of Stanislaus county. This petition was filed pursuant to the provisions of an act of the legislature approved March 12, 1885, entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this state, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use." St. 1885, p. 95. It is alleged that all of the proceedings taken by the board of supervisors with reference to this petition were under the pretended authority and direction of this act; that on June 24, 1896, said petition came on to be heard by said board, and the individual defendants, as members of said board, proceeded to fix the following rates to be thereafter charged by the complainant for the use of its water in the county of Stanislaus, namely: For irrigating alfalfa, perennial grasses, and cereals \$1.50 per acre per annum, for trees and vines \$2 per acre, for gardens \$3.50 per acre, for water for sheep, hogs, or goats \$6 per 1,000 per month, and for horses, cattle, mules, and other live stock \$25 per 1,000 per month; that the said board also estimated and fixed as reasonable annual expenses of repairs and management the sum of \$22,000. It is averred that the

rates so fixed by said board are grossly unfair and unreasonable, and, if applied to the complainant's whole business, will not realize to complainant more than \$40,000 gross per year, or less than 1½ per cent. upon the value of the canals and other property actually used in the appropriation and furnishing of the water, exclusive of the value of the right of appropriation thereof and that, including the value of said right of appropriation, will not yield to complainant more than 1½ per cent. per annum; that in fixing these rates the defendants acted in willful violation of complainant's rights; that defendants estimated the value of the property used in and useful to the appropriation of said water by complainant at the sum of \$337,000, excluding as one of the items of such property the complainant's right of appropriation; that such estimation was arbitrarily made, without receiving any evidence of the value of said property, the said defendants well knowing that the value of said property, exclusive of the right of appropriation of said water, was far in excess of the sum of \$750,000. It is averred that there is no reason to believe that the value of complainant's business will or can be increased by reason of the reduced rates so fixed and established, but on the contrary, there will be no compensatory increase whatever; that the expenses of operating its business cannot be diminished, and, if said reduction be applied to complainant's whole business, the net receipts will not amount to or exceed 3 per cent. per annum upon the value of the property used. It is further alleged that said act under which it is claimed that said rates have been fixed is in violation of and repugnant to section 1 of the fourteenth amendment to the constitution of the United States, in that by the provisions of said act it is declared that rates shall be fixed and established without reference to the value of the right of any person, corporation, or association to receive compensation for or a return upon the value of any right by it held or owned to appropriate any waters of this state for sale, rental, and distribution to the inhabitants thereof. It is alleged that, unless immediate relief is granted, complainant will be harassed by a multiplicity of suits to compel it to furnish water at the rates fixed by the defendants; that the upholding of said rates will amount to a deprivation by the defendants of complainant's property without due process of law, and a denial to complainant of its rights under section 1, of article 14 of the amendments to the constitution of the United States. An injunction is prayed for restraining the defendants from enforcing said order fixing rates, and a decree asked adjudging said order to be null and void, and that complainant is entitled to have its rates for supplying water to its customers so fixed as to return a reasonable and just compensation for services rendered.

This bill was demurred to on January 2, 1897, for want of jurisdiction and of equity. It was urged that the absence of diversity of citizenship of the parties was fatal to federal jurisdiction. The demurrer was overruled by this court (90 Fed. 516) on the ground that the averments of the bill presented a federal question, which is of itself a sufficient source of jurisdiction without the coexistence of diversity of citizenship. The federal question was determined to be contained in the allegations that the acts of the defendants, if unrestrained,

would result in the practical deprivation by defendants of the complainant's property without due process of law, and the denial to complainant of the equal protection of the laws vouchsafed by the fourteenth amendment to the constitution of the United States. The answer of the defendants was filed on July 20, 1898. In it the defendants deny that the complainant had ever been the owner of the right to take the whole flow of water of said river at any point of diversion. It is denied that the property of the complainant used in the appropriation and furnishing of water was ever of a higher value than \$251,000, that the alleged right of appropriation has ever had any value, or that complainant's capital stock has a value of more than \$3 per share. Defendants aver that during said period of nine years complainant has received net returns upon the value of all its property actually and necessarily used and useful in the appropriation and furnishing of water to its customers, together with the right to appropriate said water, amounting to more than 9 per cent. per annum on the average, and some years as high as 14 per cent., and that with prudent management such net returns would have been doubled. In this behalf it is averred that the receipts of the complainant have been greatly reduced by the fact that the firm of Miller & Lux, of which the president of the complainant corporation is a member, annually irrigate many thousand acres of their land from complainant's canal free of charge, and that water has been furnished to said firm by complainant at one-half the rate charged to other customers. In regard to the proceedings in connection with the said petition of March 10, 1896, to the board of supervisors of Stanislaus county, the defendants aver that the complainant appeared before the said board by counsel on June 10, 1896; that on June 24, 1896, all parties being ready, the matter proceeded, evidence was introduced, argument made, and after due and careful deliberation an order was made by the said board fixing the rates as aforesaid. There is also set up in the answer the report of an expert civil engineer and the deputy county surveyor, alleged to have been appointed by the defendants to report upon the estimated cost of the canal, ditches, and all other property used in complainant's business, upon which report it is averred that the said board of supervisors estimated the property of complainant to be worth \$337,000, and the reasonable annual expenses of management \$22,000. They further aver that the resolution fixing the said rates was and is the act of the said board, according to its best judgment and discretion, within its jurisdiction, and not subject to review by any court. It is denied that said rates are unfair or unreasonable, and it is averred that they will yield to complainant more than 9 per cent. upon the value of its property used in the carrying on of the said business, including the value of the right of appropriation under prudent and careful management. Defendants deny that the act of the legislature under which the said board acted in fixing the said rates is repugnant to section 1 of the fourteenth amendment to the constitution of the United States, and also deny generally the allegations upon which complainant applies for relief to this court. They aver that the functions of said board ended upon the making of said order on June 26, 1896; that said board has become functus officio with respect to the

said order and all matters in connection therewith, and the same is to be enforced, if at all, by other officers of the state of California, not now before the court, and in other proceedings before the state courts of this state; that under the constitution and laws of California permitting complainant to exercise its franchise and to appropriate and sell the waters of the state, the right was reserved by the state to regulate and control the sale and distribution of such appropriated waters; and complainant, having acted under and by virtue of such laws, cannot now be heard to complain that the laws of the state providing for such regulation and control are not binding upon complainant; wherefore defendants ask that complainant's bill be dismissed.

On June 8, 1899, an amendment to the bill of complaint was filed by the complainant, adding thereto the allegation that by section 3 of the aforesaid act of May 14, 1862, it was provided that "every company organized as aforesaid shall have power, and the same is hereby granted, * * * to establish, collect, and receive rates, water rents, or tolls, which shall be subject to regulation by the board of supervisors of the county or counties in which the work is situated, but which shall not be reduced by the supervisors so low as to yield to the stockholders less than one and one-half per cent. per month upon the capital actually invested." St. 1862, p. 541. It is alleged that prior to March 1, 1885, this complainant and its stockholders actually invested, under the authority of the said act, a capital amounting to \$971,113.13 in money, all of which was actually and necessarily expended by the complainant in the purchase and construction of canals and other property used in and useful to the appropriation and furnishing of the water aforesaid, which property was on March 1, 1885, and still is, of the reasonable value of \$971,113.13; that, though the defendants aver and claim that the said provisions were repealed by the act of March 12, 1885, hereinbefore referred to, complainant avers that such a construction is in violation of and repugnant to the provisions of section 10 of article 1 of the constitution of the United States, in this: that it would impair the obligation of the contract between the state of California and this complainant made and entered into under the authority of said section 3 of said act of May 14, 1862. For the purpose of limiting the question in this case, complainant's counsel at the hearing withdrew the claim for the value of the right of appropriation of the water of the San Joaquin river in estimating the value of the property used and useful in the appropriation and furnishing of said water.

The first question to be determined is the effect of the incorporation of the complainant under the act of the legislature of April 14, 1853, providing "for the formation of corporations for certain purposes," as amended by the act of May 14, 1862, providing for the "incorporation of canal companies and the construction of canals." It is contended on behalf of the complainant that, as it was organized as a corporation in 1871 under the act of 1853, as amended by the act of 1862, section 3 of the latter act, limiting the right of the board of supervisors to reduce rates so as to yield to stockholders not less than $1\frac{1}{2}$ per cent. per month on the capital stock actually invested, was a contract with the state for the time for which the corporation was

organized. It is contended on the other hand, on behalf of the defendants, that the act of the legislature approved March 12, 1885 (St. Cal. 1885, p. 95), entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in this state, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the place of use," repealed all prior acts in conflict therewith, and in section 5 authorized the board of supervisors of the state to regulate and control the water rates that might be charged by any person, company, association, or corporation, and provided that such rates should be reasonable and just, and so limited that the annual receipts and profits thereof should be not less than 6 nor more than 18 per cent. upon the value of all the property actually used in and useful to the appropriation and furnishing of such water, as estimated by the said board of supervisors. It is objected on the part of the complainant that the act of 1885 in no way changes or affects its rights which prior to that time had been acquired and fixed by contract with the state under the act of 1862, and that in so far as the act of 1885 repealed or amended the act of 1862, such repeal or amendment was void as against the complainant's rights, as impairing the obligation of a contract. The constitution of this state adopted in 1849 provided in article 4, § 31, that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." Article 12, § 1, of the constitution adopted in 1879, provides: "Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time, or repealed." This provision of the constitution of the state is, however, qualified by another provision of the same instrument adopted pursuant to a requirement of the constitution of the United States, providing that no law impairing the obligation of a contract shall ever be passed. Article 1, § 16, Const. Cal.; article 1, § 10, Const. U. S. There is also involved in this controversy the prohibition of paragraph 1 of the fourteenth amendment of the constitution of the United States, providing:

"Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Have the provisions of the act of the legislature of March 12, 1885, impaired the obligations of any contract entered into by the complainant with the state under its incorporation under the act of May 14, 1862? And does the enforcement of the act of March 12, 1885, by the board of supervisors of Stanislaus county in the manner and under the circumstances disclosed by the evidence in this case, deprive the complainant of property without due process of law, or deny to it the equal protection of the laws? The act of May 14, 1862, provided that a canal company organized under its provisions should have the power: (1) To make rules and regulations for the management and preservation of its works not inconsistent with the laws of the state,

and for the use and distribution of the waters and the navigation of the canals. (2) To establish, collect, and receive rates, water rents, or tolls, which should be subject to regulation by the board of supervisors. (3) Such rates, rents, or tolls should not be so low as to yield less than $1\frac{1}{2}$ per cent. per month upon the capital actually invested. The act of March 12, 1885, regulating and controlling the sale, rental, and distribution of appropriated water in this state, provides that, after proper petition for regulation of water rates, the board of supervisors shall—(1) Estimate the value of all property actually used and useful to the appropriation and furnishing of such water. (2) Estimate the annual reasonable expenses of each person or corporation whose franchise shall be controlled, including repairs, management, and operating of such works. (3) The board may establish different rates for different uses, such as mining, irrigating, domestic, etc., but such rates, as to each class, shall be equal and uniform. (4) Adjust the net annual receipts and profits so that they may be not less than 6 nor more than 18 per cent. upon the value of property actually used and useful. (5) But in such estimation of net receipts and profits the cost of extensions, enlargements, or other permanent improvements shall not be included as part of expenses, but, when completed, shall be included in the present cost and cash value of such work. (6) In fixing said rates within limits aforesaid, said board may take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that such rates shall be equal, reasonable, and just, both to such corporations and to said inhabitants. The act of 1862 requires the board of supervisors to regulate water rates and tolls of corporations organized under the provisions of the act upon the basis of the "capital actually invested." The act of 1885 requires the board of supervisors to adjust the net annual receipts and profits "upon the value of all the property actually used and useful to the appropriation and furnishing of such water." It will be assumed that this last provision means the cash value of the property at the time the estimate is made by the board of supervisors. As thus construed, these provisions of the two statutes might in some instances produce the same results, but it is clear that with respect to corporations organized under the provisions of the latter act the purpose of the legislature was to furnish a better-defined, if not a different, basis from that provided in the act of 1862 for estimating the capital or value of the property of the corporation with respect to which rates were to be fixed. What effect has this statute upon corporations organized, as was the complainant, under the prior act? The act of 1862 is not in terms repealed, but the act of 1885 provides that all water appropriated for irrigation, sale, rental, or distribution in the state is a public use, and the right to collect rates or compensation for use of such water is a franchise; and, except when furnished to a city, city and county, or town, or the inhabitants thereof, must be regulated and controlled by the several boards of supervisors of the counties in the manner provided by the act. But how regulated and controlled? Must the adjustment of rates for the purpose of determining the net annual receipts and profits which the corporation may retain as income be limited absolutely to the value of the property actually

used and useful to the appropriation and furnishing of such water? In other words, assuming as we have, that this provision of the statute means the value of the property at the time the rates are fixed by the board, is this present cash value of the property the limit of the power of the board in determining the basis with respect to which rates shall be regulated and controlled? Manifestly not, for the statute provides further that the board, in fixing rates, may take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that such values shall be equal, reasonable, and just, both to such corporations and to the inhabitants. Why, then, is it not within the power of the board in fixing rates to consider the capital actually invested in the property of the corporation, subject only to the limitation that such property is actually used and useful to the appropriation and furnishing of water? It is certainly a most important fact, recognized by constitutional and statute law in determining whether any given rate is equal, reasonable, and just as between the corporation and the rate-paying public, and there appears to be no answer to the claim of the complainant that it is entitled to such consideration, based not only upon reason and justice, but upon a legal right created by a contract under a prior statute. To hold that under this statute the capital actually invested in the property of the corporation under the act of 1862 may be entirely disregarded by the board of supervisors in fixing water rates under the act of 1885, would be to encounter the constitutional provision that no law impairing the obligation of a contract should be passed, and this interpretation of the statute would be subject to the further objection that the state cannot deprive the complainant of its property without due process of law, or deny to it the equal protection of the laws. These constitutional provisions cannot be held subordinate to the constitutional power conferred upon the state legislature to alter, amend, or repeal general laws concerning corporations. As said by the supreme court of the United States in *Shields v. Ohio*, 95 U. S. 319, 324, 24 L. Ed. 357:

"The power of alteration and amendment is not without limit. The alterations must be reasonable. They must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers the vested rights of property of corporations in such cases are surrounded by the same sanctions, and are as inviolable as in other cases."

It will not be necessary to refer to the long line of cases in the highest courts of the nation where these constitutional questions have been elaborately discussed, and the rights of property carefully defined, in controversies arising out of legislation affecting corporate rights. It will be sufficient for the present purpose to refer to the case of *Hill v. Railroad Co.* (C. C.) 41 Fed. 610, 616, where Judge Jackson, of the United States circuit court of Kentucky (afterwards a judge of the supreme court of the United States), stated the law of these cases in very clear terms. He said:

"The principle of these and other decisions upon the subject of amending or repealing charters under a reservation of power so to do is that the legislature may change or modify the privileges and franchises which the state

has granted to the corporation, and which concern the interests of the public; but dealing with what it has bestowed, either by way of withdrawal or of alteration, the state may not go further, and so legislate as to disturb, affect, or impair rights either of the corporation or of its shareholders, previously acquired, while the corporate functions were being lawfully exercised. All rights thus acquired, of whatever character, are surrounded and protected by constitutional sanctions and guaranties higher and superior to the legislative power of amendment or repeal."

Applying this constitutional principle to the provisions of the act of 1885, it must be held that it was not intended by the legislature to repeal the act of 1862, certainly not with respect to corporations organized under the prior act; and that with respect to such corporations the two acts were to be construed together. What, then, was the duty of the board of supervisors in this case? Money paid by stockholders to the capital of a corporation is unquestionably property of the corporation. Whether this capital or the property acquired by it has been actually invested and used or made useful in the operation of the franchise of the corporation, is a question of fact to be determined upon proper investigation. It follows that it was the duty of the board of supervisors to ascertain the amount of capital actually invested in the corporation—that is to say, the amount of capital actually paid in and invested in constructing the canals and acquiring other property used and made useful in supplying water to the customers of the corporation in Stanislaus county, and this fact should have been considered by the board in fixing water rates which the complainant was entitled to charge—under the statute. It appears from the evidence that on March 10, 1896, 25 persons, claiming to be inhabitants and taxpayers of the county of Stanislaus, filed a petition with the board of supervisors of that county, praying the board to regulate and control the rates and compensation to be collected by the complainant for the sale, rental, or distribution of the appropriated water of said company to the inhabitants of said county. After notice and a hearing upon said petition, the board, on June 26, 1896, made the following order:

"Pursuant to an act of the legislature of the state of California entitled 'An act to regulate and control the sale, rental, and distribution of appropriated water in this state, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use,' approved March 12, 1885 (St. 1885, p. 95), the board regularly proceeds to the hearing of the petition of O. C. Eastin et als., presented herein, praying for the regulation of the rates and compensation to be collected by the San Joaquin and Kings River Canal & Irrigation Company for the sale, rental, or distribution of its appropriated water to any of the inhabitants of Stanislaus county, under and pursuant to said act, and evidence having been introduced by and on behalf of the petitioners herein and by and on behalf of the said San Joaquin and Kings River Canal & Irrigation Company; and, the same being closed, and the matter submitted to the board for its consideration and decision, and the board being fully advised in the premises, the board does hereby estimate, as near as may be, the value of the canal, ditches, flumes, water chutes, and all other property actually used and useful to the appropriation of the appropriated waters of said company, belonging to and possessed by it, at the sum of \$837,000."

The remainder of the order is immaterial to the present controversy. This estimate of the value of complainant's property appears to have been based mainly upon a report by R. H. Goodwin, consulting

engineer, and E. D. Grove, deputy county surveyor, experts employed by the board, and whose report was made to the board under date of June 10, 1896. This report contained, among other things, the following estimate of cost of construction of complainant's canal:

"The following is an estimated cost of construction of the above-mentioned canal, taking in consideration the different widths, cross-sections, grades, materials, and appurtenances based on the prices of materials, supplies, and labor of the present date:

Earth excavation, 2,966,125 yards, at 6½ c.....	\$192,798 10
Lumber in head, regulating, distributing, waste, and inlet gates, boxes, bridges, etc., 1,689,410 feet B. M., in place....	55,536 50
Six station buildings.....	4,000 00
Telephone line 70 miles.....	4,900 00
Engineering, superintendence, offices of company, stationery and printing, law expenses, and other incidentals.....	25,723 40
Right of way, first 30 miles, 900 acres, at \$3.....	2,700 00
Right of way, balance distance, 1,068 acres, at \$25.....	26,700 00

Total cost \$312,358 00

"We place the present cash value of the above-mentioned canal and works at \$251,000.00."

To this estimated cost of construction at that date, to wit, \$312,358, the board added the sum of \$24,642, making the total of \$337,000. It nowhere appears that this addition of \$24,642 to the estimated cost of construction at that date as made by the experts employed by the board had any relation to the amount of capital actually invested in the corporation by the shareholders. On the contrary, the testimony indicates that this element in the valuation of the property was entirely ignored. Upon this valuation of \$337,000 the board fixed the following rates: For irrigating alfalfa, all perennial grasses, and all cereals, \$1.50 per acre per annum; for irrigating trees and vines, \$2 per acre per annum; for irrigating gardens, \$3.50 per acre per annum; for water for sheep, hogs, or goats, \$6 per 1,000 per month, and at the same rate for a less number; for water for horses, cattle, mules, and other live stock, \$25 per 1,000 per month, and at the same rate for a less number. Prior to this order of the board of supervisors the rates which had been fixed by the complainant and charged to consumers of water in the counties of Fresno, Merced, and Stanislaus, were as follows: For irrigating alfalfa, \$2.50 per acre per annum; for irrigating cereals, \$2 per acre per annum; for irrigating trees and vines, \$2.50 per acre per annum; for irrigating gardens, \$5 per acre per annum; for water for sheep, hogs, or goats, \$10 per 1,000 per month, and at the same rate for a less number; for water for horses, cattle, mules, and other live stock, \$40 per 1,000 per month, and at the same rate for a less number. For the purposes of this case it is conceded by the complainant that the rates per acre per annum for irrigating alfalfa, \$2.50 per acre per annum, and cereals, \$2 per acre per annum, are the only rates that are material to be considered in this case, for the reason that the water supplied to consumers at the other rates constitutes but a very insignificant portion of the business of the complainant. The damage to the complainant arises out of the fact that, but for this order of the board of supervisors of June 26, 1896, fixing the rate that complainant might charge

for water supplied to consumers in Stanislaus county for irrigating alfalfa and perennial grasses and cereals \$1.50 per acre per annum, complainant would have continued to charge such consumers for irrigating alfalfa \$2.50 per acre per annum, and for irrigating cereals \$2 per acre per annum. The evidence shows that the rate fixed by the board of supervisors reduces the income of the company considerably below 6 per cent. upon the capital actually invested in the property of the corporation, and, if a corresponding reduction were made in Fresno and Merced counties, its income would, under the most favorable conditions, be reduced to less than 5 per cent. per annum on the value of the property as estimated by the board of supervisors. Is this valuation of complainant's property correct?

It appears from the evidence that the canal owned and maintained by the complainant is on the west side of the San Joaquin river; that this canal has its head at the junction of the San Joaquin river with Fresno Slough, in Fresno county, and runs down the west side of the San Joaquin valley through the counties of Fresno and Merced into the county of Stanislaus. The total length of the canal is 120 $\frac{3}{4}$ miles, of which 42.9 miles are in the county of Fresno, 66.15 in the county of Merced, and 11.7 miles in the county of Stanislaus. A branch of the main canal in Fresno and Merced counties, called the "Dos Palos Branch," is 23 miles in length, but, as this branch is not used to supply water in the county of Stanislaus, it may be disregarded in this controversy. The complainant is a corporation organized in September, 1871, under the laws of the state of California. The capital stock of the corporation is divided into 100,000 shares of the par value of \$100. Upon 85,000 shares of this stock calls amounting to \$10.15 per share were made, and \$862,750 paid in. The remaining 15,000 shares were involved in the transaction of purchase under which they were issued nonassessable until calls to the amount of \$7.50 per share had been paid upon the other stock. The calls upon this stock amounted to \$2.65 per share, and \$39,750 paid in. There was also an additional amount of \$1.45 per share, on 8,500 shares of this stock paid in, amounting to \$12,325; making a total of \$914,825 paid by the shareholders upon the stock of the company. The complainant commenced operations in 1871 by purchasing from another corporation known as the San Joaquin & Kings River Canal Company all the property, vested rights, surveys, and works acquired by that company since the date of its incorporation in 1866. The complainant proceeded with the work of constructing this canal. The date of its completion is a subject of controversy, but need not be determined. The claim of the defendants in this respect may be accepted for the purposes of this case. It appears that in the course of construction the complainant distributed water for irrigating purposes to consumers along the line of the canal, and derived an income from that source up to the year 1886 amounting to \$60,349.20. This money was not, however, distributed in dividends, but was used by the company in construction. From 1886 to 1898 the net profits of the corporation were \$158,112.58, and of this amount \$134,893.38 was used by the company in the work of construction, making the total amount contributed to the capital of the corporation from 1871 to 1898 the sum

of \$1,110,067.58. There is, however, to be deducted from this amount; the sum of \$60,000 realized by the corporation from the sale of a tract of land which it owned. This sum was distributed to the stockholders as a dividend, and must be deducted from the capital stock of the corporation, leaving the net amount of capital the sum of \$1,050,067.58. The books of account and vouchers of the complainant during its entire existence, and the books of account of the former company, were produced as evidence before the examiner. A statement of the cost of construction of the canal and irrigation works up to November 25, 1895, as shown by these books, was prepared by the complainant, and introduced in evidence as "Exhibit 2." It is as follows:

Paid San Joaquin & Kings River Canal Company, cost of works to date of purchase.....	\$ 119,335 29
Paid John Bensley et al. in stock (15,000 shares at \$7.50) for remainder of property of old company.....	112,500 00
Paid by this company for construction performed by itself from date of purchase from old company to February 28, 1885.....	739,277 84
Paid by this company for construction from March 1, 1885, to November 25, 1895.....	84,685 51
Total	<u>\$1,055,798 64</u>

This exhibit was subject to the objection that complainant's books prior to 1886 did not distinguish between the cost of maintenance and the cost of construction. The complainant accordingly made a second statement, in which the cost of maintenance was excluded. This revised statement was introduced as "Exhibit 12," and was headed:

"Statement of cost of construction of San Joaquin Canal to December 31, 1873, and betterments since constructed therein, with cost of construction of parallels and extensions. This includes only items actually charged to construction, and which can be identified from the accounts as properly belonging thereto, and does not include any charges for construction which cannot be positively so identified from the accounts alone."

The items of cost were given in greater detail in this statement than in Exhibit 2, and amount to \$798,429.61. It is evident that this last statement shows the actual cost of complainant's canal and works more accurately than the preceding one, but it is not necessary for the court to determine that it is in fact correct, or that it shows the actual value of the property used and useful in supplying water to the inhabitants of Stanislaus county. It is not the duty of the court to estimate the value of complainant's property or fix the water rates it may charge; but this statement, as well as the one relating to the amount of capital paid into the corporation by the stockholders, can only be considered, with the other testimony in the case on behalf of complainant, as evidence tending to establish the fact that when the board of supervisors estimated the value of the canal, ditches, flumes, water chutes, and all other property belonging to the complainant, and actually used and useful to the appropriation of water by the company, no consideration was given by the board to the evidence showing the amount of capital actually paid into the corporation or the actual, reasonable, and proper cost of the works. The court finds that the evidence in the case does establish the fact that the board failed to

perform its duty in this respect. It follows that the value of complainant's property made by the board of supervisors and the water rates fixed by the board with respect to such estimate did deprive the complainant of property without due process of law, and denied to it the equal protection of the laws.

The question as to the amount of income which the complainant is entitled to receive on account of the capital actually invested remains to be considered. The act of 1862 provides that the board of supervisors should not reduce the water rates, rents, or tolls "so low as to yield to the stockholders less than one and one-half per cent. per month upon the capital actually invested." Prior to June 26, 1896, and for a period of more than 25 years, the complainant fixed its own rates for water supplied to consumers, but at no time did it fix rates so high as to yield $1\frac{1}{2}$ per cent. per month upon any estimate of the value of the property or capital actually invested. This, then, was a right under the statute which the complainant never claimed and never reduced to possession, either before or after the act of 1885. In the *Sinking Fund Cases*, 99 U. S. 700, 720, 25 L. Ed. 496, Mr Chief Justice Waite, speaking of the power of congress to make such alterations and amendments of the charter as come within the just scope of legislative power, used language appropriate to this question. He said:

"That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive corporations of the fruits actually reduced to possession of contracts lawfully made."

This statement was not necessary to the determination of the question before the court, but it appears to be sound in principle. The qualification that a statutory right embraced in the charter of a corporation must be reduced to possession to secure the constitutional protection against alteration and repeal is unquestionably a law of the grant. It is perhaps true that there might be cases where a corporation of the character of the complainant, having invested capital in good faith, would not be held to have waived its ultimate right to the limit of income provided in its charter by the acceptance of a smaller income during the progress of construction, or perhaps even longer, until its system of irrigation had brought prospective tracts of land under successful cultivation. But the evidence in this case does not justify the complainant in making that claim. It had waived its right to an income of $1\frac{1}{2}$ per cent. per month by not making rates to secure that income during any part of its term of existence prior to the passage of the act of 1885, and this act providing that the net annual receipts as adjusted by the board of supervisors should not be less than 6 nor more than 18 per cent. per annum, is therefore properly applicable to the regulation of complainant's rates.

Let a decree be entered in favor of the complainant in accordance with this opinion.

In re CLAFLIN et al.

(Circuit Court, D. Massachusetts. February 10, 1902.)

No. 1,087.

CUSTOMS ADMINISTRATION—SUFFICIENCY OF PROTEST.

Paragraph 439 of the tariff act of 1897 provides that "gloves made wholly or in part of leather * * * shall pay duty at the following rates, * * * namely." Then follows paragraph 440, which enumerates several kinds of gloves, among which are Schmaschen gloves, and the rates of duty on each. *Held*, that a protest filed by an importer under the customs administrative act of 1890 against the classification of gloves as lambskin, under paragraph 441, on the ground that they should be "assessed under paragraph 439 as Schmaschen gloves," was sufficient, and distinctly informed the collector of the position of the importer, since paragraphs 439 and 440 must necessarily be construed together, and although Schmaschen gloves are not mentioned in the former the duty is assessed thereunder.

Petition for Review of Decision of Board of General Appraisers.

Charles P. Searle, for the importers.

William H. Garland, Asst. U. S. Atty.

COLT, Circuit Judge. The only question which arises on this petition for review is the sufficiency of the protest. Act June 10, 1890, § 14 (26 Stat. 137).

The collector found the goods were lambskin, and dutiable at \$2.50 per dozen pairs under paragraph 441, and 40 cents additional under paragraph 445, of the tariff act of 1897 (30 Stat. 192), and assessed the duties accordingly; whereupon the petitioners made the following protest:

"Boston, Jan. 24, 1900.

"Hon. Collector of the Port of Boston—Dear Sir: We hereby respectfully protest against your action in assessing and exacting duty on 4 cases leather goods, C. Y. & S. 53/56, imported into this port on the 2nd day of January, 1900, per Str. 'Turcoman,' at the rate of \$2.90 per dozen, but claim they should be assessed under Schedule N, paragraph 439, as Schmaschen gloves dutiable at \$2.15 per dozen. We pay the additional sum exacted by you in order to get possession of the goods, but claim and respectfully ask to have the amount refunded to us.

"We inclose a sample of the goods for your consideration, claiming they are commercially known as Schmaschen goods and not lamb gloves.

"Very respectfully yours,

Clafin, Young & Stanley."

The case then went to the board of general appraisers for decision. As a result of the evidence taken before the board of general appraisers, the government abandoned its contention that the goods were lambskin gloves, and admitted that they were Schmaschen gloves. The government then took the position that the protest was insufficient, and the board of general appraisers sustained this position, and affirmed the decision of the collector on this ground.

The object of the statute in requiring a protest is to inform the collector distinctly of the position of the importer. Technical precision is not required, nor is brevity fatal. *U. S. v. Salambier*, 170 U. S. 621, 626, 18 Sup. Ct. 771, 42 L. Ed. 1167, and cases cited.

In *U. S. v. Salambier* the protest did not refer to any paragraph of

the tariff act, but briefly stated "that the said goods under existing laws are dutiable at 2 cts. per lb., and the exaction of a higher rate is unjust and illegal." This protest was held sufficient, although there were two paragraphs relating to the class of goods in question, under either of which the duty was two cents per pound. The court said:

"In this instance, it was impossible for the collector to have read the protest without perceiving that his classification of the merchandise, as dutiable under paragraph 239 of the tariff act at fifty per cent. ad valorem, was objected to, and that the importer claimed that, under the law, the goods were dutiable at two cents per pound. The collector could not have been perplexed by the omission to name the specific paragraph which the importer sought to have applied, for there were but two paragraphs, besides 239, which dealt with the subject, namely, paragraphs 318 and 319, and under either of them the duty was that claimed by the importer, two cents per pound." 170 U. S. 626, 18 Sup. Ct. 773, 42 L. Ed. 1167.

In the case at bar the protest indicated distinctly and definitely the ground of the importers' objection to the duties assessed. It declares that the goods are Schmaschen gloves, dutiable under Schedule N, par. 439. Neither the collector nor the board of general appraisers had any difficulty in understanding the exact issue which the importers raised. After reading the protest, it was impossible not to perceive what the importers objected to and what they claimed under the law. In the collector's letter to the board of general appraisers transmitting the protest, with accompanying papers, he says: "The protestants have duly complied with the requirements of section 14 of the act of June 10, 1890."

It is contended that the protest is insufficient because paragraph 439 is named instead of paragraph 440, where Schmaschen gloves are mentioned. A glance at the two paragraphs, however, shows they are connected by the word "namely," and that both must be read together as one paragraph:

"439. Gloves made wholly or in part of leather, whether wholly or partly manufactured, shall pay duty at the following rates, the lengths stated in each case being the extreme length when stretched to their full extent, namely:

"440. Women's or children's 'glace' finish, Schmaschen (of sheep origin), not over fourteen inches in length, one dollar and seventy-five cents per dozen pairs; over fourteen inches, and not over seventeen inches in length, two dollars and twenty-five cents per dozen pairs; over seventeen inches in length, two dollars and seventy-five cents per dozen pairs; men's 'glace' finish, Schmaschen (sheep), three dollars per dozen pairs."

Paragraph 439 does not provide any specific rate of duty upon the articles mentioned. It simply declares that "gloves made wholly or in part of leather, whether wholly or partly manufactured, shall pay duty at the following rates, * * * namely." Then follows paragraph 440, which enumerates several kinds of gloves, among which are the Schmaschen, and the rates of duty, which are assessed under paragraph 439. Paragraph 439 refers to the succeeding paragraph, and paragraph 440 refers to the preceding paragraph. When the importers in their protest referred to paragraph 439, and at the same time mentioned Schmaschen gloves, they necessarily included paragraph 440, because the two paragraphs must be consolidated in order to subject the articles mentioned therein to any rate of duty.

The further objection is taken that the protest names \$2.15 per dozen pairs as the rate of duty, and that no such rate of duty on Schmaschen gloves is found in paragraph 439 or paragraph 440.

The reason why the importers in this protest named \$2.15 instead of \$1.75 as the rate of duty is apparent, and could lead to no misunderstanding as to the rate claimed. The collector had assessed a duty of \$2.50 per dozen pairs under paragraph 441, and 40 cents additional duty under paragraph 445. The importers made no objection to this additional assessment under paragraph 445, and they therefore added this 40 cents additional duty to \$1.75, which is the duty mentioned in paragraph 440 on the Schmaschen gloves in question. Under these circumstances, it was unnecessary for the importers to refer in their protest to this additional duty under paragraph 445, because they made no objection to this further assessment; and the statement in their protest of the rate of \$2.15 per dozen becomes perfectly intelligible, in view of the collector's action and their own position.

In my opinion, and for the reasons already given, this is not a case where the importers claim in their protest that the merchandise is dutiable under a specific paragraph, and are now seeking to classify the merchandise under a different paragraph, and therefore the two cases on which the government relies are not in point. In re Sherman (C. C.) 49 Fed. 224; In re Austin (C. C.) 47 Fed. 873.

I am satisfied that the ruling of the board of general appraisers in this case was wrong, and that their decision should be reversed, and judgment entered for the importers; and it is so ordered.

Judgment for petitioners.

BLISS v. REED.

(Circuit Court, W. D. Pennsylvania. February 8, 1902.)

No. 14, Nov. Term, 1898.

PATENTS—SUIT IN EQUITY FOR INFRINGEMENT—ATTACKING JURISDICTION AFTER DECREE.

Where a suit in equity for infringement of a patent has been heard on the merits, and a decree for complainant entered, which has been affirmed on appeal, in the regular course of procedure the question of jurisdiction is not thereafter open, and defendant will not be given leave to bring forward, by a supplemental bill in the nature of a bill of review, a foreign patent to the same patentee, for the purpose of showing that by reason of the expiration of such patent the one in suit had expired prior to the commencement of the suit; and the court was therefore without jurisdiction in equity, where the identity of the invention claimed in the two patents is so doubtful that bad faith cannot be imputed to the patentee.

In Equity. Suit for infringement of patents. Sur defendant's petition for leave to bring forward by supplemental bill, in the nature of a bill of review, a Canadian patent.

J. H. Whitaker and Lysander Hill, for petitioner.
John R. Bennett and H. H. Bliss, for defendant.

ACHESON, Circuit Judge. The entire subject-matter of this suit belongs to a class over which equity has general jurisdiction, and the case proceeded on the merits to a decree against the defendant (102 Fed. 903), which has been affirmed by the United States circuit court of appeals. In the regular course of procedure, then, the question of jurisdiction is not open. *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005.

This is an application by the defendant for leave to bring forward by supplemental bill, in the nature of a bill of review, a Canadian patent granted to Elward on April 23, 1881, for the term of 15 years, for the purpose of showing that, by reason of the expiration of that patent, the United States patent to Elward, embraced in this bill, had expired before the commencement of this suit, and therefore that the plaintiff should have proceeded at law as to that patent. The defendant's petition alleges that "one of the inventions contained and claimed in said Canadian patent is identical with the invention contained and claimed in Elward's United States patent." The defendant has laid before the court a copy of the Canadian patent. It contains 28 claims, but only one of these claims, namely, claim 21, is alleged to be for the invention contained and claimed in Elward's United States patent.

It is alleged that at the time of the grant of the United States patent to Elward the existence of the Canadian patent was fraudulently suppressed by Elward, and a false oath was made by him that the invention had not been patented to him in any foreign country. It is further alleged that the plaintiff and one of his solicitors knew of the Canadian patent, and of the expiration of the United States patent, when this suit was brought, and that they acted in bad faith in instituting this suit in equity.

I am not satisfied of the truth of any of the allegations impeaching the good faith of Elward, or of the plaintiff or his solicitor. Elward's oath was made on January 22, 1883, after his application had taken the final form in which the United States patent was issued. Now, the United States patent contains a single claim, which is for a specific combination of named elements. Claim 21 of the Canadian patent also is for a specific combination of named elements. It is by no means clear that these two claims are for the same invention. They appear to me to be for materially different combinations. The elements of the two claims, as I read the claims, differ essentially. To say the least of it, identity of the inventions covered by these two claims is so doubtful that Elward might have taken the oath he did, and the plaintiff and his solicitor have proceeded as they have done, in perfect good faith. As the element of bad faith is absent, no sufficient ground for granting this application appears. I am the more satisfied with this conclusion because, in an action at law brought now, the statute of limitations would bar the plaintiff's claim in whole or part.

And now, to wit, February 8, 1902, the application of the defendant for leave to bring forward, by supplemental bill in the nature of a bill of review, the Canadian patent recited in his petition, is denied.

THE JOHN A. BRIGGS.

BALCH v. ONE MILLION TWO HUNDRED AND SIXTY-ONE
THOUSAND FEET OF LUMBER.

(District Court, E. D. Pennsylvania. February 14, 1902.)

Nos. 57, 60.

SHIPPING—NEGLIGENT LOADING OF VESSEL—DAMAGES TO CHARTERER.

Evidence considered, and held to sustain the claim of a charterer that a cargo of timber was improperly stowed by the master, by reason of which the full carrying capacity of the vessel was not utilized, and the charterer, who paid a lump sum as charter hire for the voyage, sustained loss for which he was entitled to damages.

In Admiralty. Suit by charterer to recover damages for failure of ship to carry a full cargo, and cross libel for demurrage.

Horace L. Cheyney and John F. Lewis, for the John A. Briggs.

Theodore M. Etting and Jones, Carson & Beeber, for the charterer.

J. B. McPHERSON, District Judge. These cross libels disclose a dispute between a ship and her charterers, the ship being charged with improper stowage of a cargo of timber, whereby the carrying capacity of the vessel was not fully utilized; and the charterers being charged with failure to deliver the cargo properly, whereby delay occurred, and a liability for demurrage arose. The testimony is voluminous and conflicting, and will support the theory of either party. It has not been easy to reach a conclusion, but, on the whole, it seems to me that the weight of the evidence is against the ship, and I have therefore adopted, with modifications, the findings of fact proposed by the charterers. Thus modified, they are as follows:

1. The Pacific Pine Company, a California corporation engaged in the lumber business, having orders from the Atlantic seaboard for lumber of various sizes, amounting in the aggregate to 1,470,000 feet, the acceptance of which was dependent upon their ability to charter a suitable vessel, entered upon negotiations with the managing owner of the ship John A. Briggs for the charter of that vessel. The negotiations resulted in the execution of a charter party, under whose terms the vessel was let unto the Pacific Pine Company for the carriage of "a full cargo of sawn lumber and timber" from one or two safe loading places on Puget Sound, as might be ordered by the charterers, to Philadelphia or New York, the consideration being the lump sum of \$23,500. The timber was to be "of such length and sizes as can be taken through vessel's present hatchways or bow or stern ports, if any, and on deck," these ports to be large enough to receive timber 24x24 inches square. The cargo was to be stowed under the captain's supervision and direction, and the stevedore employed by the vessel was to be mutually satisfactory to the captain and charterers or their agents. Thirty-two working days were allowed for loading, this period to begin "twenty-four hours after vessel is at loading place designated by charterers or their agents, her inward cargo or unnecessary ballast discharged, and she is ready to receive cargo, and captain

has notified them in writing to that effect." For each day's detention "by default of [the charterers]," \$120 in gold was to be paid.

2. The charterers divided the cargo to be shipped between two mills, one at Port Gamble and one at Port Blakeley, both on Puget Sound. A duplicate order was given to each mill, this being a customary and proper division, and Port Gamble was named as the first place of loading. On the arrival of the ship from the voyage on which she was engaged when the contract was made, she was ordered to Port Gamble, where she arrived on December 12, 1900. The charterers intended to ship from Port Gamble 735,000 feet of lumber, and of this amount 250,000 feet had been already cut, and was stored upon the wharf. The vessel did not report herself in readiness to receive cargo until December 21st, by which time the amount of lumber cut and on the wharf had increased to nearly 600,000 feet. This quantity was made up of lumber and timber of various dimensions and sizes: 125,000 feet was decking, 2x4 to 4x6 inches, averaging 32 feet in length; 75,000 feet was boards, 1x6, 12 to 16 feet long; and 535,000 feet was heavy timber, of different lengths and sizes, running from 10x12 in breadth and thickness, and 50 to 85 feet in length, to 26x26, and 40 to 50 feet in length, some sticks being even longer. When the vessel reported her readiness to receive cargo, the charterers tendered the 600,000 feet already on the wharf. All the boards and decking, and nearly all the timber of heavier and larger sizes, had been cut. About 150,000 feet was still to be cut, and this was for the most part made up of the smaller sizes of the large timber. The cargo was piled on the wharf, end on to the ship. All sizes, from 10x12 upward, were placed in one solid pile about 50 feet in length and 15 or 16 feet high. The boards and decking were intended to be used for stowage, and for loading under the poop. They were separately piled alongside the timber. Toward the eastern end of the pile some boards and decking were on top of the timber, but at least 50 feet of the timber was clear of this small lumber. The larger and heavier sizes of the timber, speaking generally, were at the bottom of the pile, and the smaller sizes on the top. It is neither practicable nor customary to pile each size separately. The larger and longer sizes are usually cut first, so that, if any imperfections appear, the timber can be cut shorter or planed down, and thus utilized for smaller sizes. The sticks are piled on the wharf as they are cut. In the present case, the practice usually observed was followed.

3. The lower hold of the ship had a carrying capacity of about 450,000 feet, and the lower between-decks could carry a similar amount. As 750,000 feet was to be shipped at Port Gamble, it was necessary to use both these spaces. Under such conditions, the proper practice would have been to load both at the same time, putting the sticks either in the hold or in the lower between-decks, as their dimensions might require, and filling up the vacant spaces with boards and decking. Captain Balch, the master of the ship, did not pursue this course for two reasons: First, he was ordered by his owners to stow the lower hold first; and, second, he himself believed—honestly, no doubt, but none the less mistakenly—that none of the timber that was on top of the pile was of such dimensions as to admit of stowage

in the lower hold through the vessel's hatchways and ports. He therefore declared his inability to receive any part of the cargo tendered, and for three weeks he made no effort by actual experiment to ascertain whether any of the timber accessible would go into the vessel or not, but simply rested upon his belief that the timber which was on the top of the pile could not be used. On January 15th, under changed orders from his owners, for the first time he accepted the cargo, and began the loading of his vessel by putting more than 100,000 feet of the boards and decking, which had been intended for stowage, in the bottom of the lower hold and in the wings, where larger and heavier timber should have been placed. After this had been done, he then for the first time endeavored to take the larger and heavier timber, and found immediately that he had been mistaken in supposing that he could not load the timber that had been offered. Working from the top of the pile down, he had no difficulty between January 15th and February 6th in taking on board all of the timber which was on the wharf at the time when he reported his readiness to receive cargo, together with more than 150,000 feet that was cut and delivered thereafter.

4. To stow such a cargo as this properly, dunnage should be laid on top of the ballast. Heavy timber should then be placed on top of the dunnage, and the boards and decking should be used wherever the lengths of the timber sticks are such as to leave unfilled spaces. The smaller lumber—the boards and the decking—should also be used to fill the spaces between the beams that separate the lower between-decks from the lower hold. The material thus used is technically known as "beam filling." The loading of the two lower decks of the ship was nearly finished at Port Gamble. A little additional lumber was placed on these decks after she arrived at Port Blakeley.

The loading of the ship at Port Gamble was defective in the following respects:

(1) The ballast was improperly trimmed, causing the vessel to be considerably down by the stern, in consequence of which it was found impracticable to stow cargo properly under her poop deck.

(2) There was no beam filling whatever between her beams, although this might have been put in, if the stowing had been skillfully done.

(3) There were numerous empty spaces in the lower hold and the lower between-decks. The condition of the vessel on her arrival at Port Blakeley is technically known as "blown up."

In consequence of the trim of the vessel, the marine surveyors would not permit her to be loaded at Port Blakeley with her proper complement of cargo, either on deck or under the poop, and of the 735,000 feet of lumber intended by the charterers to be shipped from Port Blakeley it was found practicable to load the vessel with no more than 526,980 feet. This quantity, together with the 735,000 feet theretofore received at Port Gamble, made up a cargo of 1,261,980 feet; and this was carried by the vessel from Puget Sound to Philadelphia, and was there delivered, upon payment of the full charter money, to the persons entitled to receive it.

5. Before the charter was agreed to, the managing owner had stated how much lumber the ship had carried on previous voyages, and upon inquiry these statements had been confirmed. Upon the voyages referred to she had carried the following cargoes of lumber:

From Puget Sound to Sydney, 1,555,823 feet.

From Puget Sound to Plymouth, 1,430,000 feet.

From Puget Sound to South Africa, 1,483,000 feet.

The lumber carrying capacity of the vessel is estimated by Capt. Balch as follows:

Lower hold	450,000 feet.
Lower between-decks	450,000 "
Upper between-decks	450,000 "
Deck load	90,000 "
Poop stowage	30,000 "
Making a total of.....	1,470,000 "

Upon her arrival at Philadelphia, the vessel was, at the instance of the charterers, examined by two expert stevedores. One of them examined her before any of the lumber had been discharged. The other was sent over from New York, and did not arrive until after the upper between-decks, the lower between-decks, the deck load, and the poop had been discharged. The testimony of the former witness is that, if properly laden, the ship could have carried about 238,000 additional feet of cargo. The testimony of the New York stevedore is confined to the lower hold, and to the loss occasioned by the absence of beam filling therein. This he estimated at more than 100,000 feet.

6. After the cargo had been discharged and was on the wharf, and after the vessel had been attached for improper stowage, the master of the ship brought a counter suit for delay at the port of loading. Upon this point, without referring to the evidence in detail, it seems to me to be enough to say that at no time after the vessel was reported to be ready for loading was there any delay occasioned by default of the charterers, their agents or servants. On the contrary, after deducting from the time consumed in actual loading such time as cannot properly be charged against the charterers, the cargo was put on board in less time than is allowed by the contract. As already stated, the delay of three weeks that occurred before the loading began was due to the fault of the ship.

7. If properly loaded, the ship could have carried 1,470,000 feet of lumber. The quantity actually carried was only 1,261,980 feet. There was therefore a deficiency of cargo, due to the improper disposition of the ballast and the bad stowage of the cargo, and for the loss thus occasioned the ship must be held liable.

The measure of damages is the difference between the price at Port Blakeley of the lumber that the ship could have carried if she had been properly stowed and the contract price of such lumber at Philadelphia, less the cost of carriage, with interest from the day when the contract price would have been paid. The record does not contain testimony that enables me to compute the sum due, and therefore (unless the parties can agree upon the amount) a commissioner must be appointed.

It may be proper to add that after the dispute arose at Port Gamble the evidence shows clearly that both parties expected a lawsuit to follow, and were anxious to lose no point that might be of advantage. Either, I dare say, was willing to shift his ground if something might perhaps be gained thereby, and the correspondence shows the irritated watchfulness on both sides that might, under such circumstances, be looked for. As I regard the case, however, these maneuvers for position are not of great importance. The determining facts are the owner's mistaken direction to the master to load the lower hold first, and the master's mistaken belief that he was not able to take on board the timber that for three weeks was always at his command.

In No. 60 the libel is dismissed. In No. 57 the libellant is entitled to a decree. In view of the closely balanced testimony, the costs in both cases will be divided.

STETSON et al. v. HERRESHOFF MFG. CO. et al.

(Circuit Court, D. Rhode Island. February 17, 1902.)

No. 2,573.

1. PATENTS—SCOPE OF INVENTION—LIMITATION BY NAME.

Where an inventor has made and patented a thing which is novel, but which performs in part the functions of each of two old structures, his selection of the name of one of them for his invention, as being approximately descriptive, should not be held a limitation which deprives him of the right to protection, save as to the features of his invention which are appropriately described by such name; nor, on the other hand, can he escape anticipation by a prior structure because it was given a different name, where the functions of the two are substantially the same.

2. SAME—ANTICIPATION—SHIPS' KEELS.

The McIntyre patent, No. 393,713, for a ship's keelson, was anticipated by patent No. 367,828, to the same patentee, for a box keel, which describes a keel formed of a single piece of cast metal, while the later patent describes substantially the same structure, divided into sections for convenience of handling in the construction of larger vessels, the sections having end walls integral with the sides and bottom, by means of which they are bolted together when in place; the change being one which does not involve invention.

In Equity. Suit for infringement of letters patent No. 393,713, for a ship's keelson, granted November 27, 1888, to James McIntyre, assignor of one-half to John A. Stetson. On final hearing.

J. E. Maynadier, for complainants.

Walter H. Barney and Francis Colwell, for defendants.

BROWN, District Judge. This suit is for infringement of letters patent No. 393,713, dated November 27, 1888, to James McIntyre, assignor of one-half to John A. Stetson, for a "ship's keelson." The defenses are invalidity and noninfringement.

The first and fourth claims only are in suit:

"(1) In a vessel the compound keelson herein described, made up of two or more separate sections, the side and end walls of which are integral, the

sections being secured together end to end, substantially as and for the purpose set forth."

"(4) In a vessel, the compound keelson herein described, made up of two or more separate sections, the end and side walls of which are integral, the sections being secured together end to end, and provided with one or more crosspieces to sustain the ribs, substantially as and for the purpose set forth."

The specification states:

"My invention consists, mainly, in a keelson made up of sections, each having one or more cross walls which are integral with its side walls, the sections being secured together end to end. * * * The sections are secured together end to end by fastenings, some of which consist of bolts and nuts, while others consist of clamps and keys, as shown."

A considerable amount of evidence and of argument is devoted to distinctions between a "keel" and a "keelson." Many definitions are quoted; but the distinction is pointed out sufficiently, for the purposes of this case, in the definition from the Century Dictionary:

"Keel. * * * (2) The principal timber in a ship or boat, extending from stem to stern at the bottom, supporting the whole frame, and consisting of a number of pieces scarfed together and bolted together; in iron vessels, the combination of plates corresponding to the keel of a wooden vessel.

"Keelson, Kelson. A line of jointed timbers in a ship laid on the middle of the floor timbers over the keel, fastened with long bolts and clinched, thus binding the floor timbers to the keel; in iron ships, a combination of plates corresponding to the keelson timber of a wooden vessel."

From the specification, it would seem that the structure of the patent was intended to be used in connection with a wooden keel or a keel plate. The specification says: "Of course, keel, E, may be dispensed with, if desired, in which case keel plate, D, is the keel."

Nevertheless, if we regard structural considerations, the connected sections of cast metal, called by the patentee a "compound keelson," are more analogous to the keel of an ordinary ship than is the keel plate, D, since the connected sections extending from stem to stern are the principal members of the backbone of the ship, and the keel plate, D, does not, by itself, perform the function of an ordinary keel, though it may perhaps be called a "keel" because it is at the bottom of the ship. But this case should turn upon a consideration of the patentee's structure, rather than upon distinctions between the words "keel" and "keelson," since the patent, read as a whole, clearly describes and claims the thing which the patentee desires to cover, as well as the function it is to perform.

The complainants' departure from older forms of construction has resulted in a structure to which neither the word "keel" nor the word "keelson," as defined, is strictly applicable. It would seem from the specification that the patentee intended to use his structure in conjunction with a wooden keel, or with a keel plate; but it is by no means apparent that it is impractical for use without a keel or keel plate, and the keel or keel plate is not described or claimed as a part of the patented structure.

Whether or not the defendants infringe cannot, in my opinion, be determined by considering whether the defendants use anything corresponding to the keel plate or keel, shown, but not claimed, in the patent. If the structure is patentable as a keel, the patent would prob-

ably be infringed by using it for a keelson, and if it is patentable as a keelson it would probably be infringed by use as a keel, since the keel and keelson have a common function as co-operating parts of the ship's backbone.

I am further of the opinion that the patentee's use of the word "keelson," upon the suggestion of the patent office that this was a more appropriate word than "keel," does not amount to a voluntary limitation of the patent to the structure used in conjunction with a keel plate or wooden keel. The structure shown in the patent is the principal member of the ship's backbone. To call it a "keel" or a "keelson" does not make it otherwise.

It is by no means apparent that the examiner was correct in saying that this structure is a keelson, "as no other appears to be provided, and the part designated by the letter E is more properly the keel." It would seem that, in choosing between the two words, regard should have been had to the question whether the connected sections or the part, E, formed the principal structural member.

But it appears to me entirely immaterial whether the examiner's choice of words was correct or not, and the fact that the patentee acquiesced in the choice of words is also immaterial. While, in some cases, the voluntary choice of a name may well be regarded as imposing a limitation upon the thing or function which the patentee desires to cover, and an acknowledgment that the standard meaning of a word is an appropriate description and limitation of the thing claimed, such a doctrine is frequently abused and misapplied for the creation of verbal and meritless issues. When it appears that an art is advanced by a novel structure, which in some features resembles old and well-known things, and in other features differs from them, or which is intermediate of things respectively bearing different names, we should be slow to allow debatable implications, arising merely from the choice of a name, to override plain text and plain descriptions of things and functions.

An inventor makes a thing which is new. He must name it, and, as he cannot usually coin a new word, he must take an old one which fits it approximately. He may, like this inventor, find two old words about equally applicable, but neither of which is exactly descriptive of the invention. He chooses one. He might as well or better have chosen the other. His rights in a patent cause should not turn upon an assumption that he has thrown away all of what he describes except that which, in our opinion, is appropriately described by the general name he has chosen.

We will consider, then, whether the patent in suit discloses a patentable invention, by whatever name it may be called. The patent in suit makes reference to a prior patent, as follows:

"The keelson sections shown in the drawings are provided with cross-pieces, *f*, to sustain the ribs, *f*¹, as fully explained in my patent, No. 307,828, dated August 9, 1887, and the planking, *f*², is best secured to the ribs, as explained in that patent."

The prior patent describes, among other things:

"A box keel, formed with crosspieces forming pockets for the ribs. The ribs are bolted to these crosspieces, and a very solid and firm interior con-

nection is formed between the box keel and the ribs, without the need of bolt holes through the keel. After the ribs are in place, the spaces between the crosspieces may be filled with lead or ballast. This is very desirable for yachts. * * *

Also: "The box keel, D, is of cast metal, with or without the center-board box, E, and crosspieces, d, may be cast with the box keel, or otherwise connected to it."

Claim 2 of the prior patent reads as follows:

"(2) The box keel, D, formed of a continuous single piece of metal having crosspieces, d, at intervals to sustain the ribs, substantially as and for the purpose set forth."

Upon the complainants' brief it is conceded that the structure of the prior patent is for the same purpose as the structure of the later patent. The complainants, therefore, cannot escape anticipation by distinctions between a keel and keelson, and are not on this issue assisted by the fact that in his prior patent the patentee has claimed a box keel, and in the patent in suit a compound keelson. The considerations which are favorable to the complainants on the question of infringement must be given full force upon the question of anticipation and invention.

It is conceded that a vessel "with a foundation, which is a single casting with crosspieces to sustain the ribs," is a part of the prior art; that the fundamental idea in the prior patent is that the foundation or backbone of the vessel is a continuous single piece of metal, with crosspieces at intervals to sustain the ribs. It is contended that McIntyre, in his prior patent No. 367,828, advanced the art by teaching the construction of a new class of vessels,—that is, the class characterized by a buoyant body, mainly the ribs and skin, with the ribs held together by a single casting, forming the backbone of the vessel; and in the patent in suit, No. 393,713, he again advanced the art by teaching how that class of vessels could be constructed of much greater length than was before practical. The brief for the complainants summarizes as follows:

"Briefly, the patentee taught in his second patent that if the pattern for the cast backbone of his first patent were cut into two or three pieces, and a cross end wall added to the front end of the stern piece, a like cross end wall added to the rear end of the bow piece, and two like cross end walls added to the midship piece, the new result produced by uniting the castings from those new patterns by means of bolts through their cross end walls would be a new backbone for vessels which would be an important practical improvement over the cast backbone of his first patent."

The complainants submit that the question to be decided is whether that new backbone is an invention or not. It is important, at this point, to refer to the evidence of McIntyre, upon cross-examination:

"Q. I understand you to say that you consider your construction of keelson superior, because the end and side walls and crosspieces are cast integral with the bottom, and so dispense with the use of angle irons, bolts, and rivets. Do I understand you correctly? Ans. I do. C. Q. In other words, the more joints there are the more chance there is for something to give way, and so weaken or injure the vessel? Ans. Yes. C. Q. Your construction of the keelson in section is for convenience in construction and handling, and if it could be conveniently made in one section it would be preferable so to do, would it not? Ans. Yes. C. Q. Were vessels constructed with metal keels prior to the application for the patent in suit? Ans. Oh, yes.

Q. Q. And these keels were frequently made up of a number of plates fastened together. Is that not so? **Ans.** Yes."

It is contended that invention resides—First, in the idea of cutting up the foundation member of the 1887 patent into cross sections; second, in the idea of cross end walls, one on the after part of the prow section, one on the forward part of the stern section, and two on the amidship section; and, third, in the idea of securing those sections end to end by means of the cross walls.

Box keels formed of plates of metal were old; and to make a structure by casting, rather than by welding or riveting, does not ordinarily constitute invention. *Kilbourne v. W. Bingham Co.*, 1 C. C. A. 617, 50 Fed. 697, 703; *Gardner v. Herz*, 118 U. S. 180, 6 Sup. Ct. 1027, 30 L. Ed. 158; *Hicks v. Kelsey*, 18 Wall. 670, 21 L. Ed. 852; *Hotchkiss v. Greenwood*, 11 How. 248, 13 L. Ed. 683. But it is obvious that in the present case the complainant McIntyre cannot stand as the inventor of a box keel of cast metal, since his prior patent anticipates this. A cast box keel of metal being old, did it require invention to put three of these together? Or, to put it another way, did it require invention to cut one of these up into three sections, put end walls on the sections, and unite these three by bolting their ends together?

The only novelty shown on the complainants' theory of their patent is the division of an old device into three pieces, because it was impracticable to make or handle castings, such as those shown in the prior patent, of sufficient size for use in larger vessels. The compound feature of the construction is merely a weakness conceded to the exigencies of construction. The function of the compound structure is exactly that of the simple structure.

I am of the opinion that it was not invention to think of using three castings instead of one, and that to make the castings of such form that their ends could be bolted together was a mere mechanical change, involving no exercise of the inventive faculty, and the scantiest exercise of mechanical skill.

The question whether there is invention in the cast metal box keel of the prior patent, unless that patent be restricted to peculiar features, is not properly in this case; but, as it has been suggested that these defendants are indebted to McIntyre for features of their construction, it may be observed that twin keelsons of cast metal in box form were used by John B. Herreshoff, one of the defendants, in the yacht *Triton*, as early as 1872, 15 years before McIntyre's earlier patent. The keel construction of the *Defender* and *Columbia* is made up of three bronze castings, which are fastened together end to end by bolts through end flanges cast integral with the sections of the plate; to the crosspieces are bolted floor plates, a common feature in the construction of iron ships; and to these floor plates are attached the frames or ribs. This is an essentially different mode of construction from that exhibited in either of the patents of McIntyre.

McIntyre's box keel was formed with cross pieces forming pockets for the ribs. The ribs were bolted to these crosspieces, with the design of forming a very solid and firm interior connection between the box keel and the ribs. There is no such interior connection be-

tween the box keel and the ribs in the Herreshoff construction. The ribs do not go into pockets, but are sustained by floor plates.

McIntyre was not recognized by the patent office as the inventor of a keel made of cast metal. In his original application for the prior patent, a box keel formed of continuous metal was claimed. The examiner rejected the claim, saying: "A box keel formed of continuous metal is not new, but a box keel formed of a continuous single piece of metal is new, so far as the examiner is advised." The earlier patent was allowed because the keel was simple, and not compound, and, presumably, because of the special combination of ribs and cast rib pockets. The patent in suit can derive no validity from what is in the prior patent; but, on the contrary, the prior patent, in my opinion, is a complete barrier to the claim that the present patent discloses a patentable novelty.

There are other defenses of importance, which show, among other things, that the builders of the Columbia, many years before McIntyre's first application, used metal cast in box form to stiffen the backbone of a vessel, and that in constructing their yachts they drew only on the common and recognized stock of all persons skilled in metal construction, so far as the formation of this particular portion of their vessels is concerned. It is not necessary to decide whether McIntyre's patents were anticipated by the twin box castings used in the keelson of the Triton. He was, at least, anticipated in the use of cast metal of box form to strengthen the backbone of a ship, and was thus limited, at all events, to the use of metal castings for the particular purpose, and in the particular mode, shown in his patents.

The fact that the structure of the patent in suit has never been used by McIntyre during 13 years of the life of his patent would seem to offset the complainants' contention that the patented structure is of vast importance.

It may be of importance to the defendants to use metal castings of bronze, instead of wooden timbers or metal timbers, made of plates in box form; but it is not because their construction is a development of the ideas of McIntyre, but because cast metal is stronger than wood, and apparently better for this purpose than metal plates riveted together. They have an unquestioned right to use rectangular boxes of metal plate as structural elements, and they have the right, in common with all builders, to cast their metal structural parts if they prefer to do so, rather than to make them by welding or riveting, and they have a right to use such structural elements to strengthen the backbone of a ship. In all of this they precede McIntyre. The superior qualities of their yachts are not attributable to the way in which they have constructed this particular member, nor to the appropriation of any inventive idea disclosed in the patent in suit.

The bill will be dismissed.

H. B. CLAFLIN CO. v. MIDDLESEX BANKING CO. et al.

(Circuit Court, E. D. Arkansas, Western Division. February 19, 1902.)

No. 1,354.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—FAILURE OF ASSIGNEE TO QUALIFY—RIGHTS OF CREDITORS.

Where a trust has been created by an assignment for the benefit of creditors, a court of equity will not permit it to fail because the assignee fails to qualify as required by the laws of the state, but will either appoint a new trustee, or permit the beneficiaries to maintain a bill to execute the trust.

2. MORTGAGES—RIGHT OF REDEMPTION FROM INVALID SALE.

A suit to redeem real estate from a sale under a mortgage alleged to have been voidable for irregularities, and to constitute the purchaser and his grantees merely mortgagees in possession, may be maintained on general equitable principles, regardless of statute, by the mortgagor or any one who has succeeded to his rights in the land.

3. ADVERSE POSSESSION—GRANTEE UNDER FORECLOSURE SALE—IRREGULARITY OF PROCEEDINGS.

A deed to land executed on a foreclosure sale, which is regular and valid on its face, and purports to convey the entire title of the mortgagor, although it may be in fact voidable, constitutes color of title, and is notice to all persons that the grantee taking possession thereunder claims the absolute title adversely to the mortgagor; and, under the statutes of Arkansas, a continuance of such possession for seven years confers upon him or his grantees an absolute title, and bars an action to redeem from the mortgage.

4. LIMITATION—DEFENSES—FORMER SUIT.

A plaintiff in a suit to redeem from a mortgage is not aided, as against the bar of limitation, by the fact that a prior suit to redeem, which was dismissed, was brought within the time limited, by a different party as plaintiff, although based on the same grounds.

In Equity. On demurrer to bill.

The material allegations of the bill are that on July 23, 1890, Joe Davies and wife conveyed the lands in controversy to Harold Smith as trustee to secure the payment of a large sum of money loaned to them on that date by the defendant the Middlesex Banking Company. This trust deed was in the nature of a mortgage, with the usual powers of sale to the trustee in case of a default in the payment of the debt, and also with power to the cestui que trust to substitute a trustee in place of Harold Smith if he declined or is unable to act; that on August 7, 1894, the defendant Lee J. Lockwood was duly substituted as such trustee, and on November 21, 1894, he made a sale of the mortgaged premises, under the powers of the trust deed, and the defendant banking company became the purchaser at said sale, and received a deed for the lands from the trustee on November 27, 1894, and took immediate possession of the premises under said deed. This sale is attacked as being void for matters de hors the deed, for the reason, as charged in the bill, that the trustee had failed to give notice of the sale as required by the terms of the deed, and also a failure to have the property appraised before the sale, as required by the laws of Arkansas, although the deed from the trustee to the banking company is good on its face, and shows a strict compliance with all the requirements of the mortgage and the laws of the state. It is further charged that on January 10, 1896, the banking company sold and conveyed these lands by proper deed of conveyance to its codefendant the Southern Planting Company, and on July 13, 1897, the planting company sold and conveyed them to Walter Davies, who is now in possession, all of whom had full notice of the defects of the sale. The bill was filed and process issued on December 6, 1901. The complainant brings this suit as a creditor of the Sterling & Smith Com-

pany, for himself and all other creditors of that corporation who are willing to join in the action for the purpose of having the deeds to the banking company and its grantees set aside, and to redeem from them as second mortgagee, claiming the right to do so by reason of the following facts: That on February 14, 1891, Joe Davies executed a mortgage to the Sterling & Smith Company to secure the payment of a debt due from him, subject to the above-described mortgage to the banking company; that at the April term, 1894, in an action instituted by the Sterling & Smith Company for the purpose of foreclosing its mortgage, the chancery court of Chicot county, state of Arkansas, rendered a decree of foreclosure, and ordered the lands to be sold, but neither the banking company nor the trustee in its mortgage were made parties to that suit. On March 18, 1895, the commissioner of the chancery court sold the lands under the decree of the court, and the Sterling & Smith Company became the purchaser of them, subject to the banking company's mortgage; the commissioner made a deed of conveyance to the Sterling & Smith Company, which is filed as an exhibit to the bill, and made a part thereof, which deed was duly approved and confirmed by the court which had, by its decree, authorized him to make the sale; that on August 14, 1899, the Sterling & Smith Company, being insolvent, conveyed these lands by deed to Perry Nugent, "In trust, however, for the benefit of the creditors of the Sterling & Smith Company, with power to lease, mortgage, and sell and to devote the net proceeds to the payment of the debts of the Sterling & Smith Company." Nugent, the trustee, filed the deed for record, but never qualified as assignee in insolvency, as required by the laws of the state of Arkansas. It is further charged that Nugent, as such trustee or assignee, in April, 1900, filed a bill in the chancery court of Chicot county against these same defendants, asking that the sales be set aside for the same reason alleged in this bill, and he be permitted to redeem; that this cause was, upon proper proceedings, removed to this court; that Nugent has since died, and that said suit abated, not having been revived. The prayer of the bill is that an account be taken of what, if anything, is due to defendants for principal and interest under the first mortgage, and also an account of the rents and profits received by the defendants, and, if anything appears to be still due on the mortgage, that the complainant is ready and willing to pay it, and that the conveyances under which defendants claim be canceled and set aside. To this bill defendants demurred, upon two grounds—First, that there is no equity in the bill; and, second, that complainant has been guilty of such laches that a court of equity should grant no relief.

P. C. Dooley, for complainant.

R. E. Craig, for defendant Walter Davies.

H. R. Boyd, for other defendants.

TRIEBER, District Judge (after stating the facts). The failure of Nugent to qualify as assignee, as prescribed by the laws of the state of Arkansas, prevents him from maintaining an action at law for the possession of the assigned estate. *Bartlett v. Teah* (C. C.) 1 Fed. 768; *Teah v. Roth*, 39 Ark. 66; *State v. Dupuy*, 52 Ark. 48, 11 S. W. 964. Yet a trust having been established by the conveyance to him, a court of equity will not let it fail, and will either appoint a new trustee, or permit the beneficiaries, the creditors of the assignor, the Sterling & Smith Company (one of whom the complainant is), to maintain a bill to execute the trust. *Pom. Eq. Jur.* § 1007; *Story, Eq. Jur.* §§ 1060, 1061; *Batesville Inst. v. Kaufman*, 18 Wall. 151, 21 L. Ed. 775; *Adams v. Adams*, 21 Wall. 185, 192, 25 L. Ed. 504; *King v. Donnelly*, 5 Paige, Ch. 46; *Clayton v. Johnson*, 36 Ark. 406, 38 Am. Rep. 40; *Ewing v. Walker*, 60 Ark. 503, 31 S. W. 45; *Memphis Sav. Bank v. Houchens* (C. C. A.) 115 Fed. 96. In *Clay-*

ton v. Johnson, 36 Ark. 406, 38 Am. Rep. 40, the court say: "If he [the assignee] fail to comply with the requirements of the statute, the remedy by application to chancery on the part of the creditors is simple." 36 Ark. 422, 38 Am. Rep. 40.

Nor can the contention of counsel for defendants that the original mortgagor, Joe Davies, is the only person who can maintain an action to redeem, be sustained. The right to redeem in this action is not claimed under a statute, but is purely an equitable action to redeem from one who it is claimed is in possession as a mortgagee. Such a right to redeem may be exercised by assignees or grantees of the mortgagor as fully as by the mortgagor, and upon the same terms and conditions, neither greater nor less. *Moore v. Anders*, 14 Ark. 635, 60 Am. Dec. 551; *Jones v. Matkin*, 118 Ala. 341, 24 South. 242; *Nesbit v. Hanway*, 87 Ind. 400; *Moody v. Funk*, 82 Iowa, 1, 47 N. W. 1008, 31 Am. St. Rep. 455; *Brown v. Bank*, 148 Mass. 300, 19 N. E. 382; *Shouler v. Bonander*, 80 Mich. 531, 45 N. W. 487; *Brewer v. Hyndman*, 18 N. H. 9. The first ground of demurrer is therefore overruled.

The second ground of demurrer pleads laches. Learned counsel for the complainant, in his elaborate and able brief, concedes that a delay of seven years, which is the period of limitation in the state of Arkansas for the recovery of real estate, bars this action, but he ingeniously argues that as according to the allegations in the bill, which the demurrer admits to be true, the deed of the trustee to the banking company is void, its possession under the deed is that of a mortgagee, and not adverse to the mortgagor and those under whom complainant claims. The possession of the banking company, and afterwards its vendees, was under a deed valid on its face, and clearly adverse to the original mortgagor and all parties claiming under him or by any other title. Even if it should, on final hearing, be held that the trustee's deed is void, and that the recitals of strict compliance with the terms of the mortgage and the laws of the state of Arkansas are false, and that the defendants are, for this reason, chargeable as mortgagees in possession, the fact that the defendants have been in open, notorious, and continuous possession, not as mortgagees, but under claim of absolute ownership, under an absolute deed of conveyance, and adversely to all the world, for more than seven years, confers upon them an absolute title against all persons sui juris. Under the laws of Arkansas, as construed by its supreme court, a title by limitation is not only good as a valid defense, but amounts to an investiture of title which may be actively asserted in all respects as effectively as if acquired by deed. *Jacks v. Chaffin*, 34 Ark. 534; *Logan v. Jelks*, Id. 547; *Wilson v. Spring*, 38 Ark. 181; *Crease v. Lawrence*, 48 Ark. 312, 3 S. W. 196.

In *Logan v. Jelks*, 34 Ark. 549, the court, speaking through Mr Justice Eakin, say:

"Conceding the patent from the United States to have been void, it may be, nevertheless, used to give color of title and fix the limits of possession, and a continuous adverse possession under it, or without any color at all, when the limits of possession may be shown for a period of over seven years as against parties whose rights are not saved, will create a title which may be used to maintain an action of ejectment."

As complainant claims its rights under the mortgage of Joe Davies to the Sterling & Smith Company, the statute of limitations, when set in operation against Davies, continued as to his grantees and heirs. *Clarke v. Boorman*, 18 Wall. 493, 21 L. Ed. 904; *Pearsall v. Smith*, 149 U. S. 233, 13 Sup. Ct. 833, 37 L. Ed. 713.

The possession of the banking company, taken on the 27th of November, 1894, was adverse to the mortgagor, his grantees, and every one else. Had the banking company or its trustee taken possession of the premises as mortgagees, without the foreclosure proceeding, then the result would be different, and their possession would not have been adverse. *Jones, Mortg.* § 703. But when there was a foreclosure, although that foreclosure was voidable, and possession was taken under the trustee's deed, this was notice to everybody that the possession was under claim of absolute ownership, and not as a mortgagee, and such a repudiation of the trust as sets the statute of limitations in operation. The following language, used in *Clarke v. Boorman*, 18 Wall. 493, 21 L. Ed. 904, is applicable to this case:

"It may be conceded that, so long as a trustee continues to exercise his powers as trustee in regard to property, he can be called to account in regard to that trust. * * * But when he has closed up his relation to the trust, and no longer claims or exercises any authority under the trust, the principles which lie at the foundation of all statutes of limitation assert themselves in his favor, and time begins to cover his past transactions with her mantle of repose." 18 Wall. 509, 21 L. Ed. 904.

In *Hindman v. O'Connor*, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490, it was held that, although the purchase by the defendant of the property of her ward at a curator's sale was void and constituted her a trustee, the statute of limitations protected her, and that it was set in motion on the day the sale was confirmed by the probate court. 54 Ark. 642, 16 S. W. 1052, 13 L. R. A. 490. See, also, *McGaughey v. Brown*, 46 Ark. 35; *Lammer v. Stoddard*, 103 N. Y. 673, 9 N. E. 328; *Stewart v. Welch*, 41 Ohio St. 500; *Bland v. Fleeman*, 58 Ark. 84, 23 S. W. 4.

Stout v. Rigney, 46 C. C. A. 459, 107 Fed. 545, decided by the circuit court of appeals for the Eighth circuit, is directly in point and conclusive of this cause. As the authorities are carefully reviewed by Judge Thayer in his opinion in that case, it is unnecessary to cite them in this opinion. The learned judge in his opinion says:

"The testimony in the case shows that the trustee's deed, which purported to convey the title in fee to Hamilton De Graw, was duly recorded in Carroll county, Mo., on the day it was executed, to wit, on December 7, 1875, when it became constructive notice to all the world of its contents; that De Graw took possession of the property under said deed on January 1, 1876; that he subsequently conveyed the land as his own to other parties; and that the title, after various transfers, became vested eventually in the defendant Stout. The proof also shows open and notorious possession of the property by De Graw and those claiming under him from January 1, 1876, until the present action was instituted, and that in the meantime there had been no assertion by the complainant of her right to redeem, or any recognition of that right by any of the successive occupants of the land. In view of these facts, we entertain no doubt that De Graw and each of his successors in interest entered into possession of the land claiming to be the absolute owners thereof. The dominion which they respectively exercised over the property is consistent with that view, and

wholly inconsistent with the theory that they assumed possession of the property merely as mortgagees to protect a lien which they had acquired. Nor do we believe it to have been essential to render their possession adverse that they should have notified the complainant that they were holding the land adversely, and would dispute her right to redeem, inasmuch as the entry was made under a deed which purported to convey an absolute title, and which also professed to foreclose her right to redeem." 46 C. C. A. 463, 107 Fed. 549.

The fact that Perry Nugent, the assignee, had instituted a similar suit to redeem for the benefit of the creditors of the Sterling & Smith Company before the seven years had expired, does not aid complainant, and does not bring it within the rule laid down by the supreme court of Arkansas in *Bank v. Magness*, 11 Ark. 344, and *Railway Co. v. Manees*, 49 Ark. 248, 4 S. W. 778, 4 Am. St. Rep. 45, and followed in *Alexander v. Gordon*, 41 C. C. A. 228, 101 Fed. 91.

This is a different action by a different party as complainant, and comes within the rule laid down by the supreme court in *Railroad Co. v. Wyler*, 158 U. S. 292, 15 Sup. Ct. 877, 39 L. Ed. 983. Whether this action can be maintained without making the representative or heirs of Perry Nugent parties has not been raised by the defendants, and, as the demurrer to the bill on the second ground must be sustained, it is unnecessary to determine that question.

The demurrer to the bill is sustained on the second ground, and overruled on the first.

In re WELLHOUSE.

(District Court, N. D. Georgia. March 7, 1902.)

No. 456.

BANKRUPTCY—PETITION TO FORECLOSE MORTGAGE—AMENDMENT.

A mortgagee filed his petition, setting up that he had a mortgage on certain real estate owned by a bankrupt, and in the possession of his trustee, and averring that certain taxes and assessments were due, and praying that the trustee be directed to pay the same, and, further, that "he be allowed to foreclose his mortgage," with an alternative prayer for a sale by the trustee. The trustee answered, setting up that the mortgage was fraudulent, and praying that the matter be referred to a special master to take testimony. *Held*, that petitioner was thereupon entitled to amend by striking from his petition the prayer with reference to foreclosure, and the alternative prayer for sale by the trustee; it not appearing that the trustee would be prejudiced by such action.

In Bankruptcy.

Ellis, Winbush & Ellis, for Louis Strasburger.
Slaton & Phillips, for trustee.

NEWMAN, District Judge. In this case Louis Strasburger brings a petition in which he sets out the fact that he has a mortgage for \$5,000 on certain real estate of the bankrupt, which is now in the possession of the trustee in bankruptcy. He further states that Alvin Strasburger has a mortgage, executed the same day as petitioner's mortgage, for \$3,000, and, further, that Mrs. B. Saloshin has a mortgage for \$3,000. It is further stated that certain taxes and assess-

ments for local improvements are due against the real estate covered by the mortgages named, and that the trustee has in his hands, collected from rents on the property, a sufficient amount to pay the same, and prayed that he be required to do so. By consent of the trustee, an order has been taken authorizing the payment of these taxes and assessments, without prejudice to the rights of the trustee or of the mortgagees as to who shall be held ultimately liable for the same.

The further prayer of the petitioner is this:

"Petitioner prays that he be allowed to foreclose his mortgage on said property, and sell the same to satisfy his claim, and that the court will direct the disposition of the balance of the proceeds of said sale to the payment of the other claims according to their rank and dignity."

And this additional prayer:

"Your petitioner prays that, in the event the court shall determine that the proper proceeding is for the trustee to sell the property, that an order be passed directing the trustee to sell the property free from all incumbrance, and at such sale, if your petitioner shall become the purchaser, that he be required to pay to said trustee only such part of the purchase price as shall be in excess of the principal sum and interest due to him on such mortgage."

And then follows a prayer for general relief.

This has been answered by the trustee, who sets up the fact that the mortgage was executed in 1892, and withheld from record until 1900; that the same is fraudulent, as are the other two mortgages; and that they were made as a part of a scheme to cover up the bankrupt's property and defraud creditors. It is also set up in the answer that the Strasburgers are relatives of Henry Wellhouse; Louis being an uncle, and Alvin a cousin. The answer goes considerably into detail, but substantially it sets up what has been stated. It then concludes:

"The premises considered, your trustee prays that the matters herein set up, as well as the petition of said Strasburger, be referred to a special master, with instructions to take testimony in regard to the bona fides of the said mortgage lien, as well as the state of account between said Louis Strasburger and Henry Wellhouse and Wellhouse & Sons, and that all dealing between them be fully investigated and reported on by such special master."

The petitioner, Louis Strasburger, now presents this petition:

"Comes now Louis Strasburger, and by leave of the court amends his petition filed in the above-stated cause by striking therefrom all the prayers of said petition except the prayer that the trustee be directed to pay, out of rents collected and to be collected by him, all taxes against said property, and said claim for street improvements, and except the prayer that the trustee be served with a rule to show cause as therein stated. And petitioner will ever pray," etc.

Counsel for the trustee object to the allowance of this amendment. The effect of it will be to strike from the petition the prayer concerning foreclosure, and the alternative prayer for sale by the trustee. I am not sure whether this should be classed as an ancillary petition on the equity side of the district court, in bankruptcy, or as a petition in the bankrupt proceeding. It is not sworn to as required by the bankruptcy act, and neither is the answer. Whatever it may be, it would seem that

the same rule should apply to it as would apply to ordinary suits at law and in equity with reference to the right of the plaintiff to dismiss. That rule, as stated in *Fost. Fed. Prac.* § 291, is as follows:

"The plaintiff may dismiss his bill without costs at any time before the defendant's appearance. * * * After appearance, and before decree or decretal order, a plaintiff can usually obtain a dismissal upon payment of the costs of such of the defendants as have appeared, but not if they, or any of them, would be injured thereby. Leave to dismiss may be refused where the defendant claims affirmative relief by cross bill, or by answer in a case where he is entitled to affirmative relief on an answer."

The same rule, I think, is stated by Judge Hammond in *Stevens v. The Railroads* (C. C.) 4 Fed. 97, in the conclusion of his opinion, commencing on page 109, as follows:

"The injury to the defendant must be of a character that deprives him of some substantive rights concerning his defenses not available in a second suit, or that may be endangered by the dismissal, and not the mere inconveniences of double litigation, which, in the eye of the law, would be compensated by costs."

Judge Hammond refers to a number of authorities with reference to the right to dismiss, and discusses them in his opinion, and cites a large number in a note.

Counsel for the petitioner urge that the district court is without jurisdiction to foreclose the mortgage. Without deciding this, it is sufficient to say that I am not satisfied that the trustee will be prejudiced, or his rights to defend against this mortgage in any way affected, by allowing the petitioner to dismiss so much of his proceeding as seeks to foreclose the mortgage. It is doubtful if the prayer is a prayer for foreclosure. The language would seem to indicate that it is a prayer for leave to foreclose, but as it has been considered in argument as a proceeding to foreclose, with the alternative prayer mentioned, it may be so regarded for present purposes.

The petitioner will be allowed to amend by striking so much of his petition as prays for foreclosure of his mortgage.

THE IROQUOIS.

(District Court, N. D. California. February 17, 1902.)

No. 12,364.

1. SEAMEN—INJURY IN SERVICE—DUTY OF SHIP TO MAKE NEAREST PORT.

Loss of time and risk to cargo are matters which cannot properly be permitted to outweigh the duty of a vessel to procure surgical aid for a seaman injured in the service of the vessel without his fault or negligence, when such assistance is reasonably necessary, and cannot be otherwise obtained than by putting into port. The obligation of the ship is discharged only when the master has used reasonable care to provide for the comfort and care of the seaman. Whether he is required to deviate from his course to touch at some port will depend upon the circumstances of the particular case, such as the nature of the injury, the means for treating it on board, and the probability of being able to reach a port in time for his relief. If a person of ordinary judgment would know that the injury was such as to seriously endanger the seaman's life or limb, and that he should have medical or surgical

aid at the earliest possible moment, it is the imperative duty of the master to take the necessary steps to procure such aid, if within his power.

2. SAME.

Libelant, who was a seaman 20 years old, fell to the deck during a gale without negligence on his part, and sustained a simple fracture of the bones of one leg below the knee. There was no surgeon on board, but the master, with the assistance of others, undertook to set the bones, bound the leg in splints, and proceeded on his voyage to San Francisco, where the ship arrived in about 10 weeks, and where libelant was paid off, and went to a hospital. The bones had failed to unite, owing to improper and unskillful treatment, and, because of the lapse of so long a time, could not be made to do so, and it became necessary to amputate the leg. At the time of the injury the ship was southwest of Cape Horn, and 450 miles from a port in the Falkland Islands, where surgical aid could have been obtained, and which the ship could have reached in two or three days, although it would have required four or five weeks, owing to head winds, to put back to such port, and again recover the distance lost. *Held*, that the injury was such that the master must be presumed to have known that the services of a competent surgeon were required to make a recovery reasonably certain, and his duty required him to make an attempt to procure them by putting into port, regardless of the loss of time and expense incident to such deviation.

3. SAME.

The fact that libelant made no objection to the action taken by the master, and did not request to be taken to the nearest port, where he was not consulted, did not prejudice his rights, nor relieve the ship from liability for the failure to perform the duty which his condition demanded.

4. DAMAGES—LOSS OF LEG—AMOUNT OF AWARD.

A seaman 20 years old, strong and in good health, who lost his leg from an injury received in the service of the ship through the failure of the master to put into port where he could obtain surgical attendance, *held* entitled to damages in the sum of \$3,000.

In Admiralty. Libel in rem for damages.

Walter G. Holmes and D. T. Sullivan, for libelant.

Milton Andros, for claimants.

DE HAVEN, District Judge. The libelant was a seaman on the ship *Iroquois*, on a voyage from New York to San Francisco; and on February 23, 1900, when in latitude 56° 50' south, and longitude 67° 36' west, a little south and west of Cape Horn, the libelant, while engaged in furling the mainsail during a gale, accidentally, and without any fault on his part or that of the ship, fell from the mainyard to the deck, in consequence of which he sustained a simple fracture of the bones of the right leg below the knee, and two of his ribs were also broken. The fractured bones and ribs were set by the master of the ship, assisted by the steward and the ship's carpenter. The libelant entirely recovered from the injury to his ribs, but the bones of the leg failed to unite. Neither the master nor any other person on board of the vessel had sufficient knowledge and skill to properly set the leg, or to thereafter give it necessary surgical attention. At the time of the accident the ship was about 480 miles from Port Stanley, the chief port of East Falkland Island, where surgical aid might have been obtained. The wind was fair for that port, and it could have been made in two or three days; but the testimony of the master of the

Iroquois, which I think should be accepted upon that point, was to the effect that it would probably have taken from three to four weeks to have gone to Port Stanley and return to the place of the accident, because in returning the vessel would have had to beat against a head wind. The ship arrived at San Francisco on May 7, 1900, where the voyage ended, and the following day the libelant was paid off, and his connection with the ship terminated. On May 14th he entered the Marine Hospital at San Francisco, where, on the 16th of October following, his leg was amputated below the knee. The broken bones having failed to unite, their ends had become dead, and amputation of the leg was necessary in order to save the life of libelant. The libelant was treated with kindness by the master at all times after the accident, and had all the care that it was possible for one in his situation to receive on board of a vessel at sea, when unattended by any one possessing surgical knowledge and skill. The libelant at no time made any complaint of the condition of his leg, and made no request to be taken to Port Stanley, or to any other port; and he was not asked by the master whether he would like to be taken to some port for treatment, or whether he would be satisfied with such care as could be given upon the ship. Libelant at the time of the accident was 20 years old, and in good health. It appears from the evidence of the physicians who testified that a fracture similar to that sustained by libelant will unite, if properly treated by a surgeon, within three or four weeks after the injury is received, and that broken bones of a person of the age of libelant, other conditions being the same, will unite more readily than those of a person of mature years. The splints put around the leg at the time of the accident were allowed to remain in place without removal of the bandages for five weeks. The medical testimony is to the effect that the splints should have been removed and replaced four or five days after being first put on, and every few days thereafter, and the leg examined at such times for the purpose of determining whether the bones were properly in place and uniting. There is no reason to doubt that if libelant had received proper surgical treatment within a few days after his leg was broken the bones would have united, and there would have been no necessity for its amputation. This action is brought to recover damages against the vessel, the libel alleging that her master was negligent in not immediately after the accident proceeding to Port Stanley, or bearing away to Valparaiso, or some other port on the western coast of South America, where surgical aid could have been obtained, before it was too late to effect a union of the fractured bones, and the question thus presented is to be determined upon the facts above stated.

1. It has been often decided, and may be regarded as a settled principle of admiralty law, entering into and forming a part of the seaman's contract, that it is the duty of the vessel "to provide, for a seaman who becomes sick or wounded or maimed in the discharge of his duty, whether at home or abroad, at sea or on land,—if it be not by his own fault,—suitable care, medicines, and medical treatment, including nursing, diet, and lodging." 2 Pars. Shipp. & Adm. p. 81; *Brown v. Overton*, 1 Spr. 462, Fed. Cas. No. 2,024; *The*

Atlantic, Abb. Adm. 451, Fed. Cas. No. 620; *Whitney v. Olsen*, 47 C. C. A. 331, 108 Fed. 202; *Scarff v. Metcalf*, 107 N. Y. 211, 13 N. E. 796, 1 Am. St. Rep. 807.

The contention of the claimant is that the master of the *Iroquois* was not, under the rule just stated, bound to prolong the voyage three or four weeks by returning to Port Stanley for surgical aid. This contention seems to be supported by the case of *Peterson v. The Chandos* (D. C.) 4 Fed. 645. That was an action brought by a seaman whose leg had been broken in the service of the *Chandos*; the libel alleging that the leg was shortened three inches because it was not properly treated upon the vessel, and that the master was guilty of negligence in not going into Valparaiso, the nearest port, where proper surgical aid and appliances could have been obtained. The court held that the master was not negligent in this respect, saying:

"The burden of proof is upon the libellant to support his allegation that the master failed to do his duty towards him in this respect. If it had been shown that the vessel could, under the circumstances, make about ten miles an hour, and thereby have made Valparaiso in a little more than five or six days, it might have been proper for the master to have gone in there; indeed, I think it would have been his duty to do so. But, as it is, I do not think it would be safe to assume that this port could have been made in less than two weeks, and I do not think that the vessel was under obligation to make that sacrifice of time and risk of cargo for the libellant."

I am unable to concur in all of the views thus expressed by the able judge who pronounced the opinion in that case. I cannot agree to the proposition that sacrifice of time and risk to cargo are matters which can properly be permitted to outweigh the duty of procuring surgical aid for a seaman disabled in the service of a vessel, when such assistance is necessary, and cannot be obtained otherwise than by putting into port. The obligation of the ship is discharged only when the master has used reasonable care in providing for the comfort and cure of the seaman. Whether he is required to deviate from his course, and touch at some port at which the seaman can receive better attention than can be given him upon the vessel, will depend upon the circumstances of the particular case, such, for instance, as the nature of the seaman's sickness or injury, and the probability of being able to reach a port in time for his relief; but it would seem clear that if one of the crew were so ill or severely injured that any one of ordinary judgment, seeing him, would know that his life or limb was in serious danger, and that he ought to have medical or surgical aid at the earliest possible moment, then it would be the imperative duty of the master to take the necessary steps to procure such aid, if within his power. Of course, if the vessel were so far at sea as to make it uncertain whether she could reach the nearest port in time to benefit the sufferer, or if the master had no reason to believe that the sickness or injury was serious, he would not be chargeable with negligence for proceeding on his course, giving to the seaman such care as his knowledge and the conveniences on board the vessel would permit. When there is no physician to consult, the master must necessarily determine, as best he may, whether the injury or sickness is such as to endanger life or limb, and he cannot be charged with negligence simply because he erred in judgment as to the necessity for

putting into port, when the nature of the disease or the extent of the injury was obscure, and its serious character would not have been apparent except to a physician or surgeon; but the duty of the master to exercise a reasonable judgment as to what is necessary to be done for a seaman disabled by sickness or accident, while in the service of the ship is an absolute one. Now, in the case of an injury like that received by the libellant, the master is presumed to know, because the fact is one of common knowledge, that to make a recovery reasonably certain the leg must be set with care, and receive the attention which only a person having some knowledge of surgery can give. In such a case, therefore, when there is no one on board possessing such knowledge, ordinary prudence would suggest that the services of a surgeon should, if possible, be obtained before the time has passed for a perfect union of the broken bones; and it is the duty of the master, without regard to the loss of time, or the expense incident to the deviation, to make an effort to procure such assistance by putting into some port where it can be obtained; and not to do this, if it is probable that a port can be made in time, is a failure to discharge the duty which the vessel owes to a seaman sick or disabled in its service. Certainly, to properly treat such an injury is beyond the ordinary skill of the master, and ought not to be undertaken by him without the consent of the seaman.

Upon the question involved here, the case of *Whitney v. Olsen*, 47 C. C. A. 331, 108 Fed. 292, is in point. That was an action to recover damages for the alleged negligence of the master of the schooner *Uranus*, in not taking the libellant to the nearest port for surgical treatment of an injury received by him at sea. It was shown in that case that the accident occurred when the vessel was about 500 miles from Port Townsend, the nearest port, and the injured seaman requested to be taken there. The master refused, and proceeded on his voyage. In consequence of not receiving surgical treatment in time, the bones of the leg failed to make a proper union, resulting in permanent injury to the leg. Upon this state of facts, it was held that the master was guilty of negligence in not taking the libellant to Port Townsend after the accident, the court saying:

"There might have been additional expense incurred, but this presents no excuse.—'not the least extenuation.' If the master had performed this duty, and taken the injured seaman to Port Townsend for treatment, the vessel and its owners would simply have been subjected to a burden which the law imposes.' No member of the crew could complain or hold the ship responsible in damages for loss of time necessarily incurred in the discharge of its duty. Necessity and humanity, as well as the principles of the admiralty law, would have amply protected the owners of the ship from such loss."

The fact that in that case the injured seaman requested to be taken to the nearest port, while in the present no such request was made, is not sufficient to make the principle upon which that case was decided inapplicable to this. The decision in that case proceeded upon the principle that the seaman, not having consented to what was done by the master of the *Uranus*, was entitled to maintain the action. So here the libellant did not consent to the action of the master of the *Iroquois*. It is not claimed that he did so expressly, and I do not

think there is anything in the evidence from which such consent can be fairly implied. He was not consulted as to his wishes in the matter, and, such being the case, he did not waive his right to be carried to the nearest port for treatment by failing to request that this should be done. The duty devolved upon the master, without such request, to make every reasonable effort to provide the libelant with surgical aid, by taking him where it could be obtained; and the failure to discharge this duty, unless performance was waived by libelant, constitutes negligence for which the ship must respond in damages. The libelant was a minor, and, it may be, ignorant of his rights in the premises, but, whether so or not, the master was in supreme authority, and the libelant entirely dependent upon him for necessary care. The master knew of the risk which libelant would incur by reason of the constant motion of the vessel, and he also knew, or ought to have known, that he was not possessed of sufficient skill to properly treat the leg under conditions which might arise, and which often result from injuries of that character. In a matter of so much importance to him the libelant should have been consulted, and the master ought not to have assumed the responsibility of proceeding upon the voyage, and himself treating the broken leg, without libelant's consent.

2. Upon the question of damages: The libelant cannot follow the occupation of a seaman, but is not disabled from engaging in business or doing such light work as one in his crippled condition is competent to perform. His ability to earn wages, however, is not as great now as before the loss of his leg. Taking this fact into consideration, as well as the pain and suffering he has endured, and the further fact that the injury will be permanent, the libelant is, in my opinion, entitled to recover the sum of \$3,000 and costs, with interest from date of decree until same is satisfied.

In re SEAY et al.

(District Court, N. D. Georgia, W. D. March 7, 1902.)

BANKRUPTCY—PREFERENCES—WHAT CONSTITUTES

A payment on a note given by an insolvent to close up an existing account with a creditor, made within four months of the filing of his petition in bankruptcy, cannot be treated as a preference with respect to a new debt afterwards created by him with the same creditor, and need not be surrendered by the creditor; nor can it be treated as a set-off against the new debt, when he seeks to prove the latter in the bankruptcy proceedings.

In Bankruptcy.

Mayson, Hill & McGill, for claimants.
Slaton & Phillips, for trustee.

NEWMAN, District Judge. This matter is before the court on exceptions to the ruling of the referee. The facts are as follows: The claimants, S. Lowman & Co., presented a claim against the estate of the bankrupt for \$1,955.75, represented by four notes, dated

August 20, 1901, and due November 11, 1901, December 10, 1901, January 10, 1902, and February 10, 1902, respectively; three of said notes being for \$486.50 each, and one for \$496.25. Upon the first of these notes there was a credit of \$100, which amount was admitted to have been paid within four months of the adjudication. Claimants also presented an account for \$1,763 for goods sold the bankrupts during September, 1901. It further appears that claimants held a note given by the bankrupts for \$500, due September 4, 1901, which note was given some time during 1900, and was one of a series of notes which closed up their merchandise account for 1900. This note was paid on September 5, 1901. A petition in voluntary bankruptcy was filed November 28, 1901. The referee held that the payment of \$100 on November 9, 1901, was a preference, and, being subsequent to the sale of any goods by Lowman & Co. to Seay Bros., should be returned before the claim could be allowed, which ruling was conceded to be correct. The referee further held that the payment of \$500 on September 5, 1901, was likewise a preference, but on account of the fact that Lowman & Co. had sold and shipped to Seay Bros., subsequent to this payment, goods in an amount greater than \$500, Lowman & Co. should be allowed to set off the payment of \$500 against their account, and to prove their claim for the balance, \$3,218.75. To this ruling of the referee the claimants except on the ground that the \$500 was paid on a distinct and separate debt, and is not within section 578 of the bankruptcy act. This \$500 note was the last of a series of notes given in 1900 for goods then purchased, and its payment closed that transaction completely. The firm of Lowman & Co. are not seeking to prove any part of that debt at all. They are proving another and distinct debt, created in August and September, 1901.

The question here presented was before the circuit court of appeals for the Second circuit in the case of *In re Abraham Steers Lumber Co.*, 112 Fed. 406. In the opinion of the court, this is said on this subject:

"The case presents another question: The bankrupt was indebted to the creditor upon an open account, and, at a date more than four months previous to the filing of the petition, made a payment upon that account in money, and gave his note for the balance, which payment and note were treated by the creditor as full payment, and the account was balanced upon his books. The debtor was insolvent at the time, but the creditor had no reasonable cause to believe that a preference was intended. Subsequently the bankrupt contracted another debt with the creditor. The question is whether proof of that debt cannot be allowed without a surrender by the creditor of the payment received upon the previous debt. We are of the opinion that the payment notwithstanding it was a preference, being upon a distinct and independent debt from that which is sought to be proved, need not be surrendered by the creditor. We are also of the opinion that the payment cannot be treated as a set-off against the debt sought to be proved. We do not deem it necessary to enlarge upon the reasons for our conclusions in respect to these questions. These are fully discussed in the opinion by Judge Thomas, who decided the case in the court below, and we fully concur in his views."

Even if it is true, as contended by counsel for the trustee, that in this case, as shown in the decision by Judge Thomas in *Re Abraham Steers Lumber Co.* (D. C.) 110 Fed. 738, the facts are not entirely

like the facts here, the opinion of the circuit court of appeals is clear that a payment on one debt is not a preference, under section 57g, as to a distinct and separate debt. If in this case there had been a running account, purchases and payments from time to time, and no distinct closing up of the older debt, the question would be different, and the rule would probably not apply. Opposed to the view of this question taken by the circuit court of appeals for the Second circuit in the Abraham Steers Lumber Company Case, *supra*, is the case *In re Conhaim*, 97 Fed. 923, decided by Judge Hanford, of the district court for the district of Washington. He holds that "the prohibition contained in section 57g is not limited by the terms of the section to the particular debt or chose in action on account of which a preference has been received, but it refers to creditors who have received preferences, and provides that the claim of such creditors shall not be allowed, unless they shall surrender the preferences received," and then quotes from *Loveland*, Bankr. p. 257, in support of this view. In this case the account for merchandise sold in 1900 was closed up by notes, as in the *Abraham Steers Lumber Co. Case*. The last of those notes was paid on September 5, 1901. That debt was then extinguished. As to the claim which Lowman & Co. presented and sought to prove, they had received no preference, except the \$100 which they surrendered.

Following the decision of the circuit court of appeals for the Second circuit, which has been referred to, I think the referee erred in requiring Lowman & Co. to deduct the \$500 received by them in extinguishment of the old debt from the claim which they were seeking to prove. He was right, of course, in requiring payment of the \$100, and in this they acquiesced. The referee is instructed to allow proof of claim without deducting the \$500.

THE MABEL S.

(District Court, D. Connecticut. February 18, 1902.)

TOWAGE—CARE REQUIRED OF TUG—INJURY OF TOW ON SUNKEN ROCK.

The master of a tug, taking his tow into a harbor and to a dock with which he is unfamiliar, is bound to exercise the highest care to protect her from injury, and his failure to either take a pilot or to inquire from persons competent to give him information renders the tug liable for an injury to the tow from striking on a sunken rock, the existence of which was known to navigators familiar with the locality.

In Admiralty. Libel in rem against tug to recover damages for injury to tow.

James J. Macklin, for libelants.
Owen & Sturges, for claimants.

TOWNSEND, District Judge. The material facts herein are undisputed, and are as follows: On March 25, 1900, the steam tug *Mabel S.* took in tow at Hoboken, N. J., the barge *James E. English*, which was loaded with pig iron, and drew about seven feet of water,

to be towed to the Brown Cotton Gin Company's docks in New London, Conn. The tug and tow reached New London on March 26th, where the tug was taken alongside, and they then proceeded up the harbor until they came near to Scott's Wrecking Dock, about a quarter of a mile from destination. Here Capt. Eldredge of the tug hailed one of the tugs of the Scott Wrecking Company, and asked if any one would show him the way into the Brown Cotton Gin Company's dock, or whether there was anything in the way of going there; but, receiving no answer, he proceeded to Scott's dock, and made fast, and he, with Capt. Barker of the tow, went around to the Cotton Gin dock to learn whether there were any obstructions in the way. Capt. Eldredge had been in New London harbor frequently, but had never been to the cotton gin company's dock. On arriving at the office of said company, Capt. Eldredge stated to the man in charge that he had come to get information about the approach to the dock. He sent them to the stationary engineer of the company, who, he said, would tell him (Capt. Eldredge) all about it. This engineer said there was no obstruction, and that schooners drawing more water than this barge beat in and out there; and, having been told by Eldredge that the tide was rising, he said, "Come right in now from where you are, and you won't touch anything." He then told Capt. Eldredge to take the range from Scott's dock over to their dock, which, he said, was the range they all took to come in there. In conclusion, the engineer said: "I want you to understand one thing: That this company will not be responsible for any information I give you. * * * If you come in here, you come at your own risk." The tide was then rising, and the two captains went to get dinner. When the tide was about half flood, they started for the cotton gin company's dock. Capt. Eldredge backed off about 150 feet, then turned, went on till he got the range the engineer had given, and then headed for the cotton gin company's dock, going slowly until the barge struck a rock. He did not make any soundings. The barge received serious injuries, for which damages are claimed herein. The libel charges three acts of negligence against the tug: First, in not avoiding the said rocks, they being well known to navigators on the Thames river and vicinity; second, in that the man in charge of the navigation of the tug was incompetent, and not familiar with the waters of the said Thames river and its tributaries; third, in not towing the said barge through the usual path or channel in said Thames river, and where there was a sufficient depth of water at all times for said barge.

The rock on which the barge struck was not buoyed, or shown on the government chart. Capt. Eldredge had examined the chart, and found soft bottom indicated, and no obstructions shown thereon, before he made any inquiries. Two questions are presented, namely: (1) Was the rock such a well-known obstruction that the master of the tug should be chargeable with knowledge thereof? (2) Was he negligent in failing to get further information? Five witnesses were examined on the first point. There is some confusion in their testimony between the rock on which the barge struck and another rock lying within about 50 feet of it; but this is not material, as either rock would be likely to be an obstruction to such a tug and tow going to the

cotton gin company's dock. Hunt, a steamboat pilot, had known of these obstructions for 14 years. Scott, another pilot, knew of rock there, and had supposed it was all one reef, until after the accident, when he discovered there were two rocks, as aforesaid. Terry, a vessel broker, who is not a licensed pilot, but who, as master of vessels, had frequently gone to the cotton gin company's dock, had never heard of said rock, but he had not been there with a vessel for six years. Batewell, an experienced pilot, had never heard of this obstruction, but he had not taken a vessel to the cotton gin company's dock for 13 years. Colfer, who was there last in 1893 or 1894, always took a circuitous course in going in and out, but had never heard of any obstructions. "The pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. * * * He must also be familiar with all dangers that are permanently located in the course of the river, as sand bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of the changes in the current of the river, of sand bars newly made, of logs or snags or other objects newly presented, against which his vessel might be injured. In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity—his skilled knowledge—very seriously in the course of a long voyage. He should make a few of the first 'trips,' as they are called, after his return, in company with other pilots more familiar with the river." *Atlee v. Union Packet Co.*, 21 Wall. 389, 22 L. Ed. 619. Tested by these requirements, the conduct of the master of the tug was negligent. The pilots familiar with this locality knew of this rock, or of the dangerous reef of which it appeared to be a part. It had been known for some years prior to this accident. Capt. Eldredge either should have known of it, or, never having gone to this dock before, he should have used the highest degree of care to avoid all risk due to his ignorance. If he did not choose, on this, his first trip, to secure the services of a competent pilot, he should at least have taken measures sufficient to acquaint himself with this obstruction, and should have assured himself by competent evidence of a safe passage around them. That he recognized this obligation is indicated by his admissions. He had hailed Capt. Scott's tugs, and failed to get the necessary information. Later, Capt. Barker told him if he would go to Capt. Scott's office he could probably find out the passage, or get some one to take them in. He declined to do this. His testimony on this point is as follows:

"When you go to a man and ask him a simple civil question like that, and he won't answer you [referring to his experience with Scott's tugs], you are disgusted with that man altogether, and you don't want any information from him at all. Q. You took the chances, then, on a landsman—is that it—giving you the information? A. I took the chances on information from men that were connected with the dock,—connected with the wharf,—and supposed to know the water around it and in the approach. Q. You took the chances, then, on getting your information from a land engineer, instead of from a navigator,—is that it? A. Well, that is what I did, because I would rely on it, and have relied on such information in a good many instances

before; yes, sir. Q. Because you were disgusted with the man in the tug-boat, who, you say, refused to answer you,—is that it? A. That is about it. I would not ask them any more about it."

Let a decree be entered for the libelants, and let the case be referred to a commissioner to ascertain the damages suffered.

In re BIG MEADOWS GAS CO.

(District Court, W. D. Pennsylvania. February 25, 1902.)

1. **BANKRUPTCY—PROVABLE CLAIMS—UNLIQUIDATED DEMANDS.**

Where the claim of a petitioning creditor, although made up of different elements, is based upon a single written instrument and the non-performance of its covenants by the alleged bankrupt, it must be treated under the bankruptcy act as a single claim; and, where some of the elements are confessedly unliquidated, the claim as a whole is an unliquidated one, and subject to the limitations incident to a claim of that character.

2. **SAME—PETITIONING CREDITORS—QUALIFICATION.**

Under Bankr. Act 1898, § 63b, providing that "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate," holders of unliquidated claims do not become "creditors" until their claims have been liquidated as therein provided; and hence such claimants, whose claims are not admitted, but disputed, cannot maintain a petition to have the alleged debtor adjudged an involuntary bankrupt.

In Bankruptcy. Sur certificate of W. R. Blair, referee, sitting as special master.

Geo. R. Wallace and Weil & Thorp, for petitioning creditors.

Edwin S. Craig, for alleged bankrupt.

Winternitz & McConahay, for Union Trust Co.

BUFFINGTON, District Judge. The scope of the certificate has, by consent of counsel, been enlarged so as to raise the question whether the petitioning creditors have standing as such. Their claim is based upon a certain written contract for the sale of gas, and it is assumed, for present purposes, that the rights of the parties of the first part to said contract have been assigned to the petitioning creditors, and the obligations of the parties of the second part assumed by the Big Meadows Gas Company. The answer of that company, amongst other things, denied the company was "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits"; averred that, as unliquidated claimants, the petitioners had no standing to file an involuntary petition against it; and alleged the petitioners were, under the contract, indebted to it in the sum of \$60,000. This answer was adopted by the Union Trust Company, a judgment creditor of the Big Meadows Gas Company. Thereupon the court, without prejudice to the right of the Big Meadows Gas Company to question its jurisdiction, appointed the referee a special master to take the testimony, and report to the court findings of fact and law. On the hearing, a question arose as to the production by the Big Meadows Gas

Company of certain of its books. That question was certified to the court for its opinion, and thereupon, by consent of counsel, the scope of the certificate was widened, as noted, so as to raise the question of the standing of the petitioning creditors as such to file this petition. Their claim consists of several elements, but they are all based upon a single contract, and alleged nonperformance thereof. The first element is for \$7,300 for gas furnished and contracted to be paid for as follows: The second party "will, once each month, pay over to said first parties the full equal one-half of all sums and amounts received from the sale of gas, without any reduction or rebates for any cause whatever." The second element is for unliquidated damages averred as follows: "A claim for damages for the breach of said contract by said corporation in failing to take and sell gas continually and without intermission as provided in said contract, and in failing to buy and take gas from the leases mentioned therein so long as said leases continue and gas is found in paying quantities, and in otherwise violating said contract and failing to perform the covenants thereof." In that regard the contract provides as follows: "Second party agrees to operate said line, and to conduct and sell gas continually and without intermission, and in lieu thereof to pay first parties all reasonable damages for his neglect so to do. Second party agrees to buy and take the gas from said leases so long as said leases continue and gas is found in paying quantities, and that if he shall conduct gas from other territory through said line he will pay over to said first party the full equal one-half of the same realized from the sale thereof, the same as if the gas was produced on said leases, and was delivered to said second party by first party at the wells of said leases." The answer in that regard was that the petitioners were indebted to the gas company, under the contract, in "not less than \$60,000.00 for labor, materials, and money paid out for and on behalf of the petitioners in and about the gas wells, operating the same, and the production of gas, and for damages in not furnishing gas in accordance with the contract." It will thus be seen that the petitioners' claim, while made up of several elements, is in fact one based upon a written instrument and nonperformance of its provisions. Now, where one has a claim based upon a written instrument, the bankrupt law treats it as a single claim, provides for its proof as such, and directs filing of the written instrument with the claim. Section 57, subd. "b," says: "Whenever a claim is founded on an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim." The petitioners then having a single claim, based on the elements noted, it is manifest that the confessedly unliquidated character of some of the elements make the claim, as a whole, an unliquidated one, and subject it as such to the limitations and statutory provisions incident to a claim of that kind. How and when is such claim liquidated and proved? Is liquidation its proof, is proof its liquidation, or are the two separate steps? The statute settles this. Subdivision "a" of section 63 defines, under five clauses, claims that may be proved; while subdivision "b" provides for the precedent liquidation, and thereafter for the proof, of unliquidated claims. The provision is: "Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct and

may thereafter be proved and allowed against his estate." It will thus be seen the demand is proved after liquidation, and that prior thereto an application is to be made to the court for direction as to the manner of such liquidation. After careful and deliberate consideration of the question here involved, we have reached the conclusion that the unliquidated demand herein made only becomes a provable debt after it has been judicially ascertained and liquidated in the statutory method set forth. Such construction is in accord with other provisions of the act. The provisions requiring petitioning creditors should have claims aggregating \$500 in excess of all securities evidence that congress felt there should be definite, ascertained claims, and that, too, in excess of all securities, as a foundation on which to base a petition to adjudicate one a bankrupt. Where a claim against another has not been judicially ascertained, and where its validity and certainty are evidenced by no paper, acknowledgment, or other admission of the debtor, it would offend our sense of right to allow such self-asserted claim to constitute sufficient ground for harassing another with a petition in bankruptcy. It will readily be seen that an averred but unfounded claim might be made an effective weapon to enforce an unjust demand, or even to bankrupt a struggling, but solvent, debtor. Of course, no such consequence would result from the case in hand. The property of the company has been sold at sheriff's sale, but the question raised is jurisdictional. It is therefore better for all parties that we should meet such question at the threshold rather than allow the case to proceed only to find at the end the court was without jurisdiction. Being of opinion the petitioners have no standing as petitioning creditors, an order may be prepared dismissing the petition. Our construction of the act finds support in *Beers v. Hanlin*, 3 Am. Bankr. R. 745, 99 Fed. 695; *In re Morales*, 5 Am. Bankr. R. 425, 105 Fed. 761; *In re Henry Ulfelder Clothing Co.*, 3 Am. Bankr. R. 432, 99 Fed. 409; *In re Brinckman*, 4 Am. Bankr. R. 551, 103 Fed. 65; *In re Silverman Bros.*, 4 Am. Bankr. R. 88, 101 Fed. 219; *In re Penny-Van Colliery Co.*, 6 Ch. Div. 477. This view of the case renders it needless for us to pass on the question whether the Big Meadows Gas Company is "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits."

LEERBURGER v. UNITED STATES.

(Circuit Court, S. D. New York. March 11, 1902.)

No. 2,722.

1. CUSTOMS DUTIES—CLASSIFICATION OF GOODS—REVIEW.

On an issue whether silk was the component material of chief value in certain wearing material, so as to make it assessable under paragraph 301 of the act of August 28, 1894, or cotton, so as to make it assessable under paragraph 258, it appeared that at the hearing before the board of general appraisers the government introduced the assistant appraiser's report, to the effect that silk predominated. The importer introduced two witnesses who testified, from a casual examination, that cotton predominated. On behalf of the collector an analysis by a chemist was in-

roduced, to the effect that he had made an examination of two samples cut from the importation, in one of which wool predominated, and in the other silk. *Held*, that as to the two samples a question of fact was made for the board, and that its decision sustaining the classification under paragraph 301 would not be disturbed.

2. SAME.

As to the remaining articles, it did not appear that the appraiser made any analysis before reaching his conclusion. On the other hand, evidence taken in the circuit court corroborated the testimony before the board that cotton predominated. *Held*, that the board's decision, sustaining the classification under paragraph 301, would be reversed.

Appeal by the Importer from a Decision of the Board of United States General Appraisers.

William B. Coughtry, for the importer.

Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The importations in this case consisted of certain articles of ladies' wearing apparel known as "boleros." The collector assessed them for duty under paragraph 301 of the act of August 28, 1894, as wearing apparel, silk being the component material of chief value. The importer protested insisting that the articles imported should have been classified under paragraph 258 of the same act as wearing apparel of which cotton is the component of chief value. The sole question here is one of fact, whether cotton or silk is the component of chief value. A finding that cotton is the component of chief value will lead to a reversal of the board of general appraisers. A finding that silk is the component of chief value will lead to an affirmation.

It appears that at the hearing before the board the government introduced the report of the assistant appraiser to the effect that silk was the component of chief value. The importer introduced two witnesses who testified from a casual examination of the goods that in their opinion cotton largely predominated and was the component of chief value. On behalf of the collector an analysis by Chemist Streuli was introduced to the effect that he had made an examination of two samples cut from the importation, known as 1,062 and 1,088, in one of which, namely, 1,062, he found wool was the component of chief value, and in the other, 1,088, that silk was the component of chief value. Without stopping to consider upon which side the evidence preponderates it is entirely clear that as to these two samples there was a question of fact presented to the board, and under the rule early established in this circuit the court will not be justified in setting aside the finding of the board on a question of fact, there being evidence to sustain the finding. The rule in such circumstances is analogous to the rule which obtains where the court is called upon to review the finding of fact of a referee or the verdict of a jury. The finding should not be disturbed unless the court is convinced that there was no evidence to sustain it, or that it was clearly against the weight of evidence.

As to the remaining articles involved in this appeal there is no evidence whatever to sustain the finding of the board except the report of the assistant appraiser, which is a simple statement by the appraiser that he has examined the goods and finds that silk is the component of chief

value. There is no evidence that the appraiser made an analysis reaching his conclusion. On the other hand there were two witnesses examined before the board, and since their decision evidence has been taken in this court, the testimony being that of a witness who was examined before the board, and also of Mr. Leerburger, who was examined. The new testimony corroborates the testimony before the board, that as to these importations cotton was the component of value and very largely predominated the silk. In other words, the samples not examined by the chemist the evidence is practically undisputed that cotton is the component of chief value.

Therefore, as to all of the importations involved in this appeal the ones numbered 1,062 and 1,088, the decision of the board of appraisers is reversed, and as to those two, the decision is affirmed.

In re STEGAR.

(District Court, N. D. Alabama, N. D. January 23, 1902.)

BANKRUPTCY—RIGHT TO FILE VOLUNTARY PETITION—PENDENCY OF INVOLUNTARY PROCEEDING.

The filing of a petition in involuntary bankruptcy by creditors which no action has been taken and to which the defendant has not appeared, does not debar him from his right to thereafter file a voluntary petition, the two being in different rights; and in such case the adjudication will be made in the voluntary proceedings, but the rights of petitioning creditors will be protected by staying their proceedings, permitting them to prove their costs and expenses against the estate, reserving to them the right to bring forward their petition if frequently found necessary to protect rights which cannot be saved in voluntary proceedings. The right will further be reserved to creditors to prove their claims and receive dividends in the voluntary proceedings, without prejudice to their rights under the creditors' petition, should further proceedings be taken thereon, all such orders being within the equity powers of the court.

In Bankruptcy. On question certified by referee.

On the 11th day of January, 1902, J. A. Anderson & Co. et al. filed a petition in bankruptcy against Reuben Stegar. A subpoena was issued, but not served. Three days afterwards, Stegar, not having appeared in the involuntary proceeding, filed a voluntary petition, which, in the absence of a judge in the Middle district, was referred to the referee for adjudication. When the matter came on to be heard, the petitioning creditors pleaded the pendency of the prior involuntary proceeding in abatement of the subsequent voluntary proceeding, and insisted that the referee make an order accordingly. Stegar insisted, on the other hand, that the referee proceed to adjudication upon his voluntary petition. The referee certified the case to the court for instructions.

Cooper & Foster, for petitioning creditors.
James Pride, for respondent.

JONES, District Judge. The object of the law in giving a debtor the right to force his insolvent debtor into bankruptcy is to secure the just distribution of the insolvent's estate among creditors. If petitioning creditors obtain this result, they cannot complain, since as their rights are fully protected, that the distribution, instead

effected on the creditor's petition, is accomplished upon the voluntary petition of the debtor. Ordinarily, adjudication on the debtor's own petition is the better mode, since it is quicker, less expensive, and less likely to lead to delay and unnecessary litigation. Why, then, in this case, should not the cost and delay of litigation upon the prior involuntary proceeding be avoided by adjudication which follows as matter of course under the voluntary petition? Nothing, so far as now appears, would be gained by adjudication on an involuntary proceeding, which could not be had on an adjudication under the voluntary petition; while the estate, if administered under the involuntary proceeding, will be burdened by cost, expense, and useless litigation, which would be avoided if adjudication passed under the voluntary proceeding. On the other hand, if the involuntary proceeding can be defeated, nothing will be effected except profitless litigation and delay, and, it may be, damage to creditors. Manifestly, therefore, it is not to the advantage of creditors to press the involuntary proceeding further, unless it should become necessary to enforce some right which could not be saved under adjudication on the voluntary petition.

Creditors, by commencing the involuntary proceeding, incur liability for costs and attorneys' fees, and, if the petition be wrongfully maintained, for damages. They also get in position to avoid preferences and transfers which might not be assailable on the adjudication under a later voluntary petition. The court cannot deprive petitioning creditors of these rights, or enlarge their liabilities, by dismissing the involuntary proceeding in order to administer the estate under a voluntary petition. How, then, are the rights of petitioning creditors to be saved, if they are not allowed to proceed, and the administration of the insolvent estate is had under the insolvent's voluntary petition, subsequently filed?

A debtor who, without appearing in an involuntary proceeding, subsequently files a voluntary petition, upon which he is adjudged a bankrupt, cannot complain of the filing of the involuntary petition. The court would never dismiss the creditor's petition under such circumstances; and unless the petition were dismissed, or petitioners withdrew it, there could not, under the plain terms of the bankrupt act, be any liability to the defendant. This liability out of the way, it would be in to save the creditors harmless as to costs and attorneys' fees. This is easily effected by directing an adjudication on the voluntary petition, staying the involuntary proceeding in the meanwhile, reserving to petitioning creditors the right to prove their costs and expenditures under the adjudication on the voluntary petition, with leave to bring forward the involuntary petition if subsequently it be found necessary to protect rights which could not be saved by adjudication on the voluntary petition. Such a decree, with further leave to creditors to prove their claims under the adjudication on the earlier involuntary proceeding, if it became necessary to bring it forward, notwithstanding such claims may have been proved, or dividends have been accepted, in the proceedings on the voluntary petition, would thereby secure every possible right of the petitioning creditors. It is the power of the court of bankruptcy to make such decrees

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there can be no doubt. Its power to mold its decrees upon petitions is as broad and flexible as that of a court of equity when petitions were pending there. There might, of course, be case where a debtor, after going so far as to begin the trial of the issue of an involuntary petition, would properly be held to waive his right to file, or to proceed upon, his voluntary petition, if an involuntary proceeding has been tried and determined. Otherwise, however, it is true that the debtor has the right to avail himself of the benefits of the bankrupt law on his own petition, and that his petition cannot be forfeited or rendered ineffectual merely because the creditors' petition is first filed and pending undetermined when the debtor files his petition. A debtor has the undoubted legal right to file the involuntary proceeding, which must necessarily be based upon some violation of the act, of which the debtor may not be guilty, and is therefore unwilling to be adjudged guilty, although he would have his estate distributed among creditors on his own petition. A debtor is not bound to postpone this right because of the pendency of an involuntary proceeding, and may, unless he has waived the right, push forward the involuntary proceeding, and at the same time contest the creditors' petition. A voluntary and involuntary petition are filed in different proceedings, based on different grounds, though the effect of the adjudication may be the same in each proceeding. The two petitions not being based in the same right, nor based on the same cause, and an adverse judgment to the petitioning creditors being no bar to an adjudication upon the voluntary proceeding, the mere pendency of a prior involuntary petition, upon which there has been neither hearing nor adjudication, is not ground for abatement of the subsequent voluntary petition. The decisions, discussing the proper practice in cases like this, are not full, and are in conflict. The weight of authority supports the practice I have outlined, which, on business considerations, commends itself to courts of bankruptcy in the administration of estates.

The following order will be entered: On consideration of the petition certified herein by the referee, it is ordered and adjudged as follows: (1) The referee will proceed to adjudicate Reuben Stegar a bankrupt on his own petition, and administer the estate thereunder as provided by law. (2) Until the further order of the court, all proceedings be stayed upon the petition filed by J. A. Anderson & Co. on the 11th day of January, 1902, except service of subpoena on the alleged bankrupt. (3) The adjudication of bankruptcy against Stegar on his own petition shall not prejudice any right of petitioning creditors by the filing of their prior petition, nor may they apply, at any time after the adjudication on the bankrupt's petition, to bring forward their petition, if found necessary to protect rights of creditors which cannot be saved under the adjudication on the voluntary petition. (4) The proving of claims, and the allowance of dividends, under the adjudication upon the bankrupt's voluntary petition, shall not be deemed a bar or waiver of the right of petitioning creditors to prove their claims under an adjudication on the involuntary petition, if such should be made; and petitioning creditors may sue against, and be allowed out of, the assets of the bankrupt, in the administration upon his voluntary petition, their reasonable

in this behalf expended; and to that end the two petitions may be consolidated and treated as one proceeding, if it become necessary for the further progress of this matter.

CELY et al. v. GRIFFIN et al.

(Circuit Court, D. South Carolina. February 25, 1902.)

PROCESS—FEDERAL COURTS—SERVICE IN OTHER DISTRICTS.

Except in suits of a local nature to enforce a lien or claim against property within the district, and upon a proper order, or in suits for infringement of a patent, there is no authority of law for the service of process issued by a circuit court of the United States outside of the district.

FEDERAL COURTS—JURISDICTION.

A suit in equity to set aside a contract for the sale of a patent involves no federal question, and cannot be maintained in a federal court, where an indispensable party defendant is a citizen of the same state as the complainant.

Equity. On motion to quash the return and vacate service of process.

Charles Koonce, Jr., for the motion.

A. Morgan and Carey & McCullough, opposed.

WILKINSON, Circuit Judge. This case comes up on a motion to quash the marshal's return, and vacate and set aside service of process on Koonce, Leslie & Co., Samuel C. Koonce, and John S. Leslie, each of them. Notice of the motion was given to, and same accepted by, counsel for complainants. The day and hour fixed for the hearing was 10 o'clock a. m. for this 25th February, 1902. Counsel for the motion appeared at 10 a. m., but, the counsel for complainant being absent, he waited until 1 p. m., after the arrival of all railroad trains which reach Charleston in the morning hours. The motion was then made and heard, defendants having put in a special appearance for this purpose.

The subpoena ad respondendum was issued from this court. The complainants making this motion are citizens and residents of the state of Pennsylvania, and were served at their homes in Pennsylvania by the marshal of the Western district of that state. The general rule of the circuit court for each district sits in and for that district, that the process of a circuit court cannot be served without the direction in which it is established without the special authority of law. See *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093. The only exception where this rule is not in force is when there is suit in equity commenced in any court in the United States to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, and one or more of the defendants is not an inhabitant of or found within said district, the court can make an order requiring such defendant to appear, answer, or demur on a day certain,—said order to be served on said absent defendant, if practicable; if not, to be published. Rev. St. U. S. § 738; and, in the case of an action brought for the infringement of a patent,

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Noonan v. Athletic Club (C. C.) 75 Fed. 334. The bill in t seeks an injunction against the sale of a patent right in whi plainants allege they are co-owners with defendants.

2. The defendants, making this motion, claim their privileg zens of the Western district of Pennsylvania, to be sued onl district of their residence. This right is unquestionable, un act of 1887-88 (25 Stat. 433, § 1). "No civil suit shall be before either of said courts [the circuit or district courts] aga person by any original process or proceeding in any other distr that whereof he is an inhabitant."

3. Examining the bill, it is brought by H. W. Cely and Cely, citizens of the district and state of South Carolina, again Griffin, a citizen of the district and state of South Carolina, a defendants, among them R. F. Lindsay and J. L. Merritt, both alleged to be of Greenville, in the district and state of South C Examining the bill, it will be seen that J. W. Griffin is a pensable party to the suit. The prayer of the bill is to set contract made by Griffin with his codefendant Samuel C. So he cannot be eliminated from the suit. As this court, ex federal questions, cannot entertain jurisdiction, except in contr between citizens of different states, it cannot entertain jurisd a controversy between two citizens of South Carolina. In th court every person complainant must be able to sue, and ever defendant must be liable to be sued, in the federal court. Cl v. Meredith, 21 How. 489, 16 L. Ed. 201. When one of the defendants in the circuit court, who is an indispensable party, zen of the same state as the plaintiffs, the court can have no tion on the ground of citizenship. Peper v. Fordyce, 119 U 7 Sup. Ct. 287, 30 L. Ed. 435. There is no federal question case. True, it is with regard to a patent. But a federal qu presented only when it is to the infringement of a patent, a then the suit can only be brought in the district of the resi the defendant, or in any district in which the defendant sh committed acts of infringement, and shall have a regular an lished place of business. Act 1897 (29 Stat. 695); Desty, Fe § 26a. See McMullan v. Bowers, 102 Fed. 494, 42 C. C. Marsh v. Nichols, 140 U. S. 344, 11 Sup. Ct. 798, 35 L. Ed. .

The motion is granted. Let an order be entered quash service of the subpoena, and dismissing the bill for want of jur without prejudice.

THE ANCHORIA.

(District Court, S. D. New York. March 19, 1902.)

1. SHIPS—LOADING APPLIANCES—CONDITION—DUTY OF OWNER.

It is the duty of a shipowner to keep his ship in such cond the loading appliances may be reasonably used without being catch on obstructions, and endanger a gangway man handling

2. SAME—DEFECTS—DUTY TO WARN EMPLOYEES.

Where several rungs of a stationary ladder on the ship proj yond the side of the ladder, so that the loading appliances w

catch on them, and endanger the gangway man handling the whip. He had no knowledge of the danger, it was the owner's duty to give notice, so that he could refrain from exposing himself to the peril he so wished.

E—SUFFICIENCY OF EVIDENCE.

The load on reaching the hold was received by an employé working there, who knew the condition of the ladder and the danger from the projecting rungs. He testified that the load was unslung a little forward of the ladder, and the sling hooked up and taken by him to the framing of the hatch, out of danger from the ladder, etc., and he gave unsatisfactory explanation as to why it caught on the rung. Testimony on the part of the claimant showed that the load was unloaded forward of the ladder, and in close proximity to it. Held to show that the load was unslung nearer the ladder than the employé was willing to admit, and that he negligently failed to keep it away from the projecting rungs.

E—DAMAGES—AMOUNT.

An employé injured by reason of a defective ladder on a ship was unconscious for several days. Among other wounds, he suffered a compound fracture of his right leg, necessitating several painful operations, a result of which his leg was shortened about three inches, and remained stiff. He was permanently disabled for anything but very light work, which he could probably do only when sitting, and such work appeared difficult to obtain. He had been a healthy man, 44 years old, earning \$3 a day, and \$5 for night work, and had steady employment. Held, that \$6,000 damages was reasonable.

E—NEGLIGENCE OF FELLOW SERVANT.

The contributory negligence of a fellow servant was no defense.

Admiralty.

ford H. Smith, for libellant.

derick E. Fishel (H. Snowden Marshall, advocate), for claimant.

AMS, District Judge. This is an action brought to recover damages for personal injuries suffered by the libellant while working on the Steamship Anchoria, on the 11th day of August, 1899, between 10 o'clock in the morning. The steamer was being loaded at New York with lumber and iron, and the libellant was a gangway man in charge of the forward whip of No. 2 hatch. A span of rope was between the masts of the vessel, about 25 feet above the deck, was used to support four whips, two for hatch No. 2, and two for hatch No. 3. The whips were purchases or falls formed of ropes and chains, with chain slings at the ends. They were operated by steam engines. The whips of No. 2 hatch at the time in question were being used to load iron, and it was the libellant's duty to stand on the main deck at the forward part of the hatch, and guide the whip, so that the cargo in the sling would not strike the hatch coamings or the decks as it descended with the load, and the sling would not swing as it came up empty. While he was performing this duty, and while he had guided a draft of iron into the lower hold, the bight of the whip in returning caught on a projecting rung of a stationary iron beam running from the bottom of the hold to the under side of the hatch above, about a foot forward of the coaming of the hatch. The

concurrent negligence of master and fellow servant, see note to Maupin v. Way Co., 40 C. C. A. 236.

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effect of the catching was to instantly cause a tension on the fall of the libelant held, and jerk him from his place on the deck of the hatch, where he fell to the bottom of the hold, a distance of about 10 feet, causing the injuries for which he sues.

The ladder was about a foot and a half wide, and consisted of upright sidepieces, with 10 or 12 rungs, which ran through the sidepieces, and originally were welded smooth on the outside, but the starboard or inshore sidepiece of the ladder had in some places become bent towards the port side of the vessel, so that some of the rungs projected from 1½ to 3 inches on the inshore side. It was upon one of these that the sling caught. The ladder had been used in this way for several months or a year, to the knowledge of all who had occasion to use the hold, including the agent of the steamer who employed the men who worked at loading and unloading. No defense is interposed to the libelant's claim with respect to the condition of the ladder, but it was urged that the accident was the result of negligence on the part of the libelant and his servants, in that they knew, or should have known, the condition of the ladder, and should have guarded against the sling catching on the rung.

The libelant was new to the work at this particular place, and was not notified or aware of the condition of the ladder. Nor was he while doing the work, in such a position that he should, in the exercise of ordinary care, have observed its defective condition. It was the duty of the owner to keep the ship in such order that the appliances could be reasonably used without liability to catch on obstructions which would become sources of danger to the gangway man handling the whip. And, in the event of the existence of such a danger which was unknown to the gangway man, it was incumbent on the owner to give him notice to that effect in order that he might refrain from exposing himself to the peril, if he should be unable to take the risk. In neither respect was the duty of the owner fulfilled, and I hold that there was negligence for which the owner is liable, and that there was no contributory negligence on the part of the libelant.

It appears that the libelant and the workmen in the hold were employed by the same master and were engaged in a common task. When this draft reached the hold, it was received by the workmen working there in receiving the cargo named White, who had been familiar with the condition of the ladder some months before the accident, and had known of the danger from the projecting rungs when the cargo was being loaded or unloaded. He said that this draft of iron was unslung a little forward of the ladder, and the sling hooked on to the ladder by him to the coaming of the hatch out of danger from the ladder, and that he then directed the winchman to go ahead, and the winchman turned to walk back of the hatch, when the libelant fell; that the libelant noticed the sling caught on the projecting rung. He attempted to account for this by a motion of the span, incident to its use in pulling several whips which caused it to sway; but such explanation is not satisfactory. This witness said the iron was to be stowed in the hold as far forward as possible. Testimony on the part of the claimant

the draft was unloaded forward of the ladder and in close proximity to it. I think that the draft was unslung nearer the ladder than he was willing to admit, and that he negligently omitted to take proper precautions to keep it away from the projecting rungs.

The libellant's injuries were concededly very serious. He was unconscious for several days after the accident. Among other severe and painful wounds, he received a compound fracture of his right leg, requiring several operations necessary, during which he suffered great agony. As a result of the operations, the leg was shortened three inches, and remained stiff. In consequence of his injury, he became permanently disabled for any but very light work, and he has been, and probably will be, only able to do when sitting. It appears that such work is difficult to obtain. At the time of the accident, he was a healthy man of 44 years of age, and earning \$3 per day for day work, and \$5 for night work, with steady employment. He is entitled to \$6,000 a reasonable allowance for his damages, under the circumstances.

The contributory negligence of a fellow servant is not a defense in cases of this kind, under the authorities. *Railway Co. v. Cummings*, 107 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; *Steamship Co. v. Carey*, 107 U. S. 245, 7 Sup. Ct. 1360, 30 L. Ed. 354; *Young v. Railway Co.*, 160 Fed. 46; *Railway Co. v. Young*, 1 C. C. A. 428, 49 Fed. 92; *Kennedy v. Grace & Hyde Co. (C. C.)* 92 Fed. 116; *Thomas*, 108 Fed. 908.

Verdict for libellant for \$6,000, with interest from August 7, 1901, date of filing the libel, and costs.

THE MISSISSIPPI.

(District Court, S. D. New York. February 28, 1902.)

CARRIAGE—DAMAGE TO CARGO—NEGLIGENT STOWAGE.

A ship is liable for damage to cargo resulting from negligence in stowage, or in failing to properly cover a hatch to prevent leakage, notwithstanding any stipulations to the contrary in the bills of lading; nor is it relieved from such liability by the provisions of the Harter act.

GLYCERIN ABOVE DRY GOODS—INSUFFICIENT HATCH COVERING.

A steamship, on a voyage from London to New York, stowed a quantity of glycerin in iron drums in the orlop deck of a hold, while on the lower deck was a quantity of furs and skins. The drums were not properly fastened as to prevent fore and aft motion, or to prevent their moving vertically in heavy weather; nor was the hatch of the orlop deck battened and calked, as were the hatches above. The ship encountered rough weather, and at the end of the voyage it was found that some of the drums had been chafed through and were empty, and that a quantity of the glycerin had washed over the coamings of the hatch, and damaged the goods below. *Held*, that in view of the dangerous character of glycerin as a cargo, owing to the frailty of the packages and the consequent liability of leakage, it was incumbent on the ship, if it stowed it above other cargo, to take proper precautions, both by securing it from shifting in heavy weather, and by rendering the hatch leading below absolutely tight, and its failure to do so was negligence, which rendered it liable for the resulting damage to the cargo below.

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In Admiralty. Suit to recover for damage to cargo.

Black & Kneeland, for libelants.

Convers & Kirlin, for claimant.

ADAMS, District Judge. Certain goods of the libelants, consisting of 45 bales of hatters' furs and skins, were shipped on the *Mississippi* from London in February, 1897, consigned to the libelants in New York. The vessel sailed on February 5th, and arrived in New York on February 20th. These goods were injured by contact with glycerin, a part of the steamer's cargo, which escaped during the voyage from the iron drums in which it was contained, and this was brought to recover the damages resulting therefrom. The contention of the libelants is that the injury was caused by fault and negligence on the part of the steamer in the loading, stowage, care, and care of the cargo, in that (1) the iron drums containing the glycerin were not properly stowed, dunnaged, and secured; (2) the drums of glycerin were improperly stowed in the orlop deck above the libelants' cargo; and (3) the orlop deck hatch was not tight. The claimant denies any negligence, and asserts that the vessel met with a severe storm and stress of wind on the voyage, which caused the iron drums to chafe against each other and leak, and that the injury was caused through the perils of the sea, and insufficient packages containing glycerin, which causes of injury were covered by exceptions in the bills of lading. It alleges that the deck hatch was secured in a proper way, and the leakage was in consequence of the tarpaulin covering being torn by the dunnage, which was broken loose by the extra action of the sea. A further defense is interposed, to the effect that it was provided in the bills of lading the shipowner was not liable for any damage to the goods on board capable of being covered by insurance, which was the case here; the goods having been insured. The Harter act was also pleaded.

The evidence establishes great severity of the weather on the voyage, and, with respect to the cargo, that glycerin was stowed in the orlop deck of No. 1 hold, and the damaged cargo in No. 1 lower hold, under the glycerin. When the vessel arrived in New York, the court found that a number of the drums were chafed through and the glycerin having escaped so that it was from six inches to six feet deep on the orlop deck, and had washed over the coamings of the hatch of that deck upon the cargo in the square of the hatch. The drums had been dunnaged and chocked when stowed, but were not lashed or fastened down to prevent a vertical movement in heavy weather. Nor were the drums protected by a bulkhead to prevent fore and aft motion. The dunnage and chocks were not sufficient to secure the drums, and they became loose. The dunnage and chocks being broken up in small pieces and strewn all over the deck, forming a pulpy mass, which got into the scupper pipes, preventing the escape of the glycerin in that way to the bilges of the ship, and thus increasing the washing of the glycerin over the coamings of the hatch. It also appears that glycerin is considered a dangerous cargo, especially liable to leakage from the frailty of the packages, and for such

udent to place it in the bottom of the carrying vessel. In this was the last of the cargo put into the hatch in question, and, of being in the bottom of the ship, was on the deck above. In such circumstances, being placed above dry cargo without anything on top to hold it in place, it was especially incumbent upon the vessel to adopt proper devices to meet the contingencies of the voyage both by securing the cargo from shifting in heavy weather, and by making the hatch leading below absolutely tight. In neither of these respects was the duty of the ship fulfilled. Only the usual method of stowing was adopted. The hatch, though covered with a plank, was not battened and calked, as were the hatches above, but without any proper means of averting danger in case of the leakage of the glycerin, excepting by the drainage scuppers, which would be insufficient.

It was urged with great vigor by the claimant that the libelants have not sustained the burden of proof to show negligence; but I think the facts and circumstances, in connection with the testimony of the ship's officers, and when the matter was fresh in their minds, are sufficiently convincing that proper precautions were not taken by the vessel. If I am correct in the findings of negligent stowage and a leaky hatch, the verdict is conclusive of the case, without regard to the other questions involved. *The Niagara*, 16 Blatchf. 516, 528, 529, Fed. Cas. No. 10,345; *The Cimbria* (D. C.) 13 Fed. 89; *The Bitterne* (D. C.) 35 Fed. 27; *The Dunbritton*, 19 C. C. A. 449, 73 Fed. 352, 366; *The Albatross* (D. C.) 79 Fed. 91; *Id.*, 26 C. C. A. 372, 80 Fed. 1003; *Grey* (D. C.) 92 Fed. 667; *Knott v. Worsted Mills*, 179 U. S. 21, 21 Sup. Ct. 30, 45 L. Ed. 90.

Decree for libelants, with an order of reference.

IN RE BURNS.

Supreme Court, W. D. Arkansas. Ft. Smith Division. March 3, 1902.)

CRIMINAL LAW—SENTENCE—CONFORMITY TO VERDICT.

In criminal cases the judgment must strictly conform to the verdict, and nothing can be added by intendment.

—INSUFFICIENCY OF VERDICT.

Under the decisions of the supreme court of Arkansas, construing the criminal laws of the state prior to their adoption by congress in the Indian Territory, a person indicted for maiming, under Mansf. Dig. § 4 (Ind. T. Ann. St. § 937), may be convicted and sentenced under section 1566 (Ind. T. Ann. St. § 909), which provides for the punishment of assault "with intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant disposition"; and a verdict of guilty of an "aggravated assault and battery" is sufficient to warrant a sentence under such section, the words "aggravated assault" having acquired a technical meaning in the state as dominating the offense therein defined; but a verdict finding defendant guilty of "an assault with a deadly weapon" is not, since it fails to include the essential elements of the offense, and such a verdict warrants the imposition of sentence for no offense greater than assault.

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B. HABEAS CORPUS—EXCESSIVE SENTENCE—RIGHT TO DISCHARGE.

Where a sentence has been imposed which neither the verdict statute authorized the defendant is entitled to discharge on a habeas corpus.

On Petition for Writ of Habeas Corpus and Return Thereto.

W. H. Korniegay, for the petitioner.

James K. Barnes, U. S. Dist. Atty.

ROGERS, District Judge. The petitioner John W. Burns dictated in the United States court for the Northern district of the Territory for the crime of maiming, and upon plea of not guilty the following verdict was rendered: "We, the jury, find defendant guilty of an assault with a deadly weapon. J. W. Birdman,"—and was sentenced by the court, upon that verdict, to be imprisoned in the United States jail situated at Ft. Smith, Ark., to pay a fine of \$200 and costs. An exception was taken to that part of that judgment upon the foregoing verdict. The indictment charged in substance (omitting formal parts), that said Burns did, feloniously and unlawfully, and with his malice aforethought, discharge and shoot a certain gun loaded with gunpowder and leaden bullets, to wit: against, and into the right leg and body of one Homer Lay, then and there, by means of the said gun so loaded with gunpowder and leaden bullets as aforesaid, so discharged and shot off as aforesaid towards, against, and into the right leg and body of him the said Homer Lay as aforesaid, wound and disable him, the said Homer Lay, contrary to the form of the statute, etc.

By act of congress certain statutes of Arkansas were adopted for the Indian Territory, and among others the statute regulating the crime of maiming. Section 1594 of Mansfield's Digest of the Statutes of Arkansas (section 937, Ind. T. Ann. St.) reads as follows:

"If any person shall, from malice aforethought, shoot, stab, cut or wound in any manner wound and disable any person, he shall be deemed guilty of maiming."

It could not be said that the verdict in this case was rendered under that statute, but it was rendered under section 1566 Mansf. Dig. (section 909, Ind. T. Ann. St.), under the head of "Assault—Batteries—Aggravated Assault—Assault with Intent to Murder," which reads as follows:

"If any person assault another, with intent to inflict upon the person another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant heart, he shall be adjudged guilty of a misdemeanor, and, on conviction, shall be fined in any sum not less than fifty nor exceeding one thousand dollars, and imprisoned not exceeding one year."

It is provided by section 1564, Mansf. Dig. (sections 907, 908, Ind. T. Ann. St.), that simple assault shall be punished by fine not exceeding \$100, and by the following section the crime of assault and battery is punished by fine not exceeding two hundred dollars; "provided this section shall not be construed to apply to assault and battery of an aggravated character." All these sections of the statute

put in force, by the act of congress referred to, in the Indian Territory, and were in force when the foregoing verdict was rendered.

In *Guest v. State*, 19 Ark. 405, Guest was indicted under the same statute under which the defendant in the case at bar was indicted, and a verdict was rendered of "an aggravated assault and battery." In that case it was held that:

"Upon an indictment for a felony, the accused may be convicted of a misdemeanor where both offenses belong to the same generic class, where the commission of the higher may involve the commission of the lower offense, and where the indictment for the higher offense contains all these substantive allegations necessary to let in proof of the misdemeanor."

See, also, *Cameron v. State*, 13 Ark. 712; *State v. Cryer*, 20 Ark. 64; *State v. Nichols*, 38 Ark. 551; *Davis v. State*, 45 Ark. 359.

I do not doubt the soundness of the principle announced in *Guest v. State*, *supra*, and especially is that true where a statute is in force such as is found in sections 2288 and 2289 of Mansfield's Digest of the Statutes of Arkansas (also in force in the Indian Territory,—sections 1631, 1632, Ind. T. Ann. St.), where it is provided, in substance, that all injuries to the person, by maiming, wounding by an assault, whether malicious or from sudden passion, and whether attended or not with intent to kill, shall be deemed degrees of the same offense, and where one is indicted for an offense consisting of different degrees he may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment. If, therefore, the jury in the case at bar thought that the defendant was guilty of an "aggravated assault and battery," that verdict would have sustained the sentence imposed in this case. But the jury did not find that the defendant was guilty of an "aggravated assault and battery." The jury found that he was guilty of an "assault with a deadly weapon." Is the one equivalent to the other? clearly not. The words "aggravated assault" have come to have a specific and definite meaning under the laws of Arkansas, and that was recognized in the case of *Guest v. State*. *Guest v. State*, *supra*, was decided prior to the passage of the act of congress adopting parts of Mansfield's Digest as the law of the Indian Territory, and by the decision of that court, interpreting its own statute, the courts in the Indian Territory should be bound in interpreting the same statute.

Section 1566 of Mansfield's Digest was taken from the Revised Statutes, and was enacted in 1838, and has been in force in Arkansas ever since, no change having ever taken place in it, except in the original act the crime was called a "high misdemeanor," whereas in the present statute, as adopted in the Indian Territory, the word "high" is omitted. But the preceding section of Mansf. Dig. § 1565 (also in force in the Indian Territory,—sections 908, 909, Ind. T. Ann. St.), is as follows:

"Any person who shall be convicted of an assault and battery shall be fined in any sum not exceeding two hundred dollars: provided, that this section shall not be construed to apply to assaults and batteries of an aggravated character."

The foregoing section of Mansfield's Digest, as it was originally enacted by the legislature of Arkansas, read, immediately after the

words "aggravated assault" at the end of that section, as for example, "In which the fine under existing laws could not be as low as ten dollars,"—making the proviso read as follows: "That this shall not be construed to apply to assaults and batteries of an aggravated character, in which the fine under existing laws could not be as low as ten dollars." This act of January 6, 1857, makes use of the word "aggravated" in connection with an assault for the first time in the statutes of Arkansas or the decisions of its courts, and it is seen, by comparing the penalty fixed by this section of the statute with the proviso, that the proviso could have no application whatever to any other assault known to the system of jurisprudence in Arkansas than that described in section 1566 (section 909, Ind. T. Ann. St.), for the reason that no other assault except that described in section 1566 might be punished by a fine of less than \$10, while that described in section 1566 might be punished by a fine of less than \$50, and also involved imprisonment.

It may be observed in this connection that the case of *Guest v. State*, supra, in which it was held that one indicted for the crime of mayhem might be convicted of an aggravated assault and battery, decided in 1858, the year following the enactment of this act. Why the language above referred to was omitted by the digests of Gantt's Digest and in Mansfield's Digest I am not advised, but it seems that the statute of January 6, 1857, by making use of the word "aggravated," and the subsequent decision of *Guest v. State*, made it unnecessary to retain the language which was dropped in order to define what statute the proviso applied to. It may be also observed that the seventh paragraph of chapter 45 of Mansfield's Digest of the statutes of Arkansas (paragraph 7, c. 19, Ind. T. Ann. St.), is "Assault—Battery—Aggravated Assault—Assault with Intent to Commit Murder." The words "aggravated assault," contained in this statute were never found in the digests of Arkansas prior to 1858. They appeared for the first time in Gantt's Digest of the Statutes compiled in 1874, and have been continued in all the subsequent digests. It may also be observed that the term "aggravated assault" appears in the following cases: *Sturdivant v. State*, 59 Ark. 267, 27 S. W. 6; *Guest v. State*, 41 Ark. 359; and thus it appears that this term has a legal and technical meaning in the jurisprudence of the state, and must apply to the crime defined by section 1566, Mansf. Dig. (section 909, Ind. T. Ann. St.); but the words "assault with a deadly weapon" were never found no specific or technical lodgement, either in the statutes of Arkansas or in the opinions of its courts.

It is true that, in *Bryant v. State*, Chief Justice English (the part of whose professional life was spent upon the bench) denominated the offense for which Bryant was indicted as an "aggravated assault," and afterwards in the body of that opinion, in alluding to certain instructions refused by the court, said: "The third [instruction] defined an assault with a deadly weapon with intent to inflict upon any person of another a bodily injury,"—substantially in the language of the statute under which the indictment was drafted; and this is the only instance in which I have found that the words, "assault with a deadly weapon," have been used in the remotest degree as designating

a crime, and manifestly this reference could not be properly treated in that way. An assault with a deadly weapon is necessarily a part of an aggravated assault, under the statute referred to, but an assault with a deadly weapon does not necessarily involve all the elements of an "aggravated assault." Something more is required to constitute an aggravated assault than that the assault was made with a deadly weapon. It involves no difficulty, and no stretch of the imagination, to suggest innumerable cases in which a man might commit an assault with a deadly weapon where the circumstances of the assault did not show an abandoned and malignant disposition, and where no considerable provocation appears; but a man could not be found guilty of an aggravated assault under this statute unless it appears that the assault was made with intent to inflict upon the person of another a bodily injury, and that there was no considerable provocation, or the circumstances of the assault showed an abandoned and malignant disposition. Four elements are necessary to constitute an aggravated assault, under this statute. There must be an assault; it must be made with a deadly weapon, instrument, or other thing; it must be done with the intent to inflict upon the person of another a bodily injury; and it must occur where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant disposition. The verdict of the jury does not cover any of the elements of this offense except the first two, viz., that an assault has been committed, and with a deadly weapon.

In civil cases no judgment can be rendered which does not conform to the verdict. Surely, in criminal cases, a judgment cannot be sustained or upheld which is made to rest upon something that is to be added to the verdict. To support the verdict in this case, it is necessary to add to the verdict that this assault was committed with the intent to inflict a bodily injury, and either under circumstances where no considerable provocation appeared, or where the circumstances of the assault showed an abandoned and malignant disposition; or, if this be not done, then we are called upon to infer, because the jury said the assault was committed with a deadly weapon, that it was committed under the circumstances I have just named. But no inference can be added to a verdict to support a judgment,—a judgment must conform to the verdict. If it be said that the jury clearly indicated by the use of the word "deadly weapon" that it found the defendant guilty of an "aggravated assault," the answer is that nothing can be added to a verdict by intentment. In criminal cases the verdict must be responsive to the issues raised by the allegations in the indictment and the defendant's plea thereto, and the judgment must strictly conform to the verdict, and impose no other or greater punishment than the statute under which the verdict is found authorizes. The author says in 2 Am. & Eng. Enc. Law, p. 965:

"An 'aggravated assault' has been defined to be, at the common law, one that has, in addition to the mere intent to commit it, another object which is also criminal: but it may be doubted whether at common law the term had a technical and definite meaning. It seems rather to have been a phrase used by the commentators and text writers in contradistinction to 'common assault,' to include all those species of assault which, for various reasons, had come to be regarded as more heinous than common assaults, or had been

singled out and made the subject of special legislative provisions. criminal codes of some of the states of the Union, the term 'aggravated assault' is given a definite and peculiar meaning of its own. Norton v. 14 Tex. 393. Using the term in the large and general sense, not of assaults with certain prescribed intents, but also assaults by stabbing, striking, shooting, or by any use of a deadly weapon, are aggravated assaults. Some states made felonious."

The same author, at page 970, states:

"By statute, in most of the states, one class of aggravated assaults is to depend upon the character of the weapon used in the assault. The provisions of the statute are varied. Some statutes are directed against the use of deadly or dangerous weapons, 'with an intent to kill a human being or to commit a felony upon the person or the property of the one assaulted,' 'with intent to inflict grievous bodily harm,' while, under other statutes, the mere use of the weapon, without reference to the intent with which it is employed, is sufficient." "Under statutes which make the intent with which the weapon is used a constituent element, the use of the dangerous or deadly weapon, with intent to inflict bodily harm, constitutes the gist of the offense, as distinguishing the act from an ordinary assault. Therefore the mere possession of a deadly weapon, without using it or the intent to use it, will not constitute the offense, nor will the intent without the use. But under statutes which declare the crime complete by the mere use of a dangerous or deadly weapon, it is unnecessary to allege or prove any intent whatsoever."

Manifestly, under section 1566, Mansf. Dig. (section 909, I. C. Ann. St.), it is not only necessary to prove that the weapon is a deadly weapon, but it is also necessary to show the intent to use it as a deadly weapon under the circumstances under which it is used,—that is to say, that it was used under such circumstances as showed an abandoned and malignant disposition, or where no considerable provocation had appeared,—and then to find that a man is guilty of an assault with a deadly weapon if he responds to what is essential to constitute an aggravated assault, under that statute. The words "deadly weapon," contained in this statute, should be treated as surplusage, and the verdict be treated as a verdict for an assault. As before stated, the punishment for an assault is a fine not to exceed \$100, and any other punishment in excess of that is wholly unauthorized in law, and therefore void.

The question now arises whether or not on habeas corpus a sentence having been imposed which neither the verdict nor the statute authorized, the defendant should be released. That question came before this court in the case of *In re Christian* (C. C.) 88, 199, and was given the most careful, painstaking, and exhaustive research, and answered in that case in the affirmative, and therefore I am not disposed to re-examine that question. Those who are interested will find the reasoning and the cases supporting that conclusion cited in the opinion itself.

The defendant alleges in his petition, and it is not denied in turn, that he has been confined in prison over 30 days, solely for nonpayment of the fine and costs imposed against him; that he is unable to pay the same or any part thereof, and that he has no property exceeding in value \$20; that he has no property in Arkansas conveyed or concealed or in any way disposed of for his future use or benefit; that the United States attorney for the Northern district of the Indian Territory, as well as the United States attorney for the Western district of Arkansas, have been notified of this applica-

and that he has not made the application contemplated in section 1042 of the Revised Statutes of the United States to a commissioner of this court, for the reason that the commitment on its face does not appear to be solely for the nonpayment of fine and costs, but the judgment rendered in this case does not order the defendant to be imprisoned for the fine and costs. I am of the opinion, therefore, that so much of the sentence imposed upon the defendant, and the judgment rendered in pursuance thereof, as was in excess of the sum of \$100 was void, and that the defendant ought to be discharged; and it is so ordered.

NOTE.

Since this opinion was delivered my attention has been called to the fact that congress on the 1st of March, 1880, enacted literally section 1594 of Mansfield's Digest of the Statutes of Arkansas, for the Indian Territory. 25 Stat. 787, § 25. This statute was passed long prior to the act putting in force Mansfield's Digest of the Statutes of Arkansas in the Indian Territory; but it was long after the decision of *Guest v. State*, supra, and therefore does not affect the principle decided in this case, nor the soundness of the opinion.

In re SMITH. .

(District Court, N. D. Georgia. February 10, 1902.)

No. 806.

**BANKRUPTCY—INVOLUNTARY PETITION—ADVERSE CLAIMANT OF PROPERTY—
RESTRAINT—POWER OF COURT.**

Where property, claimed to belong to one against whom an involuntary petition in bankruptcy is filed, is also claimed by a third person, who is about to remove it, the court, on petition of the creditors, will restrain such third person from removing such property or making any change therein.

In Bankruptcy.

Slaton & Phillips, for petitioning creditors.

Julius L. Brown, for J. W. Dunford.

John Clay Smith, for bankrupt.

NEWMAN, District Judge. As this case now stands, the petitioning creditors ask the court to issue a restraining order to prevent J. W. Dunford from removing or changing in any way the present condition of the fixtures in the premises at No. 79 South Broad street; Atlanta, Ga. The power of the court with reference to property which is claimed to be a part of the assets of the bankrupt is fully determined in *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814. In the opinion by the court it is said:

"If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceedings, he can, with the aid of friends or irresponsible persons, sell his movable property, and put the money in his pocket, or secrete his goods or remove them beyond the reach of his assignee or the process of the court, and defy the law. The evidence in this case shows the manner in which this can be done. It was the purpose of the act of congress to prevent this evil. It therefore provides that, as soon as the petition in bank-

ruptcy is filed, the court may issue to the marshal a provisional writ directing him to take possession of the property and effects of the bankrupt and hold them subject to the further order of the court. To have him exercise this right or duty of seizure to such property as he might find in the possession of the bankrupt would have manifestly defeated in many instances the purposes of the writ. There is therefore no such limitation expressed or implied. As in the writ of attachment, or the ordinary execution on a judgment for the recovery of money, the officer is authorized to take the property of the defendant, wherever found, so here it is made his duty to take into his possession the property of the bankrupt wherever he finds it. It is made his duty to collect and hold possession until the assignee is appointed or the property is released by some order of the court, and he would ill perform that duty if he should accept the statement of every person in whose custody he found the property which he believed would belong to the assignee, when appointed, as a sufficient reason for failing to take possession of it. *Sharpe v. Doyle*, 102 U. S. 686, 689, 690, 28 L. Ed. 277. A decision was made in *Felbelman v. Packard*, 109 U. S. 421, 3 Sup. Ct. 2 L. Ed. 984."

There can be no question of the power of the court between the time an involuntary petition in bankruptcy is filed and the selection of a trustee to make proper orders to protect and guard the bankrupt's estate for the benefit of creditors, as may be proper and right under the facts presented. Of course, the court will not unduly interfere with property claimed by third persons, and will not interfere at all with bona fide sales for fair consideration, and which are not obnoxious to the provisions of the bankruptcy act.

In this case it is sufficient to say that the facts are such as to make it proper for the court to maintain the existing status of the trustee in bankruptcy can be selected, and can take such steps as may be proper in the interest of the creditors of the alleged bankrupt.

It is ordered, therefore, that J. W. Dunford be restrained from removing any of the fixtures from the premises described, from encumbering the same, or from making any change whatever in the present status, so far as the fixtures in said room are concerned.

GUITERMAN et al. v. UNITED STATES (two cases).

STRAUSS et al. v. SAME.

(Circuit Court, S. D. New York. March 12, 1902.)

Nos. 3,046, 3,018, and 3,019.

1. CUSTOMS DUTIES—CLASSIFICATION—MUFFLERS COMPOSED OF COTTON AND SILK.

Mufflers composed of cotton and silk are not classifiable under 1897, par. 814, as "wearing apparel composed of cotton or other textile fibre, or of which cotton or other vegetable fibre is the principal material of chief value,"—since paragraphs 888 and 812 relate expressly to "handkerchiefs or mufflers."

2. SAME.

Mufflers composed of cotton and silk are dutiable under Act of 1897, par. 888, covering "handkerchiefs or mufflers composed wholly or in part of silk," and not under paragraph 812, covering "handkerchiefs or mufflers composed of cotton," though the cotton is the component material of chief value of the mufflers in question.

Appeals by the Importers from Decisions of the Board of United States General Appraisers.

Albert Comstock, for the importers.
W. Usher Parsons, Asst. U. S. Atty.

COXE, District Judge (orally). No question of fact is involved here. It is agreed upon both sides that the articles imported are mufflers composed of cotton and silk, cotton being the component material of chief value. The proportion of the silk varies in the different samples from 5 per cent. in one instance to 47 per cent. in another. The precise percentage is immaterial, for the reason that, as stated, it must be conceded that the cotton in every one of the samples is the material of chief value.

The collector assessed duty under paragraph 388 of the act of 1897, which provides for the article by name, the paragraph reading "handkerchiefs or mufflers composed wholly or in part of silk." The importers have protested under paragraph 312, which also provides for the article by name, the paragraph reading "handkerchiefs or mufflers composed of cotton." There is also an alternative protest under paragraph 314, the importers insisting that if the mufflers are not composed of cotton they are "wearing apparel composed of cotton or other vegetable fibre, or of which cotton or other vegetable fibre is the component material of chief value."

I do not think it is necessary to discuss paragraph 314 for the reason already stated, that the article is specifically designated under both of the paragraphs first alluded to.

Counsel for the importers, as I understand it, contends that paragraph 388 should be construed as if it read "handkerchiefs or mufflers composed wholly or in chief part of silk"; and that paragraph 312 should be construed as if it read "handkerchiefs or mufflers composed of cotton, or of which cotton is the component material of chief value." We have in this case to compare these two paragraphs, one of them providing specifically for mufflers composed of cotton, and the other for mufflers composed wholly or in part of silk. I know of no authority that will justify the court in holding that such a specific descriptive clause as is contained in paragraph 388 can be ignored and the inquiry permitted whether cotton or silk is the component of chief value. That question is eliminated by the clear and definite language of this paragraph. In other words, a muffler composed in part of silk is clearly assessable under paragraph 388, and such a muffler cannot be assessed under paragraph 312 as an article composed of cotton. There can be no question as to the component material of chief value where the importations are assessed under a paragraph relating to a manufacture wholly or in part of silk.

The decision of the board of general appraisers is affirmed.

STEINHARDT et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 12, 1902.)

No. 2,934.

CUSTOMS DUTIES—METAL BEADS.

Metal beads should be assessed under Act 1897, par. 193, as articles composed wholly or in part of iron, steel, or other metal, and not under paragraph 408, as articles composed wholly or in part of beads.

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Albert Comstock, for the importers.

Charles D. Baker, Asst. U. S. Atty.

COXE, District Judge (orally). The articles imported in this case are metal beads. The collector after first assessing them under paragraph 193 of the act of 1897, reliquidated the entry and assessed them under paragraph 408 of the same act, as "articles composed wholly or in part of beads." The importers protest insisting they should have been assessed under the paragraph first chosen by the collector, namely, as "articles composed wholly or in part of iron, steel or other metal."

It is entirely clear that these metal beads are not articles composed wholly or in part of beads, because they happen to be strung upon a cotton thread. Indeed, it is not strenuously argued for the collector that such is the correct construction of paragraph 408. The contention of the importer is correct and the beads in question should be assessed under paragraph 193 of said act.

The decision of the board of general appraisers is reversed.

McKESSON et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 12, 1902.)

No. 3,020.

CUSTOMS DUTIES—CLASSIFICATION—CRUDE SULPHIDE OF ANTIMONY.

Crude sulphide of antimony is classifiable under Act 1897, par. 1 of the free list, covering "Antimony ore, crude sulphite of," and is assessable under section 6, as a "non-enumerated article manufactured in whole or in part," the word "sulphite" being regarded as a misprint for "sulphide."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

J. S. Tompkins, for the importers.

D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). The importation in question was conceded to be crude sulphide of antimony. The collector assessed it as a "non-enumerated article, manufactured in whole or in part," under section 6 of the act of 1897. The importers insist that it should

have been classified under paragraph 476 of the free list, which provides for "Antimony ore, crude sulphite of."

It is admitted on all sides that the word "sulphite" in the tariff is a misprint for the word "sulphide," as no chemist or expert on either side of the controversy knows of such a substance as sulphite of antimony. Sulphide of antimony is well known to all the witnesses. It seems to be the product of a process by which the gangue or slag is separated from the ore by heat. The importation here is such a product; the rock and slag has been removed and the ore is imported. It is also conceded that if the paragraph of the free list read crude sulphide of antimony it would aptly describe the importation in controversy. In view of the similar provisions in previous acts it is to me entirely clear that this was precisely what congress intended. There is no other substance known in the art as crude sulphide of antimony except the importation in question. It would be a strained construction to interpret paragraph 476 precisely as if the words "crude sulphite of" were omitted, and as if the paragraph applied only to antimony ore. The court should give some significance to the concluding phrase "crude sulphite of"; and it necessarily follows that if this be done it can apply only to the subject of this importation. There is no other substance to which the words quoted can apply.

The decision of the board of general appraisers is reversed.

IN RE FULTON CLUB.

(District Court, N. D. Georgia. February 8 1902.)

BANKRUPTCY—SOCIAL CLUB.

An incorporated club whose principal object is social intercourse, any business conducted by it being merely incidental, is not "engaged principally in * * * trading," and is not the subject of involuntary bankruptcy.

Petition for Involuntary Bankruptcy.

Mayson, Hill & McGill, for petitioning creditors.

Kilpatrick & McClelland, Slaton & Phillips, and J. H. Gilbert, for objecting creditors.

NEWMAN, District Judge. A petition has been filed by certain creditors, asking that the Fulton Club of Atlanta be declared an involuntary bankrupt. Creditors having adverse interests have raised the question as to whether or not this club is the subject of involuntary bankruptcy. The charter of the club, and the evidence offered as to the manner in which it is conducted, all go to show that it is a social club, its principal object is social intercourse, and any business conducted by it is a mere incident. Being a corporation, it is conceded by counsel for the parties that, as it clearly does not come within any of the other classifications (section 4b), it must be "engaged principally in * * * trading." This cannot be said of it. Such trading (if it can be called trading) as was carried on by this club was only among its members, was not for gain, and was a mere feature of

the club, and not its main purpose. It must be held not to be the subject of involuntary bankruptcy, and the petition against it will be dismissed.

In re INDEPENDENT THREAD CO.

(District Court, D. New Jersey. March 24, 1902.)

INVOLUNTARY BANKRUPTCY—CORPORATIONS—RIGHT TO FILE PETITION.

A corporation, not being entitled to go into voluntary bankruptcy under Bankr. Act, § 4, and not being subject to involuntary bankruptcy except on petition of three of its creditors, under section 59, cannot cure one of its creditors to assign part of its claim to third person in order to create a sufficient number of creditors to join in an involuntary petition, its other creditors not being willing to file such petition.

In Bankruptcy.

Dill & Baldwin, for petitioners.

Robert M. Boyd, Jr., Ward Church, and Arthur H. Bissell,
James E. Mitchell.

KIRKPATRICK, District Judge. It appears from the testimony produced before the court in this cause that the Independent Thread Company was indebted to the Hartford Thread Company in about \$6,000; that it was desirous of having its assets distributed in accordance with the provisions of the bankrupt act; and that for that purpose its directors passed a resolution setting out that it was unable to pay its debts, and expressing its willingness that an adjudication should be made. Under section 4 of the bankrupt act, the Independent Thread Company was not entitled to its benefits as a voluntary bankrupt. Neither could it, under section 59, be adjudged an involuntary bankrupt except upon the petition of three of its creditors. The Hartford Thread Company alone could not procure an adjudication of bankruptcy. So, acting under the advice of counsel who were also counsel for the Hartford Thread Company, the Independent Thread Company executed and delivered to the Hartford Thread Company its two promissory notes, of \$100 each, to be credited on part payment of its indebtedness to the Hartford Thread Company thereupon immediately, and, as was testified to by counsel, for the sole purpose of qualifying them as creditors of the Independent Thread Company, the Hartford Thread Company indorsed the said notes and delivered them, one each, to Messrs. Brown and Hawkins, who thereupon joined in filing the petition for this adjudication of bankruptcy. The alleged act of bankruptcy consists of a resolution of the board of directors of the Independent Thread Company admitting the inability of the company to pay its debts.

It will be seen that the Independent Thread Company was desirous of being adjudicated bankrupt. This it could not accomplish by filing a petition on its own behalf, and a sufficient number of creditors were not willing to file a petition asking that they be adjudged bankrupt. Therefore, acting in co-operation with the Hartford Thread Company, the plan above set out was adopted for the purpose of creating the

Obviously, this petition was filed by the procurement of the Independent Thread Company. All the steps which enabled it to be filed were taken at the instigation of their counsel, and at their request, for the purpose of evading the requirements of the statute. For this and other reasons objection is filed by intervening creditors to an adjudication of bankruptcy, and I am of the opinion that the objection is well taken. If an adjudication were made under these circumstances, it would, in effect, amount to a nullification of that part of section 4 of the bankrupt act above referred to, and permit a corporation, by acting in collusion with a single creditor, to obtain the benefits of the law which the legislature saw fit to deny them.

Let an order be entered dismissing the petition.

KNOEDLER et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 13, 1902.)

No. 2,999.

CUSTOMS DUTIES—PAINTINGS—AMERICAN ARTISTS—REGULATION OF TREASURY DEPARTMENT.

The regulation prescribed by the secretary of the treasury that an artist can live abroad only five years, with right to have his paintings admitted free of duty, under Tariff Act 1897, par. 703, as the product of an American artist residing temporarily abroad, cannot be sustained.

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Howard T. Walden, for the importers.

D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). This controversy arises with regard to the paintings of an American artist, Mr. Ridgway Knight. The collector assessed them for duty under paragraph 454 of the act of 1897. The importer protested insisting that they should have been admitted free under paragraph 703 of the same act as "the production of an American artist residing temporarily abroad." Accompanying the invoice was an affidavit by Mr. Knight, stating that he is a citizen of the United States, that by profession he is an artist, that his permanent place of residence is Philadelphia, and that his temporary residence is Poissy, France. The vice deputy United States consul general residing at Paris refused to receive the certificate presented by Mr. Knight, for the reason that it was not in compliance with the regulations prescribed by the secretary of the treasury, in that it showed that the artist had resided in France for a period longer than five years. It cannot be successfully contended that the secretary of the treasury was justified in making the arbitrary limitation of five years. This being so it is for the court to determine upon the facts whether the residence abroad is temporary or permanent. The affidavit of Mr. Knight, while not as full as it might be as to his intention regarding his residence abroad, is probably deficient in this particular, for the reason that he followed the form pre-

scribed by the secretary of the treasury. There is, however, no to contradict his statement that his permanent residence is in delphia and that he is only temporarily residing in France.

Since this decision of the board the court is informed the secretary of the treasury upon a reconsideration of the facts and law has ruled that this same artist is entitled to free entry works under the paragraph in question. It is gratifying to no further fact that the board subsequently to the decision in the at bar, upon affidavits stating the facts with greater detail and accuracy, also reached the conclusion that Mr. Knight is an American artist residing temporarily abroad. G. A. 4,727, decision, filed 16, 1900. It appears, therefore, that the court, the board and treasury department are in accord upon the question involved.

The court is of the opinion that the paintings in question have been admitted free of duty. The decision of the board of general appraisers is reversed.

UNITED STATES v. JACKSON et al.

(Circuit Court, S. D. New York. March 18, 1902.)

CUSTOMS DUTIES—CLASSIFICATION—BRECCIA.

The question being one of fact, decision of board of general appraisers that an importation was "breccia," and therefore enterable free of duty under Tariff Act 1897, par. 508, instead of being dutiable under paragraph 114, will not be disturbed, having ample evidence to sustain it.

Appeal by the United States from a Decision of the Board of General Appraisers.

Henry C. Platt, Asst. U. S. Atty.

Howard T. Walden, for the importers.

COXE, District Judge (orally). The merchandise in question assessed for duty under paragraph 114 of the act of 1897 as "merchandise in block, rough or squared only." The importers insist that it should be permitted to enter free of duty under paragraph 508 of the act as "breccia, in block or slabs." It is conceded on both sides that the question before the court is a question of fact. The board of general appraisers heard all the evidence and have reached the conclusion that the merchandise is in fact "breccia." There is testimony in the record to sustain this finding, and the court sees no reason for disturbing it.

The decision of the board of general appraisers is affirmed.

REISS et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 13, 1902.)

No. 2,861.

CUSTOMS DUTIES—FISH.

Assessment of duties on the contents of cans, under Tariff Act 1897, par. 258, as "fish known as anchovies," is proper, though the cans are labeled "Appetit-Sild," the appraiser's return that the contents is "fish known as anchovies" not being contradicted by evidence, though witnesses state that it has been known and sold as "Appetit-Sild," and that in Norwegian "sild" is synonymous with "herring."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Albert Comstock, for the importers.

D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). The collector assessed duty upon the articles in controversy under the first clause of paragraph 258 of the act of 1897, which provides for "fish known or labeled as anchovies, sardines, sprats," etc. The importer insists that duty should have been assessed under the last clause of the same paragraph, which provides for "all other fish in tin packages." The fish imported are packed in round tin boxes labeled "Appetit-Sild." There is nothing upon the boxes directly or indirectly indicating what their contents is other than the name just mentioned. The appraiser's return states that the contents of the boxes is "fish known as 'anchovies.'" There is no evidence in the case one way or the other to contradict this finding of the appraiser. The importer has called no witness to testify as to the contents of the boxes, although a number of witnesses state that it has been known and sold as "Appetit-Sild," and that in the Norwegian language "sild" is synonymous with "herring."

The court is of the opinion that the board correctly found upon this testimony that the packages contained anchovies, and that they were properly assessed for duty under the language "fish known as 'anchovies.'" Being anchovies, the presumption is conclusive that they are known as such.

The decision of the board of general appraisers is affirmed.

WOLFF et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 13, 1902.)

No. 2,800.

CUSTOMS DUTIES—MOHAIRS.

Mohair braids made of the hair of the Angora goat are not woolen goods, within Tariff Act 1894, par. 297, suspending till January 1, 1895, reduction of duties on such goods.

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

Albert Comstock, for the importers.
Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The importations in question consist of mohair braids made of the hair of the Angora goat. The importers insist that they were properly dutiable under paragraph 286 of the act of 1894. They were imported February 12, 1894, and withdrawn for consumption in October, 1894, the act of 1894 meantime having gone into effect. The collector assessed the duty under the act of 1890, and refused to give the importer the benefit of the reductions of the act of 1894, upon the ground that the importations were manufactures of wool, as to which the reduction was suspended until January 1, 1895, by paragraph 297 of said act of 1894. Upon the evidence before the board their conclusion was correct; but since that decision evidence has been taken in this case which proves beyond question that the importations were as stated, and were not wool. The decision of the board must be reversed within the doctrine of *U. S. v. Klumpp*, 169 U. S. 209, 18 Ct. 311, 42 L. Ed. 720, and *Oppenheimer v. U. S.* (C. C.) 90 Fed.

In re KLAPHOLZ et al.

(District Court, E. D. Pennsylvania. March 21, 1902.)

No. 1,113.

BANKRUPTCY—PRIORITIES—WAIVER OF LIEN.

A manufacturer of clothing, though having had a lien for the amount of his debt on clothing sold by him to a bankrupt, was nevertheless not entitled to priority of payment out of the fund in the trustee's hand produced by a sale of all the bankrupt's property, including the clothing manufactured by him and by third persons, and other articles, made by a receiver under an order of court, where notice of the sale, but did not ask to have his clothing sold separately and where there was no evidence concerning the price for which

In Bankruptcy.

Howard E. Heckler, for a creditor.
Henry W. Wessel, for trustee.

J. B. McPHERSON, District Judge. Conceding, for present purposes, that the claimant had a lien for the full amount of his debt on the clothing shipped October 2, 1901, I am nevertheless of opinion that he cannot be awarded priority of payment out of the fund in hand for the following reasons: The fund was produced by the sale of the bankrupt's personal property, including the clothing manufactured by the claimant, clothing manufactured by other persons, and other articles; and there is no evidence concerning the price for which the suits in question were sold. The claimant had notice of the sale which was made by the receiver under an order of court, and was afterwards duly confirmed without objection; and he should have asked the court to direct this clothing to be sold separately, in order to

fund thus produced might be earmarked, and the validity of his claim upon it be considered. The court had no knowledge that he was asserting a lien for the manufacture of these goods, and, as they had passed out of his possession into the custody of the receiver, it was his duty to make seasonable claim to priority of payment. Otherwise he must be held to have taken the risk that the goods might be sold in such a manner that the proceeds might be indistinguishably mingled with the proceeds of the other property of the bankrupt; *In re Gerry* (D. C.) 112 Fed. 957.

The referee is instructed to disallow the claim to priority.

THE FREY.

(District Court, E. D. Pennsylvania. March 24, 1902.)

No. 2.

INJURY TO SERVANT—DEFECTIVE APPLIANCE—JOINT NEGLIGENCE—DIVISION OF DAMAGES.

While libelant was removing ashes from the stoke room of a steamship, the bucket, which was attached to a chain with two hooks, and, when filled, was hoisted through a ventilating shaft, fell, injuring him. The hooks were obviously inadequate to hold the bucket, and on several occasions it had slipped off and fallen while being lowered. Libelant had been warned of the danger of standing under the ventilator while the hoisting was going on. While the bucket was being lowered, he stood under the ventilator, when the bucket slipped off the hooks and fell on his head. *Held*, that the steamship was negligent in supplying inadequate hooks, and libelant was also negligent in standing under the ventilator at the time he was injured, and hence the damages must be divided.¹

In Admiralty.

Joseph Hill Brinton, for libelant.

Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. This is an action brought to recover damages for personal injuries done to the libelant in November, 1900, while performing the duty of removing ashes from the stoke room of the steamship *Frey*. The facts are as follows: The ashes are removed from the stoke room through a ventilator that leads from the deck. The ventilator is constructed of sheet iron, and is about 2½ feet in diameter. Through this the bucket in which the ashes are hoisted is lowered by a winch, to which is attached a chain fall. At the end of this fall is an iron ring, from which run two short chains, each ending in a hook which passes through an ear upon the side of the bucket. Upon the day in question, the bucket had been emptied, and was being lowered to the stoke room to be refilled. The ship was at sea and rolling heavily, and during the passage of the bucket down the ventilator, the motion of the vessel caused the bottom of the bucket to strike upon the slightly projecting rivets that fasten

¹ Negligence of both master and servant, see note to *Wm. Johnson & Co. v. Johansen*, 30 C. C. A. 678.

the plates of the ventilator together, thus detaching it from the and causing it to fall. The libelant avers that he was not standing under the ventilator, but several feet away, and that the bucket in its descent struck a bracket upon a bulkhead that was immediately behind the ventilator, and rebounded from that point, thus striking him on the head and doing the injuries complained of. I am unable to sustain this view of the evidence. As I read the testimony, it shows that the bucket could not possibly have taken this course, and I am obliged, therefore, to come to the conclusion that the libelant was standing under the ventilator, and was thereby negligently exposing himself to a known danger. The bucket had fallen upon him on former occasions, and he had been warned, even if his senses were not sufficiently tell him, that to stand under the ventilator, while the work of hoisting was going on, was to expose himself to serious risk. In my mind, his own negligence is plainly apparent, but I think the negligence of the steamship is equally clear. It consists in the use of obviously inadequate hooks to hold the bucket fast in its ascent and descent. Similar hooks were shown to the court upon the hearing, and I have no difficulty in declaring that a careful regard for the safety of the men at the bottom of this air shaft would have employed some other device. Several kinds of safe hooks were known and used at the time this injury happened, but these were straight hooks without proper curvature to prevent the bucket from becoming detached. A mere inspection makes it evident that, if the bucket met even a slight obstruction in its descent, it would probably be disengaged. If it had thus been overturned a number of times before the day of the accident, and these falls were notice to the ship that something was wrong, and called for a remedy. After the libelant was injured, proper precautions were obtained, and no further difficulty has been experienced.

Both parties being at fault, the damages must be divided. An appeal may be entered in favor of the libelant, and the cause will then be referred to a commissioner to take such further testimony concerning the damages to be awarded as the parties may offer.

ARNOLD et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 11, 1902.)

No. 2,091.

CUSTOMS DUTIES—MERCHANDISE COMPOSED OF SILK AND WOOL.

Merchandise composed of silk and wool, silk being the component material of chief value, cannot be classified under Tariff Act 1890, as a "manufacture of silk or of which silk is the component material of chief value"; being within the proviso of that paragraph of the act that "all such manufactures of which wool * * * is a component material shall be classified as manufactures of wool."

Appeal by the Importers from a Decision of the Board of United States General Appraisers.

William B. Coughtry, for the importers.
Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). It is conceded that the merchandise which is the subject of this controversy is composed of silk and wool, silk being the component material of chief value. It was classified by the collector under paragraph 395 of the tariff act of 1890, as "women's and children's dress goods, * * * composed wholly or in part of wool, worsted," etc. The protest insists that the collector should have classified the goods under paragraph 414 of the same act as a "manufacture of silk, or of which silk is the component material of chief value." Paragraph 414 contains a proviso as follows: "Provided that all such manufactures, of which wool, or the hair of the camel, goat, or other like animal, is a component material, shall be classified as manufactures of wool." Manufactures of wool under this proviso are covered by paragraph 392 of the same act. The protest in question does not refer to the latter paragraph. It being conceded upon this proof that the merchandise contains worsted as a component material, the court is clearly of the opinion that it is covered by the proviso and cannot be classified as a manufacture of silk under paragraph 414.

It follows that the decision of the board of general appraisers should be affirmed.

UNITED STATES v. LEHN et al.

(Circuit Court, S. D. New York. March 18, 1902.)

No. 2,741.

CUSTOMS DUTIES—DULCIN—CHEMICAL COMPOUND.

Dulcin, being a chemical compound, is dutiable as such under Tariff Act 1897, par. 3, and not as saccharine, under paragraph 211, it being a distinct article, and of a different chemical composition, though similar to saccharine in character and use.

Appeal by the United States from a Decision of the Board of United States General Appraisers.

Charles D. Baker, Asst. U. S. Atty.

Albert Comstock, for the importers.

COXE, District Judge (orally). The decision of the board of general appraisers is affirmed upon the opinion delivered by General Appraiser Wilkinson, which is as follows:

"The merchandise is dulcin. It was assessed for duty as saccharine at \$1.50 per pound and 10 per cent. ad valorem under paragraph 211 of the act of July, 1897, and is claimed to be dutiable as a chemical compound at 25 per cent. under paragraph 8. Saccharine and dulcin are both derived from coal tar, and are similar in appearance, character, and use; but each is a distinct article, manufactured under a specific patent and of a different chemical composition. Saccharine is anhydro-ortho-sulphamin-benzoic acid, while dulcin is para-phenetol-carbamid. Dulcin might be classified by similitude as saccharine but for its enumeration as a chemical compound. We find that it is a chemical compound, and sustain the protest. Reference is made to *Arthur v. Lahey*, 96 U. S. 112, 24 L. Ed. 768."

PAGE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 14, 1902.)

No. 8,105.

CUSTOMS DUTIES—CLASSIFICATION—STEEL TUBES—FINDING OF GENERAL APPRAISERS.

Finding of the board of general appraisers that imports were steel tubes, finished, dutiable under Tariff Act 1897, par. 152, will not be disturbed; it not being wholly unsupported by proof, or clearly against the weight of evidence.

Appeal by the Importers from a Decision of the Board of States General Appraisers.

J. P. Tucker and W. B. Coughtry, for the importers.
D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). The importations in this case consist of steel tubes. The collector classified them under paragraph of the act of 1897 as "steel tubes, finished, not specially provided for in this act." The importers protested, insisting that they should have been classified under paragraph 135 of the same act as "steel bars" and an alternative protest under the same paragraph, that they have been classified as "steel in all forms and shapes, not specially provided for in this act."

A large amount of testimony was taken before the board of general appraisers and they reached the conclusion that the articles imported are drawn steel tubes, finished. This was a question of fact determined upon conflicting evidence before the board, and with the rules established in this circuit their finding should not be disturbed, it being the rule not to interfere with the findings of the board upon questions of fact unless wholly unsupported by the proof or against the weight of evidence. Additional testimony has been taken in this court, but it does not affect the proposition that the question still depends upon conflicting testimony. The court may add nothing, ever, after considering the testimony, that it concurs with the conclusion of fact reached by the board.

The decision of the board of general appraisers is affirmed.

MARSCHING et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 13, 1902.)

No. 2,980.

CUSTOMS DUTIES—LAME.

An importation consisting of metallics produced by cutting large very minute scales, of definite size, is properly assessed as lame under Tariff Act 1897, par. 179, first clause, and not as an article made of metal under the last clause thereof, providing for laces, embroideries, galloons, trimmings, or other articles made of lame.

Appeal by the Importers from a Decision of the Board of States General Appraisers.

Albert Comstock, for the importers.
D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge (orally). The importation in this case consists of "metallics produced by cutting lame into minute pieces of definite size." It was assessed for duty under the last clause of paragraph 179 of the act of 1897. The importer insists that it should have been assessed under the first clause of the paragraph. The first clause of paragraph 179 provides for "tinsel wire, lame or lahn, made wholly or in chief value of gold, silver or other metal, five cents per pound." The last clause provides for "laces, embroideries, braids, galloons, trimmings, or other articles made wholly or in chief value of tinsel wire, lame or lahn, bullion, or metal threads." There is no satisfactory definition in the record of the words "lame" or "lahn." The Century Dictionary defines "lame" as follows: "A plate; a blade; a thin plate; see lamina." "Lamina" is defined in the same dictionary as "a thin plate or scale; a thin plate of wood, metal, etc.; a leaf, layer," etc. In the form imported the lame consists of very minute scales, which might almost be considered powder. The court is of the opinion that in this form the importation cannot be regarded as an article made wholly or in chief value of lame. It is not an article made of lame; it is lame itself in a comminuted form. But even if this interpretation be incorrect, it is entirely clear within the well recognized doctrine of *noscitur a sociis* that it cannot be classed among the articles made of lame which congress intended to cover by the last clause in question, for that clause relates to laces, embroideries, braids and other similar articles.

It follows that the contention of the importer is correct and that the decision of the board of general appraisers must be reversed.

WOOLWORTH V. UNITED STATES.

(Circuit Court, S. D. New York. March 14, 1902.)

No. 2,831.

CUSTOMS DUTIES—COMMERCIAL DESIGNATION—EVIDENCE OF USAGE.

To warrant a finding that imports, otherwise not toys, are commercially known as such, and so should be classified under Tariff Act 1897, par. 418, there must be proof of a usage, definite, uniform, and general, and not partial, local, or personal; and testimony of employes of an importing retail house, whose knowledge is confined to what has been known or done by such house, is not enough.

Appeal by the Importer from a Decision of the Board of United States General Appraisers.

Albert Comstock, for the importer.
Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The importations in controversy are small lanterns made of metal and glass, metal being of chief value. The collector assessed them for duty under paragraph 193 of the act

of 1897, as "non-enumerated articles, composed wholly or in iron, steel, lead, etc." The importer insists that they should be classified under paragraph 418 of the same act as "toys." The board of general appraisers found as matter of fact that the articles were toys. Evidence has been taken in this court of which it is to predicate a finding by the court that they have been commonly known as toys. Proof necessary to establish commercial usage has been characterized by the supreme court in the case of *Maddox v. Magone*, 152 U. S. 368, 14 Sup. Ct. 588, 38 L. Ed. 482, as follows:

"Necessarily, commercial designation is the result of established usage in commerce and trade; and such usage, to affect a general enactment, must be definite, uniform, and general, and not partial, local or personal."

The evidence in this case is clearly within the exception last mentioned. It is "partial, local and personal." It is confined entirely to the evidence of two employes of the importing house of F. W. Woolworth, which is conceded to be a retail house, and the knowledge of the business is confined exclusively to what has been known or done in the particular house in question. In other words, there is no evidence tending to show how these articles have been regarded by importers and large dealers in the commerce of this country.

The decision of the board of appraisers is affirmed.

UNITED STATES v. BRAY.

(District Court, W. D. Missouri, C. D. March 18, 1902.)

RETAIL LIQUOR DEALER—SELLING WITHOUT PAYING TAX.

One may be convicted of carrying on the business of a retail liquor dealer without payment of the required tax, in violation of U. S. § 3242, as amended, though the article is put up in bottles labeled as an appetizer, and he did not know its nature when he put it, it in fact containing a large per cent. of alcohol, and notwithstanding its curative character, and the circumstances of purchases from him, such as to show that his customers are buying it merely as an intoxicant.

Wm. Warner, U. S. Atty., for the United States.
Silver & Brown, for defendant.

PHILIPS, District Judge (charging jury). The defendant is indicted for carrying on the business of a retail liquor dealer without having paid to the government the required tax. The statute, United States (Rev. St. § 3242, as amended) under which this prosecution is conducted defines a "retail liquor dealer" to be a person who sells foreign or domestic distilled spirits, wines, or malt in less quantities than five gallons. The question to be answered by your verdict is whether or not the article in evidence, alleged to have been sold by the defendant under the name of "Diggs' Appetizer," comes within the letter and spirit of the statute. The defense is that the article in question is a useful medicinal preparation, manufactured and sold solely for its curative, or supposed curative, qualities, and not as a medicinal preparation. A manufacturer may put up a preparation containing supposed curative elements, containing herbs or roots, or

substances, supposed to possess the virtue of curing or relieving disorders of the human body; and he may use in the preparation thereof such a per cent. or quantity of alcohol or distilled spirits as may, in his honest judgment, be necessary to extract the virtues of such herbs or ingredients employed, and to hold the same in solution, although it may be more or less than is contained in some tinctures. And if such preparation be contained in bottles with appropriate labels, indicating their medicinal qualities, and they are sold by retail merchants in good faith, as a medicinal preparation in the bottle, to be used by the purchaser for such purpose as and where the purchaser sees fit to use it, although such preparation may contain (as shown by analysis) a large per cent. of alcohol, which, if drunk in large quantities, produces an intoxicating effect, such facts alone would not be sufficient to warrant a conviction of the vender for the violation of said statute. But if as a matter of fact such preparation contains a large per cent., say as much as 30 per cent., as indicated by the evidence in this case, of alcohol, and the other ingredients of such bottle consist of nothing more than sugar and water, combined with some other substance like an herb, or the like, which other substance is inoffensive and possessing no curative quality or character, and that such preparation, although sold by the bottle, was sold by the vender as a beverage, or with knowledge of the fact that those purchasing it are buying it merely as a beverage, and because of the spirituous liquor contained in it, to realize its intoxicating or exhilarating influence as a beverage, such facts would constitute a sale of distilled spirits, within the meaning of the statute. The law looks to substance, and not to shadows or forms. This revenue law cannot intentionally be evaded by the use of mere names or catchwords, or disguises. If the manufacturer or retail merchant who sells it knows that the preparation contains 30 per cent. of intoxicating spirituous liquors, and the other 70 per cent. is composed of merely sugar and water and some herb or ingredient of an ineffective character, possessing no quality of a curative virtue, and is aware of the fact that it is being bought by the purchasers as a beverage, who desire it because of its exhilarating and intoxicating character, he is entitled to no more protection under the law than if he were selling weak cocktails or toddies. If such practices are to be indulged under the guise of a printed label, designating the bottle as containing a medicinal preparation of an asserted curative property, and sold under the mere pretext of being a medicinal preparation, knowing that it is being bought by the purchaser merely as a beverage, because of the large per cent. of distilled spirits it contains, and not sold and bought as medicine, the statute under which this indictment is founded would be easily evaded and practically nullified,—as much so as if the party were selling toddies or cocktails made up of whisky, water, sugar, with a slice of lemon or orange, or other palatable vegetable, mixed therewith. Whether or not the defendant had knowledge of the composition of the preparation in question, and knew that it was being sold and bought merely as a beverage, because of the quantity of alcohol it contained, and not for medicinal purposes, is a question of fact, to be ascertained and determined by the jury from all the facts and circumstances in evidence. Although a retail mer-

chant might buy such bottles from a manufacturer under the begotten of representations made to him by the manufacturer the labels placed upon such bottles, that it was a mere patent prescriptive medicine, yet if, as a matter of fact, such preparation contains a large per cent. of alcohol, not designed, and not necessary to extract the virtues of any medical herbs or substances employed to hold the same in solution, and that the witnesses who have testified in the case were buying it, not for medicinal purposes, but solely because of the distilled spirits or alcohol it contained, that because of the fact his sales of such bottles were greatly increased, this would be a violation of the spirit of the statute in question; and the fact that such bottles bore labels indicating that the contents were medicinal in their character, and possessed curative virtues, would be no protection to him as a retail liquor dealer. Knowledge is a question of fact. And when the circumstances attending the transaction and the sales are of such a character as should excite enquiry on the part of the vender as to the character of the article being sold and the purpose for which it was being bought, such as to excite in a reasonable prudent person a conscious conviction that the article being sold was because of the fact that it contains such large quantities of alcohol to make it desirable to the purchaser as an intoxicant, and is being sold and bought on that account, the law authorizes the jury to infer from such facts and circumstances the existence of actual knowledge on the part of the vender. A man, when conscious of the existence of such facts, cannot shut his eyes and say that he does not see it. He is presumed to see and to know that which is obvious to the senses, and the character of which would be known to him if he would look and enquire. Although the defendant in this case may not have known what he was selling the bottles in question from the manufacturer that he was selling other than what the labels indicated, yet if in the use and sales of the bottles he became aware of the fact that the preparation was being bought by his customers, not as medicine, but as a beverage, because of the fact that it contained alcohol, and that he was enjoying large sales thereof because of the presence of a large quantity of alcohol therein, which constituted the principal and substantial basis in its use as a beverage, this knowledge, if frequently acquired information and knowledge should have been obtained upon enquiry, and an investigation into the real quality and character of this preparation. The analysis made of one of the bottles manufactured by Diggs in his factory at St. Louis, discloses the fact that the half-pint bottles sold by him contained over 30 per cent. of alcohol (equal to 63.77 of proof whisky) and .67 per cent. of glucose, and about 2 per cent. or more of glucose, with some aromatic substances to give it color. Some four witnesses testified to having bought and used large numbers of bottles of this preparation from the defendant's store; that they drank the contents of the bottles, some of them at the premises or near there; that they did not buy them as medicine, but solely as a beverage to drink because of the intoxicating character of that they contained a large quantity of alcohol; and that this preparation was intoxicating in a large degree in the use. And, as evidence that the defendant knew that these bottles contained intoxicants, it appears that complaint was made to him by a parent or parents of

minors, and he was asked not to sell "the stuff" to them; and defendant, on the witness stand, stated that he refused, and gave orders to his clerks not to sell it to minors, because he did not want them around him "creating a nuisance." In addition to this the label on the bottles, while commending it as a specific for many of the disorders of the human body, contained the suggestive warning not to be used "as a beverage"; thus indicating that the manufacturer knew that it was liable to be used as a beverage, and advising the vender thereof, which was a most cunning suggestion that it could be used by purchasers as a beverage.

The jury returned a verdict of guilty.

MILES et al. v. UNITED STATES.

(Circuit Court, N. D. Georgia. February 19, 1902.)

No. 1,008.

UNITED STATES—BUILDING CONTRACT—CONSTRUCTION—EXTRA COMPENSATION.

An original bid was made by plaintiffs for the construction of a court house and post office building for the United States out of stone, brick, and terra cotta for a certain sum, and afterwards an alternative bid for the construction of the same building out of marble for a greater amount. In the specifications for the building originally submitted, provision was made for certain iron beams and girders to go over openings for doors and windows in order to strengthen the building. The specifications for the alternative bid recited that the work must be performed in strict compliance with drawings to be furnished, "including all necessary changes on account of said proposed construction." *Held*, that the provision quoted was for the benefit of the government, and that, though the evidence tended to show that iron beams were not usually required in marble buildings, the government had the right to require their use, and was not liable for extra compensation.

Suit for Extra Work and Material Furnished for the Savannah Court House and Post Office Building at Savannah, Ga.

Frazer & Hynds and Dorsey, Brewster & Howell, for plaintiffs.
Geo. L. Bell, Asst. U. S. Dist. Atty.

NEWMAN, District Judge. This is a suit brought by the plaintiffs against the United States to recover the value of certain materials furnished and certain work done in the construction of the United States court house and post office building at Savannah, Ga., which they say was not provided for or embraced in the contract they made with the government. The bid made by the plaintiffs on August 22, 1895, for the construction of the court house and post office as originally planned, which was a stone, brick, and terra cotta building, was accepted, and a contract entered into on August 26, 1895, by which the government agreed to pay the plaintiffs \$117,000 for the building as then planned. An alternative bid was then made for the same building constructed of marble for \$215,000. The construction of the building with the first story of stone and the other stories of brick and terra cotta was commenced. At the instance of the citizens of Savannah, the work was suspended, after it had been commenced, in

order that an appropriation might be obtained from congress to justify the construction of the building of marble. A factory appropriation was obtained, and on October 18, 1895, a contract was entered into between the plaintiffs and the government for the construction of the building of marble for \$200,000. In the specifications for the building originally submitted, when it was to be constructed of stone, brick, and terra cotta, provision was made for certain iron beams or girders to go over the openings for doors and windows in the building, the purpose being to support and strengthen the walls, and avoid any weakness caused by such openings. The specifications for the alternative bid for construction of the building of marble, so far as material here, are as follows:

"Detail drawings, showing in full the construction, will be furnished to the successful bidder, and the work must be performed in strict accordance therewith, including all necessary changes on account of said proposition."

After the marble construction had been commenced, when it was found that these iron beams would still be required, the contractors consulted into correspondence with the supervising architect's office, and found that, inasmuch as the building was being constructed of marble, the beams and girders were not at all necessary, and that, as it involved a considerable additional expense to them, they should not be required to put them in. Considerable data was furnished by the contractors to the government officials going to show the strength of a marble building, and that these beams or girders over openings were not usual in a marble building, and were not in any way necessary to support the building. The reply of the government was substantially that the beams or girders did not give the building the even when constructed of marble, a factor of safety above that required by the government required. On the trial here evidence was introduced by both parties. Both Mr. Miles and Mr. Bradt, who have had considerable experience in the construction of buildings, testified as witnesses. They also had the evidence of several practical builders and expert architects. All of their testimony was to the effect that the iron beams or girders were unnecessary in a marble building, and that they would not expect, if they were contracting to build a marble building such as was finally constructed at Savannah, to be required to put these iron beams over the openings. The representative of the supervising architect's office, whose duty it was to visit the building and supervise its construction, testified that he considered the iron supports to be necessary and proper, and that, in his opinion, the building would not have been sufficiently strong without them. The acting supervising architect testified that, in his opinion, the strength of steel and iron required to be put in the building was necessary for the stability of the building. From the evidence submitted the facts necessary to a determination of this case seem to be: (1) That the iron beams or girders over the openings in the walls of the building were clearly provided for in the specifications of the contract for the construction of the building of stone, brick, and terra cotta. (2) That there was nothing whatever in the alternative proposal for the construction of a marble building as it was originally made, or in the contract

sequently made for the erection of the marble building, between these contractors and the government, which eliminated these iron beams. (3) The iron beams would not have been usually required over openings in constructing a marble building in this section of the country, or perhaps generally. (4) The evidence does not show satisfactorily that these beams would not be required in a first-class building as erected by the United States government. On the contrary, some of the evidence shows, and it may, perhaps, be fairly treated as a matter of common knowledge, that buildings erected by the United States for public purposes, such as court houses and post offices, are of an unusually substantial character, and that an unusual factor of strength and safety is required in their construction.

Conclusions of Law.

The question for determination here is, have the plaintiffs the right, under these facts, to recover for the cost of placing these iron beams in the building at Savannah? The plans for the stone, brick, and terra cotta building showed these iron beams, and there was no express agreement whatever, when the change to marble was made, that the beams would be left out. The plaintiffs claim that because they were not really necessary to the strength of the building, and would not usually be required in a building of that character, as testified to by builders and experts here, therefore they had the right to assume, in making their bid, that the beams would be left out. They claim that the expression, "including all necessary changes on account of said proposed substitution," in the clause from the specifications in the alternate marble bid, which has been quoted, justified them in expecting that such things as were not necessary when the change to marble was made would be left out of the building, and that they had the right to anticipate and to rely upon this in making their bid for the marble construction. It is clear that this stipulation as to "necessary changes" is for the benefit of the government; that is, the government required the contractors proposing to do this work to say that, if the change from stone, brick, and terra cotta to marble should be made, they would do the work in accordance with the details to be furnished, including all necessary changes which the representatives of the government might deem necessary. If the contract had stated, or if they had used language which would mean, that, if there should be a change from stone, brick, and terra cotta to marble, then the contractor would be entitled to have such changes as would make the construction of the building such as was usual and customary in a marble building, there might be some ground for the contention here made, but I am wholly unable to find anything like that in the language here used, or the connection in which it is used. The only possible ground for claiming extra compensation in this case is that the representatives of the government required an unusual, and possibly an extraordinary, factor of strength in the building; and this is not sufficient, in my opinion, to justify a recovery in view of the fact that these iron beams or girders appeared in the specifications for the stone, brick, and terra cotta building, and there was no stipulation whatever that they would be left out if and when the change to marble should be made. The govern-

ment should be held, of course, to fair compliance with contract entered into for government work, but only to this. And the contention that the representatives of the government engaged in supervising the construction of this building did not have the right to require that iron beams to be retained when the change in the character of the construction was made would not be warranted by anything in the contract, or, in my opinion, by any just view of the law applicable to the case.

There are three general propositions of law set out in the introductory brief filed by counsel for the plaintiffs in this case. The first proposition is that contracts made with the United States are controlled by the same general law that controls contracts between individuals; second, that there be no doubt as to the meaning of a contract, the doubtful expressions should be construed more strongly against the party who uses them in drawing up the contract; and, third, that, where doubtful or ambiguous language is contained in a contract, evidence of the usage or custom in the matter embraced in the contract at the place where it is executed is admissible as forming a part of and entering into the contract. It is not necessary to gainsay any of these propositions. On the contrary, they may all be admitted without in any way interfering with the view heretofore expressed as to the merits of this contract. Seeing these beams in the specifications for this building, for the contractors to assume that they would be taken out by the superintendent of the architect's office when the change to marble was made because the contractors had not seen them before in marble construction, seems to have been unwarranted. On the contrary, it would appear that they were put upon fair inquiry, at least, before bidding, knowing that the beams were a part of the construction, as to whether they were to be retained when the change was made.

In my opinion, therefore, the plaintiffs are not entitled to recover on any view of the case, and judgment must be entered against the plaintiffs and in favor of the United States.

ARROTT v. STANDARD MFG. CO.

(Circuit Court, W. D. Pennsylvania. April 2, 1902.)

No. 16.

PATENTS—INFRINGEMENT—BILL OF COMPLAINT—SUFFICIENCY.

In a suit in equity for the infringement of a patent, a bill of complaint setting forth the making of the invention by complainant, his fulfillment of the statutory terms entitling him to letters patent, his due application therefor, and the grant thereof to him, and alleging that complainant has been, and, but for defendant's infringement, and others of like character, would still be, in the undisturbed enjoyment of the exclusive privileges secured to him, etc., is sufficient, and need not aver that, in words, complainant's ownership of the patent at the date of the filing of the bill.¹

¹ Pleading in infringement suits, see note to *Caldwell v. Powell*, 101 A. 595.

In Equity. Sur demurrer to bill. See 113 Fed. 389.

Christy & Christy, for complainant.

Lyon & McKee, for defendant.

ACHESON, Circuit Judge. The causes of demurrer insisted on are:

"Second. That said complainant, in his bill of complaint, does not aver that he now is, or at the time of the filing of said bill was, the owner of said letters patent and invention. Third. That said complainant, in his bill of complaint, does not aver that he now is, or was at any time, the owner of said letters patent and invention, or of any rights or privileges thereunder."

In support of these propositions counsel cites *Krick v. Jansen* (C. C.) 52 Fed. 823, and *Lettelier v. Mann* (C. C.) 79 Fed. 81. But it is enough to say that in the former of these cases the plaintiff, it seems, was not the patentee, as here, and what his precise statement as to the ownership was does not appear; and in the latter case, manifestly, the court was influenced, if not controlled, by decisions of the local courts as to the equity practice in the state of California in framing bills. Now, it is true that this complainant's ownership of the patent in suit at the date of the filing of his bill is not averred in the bill in the set phrases of the demurrer, but in substance and legal effect such ownership is averred. The bill particularly sets forth the making of the invention by the complainant; his fulfillment of the statutory terms, conditions, and requirements entitling him to letters patent therefor; his due application for the same, and the grant thereof to him; and, going beyond this, the bill avers that the complainant has been, and but for the defendant's infringement complained of and others of like character would still be, in the undisturbed possession, use, and enjoyment of the exclusive privileges secured to him by the patent; and he makes profert of the letters patent. Proof of the matters alleged would make out a *prima facie* case for relief. More, therefore, the complainant was not bound to aver. If since the issue of the patent he has lost title, by assignment or otherwise, that is a matter to be shown in defense. That the averments of the bill are sufficient to put the defendant upon its answer, I cannot doubt.

The demurrer is overruled, with leave to the defendant to answer the bill within one week.

MEMORANDUM DECISIONS.

BALTIMORE & O. R. CO. v. JOY. (Circuit Court of Appeals, Sixth Circuit, January 13, 1902.) No. 311. In Error to the Circuit Court of the United States for the Northern District of Ohio. Before LURTON and Circuit Judges, and WANTY, District Judge.

PER CURIAM. Action for personal injuries sustained through negligence of the railroad company by John A. Hervey while a passenger. The injury occurred in Indiana. The action was brought in Ohio. Pending the action the plaintiff died. On application of the administrator of Hervey, he was permitted to revive and prosecute same as administrator. This revival was excepted to and assigned as error. Upon an interlocutory certified to the supreme court, that court has answered that there was no error in the revival. 173 U. S. 226, 19 Sup. Ct. 387, 43 L. Ed. 677. In a case having been submitted alone upon this question, it is now ordered that the judgment be affirmed.

BENZIGER et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit, February 7, 1902.) No. 12. Appeal from the Circuit Court of the United States for the Southern District of New York. W. W. Smith, for appellants. Chas. D. Baker, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Affirmed on opinion of court below. 107 Fed. 257.

BLUE v. FILER. (Circuit Court of Appeals, Sixth Circuit, January 1902.) No. 968. In Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio. Benjamin F. James, plaintiff in error. J. O. Troup, for defendant in error. Before LURTON, DAY, Circuit Judges, and CLARK, District Judge.

PER CURIAM. Action for personal injuries sustained while in the possession of the defendant. Upon the conclusion of the whole evidence the judge directed a verdict for the defendant. We find no error in the instruction. The reasons given for so directing a verdict, as set out on record, amply vindicate the action of the court below, and do not need to be supplemented by us. The other errors assigned upon questions arising upon the admission and rejection of evidence have been examined, and the court finds none of them well taken. Affirmed.

BOISE CITY v. WILSON et al. (Circuit Court of Appeals, Ninth Circuit, March 10, 1902.) No. 699. Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho. C. O. Oavans, appellant. Alfred A. Fraser, for appellee. Before GILBERT and Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This cause was submitted to the court below on the pleadings and an agreed statement of facts, from which it appears that the assessments for the municipal improvement in question were levied in accordance with what is known as the "front-foot rule"; and the being of the opinion that under the decision of the supreme court in the case of Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 100, assessments so levied were necessarily invalid, gave the complainants

ment. On the authority of *French v. Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, *Wight v. Davidson*, 181 U. S. 371, 21 Sup. Ct. 618, 45 L. Ed. 900, and similar decisions decided at the same time and reported in the same volume, explaining, if not qualifying, the case of *Village of Norwood v. Baker*, the judgment is reversed, and cause remanded, with directions to the court below to enter judgment for the defendant.

BRUCE v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 30, 1901.) No. 1,538. In Error to the District Court of the United States for the District of Wyoming. Willard Teller (Mr. Clayton C. Dorsey, on the brief), for plaintiff in error. Timothy F. Burke, for defendant in error. Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge. Bruce, plaintiff in error, was an employé of John O. Teller, engaged in the work of cutting timber for him under the circumstances disclosed in the case of *Teller v. U. S.* (decided at this term of court) 113 Fed. 273. This case was argued with that, and submitted on the same briefs. No facts or principles are invoked in behalf of Bruce other or different from those urged in favor of Teller. Accordingly, the judgment of the trial court sentencing him to pay a fine of \$500 is, on the authority of *Teller v. U. S.*, supra, affirmed.

BRYAN et al. v. HUNTINGTON. (Circuit Court of Appeals, Fourth Circuit. February 10, 1902.) No. 283. Appeal from the Circuit Court of the United States for the District of West Virginia, at Parkersburg. Z. T. Vinson and W. K. Cowden, for appellants. Maxwell Evarts and F. B. Enslow, for appellee. Before SIMONTON, Circuit Judge, and MORRIS and BOYD, District Judges.

PER CURIAM. Considering the assignments of error in this case and the arguments of counsel thereon, it is ordered the appeal be dismissed, and the decree of the circuit court affirmed. The reasons for this action will be filed hereafter.

THE C. D. BRYANT. (Circuit Court of Appeals, Ninth Circuit. February 21, 1902.) No. 769. Appeal from the District Court of the United States for the District of Hawaii. Andrews, Peters & Andrade, for appellant. Nathan H. Frank and Kinney, Ballou & McClanahan, for appellees. Upon application of counsel for appellant, and upon motion of N. H. Frank, appeal ordered dismissed.

CENTRAL TRUST CO. et al. v. RICHMOND & D. R. CO. Appeal of GOODSON. (Circuit Court of Appeals, Fourth Circuit. November 9, 1901.) No. 406. Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Asheville. Charles A. Moore, for appellant. Charles Price, for appellee. Order of the circuit court set aside, and remanded, with directions to the lower court to reinstate petition, with costs to petitioner.

THE E. LUCKENBACH (three cases). (Circuit Court of Appeals, Second Circuit. February 24, 1902.) Nos. 106-108. Appeals from the District Court of the United States for the Southern District of New York. These causes come here upon appeals from decrees of the district court, Southern district of New York, dismissing the libels (109 Fed. 487), which were brought to recover for damages sustained by scows while in tow of the steam tug

E. Luckenbach in Hampton Roads, about 10 a. m., October 31, 1900. Samuel Park, for appellants. Le Roy S. Gove, for appellees. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The facts are quite fully stated in the opinion of the district judge. In one respect his statement of them is fairly open to criticism. The testimony hardly warrants the finding that there was a sudden increase of wind; but we concur with him in the conclusion that the allegations of fault on the part of the tug are supported mainly by the wisdom that comes after the event. It would have been good judgment to stay in port. It would have been good judgment to turn back at Sewall's Point, when return was feasible and safe; but we are not prepared to say that in deciding to push on the master of the tug displayed such bad judgment as would amount to recklessness or negligence. The tows were staunch, well-built scows, two-thirds to three-fourths loaded; there was a government inspector along, who apparently was authorized, in the event of urgent necessity, to allow dumping short of the designated ground. The catastrophe was precipitated by the breaking of a bridle rope furnished by the tow, which seems to have been in very poor condition. Although the storm had not finally broken, the wind had gone down very much before they started from the haven they had put into overnight, and according to the weather records it continued to fall much lower during the two hours ensuing their departure. The master made a mistake in pushing on beyond Sewall's Point, but we concur with the district judge in the conclusion that it was not an error of judgment so gross as to justify a finding of negligence. The decree is affirmed, with costs.

FORCE v. SAWYER-BASS MFG. CO. et al. (Circuit Court of Appeals, Second Circuit. March 10, 1902.) No. 131. Appeal from the Circuit Court of the United States for the Eastern District of New York. H. A. West, for appellant. Henry Schreiber, for appellees. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. Affirmed, on opinion of the circuit court. 111 Fed. 902.

THE FRIESLAND. (Circuit Court of Appeals, Second Circuit. February 25, 1902.) No. 91. Appeal from the District Court of the United States for the Southern District of New York. For opinion below, see 104 Fed. 99. H. G. Ward, for appellant. Wilhelmus Mynderse, for appellee. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. We concur in the conclusion reached by the court below that the claimant failed to exercise the due diligence required by the condition of the bill of lading. Although the peculiar susceptibility of cast iron chests thus used in connection with closets was so well known that brass valve chests are now generally substituted therefor in steamers of this class, the claimant had elected to retain and continue the use of these cast iron chests in the Friesland during a period of nine years. The usual examination was made previous to this voyage, but it was not sufficient to determine whether the defect which caused the damage existed. Claimant's chief excuse for such inadequate inspection, that the valve chest was so situated that examination of the interior was difficult, only serves to emphasize the fault. The cause of the difficulty was the adjustment of two pipes in one space between two frames, whereby the opening in the top of the valve chest was so crowded as to prevent exterior visual examination. There were, however, other practicable methods of examination, as pointed out by the district judge in his opinion, none of which were followed. The decree is affirmed.

GOLDSTEIN v. LUND et al. (Circuit Court of Appeals, Ninth Circuit. February 25, 1902.) No. 747. Appeal from the District Court of the United States for the Second Division of the District of Alaska. Morton E. Stevens, for appellant. Lorenzo S. B. Sawyer, for appellees. Upon motion of L. S. B. Sawyer, appeal ordered dismissed, pursuant to the provisions of rule 23, for failure to print record.

THE JAMES D. LEARY v. THE EVELYN. (Circuit Court of Appeals, Second Circuit. February 7, 1902.) Nos. 104, 105. Appeals from the District Court of the United States for the Southern District of New York. J. Parker Kirlin, for the J. D. Leary. Chas. C. Burlingham, for Bull and others. Albert Wray, for dredging company. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Affirmed, without interest or costs, on opinion below. 110 Fed. 685.

JOHNSON et al. v. BARBER. (Circuit Court of Appeals, Fifth Circuit. January 28, 1902.) No. 1,065. Appeal from the Circuit Court of the United States for the Eastern District of Texas. Edgar Watkins and W. A. Wimbish (F. O. Jones, on the brief), for appellants. T. J. McMurray, for appellee. Before McCORMICK and SHELBY, Circuit Judges.

PER CURIAM. We are of opinion that the decree of the circuit court is right, and that there is no error in the record. It is therefore affirmed.

In re LEAOH. (Circuit Court of Appeals, Seventh Circuit. December 21, 1901.) No. 855. Petition for Revision of Proceedings in Bankruptcy in the District Court of the United States for the District of Indiana. William J. Vesey, for petitioner. Marshall, McNagny & Clugston, for respondent. Dismissed on stipulation of counsel.

McALLISTER et al. v. SOUTHERN PAC. CO. (Circuit Court of Appeals, Second Circuit. March 10, 1902.) No. 138. Appeal from the District Court of the United States for the Eastern District of New York. Maxwell Evarts, for appellant. Nelson Zabriskie, for appellee. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. Affirmed, on opinion below. See 111 Fed. 988.

THE McDONALD. THE JOHN LANG. (Circuit Court of Appeals, Second Circuit. January 7, 1902.) No. 20. Appeal from the District Court of the United States for the Southern District of New York. Le Roy S. Gove, for libellant. Amos Van Etten, for claimant. Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

PER CURIAM. Decree of district court affirmed, with interest and costs. See (C. C. A.) 112 Fed. 681.

In re MAINS. (Circuit Court of Appeals, Ninth Circuit. March 7, 1902.) No. 804. Petition for Writ of Habeas Corpus. Petition denied.

In re MAINS. (Circuit Court of Appeals, Ninth Circuit. March 12, 1902.) No. 805. Petition for Writ of Habeas Corpus. Petition denied.

MARINE INS. CO. v. GRAHAM & MORTON TRANSP. CO. (Circuit Court of Appeals, Seventh Circuit. January 24, 1902.) No. 690. Appeal from the District Court of the United States for the Northern District of Illinois. Charles C. Kremer, for appellant. Robert Rae and Louis C. Ehle, for appellee. Same decree entered in this cause as in Chicago Ins. Co. v. Graham & Morton Transp. Co., 48 C. C. A. 397, 109 Fed. 352, per stipulation of counsel.

METCALF v. AMERICAN SCHOOL FURNITURE CO. et al. (Circuit Court of Appeals, Second Circuit. February 4, 1902.) No. 80. Appeal from the Circuit Court of the United States for the Western District of New York. Frederick Seymour, for appellant. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decree affirmed in open court, with instructions to allow plaintiff 30 days to amend, on payment of costs. For opinion below, see 108 Fed. 909.

REPUBLIC OF COLOMBIA v. CAUCA CO. et al. CAUCA CO. v. REPUBLIC OF COLOMBIA. (Circuit Court of Appeals, Fourth Circuit. February 4, 1902.) Nos. 407, 423. Cross Appeals from the Circuit Court of the United States for the District of West Virginia, at Clarksburg. William G. Johnson, for Republic of Colombia. Hugh L. Bond, Jr., and John W. Beaumont (Cowan, Cross & Bond and Edward H. Murphy, on briefs), for Cauca Co. et al. Before SIMONTON, Circuit Judge, and JACKSON and PURNELL, District Judges.

PER CURIAM. We have carefully considered the opinion of the circuit court, the subject-matter of appeal in these two cases. We can add nothing to the clear statement of the facts of the case made by the learned judge who delivered the opinion of the court (106 Fed. 337), and we can add nothing to the reasons which led him to his conclusion, in which conclusion we entirely concur. The decree of the circuit court is affirmed.

TERLINDEN v. AMES. (Circuit Court of Appeals, Seventh Circuit. March 1, 1902.) No. 849. Appeal from the District Court of the United States for the Northern District of Illinois. A. C. Umbreit and Albert C. May, for appellant, and William Vocke, for appellee. Dismissed for want of jurisdiction.

TRAIN et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. January 4, 1902.) No. 27. Appeal from the Circuit Court of the United States for the Southern District of New York. Albert Comstock, for appellant. D. Frank Lloyd, for the United States. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. Decision of circuit court affirmed, on opinion below. 107 Fed. 261.

UNITED STATES v. KLIPSTEIN et al. (Circuit Court of Appeals, Second Circuit. January 7, 1902.) No. 64. Appeal from the Circuit Court of the United States for the Southern District of New York. D. Frank Lloyd, for appellant. Albert Comstock, for appellee. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The new testimony does not present a different case from that which was before us in *U. S. v. Roessler & Hasslacher Chemical Co.*, 39 C. C. A. 651, 99 Fed. 552. Decision of circuit court affirmed.

UNITED STATES v. MCCOY et al. (Circuit Court of Appeals, Ninth Circuit. March 3, 1902.) No. 708. In Error to the Circuit Court of the United States for the Southern Division of the District of Washington. Willson R. Gay, U. S. Atty., and Edward E. Cushman, Asst. U. S. Atty. W. T. Dovell, for defendants in error. Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This case has been before this court before, and was returned to the lower court, with directions to take further proceedings therein. *U. S. v. McCoy*, 44 C. C. A. 125, 104 Fed. 669. There is nothing in the present record showing any error in the subsequent proceedings taken in pursuance of such directions. The judgment of the circuit court is therefore affirmed.

UNITED STATES v. MCGIBBON et al. (Circuit Court of Appeals, Second Circuit. February 7, 1902.) No. 22. Appeal from the Circuit Court of the United States for the Southern District of New York. Chas. D. Baker, for the United States. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Affirmed, on opinion of court below. 107 Fed. 285.

UNITED STATES v. WADDELL et al. (Circuit Court of Appeals, Second Circuit. December 3, 1901.) No. 78. Appeal from the Circuit Court of the United States for the Southern District of New York. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. Affirmed on consent in open court.

THE VICTORIA. (Circuit Court of Appeals, Second Circuit. January 7, 1902.) No. 2. Appeal from the District Court of the United States for the Southern District of New York. For opinion in district court, see 88 Fed. 524. Amos Van Etten, for appellant. Le Roy S. Gove, for appellee. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. Decree of district court affirmed, with costs.

WITHEROW v. CARNEGIE STEEL CO. (Circuit Court of Appeals, Second Circuit. February 5, 1902.) No. 117. Appeal from the Circuit Court of the United States for the Southern District of New York. H. M. Hitchings, for appellant. John R. Bennett, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. Dismissed in open court for lack of jurisdiction.

BURGER et al. v. TRIPLER et al. (Circuit Court, S. D. New York. December 21, 1901.) Motion to strike demurrer from the files, for decree pro confesso, and to allow demurrer to stand as a pleading. James C. Chapen, for the motion. H. A. West, opposed.

LACOMBE, Circuit Judge. The defendant was in default, and his demurrer improperly filed. He presents an excuse for his default, and prays that it may be opened. This application is granted, and he is given to and including December 27th to demur, plead, or answer; issue, however, to stand as of June rule day, and defendant to file stipulation to complete his proofs under any plea or answer which he may file within 90 days after complainants close their prima facie proofs.

GOAT & SHEEPSKIN IMPORT CO. v. UNITED STATES (two cases). (Circuit Court, S. D. New York. March 14, 1902.) Nos. 1,715, 1,871. Appeals by the Importers from Decisions of the Board of United States General Appraisers. Albert Comstock, for appellants. Henry O. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The decision of the board of general appraisers is affirmed on two grounds: First, that the protest is insufficient; and, second, that the facts bring the cases within the decision in *U. S. v. China & Japan Trading Co.*, 18 C. C. A. 335, 71 Fed. 864.

INTERNATIONAL TOOTH CROWN CO. v. KYLE. (Circuit Court, S. D. New York. January 20, 1902.) Philip B. Adams, for petitioners. Charles K. Offield, Offield, Towle & Linthicum, Dickerson & Brown, and Walter D. Edmonds, for complainant.

TOWNSEND, District Judge. This cause having been heard upon the petition of Allan G. Bennett and others to vacate and annul the decree heretofore entered herein, and upon affidavits and arguments of counsel in behalf of the said petitioners and the said complainant, International Tooth Crown Company, and it appearing to the court that the proceedings therein were procured by collusion between the complainant, International Tooth Crown Company, and the defendant, James Orr Kyle, and that there was no real controversy between them, it is hereby ordered, adjudged, and decreed that the said decree, to wit, the decree entered on or about the 1st day of January, 1900, be, and the same is hereby, vacated and annulled, and that this cause be dismissed. It is further ordered that said International Tooth Crown Company pay the disbursements incurred in the said application for vacation of said decree. Nothing herein contained shall be construed as implicating any of the solicitors or counsel for complainant; for they are exonerated from all knowledge of or participation in said collusion.

McINTYRE v. WESTERN UNION TEL. CO. (Circuit Court, S. D. New York. September 24, 1901.) Motion for Preliminary Injunction. Drury W. Cooper, for the motion. H. A. West, opposed.

LACOMBE, Circuit Judge. This motion is now denied upon the following terms, viz.: That defendant on November 1, 1901, and monthly thereafter, file in this court sworn statements showing how many of the devices complained of have been used by it, where in such use the device was twisted as shown in the patent. In the event of failure to file such affidavits, or affidavits showing that none were twisted, complainant may renew this application.

NORTON v. HARTFORD et al. HARTFORD v. NORTON et al. (Circuit Court, S. D. New York. January 2, 1902.) In Equity. On motion for preliminary injunction. John J. Crawford and T. S. Ormeston, for the motion. John W. Griggs and Edward P. Brown, opposed.

LACOMBE, Circuit Judge. The plaintiff in the second suit may take an injunction pendente lite as prayed, provided he will file security in the amount of \$150,000, conditioned that he will pay whatever may be found due from him to the estate of George F. Gilman, with leave to the defendants to move to have the security increased, if the cause be not submitted to the court on final hearing during the year 1902, by reason of any delay on the part of complainant. If such security be given, and injunction order taken, the motion for a receiver in the first suit will be denied. If said Hartford elects not to give such security, the motion for injunction in the second suit will be denied, and the court will, in the first suit, appoint George H. Hartford and another person, to be selected by the court, joint receivers as prayed.

SHADBOLT v. LIBBY. (Circuit Court, S. D. New York. December 19, 1901.) William C. Prime, for the motion. George F. Canfield, opposed.

HAZEL, District Judge. The evidence in this case afforded no logical basis for the verdict of \$3,000, rendered in favor of the plaintiff. It indicates that the jury found that plaintiff was authorized to make the contract, and that but for the failure of the defendants to accept the contract, which they had authorized the plaintiff as their agent to negotiate, the contract would have been consummated by the purchasers, but that the purchasers would only have paid the sum of \$15,000 thereon, whereas the contract called for a cash payment of \$60,000. There is no reasonable basis for the finding that only \$15,000 of the \$60,000 would have been paid. It follows, therefore, that the damages awarded are inadequate, and for that reason the verdict must be set aside, with costs to abide the event.

END OF CASES IN VOL. 113





THE
FEDERAL REPORTER.

VOLUME 114.

CASES ARGUED AND DETERMINED
IN THE
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AND DISTRICT COURTS OF THE
UNITED STATES.

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FEDERAL REPORTER, VOLUME 114.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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Hon. CLARENCE HALE, District Judge, Maine².....Portland, Me.
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Hon. ROBERT WODROW ARCHBALD, District Judge, M. D. Pennsylvania.....Scranton, Pa.
Hon. JOSEPH BUFFINGTON, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

¹ Resigned June 30, 1902.

² Appointed to succeed Nathan Webb.

³ Appointed District Judge March 23, 1902.

⁴ Appointed additional Circuit Judge, June 3, 1902.

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 Hon. JAMES H. BEATTY, District Judge, IdahoBoise City, Idaho.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

SWENSEN et al. v. BENDER.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1902.)

No. 720.

1. TRIAL—ADMISSION OF EVIDENCE—ORDER OF PROOF

The order of proof is largely within the discretion of the court, and the admission of evidence without the requisite preliminary or connecting proof is not prejudicial error, where such proof is subsequently introduced.

2. MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—EVIDENCE.

In an action by a servant against the master to recover for an injury caused by the caving in of a tunnel in which plaintiff was working, evidence of the character of the timbering was admissible on the issue of defendant's negligence, when supplemented by evidence tending to show that it was defective, and known to be so by defendant, and that such defects were responsible for the injury.

3. SAME—CONTRIBUTORY NEGLIGENCE.

A servant injured by the caving in of a tunnel in which he was working, and which was insufficiently timbered, cannot be charged with contributory negligence as matter of law, where it was shown that he was inexperienced in the work, and there was evidence tending to show that the master assured him the place was safe, and that planks were put up by direction of the master to hide the danger from the workmen.

4. SAME—NEGLIGENCE OF FELLOW SERVANT.

Negligent acts of fellow servants cannot be relied on as a defense to an action by a servant for a personal injury, where it is clearly shown that such acts were done under the direct orders of the master.

5. EVIDENCE—OPINIONS OF EXPERTS—HYPOTHETICAL QUESTIONS

It is proper to permit a witness testifying as an expert to answer a hypothetical question stating only facts which there is evidence fairly tending to prove, and it is not necessary, as a general rule, that such question should embrace all the facts of the case.

6. MASTER AND SERVANT—ASSUMED RISKS.

A servant does not assume the risk of injury from the negligence of the master in failing to exercise ordinary care to make the place where the servant works reasonably safe, considering the nature of the employment.¹

¹Assumption of risks incident to employment, see note to *Railroad Co. v. Hennessey*, 38 C. C. A. 314.

7. DAMAGES—PERSONAL INJURY—FUTURE INCAPACITY TO WORK.

Where there was evidence tending to show that plaintiff had, ever since the injury sued for, been incapacitated from work in a greater or less degree, and that such incapacity would continue for some time, it was not error to instruct that the jury in estimating the amount of his compensatory damages should take into consideration the loss sustained through inability to work "during the period of his incapacity and probable incapacity alleged in the complaint."

8. TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS.

If the charge of the court, in its own language, embraces all the points of law arising in the case, it is not error to refuse further instructions requested, although they correctly state the law. It is the duty of the court to simplify its directions to the jury, and a repetition in different language not only tends to confuse the jury, but to give undue prominence to the proposition repeated.

In Error to the Circuit Court of the United States for the Southern District of California.

Herbert Cutler Brown, for plaintiffs in error.

W. C. Petchner, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This action was brought by the defendant in error to recover damages for injuries alleged to have been received by him through the negligence of the plaintiffs in error, who were contractors engaged in the construction of the Third Street tunnel in Los Angeles, Cal. A trial of the case before a jury resulted in a verdict in favor of the defendant in error for \$1,592.75, upon which verdict a judgment was duly rendered, and thereafter a writ of error was taken to have said judgment and all proceedings had in said cause reviewed by this court.

The errors relied upon for a reversal of the judgment relate to the admission of certain testimony, to the action of the court in refusing to grant a nonsuit, to alleged errors in giving instructions to the jury, and in refusing to give certain instructions asked for by the plaintiffs in error.

The complaint, after alleging jurisdictional facts, alleges:

"That on or about December 1, 1899, plaintiff was engaged in laboring with pick and shovel inside said tunnel, in the construction thereof, and that at said time plaintiff was unskilled in such work, and unfamiliar therewith; that on said first day of December said tunnel had been constructed inward a distance of about 200 feet; and on account of the increasing distance inward, the unusual character and (un)familiarity of such work to plaintiff, and the darkness of the interior of said tunnel, on a certain day about two weeks preceding said 1st day of December, plaintiff hesitated about proceeding with his work in said tunnel, fearing that the same might be dangerous, but the person employed by the defendant to superintend the work of construction of said tunnel, * * * and who at all times herein mentioned was in charge of the work in the interior of said tunnel, and who was in immediate control of plaintiff and his said work, seeing plaintiff's hesitancy to proceed with said work, and knowing that plaintiff feared danger therefrom, ordered this plaintiff, in the presence and hearing, and with the approbation, of defendant Anthon Swensen, to go ahead with his said work, and assured plaintiff that there was no danger therein or thereabout; that thereafter plaintiff was, up to the said 1st day of December, a number of times given such assurance by said person in charge of said work; that on the

said first day of December, while plaintiff was engaged in shoveling inside said tunnel, at a point about 170 feet inward thereof, and while in full reliance on the said assurances of said person so in charge of said work, to the effect that there was no danger in or about the same, and knowing that said assurances had the approbation of these defendants, and while this plaintiff was so engaged in work, unsuspecting danger because of said assurances, a great mass of earth fell from the roof of said tunnel upon plaintiff, crushed him to the ground, and broke his right arm in two places, and greatly bruised his left arm, so that for the space of two weeks thereafter plaintiff required the services of a personal attendant to feed him and attend to all his personal wants; and because of the falling upon plaintiff of said earth he was caused great bodily suffering, and the shock that resulted from such injury greatly impaired plaintiff's nervous system, and rendered him sick, so that at this date he is unable to perform work of any character, and such incapacity will probably continue for the space of two months hence, that said injuries so received threaten to permanently impair the health of plaintiff; that said earth was caused to fall upon plaintiff, as aforesaid, by the neglect and failure of defendants to exercise ordinary care to provide a reasonably safe place for plaintiff to work in, to do which was a positive duty due from defendants, personally, to plaintiff, and because said defendants, in violation of their said duty to furnish plaintiff with a safe place in which to work, negligently and carelessly failed to properly, or at all, brace or timber said tunnel at the point where plaintiff was working under the direction of defendants, when injured, as aforesaid, or to take proper precautions to prevent the falling of said earth from the roof of said tunnel, as aforesaid, and, further, because the dangerous character of the place at which plaintiff was employed when so injured, and of the work at said place, was such as defendants, had they exercised ordinary care and diligence, should have known and apprehended, but whereof this plaintiff was unaware by reason of his inexperience, and by reason of his reliance upon the assurance, given to plaintiff as aforesaid, that no danger need be apprehended in or about said work; that by reason of the injuries sustained by the plaintiff by the carelessness and negligence of the defendants, as aforesaid, plaintiff has been unable to work since said 1st day of December, 1899, and thereby has lost 53 days' work to this date, the value whereof per day is \$1.75, and the total value whereof is \$92.75, to plaintiff's damage in said sum of \$92.75; and that by reason of such injuries received as aforesaid, plaintiff has been further damaged in the sum of \$5,000.00."

The answer of the defendants denies these allegations of the complaint, and alleges, in substance, affirmatively, that plaintiff was fully aware and informed of all the dangers of his employment; that defendants exercised every possible precaution for the protection of their employes in said tunnel; that defendants were not guilty of negligence in any respect whatsoever, but that plaintiff's injuries resulted solely and proximately from his own negligence; and, as a further defense, that plaintiff's injuries were the result of the acts of his fellow servants.

The objections made to the various rulings of the court are quite numerous. It will be unnecessary to specifically notice all of them. Several of the objections present substantially the same question, although made at different times and in different ways.

1. It is claimed that the court erred in admitting evidence, at various times, as to the strength and size of the timbers used in the tunnel, in that it does not appear from the evidence that the accident to plaintiff was caused by defective timbering. While it may be the better practice to first show how the accident occurred, it certainly was not error to overrule the objections upon the promise of counsel for Bender that he would show that the injury resulted

from the defective timbering, which was afterwards done. The order in which testimony should be introduced is largely within the discretion of the court. The rule is well settled that an error in admitting evidence without the requisite preliminary, or connecting, proof is cured by the subsequent introduction of such proof; and this is the rule in California, where the case was tried. *People v. Shainwold*, 51 Cal. 469; *Robinson v. Bank*, 81 Cal. 106, 111, 22 Pac. 478. In the light of the issues raised by the pleadings, evidence upon this point was admissible for the purpose of showing negligence upon the part of the plaintiffs in error. Testimony was thereafter given which certainly tended to show that the place where Bender was injured was unsafe, and that the timbering about that point was defective. Touching these questions Mr. Pugh, who had been engaged for about 10 years in tunnel work, after describing the usual methods of timbering used, and of his familiarity with the tunnel, and of the timbering therein, testified as follows:

"I was foreman of the excavating. I have complained many times to Mr. Swensen of the insufficiency of the timbering; that is, as to the distance apart it was placed. I told him a couple of times that the timbering was not sufficient to protect the ground and the men. He said he thought it was all right. I complained to him maybe a dozen times. The morning of the accident I * * * met him at the entrance of the tunnel, and told him that the place was in a dangerous condition, and that we ought to put, what we call generally, a set of timbers three or four feet apart. And he said to me, 'Pugh, I can't stand it; they must be six feet apart;' and I told him, 'If that is the case, Mr. Swensen, that will put the men in danger; and, another thing, they can't do their work; they are afraid to work.' He then asked me, 'Is there anything we can do there?' I said, 'Well, there is only one thing,—to put the timbers there to protect the men.' And he suggested something this way, 'Can we put some planks there?' (meaning two by twelves) 'to hide the danger from the men, so that they won't be afraid to work?' And I said, 'You can do that if you will take the responsibility of it.' * * * I had the men to work that morning just clearing out the timbers. The timbers and the dirt were in the way. I did not put the men to work where the danger was until Mr. Swensen came there. I wanted to inform him about the place and conditions before I put the men to work. After he came there he told me to put the men to work, and to get the dirt out. * * * At about half past ten or eleven Mr. Swensen came in. We were talking over some things, and Mr. Bender, he was looking around and looking up that way, and I walked up to him and said, 'Mr. Bender, it seems to me you are afraid to work in here. If you are afraid, the best thing you can do is to get out of here, because you are liable to catch a good hurt here.' Mr. Swensen passed me and went into the men, and said, 'Go ahead about your work. It is absolutely safe to work here. There is no danger at all. Go ahead with your work.' I was present at the time of the accident. * * * At the place where the accident occurred timbers two inches by twelve inches, about four or five or six, were put forward about six or seven feet, to hide the danger from the men."

Mr. Botwright, who was the timber man at the tunnel, testified as follows:

"I was doing timber work in the east end of the tunnel. I was working there on the first day of December, 1899. I was acquainted with Mr. Bender, the plaintiff in this case, and I recollect the occurrence of an accident to him in the tunnel, between one and two o'clock on the first day of December, 1899. In the morning of that day Mr. Swensen came to me outside, and we talked over about the place where the accident occurred later that day, and I asked him what I had better do; that I did not think that it was really

safe for the men to work in there. He said, 'Oh, well, go to work and put up some planks to hide the danger from the men so they will go ahead and work.' I know the spot where Bender was hurt. He was hurt right where we were working. I told Mr. Swensen that I thought we ought to timber it as fast as we could get to it to avoid danger. Pursuant to his direction to put the timbering in there, I did just exactly what he told me to do. * * * The danger of that particular spot consisted in this: We had had a cave-in, and after this cave-in came, Mr. Pugh, the foreman, and myself had started to catch up this place on the south side. We had put up one set of timbers, and wanted to get up another set, so we could make it safe for these men to work. In order to do that way, we had to work a few men to clean this dirt away. But we went to work and put up one set. * * * The next morning we were getting ready to put up another set. I was outside pretty near all morning cutting timbers, and I had a man working with me inside. As near as I can remember now, this place was scaly in the top where it had caved down, and here the accident happened. It was about eight feet from these plants [planks] to the roof of the tunnel, where it had caved in, and it was naturally dropping there all the time and falling. I and the foreman went to work ourselves in order to get this thing stopped from caving. We didn't work anybody at helping to do this timbering but ourselves and one man. Mr. Bender and three other men were shoveling in the bottom of the tunnel,—shoveling out the cave-in. I apprehended that the place from which the cave came was dangerous to those beneath, and I told Mr. Swensen it was. Mr. Swensen told me to put those planks in to hide the danger from the men, so they would not see it. I put them * * * exactly as he directed. I got all my instructions in placing and constructing the timbering from Mr. Swensen,—nobody else. I condemned that place at which we were working, and told Mr. Swensen that I did not think his method of timbering was proper. He said it was the best he could do. He said he could not buy any more timbers; that they were costing him too much already."

The testimony of these witnesses as to the defective timbering was corroborated by other witnesses.

The court did not err in refusing to strike out the words in the foregoing testimony "to hide the danger from the men." This expression on the part of Swensen, as testified to by the witnesses, if true, tended to show a wanton disregard on the part of the plaintiffs in error to keep the tunnel safe. It tended to show that they knew the place was dangerous, and that they attempted to deceive the workmen and hide from them the knowledge which plaintiffs in error possessed as to its dangerous condition. Swensen denied having made any such remark, and denied having notified Bender that the place was perfectly safe, or directed him to go to work, and declared that Pugh was the person that gave such information and direction. He testified, among other things, that:

"The general supervision of the entire work in the tunnel was, of course, in my hands. * * * I have had no experience in placing timbers in a tunnel. I made suggestions as to the placing of timbers in this tunnel, but Mr. Pugh directed that work entirely. * * * During the morning of the accident I got to the tunnel about half-past seven. Mr. Bender was shoveling dirt into the car at the place where he was hurt. Mr. Pugh put him to work there, and I was with Mr. Pugh. The planking that was overhead where Mr. Bender was working was placed there by Mr. Pugh's directions."

Notwithstanding the statement that he "had no experience in placing timbers in a tunnel," he further said:

"I had knowledge as to the sufficiency of the timbers and the structure at the place, and on the occasion, of the accident, and they were amply sufficient to carry the load that was imposed upon them."

The entire testimony was of such a character as to eliminate from the case the question as to the injury of the defendant in error having been received by the acts of his fellow servants; as it clearly shows that the plaintiffs in error were alone responsible, and tended to show that their action in the premises was such as to induce Bender to believe that there was no danger. It is true that the putting in the planks "to hide the danger from the men" did not make the place safe, but Bender, in the light of all the facts, had reason to believe that it did; and this, with the assurances given him that the place was safe, was well calculated to allay the fears he had previously exhibited as to the danger he was in. The only reasonable inference that could be drawn by the jury from the testimony was that Bender, after the planks were put in, believed the statements as to the place being safe were true, and that he acted under that belief.

2. Dr. Schmidt was called as a witness, and testified as follows:

"I am a physician by occupation, and am engaged in active practice. I have been so practicing since 1882. I am acquainted with Mr. Bender, the plaintiff, and I knew him prior to December 1st, the time of his injury. The condition of his health prior to that time was good. From my education, training, and experience as a physician, I am familiar with nervous ailments and their causes. I have rendered medical services to the family of Mr. Bender before the accident. I have been his family physician."

It is assigned as error that the court erred in allowing a hypothetical question propounded to Dr. Schmidt to be answered, as follows:

"Q. Now, doctor, suppose a man before a certain accident has been enjoying good health, freedom from any indications of nervous disorder, and that thereafter, about December 1, 1899, he should meet with an accident of this character; that a great quantity of boards and earth should fall from a distance of seven, eight, or ten feet upon his breast and stomach and on his arms and shoulders, breaking the right arm in two places, and stunning him so that he remained in that condition for a period of three hours; that thereafter he remained in bed for about three weeks; was unable to resume his ordinary avocation, go to work for a period of eight months; that his arm is still sore; he is unable to close his hand; that before that time he treated his family with kindness,—ordinary kindness, at least; no indication of nervousness about his demeanor towards his family; since that time he is very nervous and cross; punishes his children without provocation, exhibits great irritation, so as to lead him to punish them when they talk about the room; that he has fainting spells occasionally, so that he reels about and grabs at articles that may be in reach; that he is so irritable and cross towards his wife and daughter that he has ordered both of them to leave home, without provocation; and that he had had no other accident or ailment at or about that time. What would you attribute the result of this nervousness, and this nervous condition, exhibited by him that I have referred to? A. I would attribute it to the accident."

The objection to this question was that, "It was based upon facts not in evidence, and upon a hypothetical nervous condition subsequent to the accident of which there was no evidence." This objection was properly overruled. There was testimony offered upon every fact specified in the question. It is always proper to permit such questions to be answered, and it is not, as a general rule, necessary that the questions should embrace or cover all the facts of the case. The authorities upon this point will be found in *Railroad Co. v. Roller*, 41 C. C. A. 22, 100 Fed. 738, 754, 49 L. R. A. 77.

3. With reference to the alleged error of the court in refusing to grant a nonsuit but little need be said. It is true that an employé assumes all the ordinary risks incident to his employment; but it was the duty of the plaintiffs in error to use reasonable care and diligence to keep the tunnel in a reasonably safe condition, so that their servant might not be exposed to unnecessary, unreasonable, or extraordinary risks. The servant only undertakes the risks of the employment so far as they spring from defects incident to the service. He does not take the risk of the negligence of the master. *Railroad Co. v. O'Brien*, 161 U. S. 451, 457, 16 Sup. Ct. 618, 40 L. Ed. 766, and authorities there cited. For a failure to exercise this duty which results in an injury to the employé the employer is liable. *Railroad Co. v. Peterson*, 162 U. S. 346, 353, 16 Sup. Ct. 843, 40 L. Ed. 994; *Railroad Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; *Same v. Archibald*, 170 U. S. 665, 669, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Railroad Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. 65, 68; *Hanley v. Construction Co.*, 127 Cal. 232, 239, 59 Pac. 577, 47 L. R. A. 597; *Bowen v. Railway Co.*, 95 Mo. 268, 273, 8 S. W. 230. This duty and liability is personal to the master, and cannot, in any case of this character, be so delegated by the master as to relieve him of his liability. *Railroad Co. v. Herbert*, 116 U. S. 642, 648, 6 Sup. Ct. 590, 29 L. Ed. 755. Applying these principles of law to the facts of this case, it is manifest that the court did not error in refusing to instruct the jury to return a verdict for the plaintiffs in error. The authorities cited by plaintiffs in error contain correct principles of law as applied to the facts of each case; but an examination of them shows that the servant either voluntarily entered a service known to him to be dangerous, or which afterward became dangerous to him, and with full knowledge thereof he continued work without notifying his employer of the danger; or where the servant knows of the hazardous character of the work and is injured by an accident which could not have been foreseen by his employer; or where the service in which the servant is engaged includes the duty on his part of preparing the timbers or appliances used in the construction of a tunnel or in the erection of buildings, etc. This case does not present any such questions. The distinction between the case at bar and the cases relied upon by plaintiffs in error are clearly pointed out in *Hanley v. Construction Co.*, *supra*. In *Kelley v. Dyeing Co.*, 12 R. I. 112, 116, 34 Am. Rep. 615, cited by counsel, the court, after holding that plaintiff had assumed the risk under the first point above stated, said:

"If, when the danger occurred, the plaintiff had notified the defendant of it, and had been induced to remain in his position by assurances that it should be remedied, or, as some of the cases hold, by a reasonable expectation that it would be remedied, then it would not necessarily be presumed from his knowledge of the danger that he had assumed the risk."

Upon the question of the assumption of risk and alleged contributory negligence upon the part of Bender, it is only necessary to add that the charge of the court upon these points, to which no specific objections were made, was as favorable to the plaintiffs in error as the law and testimony would warrant.

4. There were but two exceptions taken to the charge of the court. After stating that it was essential to a recovery that the plaintiff must prove "that the defective timbering was due to the negligence of the defendants, or, in other words, that its unsafe and dangerous condition was, or, by the exercise of ordinary care, could have been, known to the defendants in time to prevent the injuries complained of," the court said:

"On this branch of the case the court instructs you, further, that an employer does not guaranty the absolute safety of the place where the employé works; but it is the duty of the employer to exercise ordinary and reasonable care in providing a safe place for the employé to work in, and this duty cannot be delegated to a servant, so as to exempt the employer from liability for injuries caused to another servant by its omission. The servant does not undertake to incur the risks arising from negligence in providing or maintaining a suitable and safe place for his work. His contract implies that, in regard to this matter, his employer will exercise due care in making adequate provision that no danger shall ensue to him. It was the duty, therefore, of the defendants, resulting from their employment of the plaintiff as a laborer, to exercise reasonable care in properly timbering the tunnel."

This portion of the charge was objected to on the ground that it does not take into consideration the exception to the general rule therein stated, that the rule does not apply where the preparation of the place in which the employé is to work is a part of the very work which he and his fellow servants are employed to perform, and for the further reason that the rule of law set forth in the said instruction does not apply where the employé is employed to repair a defect itself obviously, and from the very nature of the case, dangerous to all persons employed in such work. It is a sufficient answer to these objections to say, in addition to what has already been said upon this subject, that the facts testified to did not bring the case within any of the exceptions to the general rule stated in the instruction.

The other portion of the charge complained of reads as follows:

"The damages, if any, in this case cannot be exemplary, that is, given by way of example or punishment, but must be limited to actual or compensatory damages; and in estimating their amount *you should take into consideration the monetary loss, if any, sustained by plaintiff through inability to work during the periods of his incapacity and probable incapacity alleged in the complaint*, also the condition of his health, and physical ability to labor, before the accident complained of, as compared with the present condition thereof, and how far the injury is probably permanent in its character and results, as well as the physical and mental suffering he has suffered, if any, by reason of the injury; and you will allow such damages as in your opinion will fairly and justly compensate plaintiff for all the injury and loss and suffering, physical and mental, sustained by him, as the direct and proximate results of the accident, not to exceed the amount demanded in the complaint."

Exceptions were taken to the use of the words we have italicized. We are of opinion that this portion of the charge was correct. The authorities in support thereof are cited in *Railroad Co. v. Roller*, 41 C. C. A. 22, 100 Fed. 738, 750, 49 L. R. A. 77. In that case the court, after stating that the damages, if any, which could be recovered, are compensatory damages,—such damages as would naturally

flow directly from the injury, if any, occasioned to Mrs. Roller by said collision,—said:

"These compensatory damages embrace all damages for bodily and mental pain and suffering which have resulted to said Katherine A. Roller from said injuries, and if said injuries are permanent, or she has not recovered from them, such damages, also, as you may find from the evidence it is fair to believe she will suffer from said injury in the future."

This court said, "This part of the charge was unquestionably correct." The use of the word "probable" in this instruction, which is criticised by counsel, could only be construed to have the same meaning as "it is fair to believe * * * the plaintiff will suffer * * * in the future," and does not call for any conjecture or guess upon the part of the jury, and it is apparent that the jury could not have been misled thereby. There was some evidence—perhaps slight—sufficient to authorize the court to give the instruction.

Bender himself testified:

"Before the occurrence of this accident I was very healthy, and my arms were in good condition. My right arm was broken in two places. It now pains me continuously, and is stiff. I cannot use it well. I cannot close my whole hand. * * * I am working now, and the effect of this work upon my hand is that the hand always hurts me at nighttime; and it hurts me also during the day when I am using it."

5. The entire charge of the court to the jury was substantially correct in all particulars, and was directly applicable to the issues raised by the pleadings and the testimony given at the trial, and embraced all the points upon which it was necessary to instruct the jury. Some of the instructions asked for by the plaintiffs in error which were refused contained correct principles of law, others were misleading, and some of them were clearly erroneous. As to these instructions, it is only necessary to say that the points involved therein were all embodied in the charge of the court in a clear, concise, and correct manner. It was unnecessary to repeat them. The general rule with respect to this matter is well settled that instructions on points which have been sufficiently covered by other instructions may properly be refused, although they are correctly drawn and applicable to the evidence. This is so, whether the instructions requested are covered by the general charge, or whether the mode of expression is the same or different. The duty of the court is fully discharged if the instructions embrace all the points of the law arising in the case, in the court's own language. It is the duty of the court to simplify its directions to the jury and make every effort to render them as free from complexity as possible. The reason for this rule is obvious. Repetition tends to incumber the record, and to confuse and embarrass the minds of the jury, and it is also liable to give undue prominence to the proposition repeated. 11 Enc. Pl. & Prac. 288.

The judgment of the circuit court is affirmed, with costs.

CORBUS v. LEONHARDT.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1902.)

No. 709.

1. WITNESSES—COMPETENCY—TESTIMONY AGAINST DECEDENTS—TERRITORIAL COURTS.

Rev. St. U. S. § 858, providing that in actions by or against executors, administrators, or guardians neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, etc., has no application to territorial courts.

2. SAME—LAWS OF OREGON—APPLICABILITY TO ALASKA.

Act May 17, 1884, "providing a civil government for Alaska" (23 Stat. 24), by section 3 provides for the establishment of "a district court for said district, with the civil and criminal jurisdiction of district courts of the United States." Section 7 declares "that the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." The laws of Oregon at the time made no restrictions excluding witnesses from testifying in any cause (1 Hill's Ann. Laws Or. § 710). *Held*, that such laws were in force in Alaska, and parties were not restricted from testifying with relation to transactions with or statements of decedents.

3. SAME—WHAT TESTIMONY EXCLUDED.

In an action by a physician against an administrator for services rendered his decedent during the latter's lifetime, plaintiff's testimony as to his services, the value thereof, and that no part thereof had been paid, did not relate to any transaction with or statement of the decedent, and was admissible.

4. PHYSICIANS—ACTIONS FOR SERVICES—DEFENSES.

Defendant's evidence tended to show that decedent was employed by a corporation, and was a subscriber to a hospital, and that a verbal contract existed between the hospital and the company that all the latter's employes, by paying \$1 per month, should be entitled to medical attendance at the hospital free. There was conflict in the evidence as to whether subscribers were entitled to treatment at their homes, where decedent's treatment was received. Plaintiff testified that he never agreed to attend subscribers away from the hospital, which was not denied. *Held* not to sustain the defense that plaintiff could not recover because the services were rendered under contract with the hospital.

5. SAME—RECEIPTS—MISLEADING INSTRUCTIONS.

A receipt given decedent by a physician recited: "To attending Mrs. D. [decedent's wife] and baby, \$25.00; ferry charges, \$34.00. Rec'd payment in full to date." In an action by the physician for services rendered decedent himself, plaintiff admitted that he had been paid for his services in attending the wife and baby. There was direct conflict as to whether at the time of its payment the physician had not stated that it was in full for all charges for treating decedent, as well as his wife and baby. *Held*, that a charge that defendant had introduced in evidence a receipt reciting the payment in full to date, and that the receipt was prima facie evidence that all indebtedness was paid, etc., was properly refused.

6. REQUESTED INSTRUCTIONS.

A requested charge is properly refused where covered by charges given.

In Error to the District Court of the United States for Division No. 1 of the District of Alaska.

This action was brought October 14, 1898, by the defendant in error to recover from Robert Duncan, Jr., the sum of \$500 for medical services rendered during the months of January, February, and March, 1895,—in all, 100 visits, from Juneau to Douglas Island, Alaska. Duncan died April 14, 1899. The plaintiff in error was duly appointed administrator of the estate of Robert Duncan, Jr., November 2, 1899, and was afterward substituted as the defendant in said action. In his answer he admitted the rendition of the services, but denied they were worth the sum of \$500, or any other sum; alleged that Robert Duncan, Jr., in his lifetime, paid plaintiff in full for all services rendered; and further alleged that all services rendered Duncan "were rendered in behalf of the St. Ann Hospital." The case was tried before a jury, and resulted in a verdict in favor of the defendant in error in the sum of \$500. Judgment was duly entered for said sum.

There are but two assignments of error, viz.: "(1) The court erred in admitting in evidence to the jury the following testimony of the plaintiff, S. C. Leonhardt, to wit: 'My name is Samuel C. Leonhardt. I reside at Juneau, Alaska, and am a physician and surgeon. I knew the defendant, Robert Duncan, Jr., in his lifetime. I performed services for him in his lifetime. I was sent for, as a private case, and attended Mr. Duncan. I also attended Mrs. Duncan and the baby. I attended Mrs. Duncan during her confinement, and, for some two months after, for milk leg. The baby was what was called "stillborn," and I brought it to life. In January, 1895, I made forty visits to Mr. Duncan; in February I made thirty-five visits; and twenty-five in March. The usual charge for such visits was five dollars each, and that is what I charged, making a total of \$500. Mr. Duncan never paid me for the services rendered. I made a demand on him to pay, and he didn't make any satisfactory answer. He never in his lifetime refused to pay, or denied the bill. He promised to pay it. He told me, just as soon as he was strong enough, and able to think the matter over, he would pay me handsomely for the services I had rendered him, and for me to make out a bill for Mrs. Duncan's confinement and the ferry charges, and he would pay that at once, and just as soon as he was able to be around he would attend to his part of it. He said that he appreciated the fact, or asked me to make out a bill for the whole amount, and I told him I would leave it to his own judgment as to the services for him; and he stated he appreciated the fact that I refused to make out a bill at this time to him for the services. On the 26th of March, 1895, he asked me for his bill. I said: "I rather not make out a bill to you; rather leave it to your own judgment to pay what you think best." And he said he appreciated and knew what position I was in, having just come up here, * * * and he said then, "What do you usually charge in such cases?" I said, "Twenty-five dollars;" and he then said, "Well, you make out your bill for twenty-five dollars, confinement charges for Mrs. Duncan, and the ferry charges to here, for this time, and as soon as I get well I will pay you for myself." And he said, "We can never suitably remunerate you in money for this service." He expressed himself as fully satisfied,—highly satisfied.' (2) The court erred in refusing to give, at the request of the defendant, the following instruction, to wit: 'Gentlemen of the jury, the defendant has introduced in evidence before you a receipt executed to Robert Duncan during his lifetime by the plaintiff, Dr. Leonhardt, dated, March 26, 1895, reciting the receipt of payment in full to date. This receipt is prima facie evidence that all indebtedness of Robert Duncan to Dr. Leonhardt was paid; that nothing more was due from Robert Duncan on account of anything transpiring prior to March 26, 1895; and, before you can find for the plaintiff in this case, you must find that the presumption arising from the receipt is met and overcome by the preponderance of the evidence.'

Section 858, Rev. St., referred to in the opinion of the court, reads as follows: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: provided, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the

other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

Maloney & Cobb, for plaintiff in error.

Lorenzo S. B. Sawyer, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts as above). 1. The objections presented by the first assignment of error are based upon the ground that the testimony of Dr. Leonhardt comes within the provisions of section 858, Rev. St., and that by this section he was not a competent witness to any transactions and conversations between himself and defendant's intestate. We are of opinion that the court did not err in admitting the testimony objected to. It is perhaps true, as claimed by the plaintiff in error, that there is no decision directly in point, but the decisions bearing upon the general question lead us to the conclusion that section 858 does not apply to territorial courts. *Good v. Martin*, 95 U. S. 90, 98, 24 L. Ed. 341; *McAllister v. U. S.*, 141 U. S. 174, 11 Sup. Ct. 949, 45 L. Ed. 693; *Thiede v. Utah*, 159 U. S. 510, 515, 16 Sup. Ct. 62, 40 L. Ed. 237; *The Coquitlam v. U. S.*, 163 U. S. 346, 351, 16 Sup. Ct. 1117, 41 L. Ed. 184; *Jackson v. U. S.*, 42 C. C. A. 452, 102 Fed. 473, 479.

In *Good v. Martin*, supra, the court said:

"Territorial courts are not courts of the United States, within the meaning of the constitution, as appears by all the authorities. *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; *Hornbuckle v. Toombs*, 18 Wall. 648, 21 L. Ed. 966. A witness in civil cases cannot be excluded in the courts of the United States because he or she is a party to or interested in the issue tried, but the provision has no application in the courts of a territory where a different rule prevails."

Page v. Burnstine, 102 U. S. 664, 26 L. Ed. 268, cited by the plaintiff in error, is not in opposition to these views. That decision was rendered under certain provisions of the act providing a government for the District of Columbia, which are not applicable to Alaska. In the course of the opinion the court said:

"These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the General Statutes of the United States relating to the practice and proceedings in the 'courts of the United States' are locally inapplicable to territorial courts."

By the provisions of section 3 of the "Act providing a civil government for Alaska," approved May 17, 1884 (23 Stat. 24), there was "established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States." By section 7 of this act it was provided "that the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the pro-

visions of this act or the laws of the United States." At the time this law was enacted there were no restrictions excluding witnesses from testifying in any case. 1 Hill's Ann. Laws Or. § 710. These laws were in force in Alaska at the time this suit was brought and at the time of Robert Duncan's death, and were applicable to the proceedings had in this case.

In so far as this case is concerned, there was ample evidence to sustain the verdict in the testimony of Dr. Leonhardt, independent of his testimony relating to "any transaction with or statement of the intestate." The testimony as to his services, the value thereof, and that no part thereof had been paid, was clearly admissible. In *Cowdery v. McChesney*, 124 Cal. 363, 366, 57 Pac. 221, the plaintiff was asked questions as follows:

"Q. Has anything been paid to you since his death on account of any services rendered by you to him during his lifetime? * * * Q. If any balance upon any account was due to you upon the death of George M. Kasson, does that balance still remain unpaid?"

Objections were made to both questions on the ground that the plaintiff was not a competent witness to testify to such facts, under the provision of section 1880 of the Code of Civil Procedure, which is substantially the same as section 858, Rev. St. The court sustained the objection, to which ruling of the court plaintiff excepted. The supreme court said:

"The inquiry contained in these questions did not relate to anything that occurred before the death of deceased, and does not fall under the inhibition of section 1880 of the Code of Civil Procedure. The ruling of the court was therefore erroneous."

In relation to these matters there was no conflict. In fact, they stand admitted by the evidence contained in the record.

The defense interposed by plaintiff in error, that Dr. Leonhardt was not entitled to recover anything for medical services rendered Robert Duncan, Jr., because the services were performed under a contract with St. Ann's Hospital, is not sustained by the evidence. The testimony on behalf of the plaintiff in error tended to show that Duncan was in the employ of the Alaska-Treadwell Gold Mining Company, and was a subscriber to St. Ann's Hospital, and that a verbal contract existed between the mining company and the hospital that all of its employes, by paying \$1 per month to the hospital, were entitled to medical attendance at the hospital free. There is a conflict in the evidence as to whether the subscribers were entitled to treatment at their homes. Dr. Leonhardt testified that the subscribers were entitled to be treated free by the hospital physician "if they entered the hospital, but not if they were treated at their homes." He further testified that he never entered into any "contract to attend such subscribers away from the hospital." This is not denied. Any contract made by the subscribers with the mining company or with St. Ann's Hospital might be binding upon them, whether the subscribers were treated at the hospital or at their homes; but the physician could not be bound unless he had agreed to the contract, assented to it, or acted under it.

2. The court did not err in refusing to give the instruction asked for by the plaintiff in error. The language of the instruction was misleading, if not erroneous. The receipt in question reads as follows:

"Juneau, Alaska, March 28, 1895.

"Mr. Robert Duncan, Jr., to S. O. Leonhardt, Dr.

To attending Mrs. Duncan and baby.....	\$25 00
To ferry bills for Jan., \$14.00; Feb., \$10.00; Mar., \$10.....	34 00
	<hr/> \$59 00

"Rec'd payment in full to date.

"Saml. C. Leonhardt, M. D."

It will be observed that this receipt does not include any services rendered to Robert Duncan, Jr. It was only prima facie evidence of what appears on the face of the receipt. It was for attending Mrs. Duncan and the baby, and, independent of the receipt, the doctor testified that he had been paid for such services. There was a direct conflict in the evidence as to whether or not at the time of its payment the doctor had not stated that it was in full of all charges for treating Mr. Duncan, as well as his wife and baby. That conflict was settled by the verdict of the jury. Moreover, the court gave proper instructions to the jury with reference to the receipt, and was not required to repeat it in language used by counsel, even if it was admitted to be correct in all particulars. *Railroad Co. v. Roller*, 41 C. C. A. 22, 100 Fed. 738, 759, 49 L. R. A. 77; *Swensen v. Bender* (C. C. A.) 114 Fed. 1; 11 Enc. Pl. & Prac. 288.

The judgment of the district court is affirmed, with costs

FARMERS' LOAN & TRUST CO. v. EATON et al.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1902.)

No. 1,512.

1. RECEIVER—AUTHORITY TO LEASE PROPERTY.

A court, having possession of property through its receiver, may authorize him to lease the same.

2. SAME—TERM—RESERVING RIGHT OF CANCELLATION.

Such lease should not be given for a period that will needlessly prolong the litigation, and, if necessary, a provision for cancellation, at the court's option, should be inserted.

3. SAME—OUSTER OF LESSEE BEFORE EXPIRATION OF TERM—RIGHT TO DAMAGES.

Where property is leased by a receiver for a fixed term, with the express sanction of the court, and no right to terminate the lease is reserved, and the lessee is ousted by order of court before the natural termination of the lease, compensation should be awarded him for such actual damage as he has sustained.

4. SAME—ELEMENTS OF DAMAGES—LOSS OF PROPERTY.

Loss of expected profits sustained by a lessee of a railroad lease executed by a receiver, due to the termination of the lease prior to its natural term by order of court, is a proper element of damages to be awarded the lessee.

Appeal from the Circuit Court of the United States for the District of Kansas.

W. H. Rossington, Charles Blood Smith, and Clifford Histed, for appellant.

J. D. McFarland and George H. Whitcomb, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The questions to be determined in this case arise on the following facts: In a certain action which was brought by the Farmers' Loan & Trust Company, as trustee, to foreclose a mortgage on the property of the St. Louis, Kansas & Southwestern Railroad Company, the circuit court of the United States for the district of Kansas, on November 27, 1896, appointed Dwight Braman as receiver of the mortgaged property. On January 27, 1897, the receiver aforesaid presented a petition to the court, requesting leave to lease the property of said railroad company to Francis S. Eaton, one of the appellees, for the period of one year from January 30, 1897, until January 30, 1898. Such leave was granted, and the proposed lease was submitted to the court and approved. On June 30, 1897, the receiver filed another application for authority to enter into another lease with said Eaton for a term of one year from July 1, 1897, with an option to said lessee to continue such lease in force for a second year. The proposed lease was authorized and approved by an order made and entered of record on June 30, 1897, and was duly executed. By the terms of the latter lease Eaton, the lessee, was to pay a deficit, in the sum of \$2,780, which had accrued from the operation of the railroad from March 17, to July 1, 1897. The lessee also agreed to assume and pay certain notes, which had been given for equipment, amounting to \$2,400, and were payable at the rate of \$200 per month. He also agreed to pay the interest which accrued during the term of the lease on certain receiver's certificates, to the amount of \$12,000, to insure the buildings along the road, to put in at least 2,000 new ties, and to place the road generally in a safe condition. The receiver, on his part, was to pay all the taxes upon the property, but the lessee was to receive all the income and earnings of the property, together with all cash then in the hands of the lessee as manager, and also all accounts and bills receivable, which accrued or were received from the operation of the road while the same had been under the charge of the lessee. On September 23, 1897, the court entered a decree of foreclosure and sale, by virtue of which the mortgaged property was sold and the sale confirmed on December 20, 1898, at which time the purchaser at the foreclosure sale was placed in possession of the mortgaged property. In the meantime, on November 30, 1898, Eaton, who had been or was about to be dispossessed of the leasehold property, filed a petition, asking, by way of relief, that he might continue to operate the road which he had leased until the 1st day of July, 1899, in accordance with the option which he had reserved by the terms of the lease. This petition on the part of Eaton was subsequently referred to a master, to report what, if any, compensation should be

allowed to him as lessee, on account of the wrongful termination of his lease. After a full hearing and report, and after exceptions to said report had been heard and considered, the lower court allowed the lessee, as damages for the cancellation of his lease before the termination thereof, the sum of \$8,298.88, which was a sum somewhat in excess of the amount recommended by the master. The present appeal was taken by the Farmers' Loan & Trust Company, the complainant in the foreclosure proceedings, from such order or allowance.

The principal question which this court is called upon by the appellant to determine is whether Eaton, the lessee, is entitled to any damages on account of being dispossessed of the leasehold property, prior to the natural termination of his lease. It is conceded, apparently, that a court, having possession of property through its receiver, may authorize him to lease the same; but, if such proposition is not fully conceded, it is, at least, well sustained by the authorities. In the case of *Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.* (C. C.) 41 Fed. 8, 11, it was held by Judge Brewer that receivers, acting under the direction of the court which appointed them, have power to execute leases without the consent of the mortgage bondholders. And in the case of *Vault Co. v. McNulta*, 153 U. S. 554, 560, 14 Sup. Ct. 915, 38 L. Ed. 819, it was taken for granted that such power exists. See, also, *Weeks v. Weeks*, 106 N. Y. 626, 13 N. E. 96; *Beach, Rec.* §§ 288, 289. The point relied upon by the appellant seems to be that when such leases are made, even with the approval of the court, the court has the right to terminate them whenever the necessities of the litigation so require, and that, if terminated, the lessee is not entitled to compensation for any damages which he may have sustained. We are at a loss, however, to discover any good reason by which such a doctrine can be upheld. A private person has the right to break his contract only on condition that he pays the damages incident to the breach. In some cases the right of an individual to break his contract on condition that he makes compensation in damages is not conceded, but courts of equity will compel specific performance. And no reason occurs to us why a judicial tribunal which has power to authorize a receiver to enter into a contract should be exempt from the rule which obtains as between individuals. If anything, it would seem that courts ought to be more scrupulous in keeping their engagements, and more ready than private individuals to award damages, when, in the exercise of their powers, they find it necessary to violate agreements which they have unwittingly made through their receivers. A judicial tribunal, as was said in one case (*Farmers' Loan & Trust Co. v. Burlington & S. W. R. Co.* [C. C.] 32 Fed. 805), "should be chary of promises, eager of performance." It was also held in a New Jersey case (*Vanderbilt v. Railroad Co.*, 43 N. J. Eq. 669, 12 Atl. 188) that the contracts of a receiver, made with either express or implied authority, cannot be annulled or revoked at the mere pleasure of the court, except on the same conditions that an individual may break his engagements. When a court authorizes its receiver to lease, for

the time being, property in his custody, it should act with great circumspection, and see to it that the lease is not given for such a period of time as will needlessly prolong the litigation or endanger the rights of any parties thereto. If need be, clauses should be inserted in such leases reserving to the court the power to cancel them whenever it is deemed expedient to do so. But when, as in the present case, property is leased for a fixed term, with the express sanction and approval of the court, and no right to terminate the lease is reserved, and the lessee is ousted by order of the court before the natural termination of the lease, compensation should be awarded to the lessee for such actual damages as he has sustained. If this is not done, it might well be said that the court, in its own dealings, does not observe the same good faith which it compels others to observe. We are of opinion, therefore, that the lower court very properly awarded the lessee damages for the wrongful ouster, and the only question which remains for consideration is whether the damages so awarded were excessive.

Counsel for appellant concede that the basis adopted by the lower court for estimating the lessee's damages was as fair as could have been adopted, but they contend broadly that the lessee was not entitled to any allowance for what he might have made by the operation of the road if he had been allowed to operate it during the residue of his term. They characterize such damages as speculative, and not recoverable. We do not concur in that view. For the breach of such a contract as the one in question we do not perceive what damages could have been more direct and certain than the loss of the profit of operation. The lessee doubtless entered into the lease for the purpose of realizing something from the operation of the road over and above the expenses of running it and the rental. This expected profit was within the contemplation of the parties, and the ouster of the lessee necessarily deprived him of the expected gain. The most that can be said is that the amount of the profit which the lessee would have realized could not be computed with mathematical accuracy. The loss of this profit, however, was the natural and probable result of the ouster, and the fact that the amount of the profit was not susceptible of mathematical demonstration, since the lessee had not been allowed to operate the road, did not render it so uncertain that it should have been excluded, within the rule announced by this court in *Trust Co. v. Clark*, 34 C. C. A. 354, 92 Fed. 293. As the profit which the lessee would have realized was estimated by the master after the termination of the leasehold term, and at a period when all of the conditions which affected the earnings of the road during the period covered by the lease were fully known, we have no doubt that the probable earnings, and the probable cost of operation, during that period, were so well known that the master was able to estimate the same, at the time he did, with reasonable accuracy. We conclude that the damages allowed below were recoverable, within the doctrine announced by this court in the case above cited, and also by the doctrine enunciated in the following cases: *Railroad Co. v. Howard*, 13 How. 307, 344, 14 L. Ed. 157; *Howard v. Manufacturing Co.*, 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147, and cases there cited.

We have not overlooked the fact that counsel for the appellees have filed and argued a motion to dismiss this appeal upon the ground that the clerk of the lower court has merely certified that certain documents contained in the transcript, such as the bill of complaint, order appointing a receiver, etc., are full and complete copies thereof as they appear of record in his office, without certifying that the transcript is a complete one. Counsel for the appellees cite, in support of their motion to dismiss, the case of *Meyer v. Implement Co.*, 29 C. C. A. 465, 85 Fed. 874, which seems to support their contention. We have deemed it best, however, to dispose of the case on its merits, without expressing a definite opinion with respect to the point thus raised. In making up transcripts in equity cases, it is doubtless found to be expedient, at times, to omit copies of certain proceedings, which really form a part of the record, because the omitted proceedings have no bearing upon the question intended to be presented on appeal, and merely cumber the record. To avoid such objections to the transcript as have been made in the present case, it would doubtless be well for the clerk, when the transcript is not a full and complete transcript of all the proceedings in the case, to make some appropriate mention of the fact in his certificate, stating the reasons why a portion of the proceedings are omitted, and that the transcript, as prepared, is a full and complete transcript of such proceedings in the case as it purports to contain.

The decree below is affirmed.

BRAMAN v. FARMERS' LOAN & TRUST CO. et al.
(Circuit Court of Appeals, Eighth Circuit. March 17, 1902.)

No. 1,555.

1. RECEIVER—COMPENSATION—REVIEW BY APPELLATE COURTS.

Appellate courts will not interfere with the discretion of the courts below in fixing the compensation of receivers and their counsel unless it has been abused.

2. SAME—AMOUNT OF COMPENSATION.

Twelve thousand dollars was a reasonable compensation for two years' service as receiver of a Kansas railroad, only 60 miles in length, the volume of whose business was small, and the road itself operated during most of the receivership by a lessee, who was entitled to all the earnings, where the receiver resided in Massachusetts, and was only in Kansas on a few occasions, and where his services were confined to issuing receiver's certificates and negotiating them when he could find a purchaser.

3. SAME—ALLOWANCE FOR HOTEL BILLS.

A claim of \$2,952 for hotel bills, claimed to have been paid by the receiver while in New York on receivership business, was properly disallowed, as an unnecessary outlay.

4. SAME—RENT OF OFFICES.

The receiver ought not to have rented an office in New York without the express sanction and approval of the court.

Appeal from the Circuit Court of the United States for the District of Kansas.

J. D. McFarland and George H. Whitcomb, for appellant.
Charles Blood Smith, W. H. Rossington, and Clifford Histed, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case arose out of an action to foreclose a mortgage, executed by the St. Louis, Kansas & Southwestern Railroad Company, that was brought by the Farmers' Loan & Trust Company, as trustee in the mortgage, on November 27, 1896. It is a companion case to the one recently decided by this court entitled "Farmers' Loan & Trust Co. v. Francis S. Eaton et al.," 114 Fed. 14, in which we had occasion to consider whether Eaton, the appellee in the latter case, who had leased the property of the aforesaid railroad company from Braman, the present appellant, who was receiver of the property, appointed as such in the foreclosure proceedings, was entitled to damages because he was ousted from possession before the natural termination of his lease. In this case the parties litigant are represented by the same counsel, but Braman, the receiver, is complaining because the lower court did not award him such compensation for his services as receiver, and for his disbursements in that capacity, as it ought to have allowed.

On October 22, 1898, the property of the aforesaid railroad company was sold under a decree of foreclosure, and the day previous Braman, as receiver, filed what he termed an account of his receipts and disbursements, but no vouchers accompanied such report. He had never before, as it seems, filed any such account in the court by which he was appointed as receiver. A few days later the Farmers' Loan & Trust Company filed exceptions to this account, accompanied by a request that the receiver be ordered and directed to file a further and correct report or account. Thereafter, on November 23, 1898, he did file a further amended account of receipts and disbursements, which was also excepted to by the trust company. These two accounts, and the exceptions thereto, were referred to a master for hearing and report, and, after considerable testimony had been heard, the receiver, of his own volition, seems to have filed another supplemental account, which was exhibited some time in April, 1899, and was immediately excepted to by the trust company. This latter supplemental account, which was filed after the hearing before the master had commenced, was the only one that appears to have been accompanied with any vouchers. After these three accounts of the receiver had undergone judicial scrutiny at great length before the master, and before the lower court on exceptions to the master's report, it seems that various sums, aggregating \$11,346.58, which the receiver claimed as credits, either for services rendered as receiver or for disbursements in that capacity, were disallowed, and it was because of such disallowances that the present appeal was taken. The total sum allowed by the lower court for services and disbursements amounts to \$16,699.81. No question of law is presented by the appeal, but this court is asked to review the evidence adduced before the master, and to decide that both the lower court and the master have erred in fix-

ing the value of the receiver's services and in rejecting certain claims for alleged expenditures which are said to have been incident to the proper administration of the trust.

We observe, in the first place, that appellate courts are very much disinclined to interfere with the exercise, by courts of first instance, of such a discretionary power as is involved in fixing the compensation of receivers and their counsel. The lower court usually has better knowledge of what services such officers have actually rendered, and better means of determining how valuable such services have been to the trust, and what is a reasonable compensation therefor, than an appellate tribunal can have. For these reasons they are reluctant to disturb the action which has been taken in such matters, by a court of first instance, and will not do so unless there has been an abuse of discretion which has led to an allowance that is manifestly excessive or too small. Our observation leads us to believe that courts are not prone to make allowances for the services of receivers and counsel that are too small. If they err, it is usually in the other direction. *Trustees v. Greenough*, 105 U. S. 527, 536, 537, 26 L. Ed. 1157; *Southern California Motor Road Co. v. Union Loan & Trust Co.*, 12 C. C. A. 215, 64 Fed. 450; *Whitney v. City of New Orleans*, 4 C. C. A. 521, 525, 54 Fed. 614; *Trust Co. v. McClure*, 24 C. C. A. 64, 78 Fed. 209. The largest disallowed item in the receiver's account was a part of his claim for compensation. He claimed compensation for his services as receiver at the rate of \$1,500 per month, a sum aggregating \$18,000 per year, and succeeded in finding one witness who, upon the receiver's statement of the character of his own services, valued them at the rate of \$25,000 per annum, for acting as receiver of a road which was only 60 miles in length, the volume of whose business was small, and which was in fact operated, during most of the period of the receivership, by a lessee, who, by the terms of his lease, was entitled to all the earnings of the property. The master disregarded the opinion of the latter witness, and allowed the receiver compensation for his services at the rate of \$3,000 per year, but, on exceptions to his report, the lower court allowed him, in full for his services, which covered a period of about two years, the sum of \$12,000. We feel confident that no injustice was done to the receiver by this allowance. It was as liberal as he had any reason to expect, unless he expected to receive largely more than he had earned. He was appointed receiver in November, 1896; the road was sold, and the sale confirmed to the purchaser, on December 22, 1898. From some time in February or March, 1897, until the road was sold and the purchaser took possession, it was operated by Eaton, as lessee, who had full charge of the same. The receiver was a broker, who resided in Boston, Mass. He does not appear to have been in Kansas, where this short piece of road was located, except on a few occasions, during the receivership, and his services as receiver seem to have been confined to issuing receiver's certificates and negotiating them when he could find a purchaser. The master, in his report, remarks "that the financiering done by Braman as receiver, in regard to the property of the St. Louis, Kansas & Southwestern Railroad Company, does not appear to have been of such a high character as to justify the estimate

placed thereon by Baldwin," who was his principal witness. We fully concur in that view. His services in financiering the property do not appear to us to have been very important or very beneficial to the trust committed to his charge. In view of all the circumstances, we are satisfied that the allowance made by the lower court to the receiver for his services was fully as large as it ought to have been, and that he has no fair pretense for complaint on that score.

Another large item in the receiver's account which was disallowed is the sum of \$2,952.54, for hotel bills which he claimed to have paid in New York while he was in that city, necessarily, on business connected with the receivership. The master disallowed various alleged expenditures, making up the above sum in the aggregate, on the ground that there was nothing in the testimony to show the reason or necessity of such expenditures on the part of the receiver. We entirely agree with that conclusion of the master, and are fully persuaded that these expenditures were not made solely for the benefit of the trust, and that, if they were so made, they were unnecessary expenditures, and ought to be disallowed for that reason. Operated, as this road was, by a lessee, and being a small local road in an impoverished condition, we can conceive of no reason why the receiver should be living, at the expense of the property, in the city of New York, 1,500 miles distant from the property. The necessity of conferring with other railroad companies and being near their principal offices strikes us as being a poor excuse for such outlays. Nor do we regard it as a sufficient reason for the allowance of these hotel bills, or a part of them, that the master did allow the receiver for office rent in the city of New York up to July 1, 1897, when the Eaton lease took effect, since we are of opinion that, in view of all the circumstances, this latter expense for office rent was entirely unnecessary; but, as no appeal was taken from the latter allowance, it will be permitted to stand. Certain it is that the receiver should not have rented this office in New York without the express sanction and approval of the court, which was not obtained. *Vault Co. v. McNulta*, 153 U. S. 554, 14 Sup. Ct. 915, 38 L. Ed. 819.

Complaint is made because the master and lower court disallowed the sum of \$3,000 which the receiver claimed to have paid to an attorney in New York for legal services rendered to him as receiver. The facts attending this transaction appear to be that Roger Foster, an attorney residing in New York, presented to the receiver a bill in the sum of \$6,000, which appears to have been a bill for legal services rendered at the instance of the receiver in various matters, some of which had no legitimate connection with the receivership. The receiver says that he paid this bill with the proceeds of discounted receiver's certificates, and charged \$3,000 to the account of the St. Louis, Kansas & Southwestern Railroad Company. The master found that the services rendered in behalf of the latter company, by the attorney in question, were not worth to exceed \$1,000, which sum was allowed, and in that view we concur. This transaction, as explained by the receiver, is on its face exceedingly sus-

picious, and we very much doubt whether he should have received any allowance on account of money paid to the attorney.

Exceptions are alleged to various other disallowances, but we do not deem it necessary to speak of them in detail, although they have each been carefully examined. We find no occasion to disturb the action of the lower court as respects any of them. As the master well remarks, "Braman never kept any books in the ordinary acceptation of the term;" that is, books showing in detail his receipts and expenditures on account of the trust, as it was his plain duty to have done. His accounts were kept mainly in memorandum books and bank book stubs, and his vouchers consist in part of receipts and in part of his own checks, drawn to cover items contained in his reports. Because of his failure to keep proper accounts, the master observes that, "It was with great difficulty that anything could be sifted out from it which would aid, * * * to any great extent, in arriving at a proper conclusion." The receiver seems to have acted upon the theory that he could manage the property committed to his charge as if it was his private property, and not a public trust, keeping no accounts other than such as he found it convenient to keep for his private information. For that reason, if the rule applicable to such cases was strictly applied, he could be denied any compensation for his services. The master, however, took a more liberal view, resolving, as he says, every question in favor of the receiver, when he was in doubt whether an item claimed as an expenditure should be allowed or disallowed. We have no doubt that the allowances made in behalf of the receiver, both for compensation and for expenditures, were fully as great as they ought to have been, and the order made below is accordingly affirmed.

CHICK et al. v. FULLER et al.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1902.)

No. 682.

1. CORPORATIONS—LIABILITY OF DIRECTORS—NEGLIGENCE IN PERFORMANCE OF DUTY.

Directors of an insolvent manufacturing corporation cannot be held individually liable to creditors either on the ground of negligence in the discharge of their duty or under the statute of Illinois because they declared and paid a dividend to stockholders when the company was insolvent, and permitted the creation of indebtedness exceeding its capital stock, where it is not satisfactorily shown that in the exercise of ordinary diligence they should have known that the company was insolvent when the dividend was declared, or that the indebtedness was being created; and the evidence is insufficient to charge them with notice of such facts where it shows that the president, who was the active manager of the business, deliberately wrecked the company, and defrauded both stockholders and creditors by embezzling the proceeds of goods sold and substituting fictitious notes, purporting to have been given by customers therefor, and by falsifying the books, which failed to show indebtedness for materials purchased on credit, but, on the contrary, showed the company to be solvent, and the business prosperous, and it does not appear that the directors had any reason to suspect the

president's integrity until after the dividend had been declared and the indebtedness created.¹

2. SAME—VALIDITY OF MORTGAGE—PREFERENCE OF DIRECTORS AND STOCKHOLDERS.

A mortgage given by a corporation to secure bonds issued to pay its indebtedness to two banks, in which directors and stockholders of the corporation were large stockholders, at a time when the corporation was in fact insolvent, and shortly before it suspended business, *held*, under the evidence, to have been given in good faith, while the corporation was a going concern, and in the expectation that its business would be continued, and to be valid, the directors and stockholders who were secured thereby being ignorant of the company's insolvent condition.

Grosscup, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The bill was by appellants, judgment creditors of the Northwestern Shoe Company, and in behalf of all other creditors of that company who might join in the suit against the appellees, (a) to set aside certain alleged preferences said to have been made by the directors and officers of the Shoe Company to the appellees, Allen C. Fuller, the First National Bank of Belvidere and the Second National Bank of Belvidere; (b) to hold the directors and officers (Allen C. Fuller, John J. Foote, David D. Sabin, and Calvin D. May and Steven D. May, as executors of Ezra May, deceased, being the only ones involved in this appeal) responsible to appellants for alleged negligence in the management of the assets and property of the company; (c) to hold the directors liable for assenting to and paying a dividend when the corporation was insolvent; and (d) to hold the directors liable for assenting to the incurring of indebtedness in excess of the capital stock of the corporation.

Upon the filing of the respective answers of appellees, and the replication, the court below referred the cause to a master, who found, in substance, as follows: (a) That the directors were liable to the complaining creditors for negligent discharge of their duties; (b) that the directors were liable for the declaration and payment of a dividend when the shoe company was insolvent; (c) that the directors were liable for assenting to indebtedness of the company in excess of its capital stock; and (d) that the payments made to the First and Second National Banks of Belvidere and Allen C. Fuller from the avails of the twenty-five thousand increase of stock, and the issuance and delivery of the fifty thousand dollars of bonds (hereinafter set forth more at large), were in the nature of a fraudulent preference, and should be vacated, and the mortgage set aside.

Exceptions were filed by the appellees, and sustained by the court below, and the bill dismissed. From this decree the appeal is prosecuted.

The further facts are stated in the opinion of the court.

The opinion of the circuit court by JENKINS, Circuit Judge, was as follows:

"I have given to this case a careful consideration of the evidence and the arguments of counsel, but am compelled to state the conclusions to which my mind is forced without elaboration or special argument. The case presents itself in four aspects: (a) General liability of the directors for negligence; (b) their liability under the statutes of Illinois for assenting to the incurring of indebtedness beyond the capital stock of the corporation; (c) their liability under the statutes of Illinois for assenting to and paying a dividend when the corporation was insolvent; and (d) invalidity of the trust deed executed July 1, 1892.

"The general principles by which to judge the liability of directors for negligence are authoritatively established by the decision in *Briggs v. Spaulding*, 141 U. S. 182, 11 Sup. Ct. 924, 35 L. Ed. 662, and are also well

¹ Personal liability of directors of corporations for negligence, see notes to *Robinson v. Hall*, 12 C. C. A. 680; *Warner v. Penoyer*, 33 C. C. A. 230.

stated in *Association v. Childs*, 82 Wis. 460, 52 N. W. 600, 33 Am. St. Rep. 57. The statute of Illinois imposing liability upon directors for assenting to indebtedness in excess of capital stock is paragraph 16, c. 32, p. 1007, 1 Starr & C. Ann. St. (2d Ed.), and provides that a director, assenting to the incurring of indebtedness by a corporation in excess of its capital stock, shall be personally and individually liable for such excess to the creditors of such corporation. This statute, as I think, clearly implies that the director assenting must do so knowingly, or be guilty of such gross negligence with respect to informing himself of the conditions of the corporation, when prudent action would readily have informed him of its condition, that the law will presume knowledge. The liability imposed by statute upon directors with respect to the declaring of dividends under certain conditions is paragraph 19 of the same chapter, and implies the same assent and knowledge upon the part of the director in declaring a dividend when the company is insolvent, or which would render it insolvent, or which would impair its capital stock.

"The fraud which wrecked this corporation was artful, bold, and cunningly concealed. Graff, the president, and his co-conspirators, purposely omitted to report to and concealed from the bookkeeper and directors, and purposely omitted to enter upon the books of the corporation, all of the purchases made, so that much of the indebtedness of the corporation for goods purchased was concealed from the bookkeeper and from the directors. Graff caused to be shipped to Chicago to fictitious consignees a large amount of manufactured goods, sold them there for cash, and appropriated the proceeds. He returned to the company fictitious or forged notes as the avails of the property sold; these pretended sales, of course, being reported by him and appearing upon the books of the corporation. These notes were discounted by Graff for the corporation with the banks at Belvidere, and furnished the means by which the business was conducted. I fail to find in the evidence any actionable negligence upon the part of the directors, who have excepted to the master's report. When the citizens of Belvidere first became interested in the Graff concern, and procured its removal to Belvidere, they subscribed for and paid in in cash \$15,000 to the capital stock, and the donation in addition of \$7,500. The inventory of the property put in by Graff and Harris was procured to be made by those citizens of Belvidere who had interested themselves in the concern, and it was valued at \$25,000, the amount invested or supposed to be invested by Graff and Harris, who were the active conductors of the business. They appeared to the citizens of Belvidere as active, energetic business men. There was nothing to suggest that Graff and Harris were not as honorable as they were energetic. It is said that the directors failed to have examination of the books. If this be true, with respect to any particular period of the time, such examination would have disclosed nothing of the fraud, and would have led to no result. These directors, who are sought to be charged with liability for negligence, acted certainly in entire good faith. In the early part of 1892, they took the unissued stock of \$10,000 at par or over, advancing their own money to aid the concern. As late as the 28th of June, to the 1st of July, 1892, they increased the capital stock by the sum of \$25,000 to relieve the corporation from what they supposed to be temporary embarrassment arising from attempting to do too large a business on a capital of \$50,000, and paid in their own money into the concern. When Harris became obnoxious, for some reason, to the directors, or some of them, they purchased his stock at above par, and, as they supposed, got him out of the concern. They certainly acted in entire good faith, and evidenced their confidence in the corporation by their constant investment of money. They had no interest to subvert except to protect the corporation, its creditors, and themselves. I have been unable to see any one act of neglect upon their part during the time they respectively held their offices as directors, which resulted in injury to the creditors. Under the decisions referred to I am of opinion that they are not liable for negligence. I may add with respect to the director (May) who departed this life before the report of the master, and whose executors have been substituted in his place, that in my judgment the action for such negligence, irrespective of statutory liability, does not survive the death of the

party, but dies with him; and the executors should be discharged, also, upon that ground.

"With respect to the liability imposed by the statute for assenting to debts in excess of the capital stock, it is contended that the corporation indorsement of business paper discounted at the banks is a liability within the meaning of the statute. The liability of the corporation as indorser had not been fixed. It was contingent upon nonpayment of the notes at maturity, and the corporation being charged by proper proceedings for the amount of the note, I do not think the statute contemplates such an indebtedness as that, for it would be wholly impossible for any stock corporation to carry on business without rendering all its directors personally liable. The indebtedness contemplated in the statute is the direct and absolute liability of the corporation for the goods and property procured for its use. Eliminating this feature of the transaction, there is nothing upon the books to show that the indebtedness of the corporation exceeded its capital stock at the time charged, nor anything to show that these directors knowingly assented to such increase, or were guilty of any neglect of proper action which would have informed them of the true condition of affairs brought about by the fraud of Graff and his co-conspirators. The same may also be said with respect to the declaration of a dividend in the early part of 1892. The trial balance presented to the board by the president of the company, showed, as did the books, a profit which warranted a dividend. That the actual fact did not so warrant was because the concealed fraud of Graff either rendered the company insolvent at that time, or made the declaring of a dividend improvident. But most certainly these directors did not assent to the declaration of a dividend with any knowledge of such insolvency or improvidence. I find nothing in the testimony or in the facts reported by the master which warrants the conclusion reached with respect to the liability of the directors upon either of the three grounds considered.

"I have had more doubt with respect to the validity of the mortgage of July 1, 1892, under which \$50,000 of bonds were issued to retire the indebtedness of the bank. The court of appeals for the circuit in *Sutton Mfg. Co. v. Hutchinson*, 11 C. C. A. 320, 63 Fed. 496, 24 U. S. App. 147, had occasion to consider when and under what circumstances a corporation could prefer creditors, and it was there ruled that when a corporation has become insolvent and suspends the prosecution of its business, or when it is seen that the business can no longer be prosecuted, then the directors become trustees for all the creditors and cannot give a preference. Does this case fall within that ruling? Contemporaneously with the issuing of this mortgage the directors increased the capital stock, and paid their own money therefor to take up the indebtedness of the corporation; and at the same time, in order, as they supposed, to place the company upon a firm basis, and to take up all the outstanding indebtedness to the banks of which they were informed, issued this trust deed, proposing to continue the business, and having no knowledge at that time of the frauds of Graff and Harris and their co-conspirators. They did not acquire that knowledge until after September 2, 1892, when, it would seem, creditors of the company came forward with attachments, of whose debts they, up to that time, had no knowledge whatever, at least, as to the amount, and whose debts, or the most thereof, did not appear upon the books, and they then ascertained that these notes, which Graff had turned over in payment of supposed purchases and sales of goods, were fictitious, and the fraud was disclosed which wrecked the corporation. There was no intent by this trust deed to give a preference to these banks over other creditors. It was supposed that all creditors would be taken care of and the treasury of the corporation replenished by funds arising from the subscriptions to further stock. There was no design to close up the corporation, but the purpose and object was to continue its business, and as it seemed to the directors it could be continued successfully and profitably. That there was failure in this regard arose from no fault of theirs, but from the subsequently discovered frauds of Graff and Harris which had been concealed from the directors. I think, therefore, that under the circumstances this trust deed was valid and effectual to secure the

bonds, and that their issue of bonds was valid in the hands of the creditors to whom they were delivered.

"It follows that this bill must be dismissed as to the defendants Foote, Sabin, Fuller, the executors of May, the First National Bank of Belvidere, and the Second National Bank of Belvidere. With respect to the exceptions filed, they are all sustained, except the tenth exception of the defendant Fuller, which is overruled, and the eighteenth, twenty-third, and twenty-fourth exceptions, which are overruled, because not specific. Of the exceptions of Foote and Sabin, the first exception is overruled, and the last sentence of the ninth is overruled. The twenty-eighth exception is overruled. The twenty-ninth, thirty-fourth, and thirty-fifth are overruled because not specific. I have not the exceptions filed by the executors of May before me, but the views stated will indicate which exceptions should be sustained and which overruled. A decree may be prepared in conformity with this opinion."

Wm. Z. Manning and A. W. Bulkley, for appellants.

Frank F. Reed and Charles H. Aldrich, for appellees.

Before GROSSCUP, Circuit Judge, and BUNN and SEAMAN, District Judges.

After the foregoing statement, the opinion of the court was delivered by GROSSCUP, Circuit Judge.

The facts rightly settled, this case involves no controverted questions of law. The evidentiary facts are voluminous, but the findings upon which the case turns, including what seems necessarily prefatory, may be summed up as follows:

In 1890 the Northwestern Shoe Company of Chicago entered into negotiations with certain citizens of Belvidere, Illinois, looking toward the transfer of the shoe company from Chicago to Belvidere. As a result of these negotiations, a public meeting was held in Belvidere, and a committee consisting of three of its citizens, John Hannah, Levi Murch, and James Cook, was appointed to visit the factory of the shoe company at Chicago, and investigate the standing of the concern and its management.

The committee proceeded to Chicago; made an examination of the machinery, books, and stock in trade of the company; had conversations with Barnett Graff, its then president, and Frank Harris, its then secretary, respecting the profits, assets and business of the company; and, upon returning to Belvidere, submitted a report favoring the transfer.

In reliance upon this report, the citizens of Belvidere accepted a proposition submitted to them by Barnett Graff, asking, as a consideration for the transfer, that the capital stock of the company—then five thousand dollars—be increased to fifty thousand dollars; that twenty-five thousand dollars of this stock be issued to Barnett Graff, Frank Harris and Jacob Graff, in return for tools, machinery and merchandise to be transferred; that the citizens of Belvidere subscribe for fifteen thousand dollars; leaving ten thousand dollars of the stock in the treasury. It was asked, also, that a donation should be made to the company of seven thousand five hundred dollars for the purchase of a site upon which to erect a factory; the shoe company, on its part, to employ, for a certain period of years, a minimum number of men in such factory; and to give a mortgage

upon the land and buildings so purchased and erected as security therefor.

In pursuance of the above arrangement, the citizens of Belvidere named Allen C. Fuller, John Hannah, Ezra May, W. D. Swail, S. S. Whitman and E. L. Lawrence, a committee to secure the cash bonus of seven thousand five hundred dollars, and to sell the fifteen thousand dollars stock of the company. This committee selected the site and erected the factory, at a total cost of thirteen thousand five hundred dollars, and turned the balance, nine thousand dollars, over to the treasury of the company.

Accordingly, Barnett Graff, Jacob Graff, and Frank Harris, shipped to Belvidere the machinery, tools, fixtures, etc., belonging to the Northwestern Shoe Company in Chicago, which were appraised at the instance of the committee, by Samuel C. Tribou (general manager and superintendent of the Rockford Shoe Company of Rockford, Illinois) at twenty-five thousand dollars; and thereupon stock to that amount was issued to Barnett Graff and his associates, certificates amounting to fifteen thousand dollars being issued to the Belvidere stockholders.

February 13, 1891, having completed the work intrusted to it, the committee submitted a written report to the stockholders of the re-organized Northwestern Shoe Company, and were discharged; and F. R. Smiley, Ezra May, Barnett Graff, Jacob Graff, and Frank Harris were thereupon elected directors of the new company, Barnett Graff being elected president and treasurer, and Frank Harris secretary. January 11, 1892, Allen C. Fuller, D. D. Sabin, Barnett Graff, John Hannah, and Frank Harris were elected directors. January 20, 1892, E. L. Lawrence succeeded Frank Harris as director. March 9, 1892, John J. Foote succeeded Allen C. Fuller as director. No further change took place on the board until August 9, 1892, when John J. Foote was succeeded by Irving Terwilliger.

The shoe company continued doing business until September 2, 1892. In the meantime the ten thousand dollars treasury stock was issued at par, and the money therefor received; and June 28, 1892, a further issue of twenty-five thousand dollars of stock was made—ten thousand being taken by Graff, and the balance by the Belvidere stockholders and directors—the avails being used to pay off the indebtedness to the First and Second National Banks of Belvidere and Allen C. Fuller. July 1, 1892, bonds were issued to the amount of fifty thousand dollars, secured by trust deed upon the entire property, and were used to take up the indebtedness then due to the First and Second National Banks of Belvidere. Additional to these transactions, during this interval, Graff, in the name of the shoe company, contracted debts with other parties, on account of goods purchased, to the amount of some twenty-eight thousand dollars, inclusive of the indebtedness due to the complaining creditors. But only a small amount of this appeared on the books of the company. When the crash came in September, 1892, the available assets did not exceed thirty-one thousand dollars; it being found, among other things, that of the outstanding accounts and bills receivable, amounting in all to some ninety thousand dollars,

as shown by the books to be due the company, only about five thousand dollars were collectible, the balance being largely fictitious.

There is no doubt that these transactions concealed and carried out a monstrous fraud; but it is not insisted that the appellees were purposely parties to the fraud; indeed, they were, to a large degree, victims, for they continued putting into the company, from time to time, fresh money. The deception that was practiced upon the complaining creditors, and also upon the appellees, was brought about principally by, (a) a gross overvaluation of the assets, at Chicago, upon which the twenty-five thousand dollars par value stock was issued to the Graffs and Harris; (b) the imposition upon the banks, and the shoe company of fictitious notes, said by Graff to be in payment by customers of goods previously sold; (c) a continuation, after removal to Belvidere, of this practice of bringing forward and discounting fictitious notes upon the pretense that they were in payment of goods sold to various customers; (d) the removal from the factory of manufactured goods ostensibly shipped to designated consignees, but, in fact, sold for cash, and the proceeds appropriated by Graff; and (e) omission from the books of the company of the greater part of purchases made (including those from complaining creditors) whereby a large portion of the indebtedness of the company was concealed from the stockholders and directors.

There is nothing in the record showing that the appellees, either as individuals, or directors, actually knew that the company was insolvent when the dividend complained of was declared; or that, prior to June, 1892, the indebtedness of the company exceeded the capital stock. The contention, at most, is that, owing to their negligence in taking note of the affairs of the company, they constructively had such knowledge. The whole question of liability in these respects seems to center around the inquiry, Should the appellees, in the exercise of the diligence required of them by law, have known, at the time of the transactions, the true state of the company's affairs.

After a careful study of all the evidence, our conclusions respecting the general questions of fact involved may be stated as follows:

First, taking into consideration everything that would naturally influence the committee, including a reasonable confidence in the statements of Graff, and doubtless some anxiety to obtain for their town the industry represented by the shoe company, it is not clear that men of ordinary carefulness, acting in their place, would have discovered that the company's Chicago assets were overvalued.

Second, it is not satisfactorily shown that, until near the culmination of the company's career, and after the indebtedness due to the complaining creditors had been contracted, the appellees had the means of knowing, without the exercise of unusual acuteness and diligence, that the notes said by Graff to have been in payment of goods sold to various customers were, in fact, fictitious.

Third, it is not satisfactorily shown that there came to the directors, prior to the failure, evidence to put them upon notice that

the goods shipped from the factory to the consignees named on the books were, in fact, never delivered to such consignees.

Fourth, there is not evidence sufficient to justify a finding that, until near the culmination of the company's career, and after the indebtedness to the complaining creditors had been contracted, the appellees ought, in the exercise of ordinary diligence, to have known that the books were falsely kept, and that there existed, from time to time, indebtedness that was not shown there.

Upon the basis of these findings, we cannot hold the appellees chargeable on account of the dividend declared, for, at the time the dividend was so declared, they had no means, sufficient to put them on notice, of knowing the insolvency of the company; nor can we hold the appellees to have assented to indebtedness in excess of the capital stock, for, at the time the indebtedness was created, they had no means, sufficient to put them upon notice, of knowing that such indebtedness was being created; nor can we hold them liable, upon any common-law obligation, to the complaining creditors, for negligent discharge of their duties, for, at the time the debts due the complaining creditors were contracted, the appellees had no means, sufficient to put them on notice, of knowing that the affairs of the company were not being honestly managed, and that the company was not financially sound.

Upon the remaining question—the preference given to Fuller and the banks—the members of the court entertain a difference of opinion.

The majority of the court are of the opinion that the mortgage or trust deed of July 1, 1892, securing fifty thousand dollars of bonds, was authorized in good faith to retire that amount of bona fide corporate indebtedness to the banks, and so used and accepted in like good faith, and that the mortgage was executed by a going concern, to secure its indebtedness, after the stockholders had put in their capital for the undoubted purpose of continuing the business; which was so continued up to the failure of September, 1892.

Upon this finding of fact—not concurred in, however, by the writer of this opinion—the transaction would not be within the condemnation of *Sutton Mfg. Co. v. Hutchinson*, 24 U. S. App. 145, 11 C. C. A. 320, 63 Fed. 496, or any case cited, but is upheld in all material features by the authorities, both federal and state. *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; *Sandford Fork & Tool Co. v. Howe, Brown & Co.*, 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713; *Rockford Wholesale Grocery Co. v. Standard Grocery & Meat Co.*, 175 Ill. 89, 51 N. E. 642, 67 Am. St. Rep. 205, and cases cited. In the *Sutton* Case, the insolvent corporation mortgaged all its property to another corporation to secure its over-drafts, with the intention and effect of closing all further prosecution of its business immediately thereupon; and this when both corporations, debtor and creditor, were managed by the same officers and directors and the capital stock owned substantially by the same persons. On the contrary, in the finding of fact arrived at by the majority of the Court, the mortgage under consideration was executed by a going concern to secure its indebtedness for the

purpose of continuing the business, and was reinforced by fresh money contributed by the stockholders in good faith to the same end. This unquestionably would bring this case clearly within the distinctions pointed out in *Sandford Fork & Tool Co. v. Howe, Brown & Co.*, supra, as sustaining the mortgage there in question.

In addition to this, the majority of the Court are of the opinion that the fact that two of the five directors of the shoe company, or that certain of its stockholders, were likewise either directors or stockholders of one or the other bank, receiving the security—all being free from knowledge of the true state of affairs as heretofore indicated—cannot in any view operate to invalidate the security in favor of the banks, accepted in good faith, where a large proportion of the banks' shareholders are not shareholders in the shoe company; nor, can the further fact, that directors or stockholders of the shoe company were guarantors of any part of the indebtedness of that company to the banks impugn that security thus given, as the case is not thus within the rule against the preference of corporate indebtedness to a director. *Rockford Wholesale Grocery Co. v. Standard Grocery & Meat Co.*, 175 Ill. 89, 93, 51 N. E. 642, 67 Am. St. Rep. 205; *Sandford Fork & Tool Co. v. Howe, Brown & Co.*, supra. As held in *Hollins v. Iron Co.*, 150 U. S. 371, 382, 14 Sup. Ct. 127, 37 L. Ed. 1113 (approved in *Manufacturing Co. v. Hutchinson*, supra), the doctrine is well settled in the federal courts "that the property of a private corporation is not burdened with any specific lien or direct trust in favor of general creditors" and prior to the Bankrupt Act of 1898 it was the established rule in Illinois that an insolvent corporation is at liberty to prefer creditors not officers of the company. *Blair v. Steel Co.*, 159 Ill. 350, 364, 42 N. E. 895, 31 L. R. A. 269, and cases cited. In this judgment the writer of this opinion would concur were he able to see that the directors and stockholders of the bank receiving the security were at the time free from knowledge of the shoe company's true state of affairs.

I cannot, however, bring myself to see the facts, centering around the preference transaction, as the majority of the Court have seen them, and feel that it may be excusable to state my own conclusions in this respect.

July 1, 1892, the board of directors of the shoe company consisted of John J. Foote, Barnett Graff, John Hannah, E. L. Lawrence and D. D. Sabin. On this date Foote was a stockholder in both banks, and a director of the First National Bank; and Sabin was a stockholder, director and vice-president of the Second National Bank. Allen C. Fuller, a director of the shoe company from January 11, 1892, until March 8, 1892, was, during that period, and until after the failure of the company, the largest stockholder in both banks. Ezra May, director of the shoe company from February 13, 1891, until January 11, 1892, was, during this period, and on July 1, 1892, a stockholder and director in both banks, and president of the Second National Bank. All the stockholders in both banks were stockholders in the shoe company, at different times. Fuller was the holder approximately of twenty-two thousand dollars of the cap-

ital stock of the two banks, or a little less than one seventh. His subscription to the twenty-five thousand dollar increase stock was six thousand two hundred and fifty dollars, which, after deducting something over thirty-five hundred dollars paid to himself, left two thousand seven hundred and fifty dollars to go upon the payment of the debts—or a little over one ninth of the whole sum paid in as increase capital stock. Foote was the owner of thirty-eight hundred dollars of the capital stock of the two banks, or about one thirty-ninth, and his subscription to the increase capital stock was four hundred dollars, or about one sixtieth. Sabin was the holder of the stock of the two banks to the amount of two thousand one hundred dollars, or about one seventy-first thereof, and his subscription to the increase capital stock was one hundred dollars, or about one two hundred and fiftieth thereof. May was the holder of stock in the two banks to the amount of six thousand five hundred dollars, or about one twenty-third thereof, and his subscription to the increase capital stock was six hundred and seventy-five dollars, or about one thirty-seventh thereof. It is thus apparent that if the avails of the increase capital stock went to the banks to pay off the liability on the fictitious notes, each of these men, considering the notes as otherwise worthless, received from the subscription a benefit considerably greater than his contribution.

The testimony shows that the bond issue of fifty thousand dollars, and the avails of the twenty-five thousand dollars increase capital stock, (except the thirty-five hundred going to Fuller) went to the two banks, to lift the so-called customer's notes, and certain notes of the shoe company itself, then held by the banks; that, after March 25, 1892, the First National Bank discounted no further paper of the shoe company, and that, after June 5, 1892, the Second National Bank discounted no further paper of the company. It is not clear what business was done by the shoe company from July 1, 1892, until the failure in September. The question is whether these transactions show that on July 1, 1892, the appellees were apprised of the insolvency of the company, and took these steps—the execution of the mortgage and the increase of stock—to obtain for their banks an advantage over the other creditors.

The fact that the banks, largely owned by these officers, directors, and stockholders of the shoe company, were the beneficiaries of the mortgage, covering every species of the shoe company's property, is in my opinion a circumstance sufficient to put the court upon inquiry. "Courts of equity" say the Supreme Court, considering a transaction similar to this, (*Richardson v. Green*, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516), "regard such personal transactions of a party in either of these positions, not perhaps with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement." The circumstances of the transaction, in my opinion, put the burden of explanation, upon the appellees.

The explanation is that the rapidly increasing business of the shoe company made it desirable that the pending indebtedness to the banks should be liquidated, so that the banks could, in the future, carry the shoe company's current financial needs, including the discounting of customers' paper. This might be satisfactory, if it were not in conflict with the sequel. Either the shoe company had further financial needs, in which case, contrary to the explanation, the banks did not, in fact, come to its help, or, what seems more probable, the business of the shoe company was already collapsing, in which case, the explanation is shown to have been false. The explanation, indeed, is no explanation. It only intensifies the suspicion aroused by the circumstances of the transaction.

The judgment of the Circuit Judge, hearing the case below, and of the majority of this Court, seems to have been influenced by the fact that the stockholders and directors of the shoe company, at the time the mortgage was executed, subscribed and paid for the increased capital stock; and that this constituted satisfactory evidence that they did not then realize or suspect the failing condition of the shoe company. But this argument is shorn of its force, when it is remembered that the money thus going out of their pockets, as stockholders of the shoe company, came back, with increase, into their pockets, as stockholders of the banks; and that on the whole, not even taking into account the fifty thousand dollars bond transaction, that was wholly for the benefit of the bank, this transfer from one pocket to the other was to their financial advantage.

I cannot escape the conviction—looking at their conduct both preceding and following the transaction of July, 1892—that the parties above named, directors or stockholders of the bank, had reason to know at the time of the execution of the mortgage of July 1, 1892, that the shoe company was insolvent. I cannot bring myself to believe that the mortgage was given in good faith by a going concern to obtain financial assistance to keep the company upon its feet. It seems much more probable to me that the whole transaction was a device, in view of coming failure—a failure that came in fact without any further attempt to keep going—to enable the banks to obtain a preference in the distribution of the company's assets. Nor does the fact that Fuller and May, the chief stockholders in the First and Second National Banks, ceased to be directors of the shoe company in January, 1892, prevent the rule stated from applying. They continued directors and officers of the bank. Foote and Sabin, small stockholders and officers in the banks, were put upon the directory of the shoe company. The rule that creditors thus situated shall not be permitted to obtain a peculiar advantage to themselves over others goes to the core of the transaction, and is not intended to be defeated by a mere technical alignment of officers. I have no doubt, in view of this record, that Foote and Sabin, directors of the shoe company, were controlled in this transaction by Fuller and May, their associates and superior officers in the bank. Nor is this view changed by the fact that there were other stockholders of the bank. For the purposes of this transaction the men named were the representatives of the others.

In this view of the facts, this case is, in all material respects, similar to *Manufacturing Co. v. Hutchinson*, supra. In that case, the Hopper Lumber and Manufacturing Company, being insolvent, and having no purpose to further continue its business, executed a mortgage to the Sutton Manufacturing Company, covering its entire stock, and every article and thing used in its business, to secure the payment of drafts to the amount of eighteen thousand dollars, drawn at different times during the preceding two months by the Hopper Company upon the Sutton Company. Of the six hundred shares capital stock of the Hopper Company at the time of the mortgage, five hundred and ten shares were held by James S. Hopper, the president; thirty shares by Henry S. Hopper, secretary and treasurer, and a director; twenty shares by Fannie E. Hopper, a director; and forty shares by Elizabeth Sutton, mother of Fannie E., and mother-in-law of James S. Hopper.

Of the one thousand shares of the Sutton Manufacturing Company, one share was held by James S. Hopper; two hundred and fifty-nine shares by Fannie E. Hopper; one hundred and twenty shares by Henry S. Hopper; two hundred and four shares by Benjamin F. Sutton (a director in the Hopper Company); seventy-six shares by Mary J. Adams; one hundred and twenty shares by Walter A. Hopper; and two hundred and twenty shares by Elizabeth Sutton. Neither of the last three were officers or directors in the Hopper Company, and had no relation to the Hopper Company, other than that Mary J. Adams was his sister, and Elizabeth Sutton the mother, of Fannie E. Hopper, and Walter A. Hopper was the son of James S. Hopper by a former wife.

The court held the mortgage void, laying down the rule that when a corporation becomes insolvent, and does not expect to make further effort to accomplish the objects of its creation, its managing officers and directors came under a duty to distribute its property or its proceeds ratably among the creditors; and that, because of the existence of this duty, the law will not permit them, although creditors, to obtain any peculiar advantage for themselves to the prejudice of others.

Recognizing the fact that the mortgagee was a corporation, and not the individual directors, of the Hopper Company, and that some of its stockholders had no pecuniary relation with the Hopper Company, the rule is, notwithstanding, applied, because, as stated, two of the directors of the insolvent Hopper Company owned nearly four hundred shares out of the one thousand shares of the Sutton Company; wherefore, the mortgage had the effect to protect their interest, and to withdraw the property mortgaged from its primary liability for the debts of the mortgagor company. "The case presented" say the court "is consequently one in which an insolvent corporation, recognizing its inability to further prosecute its business, and with no hope of recovering from its financial embarrassments, gives a preference by mortgage of its property to some of its directors, being also creditors. According to the principles we have announced this could not be rightfully done."

The Illinois cases (*Gottlieb v. Miller*, 154 Ill. 44, 39 N. E. 992; 114 F.—3

Blair v. Steel Co., 159 Ill. 350, 42 N. E. 895, 31 L. R. A. 269; State Nat. Bank of St. Joseph v. Union Nat. Bank of Chicago, 168 Ill. 519, 48 N. E. 82), in essence, are not in conflict with this ruling. In all these cases it is held that creditors of an insolvent corporation, who are, also, directors, can not secure preference of their claims, at the expense of other creditors; that in such a case, as distinguished from a case where the directors apply the assets of the insolvent corporation to the payment of a debt due a third person, there is a trust.

The mortgage, in my judgment, comes under the ruling of Manufacturing Co. v. Hutchinson, supra, and should, as to the complaining creditors, be declared void, and the estate should be administered according to that theory; but overruled in this particular phase of the case, as I am, by the judgment of my associates, the decree of the Circuit Court must be affirmed.

WENGER et al. v. CHICAGO & E. R. CO.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1902.)

No. 753.

1. RAILROADS—REORGANIZATION—INVALIDITY FOR FRAUD AS AGAINST CREDITORS.

The sale of railroad property in foreclosure proceedings to a committee of reorganization, by whose plan the stockholders of the mortgagor appear to obtain some benefit in the purchasing company, is open to the closest scrutiny where general creditors of the mortgagor are left unprotected; but where the foreclosure is instituted and carried on in the ordinary course for the honest purpose only of enforcing the rights of the bondholders against the property, the mere fact that stockholders of the old company may, under the purchasing arrangement, be given some interest in the securities of the new in exchange for their stock, while it may be indicative of fraud, does not render the sale fraudulent per se, and a general creditor of the old company cannot successfully attack such sale without showing actual fraud, and that property of such company, exceeding in value the mortgage debt, has, by reason of such fraud, been placed beyond his reach on execution.

2. SAME—SUIT TO CHARGE PROPERTY—PARTIES.

To a suit in equity by a creditor of a railroad company to enforce his claim against the property of such company, which has been sold in foreclosure proceedings, and passed into the hands of a reorganized company, on the ground that such sale and purchase were fraudulent, a corporation which owns all the stock of the new company and the trustee for its bondholders are both necessary parties, and a bill which neither joins them as parties nor shows that they cannot be made defendants is demurrable.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The bill was originally filed by appellants, citizens of Illinois against appellee, a corporation, organized under the laws of the State of Indiana, in the Circuit Court of Cook County, in the State of Illinois, and was by appellee removed to the Circuit Court of the United States for the Northern District of Illinois, Northern Division, on account of diversity of citizenship.

Thereupon, an amended bill was filed. To this, appellee demurred, and the demurrer having been sustained by the Court below (105 Fed. 796) this appeal is prosecuted.

W. E. Griffin, for appellants.

F. L. Brooks, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

GROSSCUP, Circuit Judge. It is not necessary to set out the bill at large. In substance, so far as is material to the questions involved, it avers that prior to, and on the 10th of June, 1888, the Chicago & Atlantic Ry. Co., a corporation of the States of Ohio, Indiana and Illinois, owned and operated the line of road from Marion, Ohio, to Chicago, Illinois, that subsequently passed by foreclosure sale to the appellee; that appellant Wenger, a passenger on one of the trains operated by said Chicago & Atlantic Ry. Co., sustained through the negligence of the said company permanent injuries, resulting in the loss of his leg, on account of which, on April 4, 1889, a suit at law was instituted in the Superior Court of Cook County against the railway company to recover damages; that the appearance of the railway company was entered therein May 7, 1889, and the plea of the general issue filed; that said cause coming on to be heard October 4, 1893, resulted in a verdict in favor of Wenger for the sum of twenty-five thousand dollars, upon which judgment was subsequently entered against the railway company; that execution has been sued out upon such judgment against the Chicago & Atlantic Ry. Co. and returned unsatisfied, with the certificate of the sheriff of Cook County thereon that he could find no property whereon to make his levy; and that the said judgment, together with interest thereon, still remains in full force and effect. By proper articles of assignment and for a valuable consideration, appellant McShane has acquired an interest in the judgment.

The bill further shows that prior to the happening of any of the foregoing events, the Chicago & Atlantic Ry. Co. had executed its mortgage, or deed of trust, upon all its railway property and franchises, then owned or thereafter to be acquired, to secure six million five hundred thousand dollars first mortgage bonds; and subsequently, but prior to the injury to appellant Wenger, a second mortgage, or deed of trust, to secure its second mortgage bonds, to the extent of five million dollars.

The bill further shows that the New York, Lake Erie & Western Ry. Co., a corporation, owning and operating a line of railroad from New York to Marion, Ohio, and running in connection with the Chicago & Atlantic Ry. Co., had at the time of the execution of the first mortgage bonds guarantied the payment of the interest thereof; and that the said company was, from the beginning, the holders for value of the entire issue of second mortgage bonds; that default having been made in the payment of interest on the second mortgage bonds, and in certain installments of interest on the first mortgage bonds—upon which default the New York, Lake Erie & Western Ry. Co. had advanced, as guarantor, several hundred thousand dollars—foreclosure proceedings were instituted in 1886, in the Circuit Court of the United States for the District of Indiana; that such foreclosure suit having gone to a decree, there

was, under the order of the court, a sale by a master of the court of the property and franchises of said railway company, August 13, 1890, to Charles H. Koster and Anthony J. Thomas, representing a re-organization committee, by whom the said property was conveyed to the appellee in pursuance of the re-organization plan.

The plan of re-organization, as set forth in the exhibit to the bill, appears to be substantially as follows: The re-organized company to issue twelve million dollars first mortgage bonds in place of the six million five hundred thousand dollars first mortgage bonds foreclosed, distributable as follows: (a) Six million eight hundred and twenty-five thousand dollars in exchange for the six million five hundred thousand dollars, being at the rate of one thousand and fifty dollars of the new first mortgage bonds for each thousand dollars of the then existing mortgage bonds; (b) two million dollars to be used in settlement of debts due to the New York, Lake Erie & Western Ry. Co. and to the New York, Pennsylvania & Ohio Ry. Co., upon their surrender of coupons held, and presumably paid, by them as guarantors of the first mortgage bonds, and holders of the second mortgage bonds; (c) seven hundred thousand dollars to be used in acquiring outstanding second mortgage bonds, other than those claimed by the New York, Lake Erie & Western Ry. Co., at the rate of four hundred dollars new bonds for each ten thousand dollars of the old; and (d) such amount of first mortgage bonds as are necessary to pay the expenses of the foreclosure; the remaining two million, or more, to be used from time to time by the appellee for betterments and improvements.

The plan contemplated also the issue of ten million dollars five per cent. non-accumulative income bonds, secured by second mortgage, distributable as follows: (a) Four million dollars in exchange for the capital stock of the Chicago & Atlantic Ry. Co. at the rate of forty dollars in bonds for each share (one hundred dollars) of stock; and (b) five million dollars to the New York, Lake Erie & Western Ry. Co. as part consideration for its guaranty of the interest of the new first mortgage bonds. The plan provided also that the new capital stock, ten million dollars, should be issued to the New York, Lake Erie & Western Ry. Co. as part consideration for the foregoing guarantee. The re-organization was open, under this plan, to all the bond holders and stock-holders of the Chicago & Atlantic Ry. Co. who should come into the plan within a certain time limited.

Appellants contend, chiefly upon the authority of *Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co.*, 174 U. S. 675, 19 Sup. Ct. 827, 43 L. Ed. 1130, that, owing to the foregoing provision in favor of the stockholders of the old road, the foreclosure sale to the Chicago & Erie Ry. Co. is fraudulent per se, and that appellants are, on that state of the case, entitled to assert their subsequently acquired judgment lien, as if the foreclosure sale had not intervened. This contention can be based solely upon the fact that the plan of re-organization included in its beneficial provisions the stock-holders of the mortgagor company, as persons who should, by reason solely of their holding such stock, have an interest in the second mortgage

income bonds of the proposed purchasing company, in the ratio of forty dollars of new bonds to one hundred dollars of the old stock.

Unquestionably, the sale of a railroad property under foreclosure proceedings to a committee of re-organization, according to whose plan the stock-holders of the mortgagor company appear to obtain some benefit in the purchasing company, is open to the closest scrutiny. While in the distribution of assets, the mortgage bond holders come first in their claim upon the railway property as security, general creditors, and especially those having reduced their claims to judgment, have a place that attaches to the property before the equity of the share-holders of the mortgagor company; and courts of equity will not permit themselves to be used as instruments to unfairly eliminate this intervening interest in favor of the share-holders. A foreclosure, in pursuance of such a scheme, while colorably legal, is in conscience and equity indefensible, and, in a proper action, is open to attack and correction. It was the possible presence of just such a purpose and result that led the Supreme Court (in *Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co.*, supra) to the decree entered in that case.

But where, in ordinary course, foreclosure is instituted and carried out for the honest purpose only of enforcing, against the property, the mortgage obligation, the mere fact that share-holders of the old company may, under a purchasing arrangement, become interested in the securities of the new, will not make the foreclosure per se fraudulent. Such fact may be indicative of fraud, but is not a fraud per se. We see no reason why the purchaser for reorganization may not include any one whom he chooses to take into the organization, and may not contemplate even an exchange of some of the new securities for outstanding shares. To the extent that the property is worth something more than the mortgages, the general creditors are interested in any subsequent distribution. But beyond that, their interest does not extend.

In the case under consideration no showing of fraud of such nature is averred. It is plain from the bill that the interest on the first mortgage bonds had remained unpaid for a considerable period, and that no interest whatever had been paid upon the second mortgage bonds. There is no averment in the bill relating to earnings, or to the actual value of the road, or that such value and earnings were adequate to meet the mortgage obligations. So far as the bill discloses, it was a case of necessary foreclosure, in the interest of the mortgage bond holders; and in the nature of the case there remained nothing for the general creditors. Hence, there was no actual fraud upon such creditors.

The distribution of the securities of the new company under the re-organization plan carry out this view. The new first mortgage bonds—twelve million dollars—secured by no property other than that of the defaulting mortgagor company exceeded the combined first and second mortgage bond issue of the old company. Their increased value they obtained through the foreclosure was not by reason of added mortgaged property, but solely because, in the new arrangement, they were guaranteed by the New York, Lake Erie

& Western Ry. Co. In the distribution of these bonds—the equivalent of the old bond issue—the stock-holders of the old company obtained nothing. The foreclosure, therefore, was of no benefit to them, except to the extent that the intervention of the New York, Lake Erie & Western Ry. Co., as a guarantor of the new first mortgage bonds, and as owner of the new stock should, in the future adjustments of railway business, make the new income bonds valuable. But, general creditors of the old company had no intrinsic right to share in any such new value; and, having no such right, cannot object that the new owner may include beneficially in the new organization the share-holders of the old company. The question raised by the bill is not: Will the new company with its new railway connections make the income bonds valuable. The sole question is: Had the railway property, as it existed at the time of foreclosure, a value greater than the mortgage indebtedness. And that such value existed is not averred.

It seems clear, therefore, that the averments of the bill make no such case of fraud as would render the foreclosure sale void. But we need not rest our decision here. In any state of the case, the impeachment of the decree must be for actual, and not merely for constructive fraud; and a bill to set aside a decree for actual fraud is demurrable, unless all the parties interested in the controversy are brought before the court, or their absence satisfactorily accounted for. The purchaser at the sale attacked—the Chicago & Erie R. R. Co.—is not a defendant. It certainly has a substantial interest in the controversy.

The owners of the new stock—the New York, Lake Erie & Western Ry. Co.—is not a party. The decree prayed for would burden the property represented by this stock with a debt not contemplated when the stock was issued.

The trustee, or other representative of the new first mortgage bonds, is not here. Indisputably, the holders of these bonds are interested in a project that would reduce by nearly one-half their issue of bonds from a place as first mortgage bonds to a place second to appellants' judgment.

It is not averred that these parties, or any of them, are without the jurisdiction of the Court, or that they could not be made defendants without defeating the jurisdiction of the Court. No explanation, indeed, for their absence is attempted.

On the whole case we think the decree of the Circuit Court should be affirmed.

UNITED STATES v. SHEA, SMITH & CO.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1902.)

No. 811.

CUSTOMS ADMINISTRATION—SUFFICIENCY OF PROTEST—EFFECT OF ERROR.

Under the procedure inaugurated by the customs administrative act of 1890, by which the decision of a collector is reviewed by a special tribunal, there is no necessity for exacting such nice precision in the protest of an importer, or such accurate knowledge of the law by him,

as to debar him from relief from an erroneous classification and excessive assessment by the collector because he fails to designate correctly the provision under which the classification should have been made.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The substantial facts of this case are as follows:

During the years 1893 and 1894, while the tariff act of 1890 (26 Stat. 567) was in force, appellee imported at various times from Japan, through the Chicago Custom House, certain thin paper, which was assessed by the collector of the port as "tissue paper" at a duty of eight cents per pound and fifteen per cent ad valorem under paragraph 419 of the tariff act.

Being dissatisfied with this classification, the appellee, in apt time, filed its protests, adding thereto these words: "We claim that the goods in question are specially provided for and dutiable under paragraph 425, as 'manufactures of paper', dutiable at twenty-five per cent ad valorem."

The protests having come, in due course, before the Board of General Appraisers, March 31st, 1898, it was there held that the collector was wrong in assessing the merchandise "as tissue paper" under paragraph 419; also, that the paper did not come under paragraph 425—manufactures of paper—as claimed in the protests, but that it was properly dutiable under paragraph 422 of the act at twenty-five per cent ad valorem, as "paper not specifically provided for". The Board, thereupon, over-ruled the protests and sustained the classification of the collector, solely upon the ground that the protests had mistakenly pointed out section 425, and had failed to point out section 422, as the paragraph under which the goods were dutiable.

On appeal to the Circuit Court, the classification adopted by the Board of General Appraisers was approved, but the ruling of the Board, that the protests were insufficient and that the original classification by the collector must on that account stand, was over-ruled; and a decree was entered ordering the collector to return to the appellee the difference between the rate of eight cents per pound and fifteen per cent ad valorem, as provided for in section 419, and the rate of twenty-five per cent ad valorem, as provided in section 422.

From this ruling of the Circuit Court this appeal is prosecuted.

Oliver E. Pagin, Asst. U. S. Dist. Atty., for appellant.

Wm. Brace, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

GROSSCUP, Circuit Judge (after stating the facts). Section 14 of the Customs' Administrative Act of June 10, 1890 (26 Stat. 137)—a reenactment of the previous provisions on the same subject—provides:

"That the decision of the collector, as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges and exactions other than duties, shall, within ten days after, but not before, such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges and exactions, if dissatisfied with such decision give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon."

It is insisted, at argument, that appellee's omission in its protests to point out section 422, and its reliance upon section 425 as the one under which the paper was properly dutiable, were calculated (though not intended) to mislead the collector, and that the protests are on that account insufficient and void.

The argument runs thus: The collector is not presumed to know the law; the object of the protests, as required by section 14, is not merely to challenge the applicability of the section under which the assessment is made, but requires with like precision that the section under which it ought to have been made be pointed out; and a failure in the latter requirement is fatal to the sufficiency of the protests. Many cases are cited in support, among others: *Curtis v. Friedler*, 2 Black, 461, 17 L. Ed. 273; *Davies v. Arthur*, 7 Fed. Cas. 43 (No. 3,611); *Cummins v. Robertson* (C. C.) 27 Fed. 654; *In re Austin* (C. C.) 47 Fed. 873; *Herrman v. Robertson*, 152 U. S. 521, 14 Sup. Ct. 686, 38 L. Ed. 538.

In the latter case the importation was of certain goods assessed by the collector of the port of New York, as being liable to a duty of fifty cents per pound and thirty-five per cent ad valorem, while the protest insisted that they should pay a duty of thirty-five per cent ad valorem, only, under the second half of section 2499 of the then existing tariff laws (1881). The Circuit Court having found that the goods were properly dutiable under neither of these schedules, but, under another schedule, held that the protest was, for that reason, insufficient; and this holding was affirmed by the Supreme Court in the following language:

"The protest failed to point out, or suggest in any way, the provision which actually controlled, and, in effect, only raised the question which of two clauses, under one or the other of which it was assumed that the importation came, should govern as being most applicable. We agree with the Circuit Court, in holding the protest to have been insufficient."

This decision would seem to be in point, but it must be noted as having been made in a case coming under the tariff act previous to that of 1890, and at a time that the Customs' Administrative Act of June 10, 1890, was not in force.

A later case—*U. S. v. Salambier*, 170 U. S. 621, 18 Sup. Ct. 771, 42 L. Ed. 1167—was one arising under the two acts of 1890. The importation in that case was of certain merchandise, consisting of sweetened chocolate in the form of small cakes or tablets, manufactured from cocoa sweetened with sugar, known commercially as "Sweetened Chocolate", and was classified by the collector of the port of New York "as confectionery not specially provided for" at fifty per cent ad valorem under paragraph 239 of the act. The protest challenged this classification, claiming that the goods were dutiable at two cents per pound, but not pointing out the paragraph under which such claim was made. Two paragraphs of the act—318 and 319—impose a duty of two cents, the first, upon "chocolate", and the second upon "cocoa, prepared or manufactured". On review, the Board of General Appraisers held that the goods were dutiable at two cents per pound as "cocoa" under paragraph 319, and further, that the failure of the importer to specifically claim

under such paragraph did not vitiate the protest. This ruling was affirmed by the Circuit Court, and on appeal by the Supreme Court, Justice Shiras saying:

"The object of the statute, in requiring a protest, was to distinctly inform the collector of the position of the importer. In this instance, it was impossible for the collector to have read the protest without perceiving that his classification of the merchandise, as dutiable under paragraph 239 of the tariff act, at fifty per cent ad valorem, was objected to, and that the importer claimed that, under the law, the goods were dutiable at two cents per pound. The collector could not have been perplexed by the omission to name the specific paragraph which the importer sought to have applied, for there were but two paragraphs, besides 239, which dealt with the subject, namely paragraphs 318 and 319, and under either of them the duty was that claimed by the importer, two cents per pound. * * * We are not disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this statute. It is sufficient if the importer indicates distinctly and definitely the source of his complaint and his design to make it the foundation for a claim against the government."

The *Salambier Case* is in all respects identical with the case under consideration, except that in this case the protest, in fact, named the section, as well as the rate of duty, on which it was claimed the assessment ought to have been made. We are of the opinion that as customs' duties are now levied, subject to review by the Board of General Appraisers, this mistake of the importer did not, in effect, make his claim indefinite or indistinct, and was not calculated to mislead.

The Customs' Administrative Act of 1890 created for the first time a Board of General Appraisers. Prior to that time, the classification of the collector was final, except under complaint to the Secretary of the Treasury. The procedure was to appeal directly to the courts, and, if successful, to recover from the Treasury the excess paid, together with the costs of the suit.

Under the procedure inaugurated by the act of 1890, the ruling of the collector comes under review of the Board of General Appraisers; and in such appeal no cost is incurred. The Board is, in a sense, an essential part of the Custom House machinery.

The sole function of this Board is to hear cases of this character, and to discriminate between the paragraphs of the law applicable to given importations. Upon all the questions that arise in disputes between importers and the collector, the appraisers are probably better informed than any tribunal in the country. They will be presumed to know the law—especially when the rate of duty, as claimed, is pointed out. It is no part of the purpose of the law as it now stands to exact such nice precision that the importer may not indicate his impression as to what paragraph governs except at his peril.

We are of the opinion that under the *Salambier Case*, and on independent construction of the law as it now stands, this decree should be affirmed.

SAUNDERS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1902.)

No. 627.

CUSTOMS DISTRICTS—COMPENSATION OF COLLECTOR—CHANGE IN STATUTE.

Act Aug. 28, 1890 (26 Stat. 363, c. 814), "to reorganize and establish the customs collection district of Puget Sound," not only by its title, but also by its provisions, shows the intention of congress to make a complete revision of the law relating to the organization of such district; and section 3, fixing the compensation of the collector at a salary of \$3,500 per annum, supersedes and repeals Rev. St. § 2670, on the same subject, including the provision permitting the collector to retain fees to the amount of \$2,000 in addition to his salary.

In Error to the District Court of the United States for the Northern Division of the District of Washington.

Wallace McCamant, for plaintiff in error.

Wilson R. Gay, U. S. Atty.

Before McKENNA, Circuit Justice, and GILBERT and ROSS, Circuit Judges.

McKENNA, Circuit Justice. This is an action upon the official bond of James C. Saunders, given as collector of customs for the district of Puget Sound, in the state of Washington. Saunders was collector from the 13th of September, 1893, to August 31, 1897. The complaint alleged the receipt by Saunders, as collector, of various sums of money between certain specified dates, amounting in all to the sum of \$3,869.51, for which judgment was prayed. A demurrer was filed to the complaint, and overruled, and the defendants answered, denying certain of the allegations of the complaint, and set up an affirmative defense and counterclaim. The contention of the parties turns upon the counterclaim. It set out in detail the salary and emoluments which Saunders claimed under the statutes of the United States, which were summarized in the third paragraph of the answer as follows:

"That plaintiff, in adjusting the accounts with said collector of customs, allowed to defendant, as such collector, for all his official services, and for all his salary, compensation, emoluments, fees, rents, and storage, percentages, and allowances, the following sums or amounts, and no more: For the year ending June 30, 1894, \$5,500; for the year ending June 30, 1895, \$5,500; for the year ending June 30, 1896, \$4,033.25; for the year ending June 30, 1897, \$3,606.50; for said period commencing July 1, 1897, ending August 31st, \$598.10; and that plaintiff refused to pay or allow defendant as such collector of customs any more than stated in this third paragraph, and wrongfully rejected and disallowed from the sums or amounts herein claimed and retained the following sums or amounts, to wit: For the year ending June 30, 1894, \$500; for the year ending June 30, 1895, \$500; for the year ending June 30, 1896, \$1,936.75; for the year ending June 30, 1897, \$2,000; for the said period ending August 31, 1897, \$337. Total amount so wrongfully rejected and disallowed by plaintiff as aforesaid during the entire official period of defendant as such collector of customs, the sum of \$5,303.75; and that said sum of \$5,303.75, so wrongfully rejected and disallowed by plaintiff, should be credited to the account of defendant as such collector; and that, if this credit and claim of defendant be allowed and sustained, there would be nothing due to plaintiff from said defendant for anything whatever."

The United States demurred to the counterclaim, and the defendant Saunders (plaintiff in error) made a motion for judgment on the pleadings. The motion was denied, and the demurrer was sustained, and judgment entered for the United States. 98 Fed. 196. This writ of error was then sued out.

The contention of plaintiff in error is that he was entitled under the law to a compensation of \$6,000 per annum, made up as follows:

"(1) A salary of \$3,500 per annum; (2) fees and emoluments, under sections 2654 and 2659 of the Revised Statutes, not exceeding \$2,000 per annum; (3) moneys earned by him for rent and storage in the public stores, not exceeding \$2,000 per annum."

His construction of the statutes, he claims, was acquiesced in by the treasury department until he came to surrender his office. At that time the treasury department changed its view of sections 2654 and 2659 of the Revised Statutes of the United States, and disallowed items in his account aggregating the sum of \$5,303.75. The question in the case, therefore, is whether he was entitled only to his salary, or to that and the fees and emoluments provided for in sections 2654 and 2659 of the Revised Statutes.

Section 2670 of the Revised Statutes of the United States reads as follows:

"The collector for the district of Puget Sound shall receive a salary of one thousand dollars a year, with additional maximum compensation of two thousand dollars a year, when the official emoluments and fees provided by existing laws amount to the sum."

This section was a reproduction of an act of congress passed in 1851. In that act, and in its reproduction in the Revised Statutes, there is a clear expression of the compensation of the collector. It is a salary of \$1,000, with an addition of fees not exceeding \$2,000,—a possible \$3,000 in all. It may be conceded that that compensation was in accordance with the history of the legislation on the subject and the practice of the government, but a change was made in the words of the statute in 1890, and the effect of that change is the immediate question to be considered.

In the year 1890, congress passed an act entitled "An act to reorganize and establish the customs collection district of Puget Sound." The third and fourth sections of this act are as follows:

"Sec. 3. That the salary of the collector of customs for the district of Puget Sound shall be three thousand five hundred dollars per annum, and that of the deputy collector at Tacoma and Seattle each two thousand dollars per annum.

"Sec. 4. That all acts or parts of acts in conflict with the provisions of this act are hereby repealed." (26 Stat. 363.)

Can this act subsist with section 2670 of the Revised Statutes? In answering in the negative we are not unmindful of the rule invoked by plaintiff in error that repeals by implication are not favored. But two acts need not be in express terms repugnant for one to work a repeal of the other. The latter act may be intended as a substitute for the prior act, and will hence operate as a repeal of that act. *Milling Co. v. Gardner*, 173 U. S. 123, 19 Sup. Ct. 327, 43 L. Ed. 637.

The relation of the act of 1890 and section 2670 of the Revised Statutes was expressed by Judge Handford in passing on the demurrer to the counterclaim:

"Certainly," he said, "section 8 of the act of 1890, and section 2670, Rev. St., are in conflict with each other, and the latter is therefore repealed in its entirety, unless its provisions are divisible, so that one part may be retained and have force as an independent statute. When an attempt is made to divide section 2670, it must be borne in mind that congress has not passed an act to amend that section, but a part, if not the whole, of it has been repealed, and no longer exists for any purpose, even to give aid and support to any part not repealed. Now, if we take a pair of scissors, and cut out of section 2670 the part which is clearly and necessarily inconsistent with the act of 1890, we must necessarily take out all of the section from the beginning of it to the first comma, and the part remaining is so unintelligible as to be ineffective for any purpose. To make my meaning plainer, I hold that the following words found in section 2670, viz.: 'The collector for the district of Puget Sound shall receive a salary of one thousand dollars a year,'—are certainly repealed and expunged entirely, and it is obvious that the remaining part of the section is not a complete sentence, and is meaningless. I consider, also, that the title of the act of 1890, as well as the context, shows that congress intended to make a complete revision of the law relating to the organization of the customs district of Puget Sound. Statutes which are clearly intended to be a full and complete declaration of the legislative will on any particular subject have the effect to repeal all prior statutes, covering the same ground, which are not incorporated into the new act. U. S. v. Claflin, 97 U. S. 546, 24 L. Ed. 1082."

Judgment affirmed.

COWEN et al. v. ALDRIDGE, Auditor of Belmont County, Ohio.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1902.)

No. 996.

TAXATION—RAILROAD PROPERTY—OHIO STATUTES.

The statutes of Ohio relating to the taxation of railroad property (Rev. St. 1890, §§ 2770-2776) provide for the valuation of the property of a railroad company by a board consisting of the auditors of the several counties into or through which its road extends. If it extends into one county only, the auditor of such county constitutes the board. They also provide two general systems for distributing the valuation between localities for purposes of taxation. The real estate, structures, and stationary personal property are valued separately, and the valuation of each apportioned to its own local taxing district, while the valuation of the rolling stock, main track, roadbed, supplies, moneys, and credits is distributed between such districts in proportion to the mileage in each. A railroad of the state, extending through several counties, terminated at its southern end at low-water mark on the Ohio river. Such road was leased to a company owning a road on the opposite side of the river; the two being connected by a bridge and approaches owned, as shown by the pleadings, by the lessee. The approach on the Ohio side extended back from low-water mark 1,490 feet, and consisted of a permanent and expensive stone structure, having 43 arches. An additional rate was charged for passengers and freight crossing the bridge. The lessee, in making returns of the property of the lessor for taxation in Ohio, made no separate mention of such approach, but included the main track, roadbed, and right of way to low-water mark, and the same was assessed by the board of auditors, and the valuation duly apportioned

according to mileage. *Held*, that such valuation did not cover the approach as a "structure," but that the same was subject to valuation and taxation as such by the auditor of the county in which it was situated, as the property of the lessee.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This case was a proceeding in the circuit court of the United States for the Southern district of Ohio in a foreclosure suit brought by the Mercantile Trust Company against the Baltimore & Ohio Railroad Company to foreclose a mortgage upon the property of that company. On March 11, 1899, the receivers filed an information in the foreclosure suit, setting forth: "That the Baltimore & Ohio Railroad Company is the owner of a bridge across the Ohio river, commencing at the town of Benwood, in the state of West Virginia, and running thence across said river to the town of Bellaire. That, commencing at the line between the said states of West Virginia and Ohio, the abutments of said bridge were constructed on lands owned by the Central Ohio Railroad Company, as reorganized; passing through said lands, and into and through one of the streets of the said city of Bellaire, in the center of which the abutments of said bridge were constructed; running for a distance of about one-half of one mile from the said line between the said states. That upon said abutments so constructed a railroad track was laid about the year 1872, and the said Baltimore & Ohio Railroad Company, being then in possession of all the property of the Central Ohio Railroad Company, as lessee, continued to run locomotives and cars over said railroad track, from the line between the said states, westward, to the city of Columbus. That all of the property in the possession of the Baltimore & Ohio Railroad Company, as such lessee, as well as the property which it owned, has been assessed and placed upon the tax duplicate of Belmont county and other counties, in the name of the Baltimore & Ohio Railroad Company; it being bound, under the terms of the said lease from the said Central Ohio Railroad Company, as reorganized, to pay all taxes and assessments against said line of railroad. That such assessments have always been made by the board of auditors composed of the auditors of Belmont, Noble, Guernsey, Muskingum, Licking, and Franklin, who were duly organized as such board of assessors or appraisers in pursuance of the statute of the state of Ohio. That about the year 1890 the authorities of Bellaire claimed that the said abutments and railroad track, commencing at the said line between the said states, and running thence west about one-half of one mile, should be assessed as a structure separate and apart from the balance of the said railroad track between said cities of Bellaire and Columbus. That said subject, having been duly presented, was considered by said board of auditors and overruled; the said board holding and deciding that the said bridge structure, and the tracks thereon, should be assessed as a part of the said railroad between the said cities of Bellaire and Columbus; and it was so assessed in the year 1890, and each year since that year, up to and until the year 1898. That at the regular annual meeting of the board of auditors in the month of May, 1898, the said authorities of said city and the auditor of Belmont county, Ohio, again presented said question of the assessment of said structure separate and apart from the balance of said railroad track to the said board of auditors. That said board duly considered the same, and again overruled such application, holding and deciding that said structure should be assessed by said board as a part of the track of said railroad between said cities of Bellaire and Columbus; and it was so assessed, as it had been each and every year subsequent to the year 1890 and previous thereto. That, notwithstanding the facts aforesaid, Madison Aldridge, auditor of Belmont county, Ohio, has served notice upon the petitioners that he would appraise said structure, and put the same upon the duplicate of Belmont county, Ohio, to be assessed separately from the other property of said railroad, and that said auditor is now threatening to so appraise and place said structure upon the said tax duplicate, and, unless re-

strained by this honorable court from so doing, he will place the same upon the said tax duplicate, and proceed to collect from the petitioners the taxes on the same for the years 1894, 1895, 1896, 1897, 1898, which, exclusive of interest and costs, exceed the sum of two thousand dollars, notwithstanding the fact that the said bridge has been already appraised as hereinbefore stated, and the taxes thereon paid by the Baltimore & Ohio Railroad Company, up to the time of the appointment of these petitioners as receivers, and by them since that date, under and in pursuance of the assessment and appraisal of said property made by said counties through which said railroad runs." To this information the auditor of Belmont county filed an answer, admitting the ownership of the bridge, and his purpose to take proceedings to require the same to be taxed in Belmont county, in Ohio, and taking issue upon the allegations of the information claiming that said property had already been assessed and taxed under the laws of Ohio.

The case was heard upon the testimony and the report of the special master to whom the case had been referred. The master's findings were as follows:

"Statement.

"The bridge in question crosses the Ohio river between Bellaire, Belmont county, Ohio, and Benwood, Marshall county, West Virginia, connecting the lines of railway of the Central Ohio Railroad Company and the Baltimore & Ohio Railroad Company, and was built by said companies jointly, under a certain article of agreement made and entered into July 12, 1865, a copy of which article is hereto attached. Under said article of agreement the bridge was to be paid for by said companies in the proportion of two-thirds by the Baltimore & Ohio Railroad Company and one-third by the Central Ohio Railroad Company. The plans of the bridge, its location, and the contracts for its erection were to be as agreed upon by said companies, and included 'all the work of continuous arches and superstructures of wood and iron necessary to span the river, streets, railroads, and other roads extending from solid ground on the Ohio side of the Ohio river to solid ground on the Virginia [West Virginia] side of said river, together with the abutments and piers necessary to support the same.' Payment for the structure was provided by the issue of certificates signed by the presidents of the two said railroad companies; the same to be a lien on the bridge, but without any claim on either of said companies, or the stockholders thereof. To meet the liability of said certificates, a tariff of charges was established on all traffic passing over said bridge, not to exceed such sum as might be necessary to maintain said bridge, pay the annual interest on said certificates and the sum of \$30,000 annually toward the creation and increase of a sinking fund for the ultimate redemption of said certificates. When all of said certificates were redeemed, then the charges were to be limited as to such sum as was necessary to maintain or renew the bridge, and to furnish an income to the owners of the bridge not exceeding 10 per centum per annum on the original cost thereof. After the redemption of all of said certificates the said bridge was to be held by the two said railroad companies, as tenants in common, in the proportion of two-thirds to the Baltimore & Ohio Railroad Company and one-third to the Central Ohio Railroad Company. Said bridge was constructed under said articles of agreement, and under the general authority of an act of congress approved July 12, 1865, which act provides (section 3) 'that it shall be lawful for any other railroad company or companies whose line or lines of road may now, or shall hereafter be built to the Ohio river, above the mouth of the Big Sandy river, in accordance with the terms of the charter, or charters, of such company or companies, to build a bridge across said river for the more perfect connection of any such roads, and for the passage of trains thereof, under the limitations and conditions hereafter provided.' Section 5 of said act provides 'that any bridge or bridges erected under the provisions of this act shall be lawful structures, and shall be recognized and known as post routes, upon which, also, no higher charge shall be made for the transmission over the same of the mails, troops and munitions of war of the United States than the rate per mile which the company or companies erecting such bridge may, from time to time, receive on the balance of their line or lines for such services.' Under an act of

congress approved July 11, 1870, a board of engineers was appointed by the secretary of war to inspect and report on the bridge over the Ohio river, and in the report of that board, dated April 19, 1871 (Senate Document, 42d Congress, Ex. Doc. No. 1, p. 70, on file in this case), it is found that the bridge, then unfinished, 'was being built according to law.'

"The structure is a single-track railway bridge, connecting the main stem of the Baltimore & Ohio Railroad with the Central Ohio at the eastern terminus of the latter, and is 4,001.5 feet in length; the length of approach on the Ohio side of the river being 1,490 feet, and on the West Virginia side 864 feet. The right of way for the approaches of the bridge is through the streets and alleys of Bellaire, and over the lands of Sullivan, Barnard, and Cowen. The council of Bellaire, through its duly appointed committee, and by ordinance dated March 7, 1867, authorized the Central Ohio Railroad Company to 'extend their railroad' through and over certain streets and alleys. December 12, 1867, J. H. Sullivan, Wm. G. Barnard and B. R. Cowen, joint owners of the 'Harris Farm,' so called, on a part of which Bellaire City was located, released to the Central Ohio Railroad Company the right of way for the road of said company through and over their lands for an approach for the track or tracks of the road of said company to the said bridge. Copies of said release and of the ordinance of Bellaire council are attached to the affidavit of T. J. Frazier, filed with the papers in this cause.

"It is in evidence, and is not disputed, that an additional fare of twenty-five cents is charged passengers coming west over the Baltimore & Ohio Railroad from Moundsville, West Virginia, to Bellaire, over said bridge, over the fare charged those from Moundsville to Benwood, at the east end of the bridge, and that one cent per hundred additional is charged for freight passing over the same part of the road. (See affidavits of Geo. M. Wise, W. H. H. Showacre, and S. O. Gans, filed herewith.)

"It is also in evidence, and not disputed, that the portion of said bridge lying in West Virginia is taxed in Marshall county, in said state, at \$315,000. Upon the last fact above stated, counsel for the auditor cites *Pittsburgh, C., O. & St. L. R. Co. v. Board of Public Works of West Virginia*, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354, as the ground upon which the present contention of the auditor is founded. In the cause cited the first point in the syllabus raises the question as to whether a writ of injunction from a United States court is the proper remedy. But that question has been settled in this case by his honor Judge Taft, who has decided that, under the Ohio Statutes, injunction is the proper remedy. The third point in the syllabus is: 'A railroad bridge is taxable under the Code of West Virginia of 1891 (chapter 29, § 67); and although the board of public works assesses separately the whole length of the railroad track within the state, and that part of the bridge within the state, yet, if the railroad company does not, as allowed by that section, apply to the auditor to correct any supposed mistake in the assessment, nor appeal, within thirty days after receiving notice of the decision of the board, to the circuit court of the county, and the officers of the state make no attempt to interfere with the company's possession and control of its real estate, nor, until after the expiration of the thirty days, either to impose a penalty for delay in paying the taxes, or to levy on personal property for nonpayment of them, the company cannot maintain a bill in equity in a court of the United States to restrain the assessment and collection of any part of the taxes.' That is to say, the railroad company, in the case cited, did not take proper steps to correct an alleged error of the board of public works, and by reason of its neglect it had no remedy, and was compelled to pay the assessment. In this case, however, the court says informant has taken the proper steps to prevent an assessment. Now, it is in evidence that that part of the bridge within the state of Ohio, and county of Belmont is upon the ground owned by the Central Ohio Railroad Company; that said company paid one-third of the cost of building the bridge, which is said to be the approximate cost of that part of the bridge structure lying within the county of Belmont. The certificate of the auditor of state of the state of Ohio, offered in evidence, shows that the Central Ohio Railroad Company, or its lessee, the Baltimore & Ohio Railroad Company, has for a number of years, up to and including the year 1898, paid

taxes on 137.3 miles of main-line track from Columbus, Ohio, to its eastern terminus at the Ohio river, in Bellaire, or 104.27 miles from Newark, Ohio, to said terminus, which is the whole of said main line of road between said points; and which includes that part which is upon and over the western approach to said bridge. (See affidavits of T. J. Frazier and Wm. P. De Hart.) All the railroad time-tables and guidebooks in current use give these distances. It appears in evidence that, of the main-line track so assessed, 1.37 miles lies within the corporate limits of Bellaire. It is contended by counsel for the auditor that this 1.37 miles of main track in Bellaire is only that part of said track which reaches up to the point where the approach to the bridge begins, because, by the terms of the agreement between the two companies under which the bridge was built, it was to be built 'for the purpose of connecting their respective lines of road,' and that the track on the bridge is 'a connecting track between the two main lines on terra firma.' But the eastern terminus of the Central Ohio Railroad is, and has been ever since its first construction, at low-water mark on the west side of the Ohio river. Upon the completion of said bridge the main-line track formerly in use on the surface of the ground was abandoned, or put into use as a switch side track, and the main track was placed upon the Ohio approach to the bridge. The point of connection between the two roads, therefore, is at low-water mark on the Ohio side of the river, as it has always been. To make this connection, the Baltimore & Ohio Railroad Company laid a track from its main stem, at Benwood, West Virginia, over the bridge, to the terminus of the Central Ohio main-line track. It is the main-line track which lies on the western approach to the bridge, as well as that part of it which lies on the surface of the ground west of said approach, and within the corporate limits of Bellaire, which goes to make up the 1.37 miles referred to, and which is included in the total main-track mileage of 137.3 miles from Columbus to the Ohio river, on which taxes were assessed and paid as aforesaid.

"It is further contended that because no mention is made of the bridge, or any part thereof, nor of the land on which it stands, in the reports of the auditor or in the report of the auditor of state, it is not, therefore, included in the assessment. But there is no mention of the bridges of said company over the Muskingum river at Zanesville, over the Licking river at Newark, or of other bridges and trestles supporting the main-line track, which would seem to indicate that it was not customary to note such structure in making assessments on the main line of that road.

"Findings:

"In view of the facts stated above, I find that the main-line track of the Central Ohio Railroad extends from Columbus, Ohio, to low-water mark on the west bank of the Ohio river, within the corporate limits of Bellaire; that the length of said track is 137.3 miles, and that the Central Ohio Railroad Company, or its lessee, the Baltimore & Ohio Railroad Company, has paid in full the taxes levied on its said entire main track, which includes that part of said track lying upon and over the western approach to said bridge; and that said 137.3 miles includes the 1.37 miles of said main line track lying within the corporate limits of Bellaire.

"Testimony was offered going to show that a proposition had been made at the meeting of the board of county auditors to assess the Ohio approach to the Bellaire bridge as a structure separate and apart from the main-line track of the road, and that the proposition had been ignored, or at least not favorably considered, but the testimony on that point is contradictory. (See affidavits of T. J. Frazier, W. P. De Hart, A. M. Beatty, and A. B. Hall.) However the fact may be, the master has not considered it material to this inquiry, in view of his findings as above."

J. H. Collins, for appellants.

W. W. Granger, for appellee.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

DAY, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The right to an injunction in this case turns upon the determination of the issue as to whether the Baltimore & Ohio Railroad Company has been once taxed upon the bridge mentioned in the information under proceedings already had under the tax laws of Ohio. If the receivers have established the affirmative of this proposition, further attempts to tax the same property may be enjoined under the laws of Ohio, which provide the equitable remedy of injunction against illegal taxation. Rev. St. Ohio, § 5848. In Ohio the taxing of property of railroad companies is regulated by the Revised Statutes of the state (Rev. St. 1890, §§ 2770-2776, inclusive). Where a railroad is in several counties of the state, the auditors of such counties constitute a board of appraisers and assessors for such railroad company. For any railroad company having its road, or any part thereof, in one county only, the auditor of such county constitutes the board. At its annual meeting in May the board is required to proceed to ascertain all the personal property of the company, which, it is provided, shall include the roadbed, water and wood stations, and such other realty as is necessary to the daily running operations of the road, moneys and credits of the company, the undivided profits, reserve, or contingent fund, whether the same be in money, credits, or in any manner invested, and the actual value thereof in money; and also locomotives and cars not belonging to the company, but hired for its use or run under its control on its road by a sleeping car or other company, but as to such rolling stock the company may return it separately from its own property, in which event it shall be valued separately, but included in the aggregate valuation. Such boards have power to require certain officers of the road to make a detailed statement, under oath, of the items and particulars constituting such property, moneys, and credits, and the values thereof. The value of such property, moneys, and credits, as found and determined by the board, is required to be apportioned by the board among the several counties through which said road, or any part thereof, runs, so that to each county, city, village, township, and district, or any part thereof, therein, shall be apportioned such part thereof as shall equalize the relative value of the real estate, structures, and stationary personal property of such company therein, in proportion to the whole value of the real estate, structures, and stationary personal property of such company in the state; and the rolling stock, main track, roadbed, supplies, moneys, and credits of such company shall be apportioned in such proportion as the length of such road in such county bears to the entire length thereof in all said counties. When a railroad company has part of its road in the state, and part thereof in any other state or states, the proper board shall take the value of such property, moneys, and credits so found and determined as aforesaid, and divide it in the proportion the length of said road in the state bears to the whole of such road, and determine the principal sum for the value of such road in the state accordingly, equalizing the relative value thereof in the state, as above set forth.

An analysis of these sections shows two general systems of distributing the taxable valuation of the property of railroad companies in Ohio. It is primarily made the duty of the board, whether it is to consist of one or more of the county auditors, to ascertain the property subject to taxation, and to place upon it a valuation. For the purpose of ascertaining the character and extent of the property, detailed statements may be required, under oath, from the officers of the company. The distribution of the valuation of the property, where several counties are interested, is made according to the nature of the property. Real estate, structures, and stationary personal property are to be apportioned to its own local taxing district. These valuations the statute requires to be "equalized," so that the local real estate, structures, and stationary personal property in any taxing district shall be valued in the same proportion as the value of said property in said taxing district bears to the total valuation in the state. The other class of property to be valued, which includes rolling stock, main track, roadbed, supplies, moneys, and credits, is not localized for taxation; but the aggregate value of this class of property is apportioned among the local taxing districts according to the mileage of the road in such districts, respectively. One object of this statute is evidently to require real estate and structures to be locally taxed. The valuation of the real estate and structures is apportioned to the locality where situated. This is the policy of the statute, and is in harmony with the general system of taxation in the state.

In view of this system of classification of railroad property for taxation in Ohio, to which class does the bridge in question belong? The part of the bridge which it is proposed to tax in Belmont county is the approach from the Ohio side, the length of which is 1,490 feet; on the West Virginia side, 864 feet. The approach on the Ohio side is described as consisting of 43 semicircular stone arches, with two spans of deck bridge. The piers are described as massive in structure. The bridge is an expensive and durable one. It was built under authority of an act of congress, and is made a post route of the United States, subject to regulation as such. Additional rates are charged to passengers and freight using the bridge. It has a distinct value as a bridge, irrespective of its present use for railroad purposes. It is a suggestive fact that the West Virginia portion has been valued for taxation in that state in the sum of \$375,000. These considerations would seem decisive of the question as to whether this bridge is to be regarded as a structure to be locally taxed, or "roadbed" or "main track," with taxable valuation to be distributed throughout the length of the line in proportion to its mileage. It is, in our judgment, a structure, within the meaning of the statute, and to be taxed as other local structures are in the district where it is situated. Similar considerations led the supreme court of Nebraska to like conclusions in a well-considered case. *Cass Co. v. Chicago, B. & Q. R. Co.*, 25 Neb. 348, 41 N. W. 246, 2 L. R. A. 188.

In the returns made by the Baltimore & Ohio Railroad Company for the Central Ohio Railroad, no mention is made of this structure. There is nothing in the testimony or in the finding of the master to show that it was distinctly considered in making a valuation of the

property to be taxed, notwithstanding its great value as an independent structure. But it is contended that this bridge has already been taxed as a part of the main track, including roadbed and right of way, by the board of county auditors. The findings of fact show that the Baltimore & Ohio Railroad Company is assessed and pays the taxes upon the property in Ohio of the Central Ohio Company, of which it is the lessee. This is because of the agreement between the companies, which requires this course of action. In Ohio all property is taxed against the owner. Rev. St. 1890, §§ 2734, 2735. In the return and assessments referred to, the Baltimore & Ohio Company assumes the obligation which the law imposes upon the Central Ohio Railroad Company. It is said that this bridge is included in the assessment of the 137.3 miles of main track, including roadbed and right of way; being the entire length of the line of the Ohio Central Railroad from low-water mark on the Ohio side of the river to its northern terminus at Columbus, Ohio. The finding shows that the southern terminus of the Central Ohio Railroad is at low-water mark on the Ohio side. It also appears that the tracks of the Central Ohio Railroad were raised and laid upon the approaches to this bridge. But it also appears from the allegations of the petition and the admissions of the answer that the bridge is the property of the Baltimore & Ohio Railroad Company. In the mortgage which is the subject of foreclosure in this case this bridge is described as owned and operated by that company, "known as the 'Benwood Bridge,' beginning in Marshall county, in the state of West Virginia, and running through the town of Benwood, over the Ohio river, into the town of Bellaire, in Belmont county, in the state of Ohio, together with the approaches thereof; the said bridge and approaches being of the total length of 8,556 feet, more or less." It is true that the master finds that this bridge was built under a contract between the Baltimore & Ohio Railroad Company and the Central Ohio Railroad Company, by which the latter company pays one-third of the cost of the bridge; and, after the payment of the certificates issued for such cost, the companies were to hold the same as tenants in common, in the proportion of two-thirds to the Baltimore & Ohio Railroad Company, and one-third to the Central Ohio Railroad Company. This contract cannot overcome the allegations of the pleadings as to the ownership of the bridge. Nor does the joint ownership of the structure relieve the situation from the considerations which give it a local character for the purposes of taxation. It is also found that the approach in question is upon ground of the Ohio Central Company, and that its tracks are laid upon it. This does not affect the question of the right to tax this large and costly structure against its true ownership, irrespective of the ownership of the track upon it, or of the right of way upon which it rests. When land is owned by one, and the buildings by another, the two may be separately assessed for taxation. *People v. Board of Assessors of Brooklyn*, 93 N. Y. 308. If this were not so, much property which must be assessed against the owner would escape taxation. It appears that the Baltimore & Ohio Railroad Company, the owner of this bridge and its approaches, is the owner, also, of a line of railroad extending across

the bridge from Ohio, and thence eastwardly, through West Virginia. We think this structure is a part of that railroad, and, within the requirements of the Ohio Statutes, taxable in Belmont county. We cannot agree that the assessment of the main track of the Ohio Central Railroad covered so much of this structure as includes the approach to this bridge from the Ohio side, or that, under the facts shown, it could be legally assessed as a part of such main track, including roadbed and right of way. It may be the practice to assess bridges as a part of such main track of railroads in Ohio. It may be that many bridges have no value except to carry the track of the company. Whether this practice, if it exists, be right or wrong, is immaterial here, in view of the character and ownership of the bridge in question.

We think the circuit court did not err in vacating the restraining order and dismissing the petition of the receivers. Judgment affirmed.

POTTS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1902.)

No. 874.

PUBLIC LANDS—INCLOSURE—FENCE ON OWNER'S LAND—MISDEMEANOR.

Where a landowner in good faith, for the purpose of inclosing his own land, builds a fence on the line extending around the tract, such act is not unlawful, and is not a violation of the act of February 25, 1885 (23 Stat. 321), which forbids the inclosure of public lands or obstructing access thereto by one who has no claim thereto, even though such fence so connects with fenced lands of other owners as thereby to inclose unclaimed public lands.

In Error to the Circuit Court of the United States for the Eastern Division of the District of Washington.

The plaintiff in error was indicted by the grand jury for unlawfully inclosing public land in the state of Washington, by erecting and maintaining a post and wire fence around certain land owned and leased by him, thereby preventing and obstructing any and all persons from peacefully entering upon or establishing a settlement or residence upon certain tracts of public land, and preventing and obstructing passage and transit over and through said public land. The indictment contained six counts, but only the charges contained in the first, second, and fifth counts were submitted to the jury. These counts charged as follows:

"That one Robert Potts * * * did unlawfully, as owner, make, erect, construct, and maintain an inclosure of the following described public land of the United States, containing not less than 160 acres, to wit, the N. W. $\frac{1}{4}$ of section 2, township 19 north, of range 38 east of the Willamette meridian, and the S. W. $\frac{1}{4}$ of section 28, township 20 north, range 38 east of the Willamette meridian, and section 34, township 20 north, range 38 east of the Willamette meridian; said inclosure so made, erected, constructed, and maintained, consisting of and being a post and wire fence, and be, the said Robert Potts, so making and constructing said inclosure, then and there having no claim or color of title to any of said land, made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office, to wit, the United States land office at Spokane, in said state and district, under the general land laws of the United States,—contrary to the form of the statute in such

case made and provided, and against the peace and dignity of the United States.

"That one Robert Potts * * * did unlawfully, as part owner and agent, make, erect, construct, and maintain an inclosure of the following described public land of the United States, containing not less than one hundred and sixty acres, to wit, the N. W. $\frac{1}{4}$ of section 2, township 19 north, range 38 east of the Willamette meridian, and the S. W. $\frac{1}{4}$ of section 26, township 20 north, range 38 east of the Willamette meridian, and section 34, township 20 north, range 38 east of the Willamette meridian; said inclosure so made, erected, constructed, and maintained consisting of and being a post and wire fence, and he, the said Robert Potts, so making and constructing said inclosure, then and there having no claim or color of title to any of said land, made or acquired in good faith, or an asserted right thereto, by or under claim, made in good faith with the view to entry thereof at the proper land office, to wit, the United States land office at Spokane, in said state and district, under the general land laws of the United States at the time such inclosure was so made,—contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

"That one Robert Potts * * * did unlawfully, by and with a post and wire fence, prevent and obstruct from passage and transit over and through certain of the public lands, containing not less than one hundred and sixty acres, to wit, the N. W. $\frac{1}{4}$ of section 2, township 19 north, of range 38 east of the Willamette meridian, and the S. W. $\frac{1}{4}$ of section 26, township 20 north, range 38 east of the Willamette meridian, and section 34, township 20 north, range 38 east of the Willamette meridian,—contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The jury found the defendant guilty as charged in these three counts, and the court imposed a sentence of one day's imprisonment in the county jail and a fine of \$100, and costs of action. Writ of error was thereupon sued out to this court.

Merritt & Merritt, for plaintiff in error.

Wilson R. Gay, U. S. Atty., and Edward E. Cushman, Asst. U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

It appears from the evidence that the defendant is the owner of section 25, township 20 north, range 38 east of Willamette meridian, Spokane county, Wash., and has a lease of section 36 in the same township. These two sections adjoin, and the defendant had inclosed them with a wire fence, thus making an inclosure two miles long north and south, and approximately one mile wide east and west. A county road meanders along the east line of said sections. The government land charged in the indictment to have been unlawfully inclosed by the fence of the defendant is the N. W. $\frac{1}{4}$ of section 2, township 19 north, of range 38 east; and the S. W. $\frac{1}{4}$ of section 26, and section 34, township 20 north, range 38 east. None of this land adjoins that inclosed by the defendant; but it is contended that the defendant, by connecting his fence with that of other owners of land on the north and south, has cut off the government land from access to the county road, and is thus violating the statute prohibiting the inclosing of government land. The chain of private fences complained of immediately incloses only the lands of the various owners, and the inclosing

of or obstruction of passage to the government land is merely an incident arising from the peculiar situation of the land with relation to the county road.

The act of February 25, 1885 (23 Stat. 321), provides as follows:

"That all inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited. * * *

"Sec. 3. That no person, by force, threats, intimidations, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands. * * *

The trial court instructed the jury, in this connection, as follows:

"The law which I have read to you has for its obvious purpose the protection of the rights of the public in and to all of the public domain, as against the selfishness of any particular individual, association, or company, or set of individuals, to appropriate to their own use the public domain and exclude the public from the equal enjoyment of the use of it while it remains public and unclaimed by private individuals. The law is broad in its terms, and it is intended to prohibit any manner of inclosing the public domain by a person or a company or a corporation that has no color of title or right to have the exclusive use of it. The inclosure by a fence, or a combination of fences, or joining of fences that is wholly upon the land which the person does own, is unlawful, if in effect it does inclose and shut out the public from any part of the public domain. A man has no right to build a fence upon his own land, that connects with another fence, that is so connected as to form an inclosure of public land, and shut the public out, or prevent their passage over the public lands."

This instruction was plainly directed to the charge contained in the fifth count of the indictment, and this count appears to have been framed under section 3 of the above-named act. Upon the evidence in the case and the charge contained in the count, the question to be submitted to the jury was whether the defendant had, by "fencing or inclosing, or any other unlawful means," prevented or obstructed free passage or transit over or through the public lands of the United States. By a well-known rule of construction the words "or any other unlawful means," in describing and giving scope to the prohibited acts, relate back to and qualify the preceding words "fencing" and "inclosing," so that those words must be read as "unlawful fencing" and "unlawful inclosing." In other words, the "fencing" or "inclosing" of land does not become unlawful merely because either of these acts prevent or obstruct any person from peaceably entering upon or establishing a settlement or residence on a tract of the public land subject to settlement or entry under the public land laws of the United States. The act of a person in fencing or inclosing his own land is lawful. It is also lawful for a person to fence and inclose his own land up to a

point where it connects immediately with the fence or inclosure of adjoining land owned by another. It is only when, under the guise of inclosing his own land, a person builds a fence for the purpose and with the intention of inclosing the public lands of the government, that the fence or inclosure becomes unlawful. This is the law as declared by the supreme court in the case of *Camfield v. U. S.*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260. In that case the defendants had acquired the right to use all the odd-numbered sections of land lying within certain townships, and built fences around the boundary lines of the townships. By an ingenious arrangement of crossing the township boundary line at each section line, the fence was constructed entirely upon the odd-numbered sections, and was thus located entirely upon the land of the defendants, though completely surrounding and inclosing the even-numbered sections belonging to the government. The court held the defendants' action to be within the letter of the statute, as actually inclosing public lands without any color of title to the lands, and that the fence was therefore a nuisance, subject to abatement by the government, under the act of February 25, 1885. But the court said, in the course of its opinion:

"It is no answer to say that, if such odd-numbered sections were separately fenced in, which the owner would doubtless have the right to do, the result would be the same as in this case, to practically exclude the government from the even-numbered sections, since this was a contingency which the government was bound to contemplate in granting away the odd-numbered sections. So long as the individual proprietor confines his inclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor; but when, under the guise of inclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to inclose the lands of the government, he is plainly within the statute, and is guilty of an unwarrantable appropriation of that which belongs to the public at large."

In the case at bar, however, the evidence tends to show that no public land had actually been inclosed by the fence of the defendant alone. He had, it appears, constructed a fence around two sections of his own land. This land is situated between certain public lands and the county road. Other owners of land in the vicinity had formerly fenced their holdings, apparently without complaint from the government or adjoining settlers. The fence of the defendant, connecting with the fences of the other owners, had formed a chain of fences which presented a barrier between the public land in question and the county road. It is evident that this portion of the country is not well populated, and that public roads are few, as the greater part of the public land claimed to be unlawfully inclosed by the fence in question is two miles from the county road. Upon this evidence it was clearly the duty of the court to submit to the jury the question whether the defendant's fence or inclosure was erected by him in good faith to inclose his own land, or whether, in joining his fence to that of others, it was his intent and purpose to prevent or obstruct any person from peaceably entering upon, or establishing a settlement or residence upon, the tract of public land described in the indictment. This the court did not do, but instructed the jury that a fence built

by a person upon his own land was unlawful, if in effect it inclosed and shut out the public from any part of the public domain. This instruction, as a statement of the law upon the subject, was too broad, and was therefore subject to objection.

The other errors assigned are without merit, and require no discussion. For the reasons stated, the judgment of the circuit court is reversed, with directions to grant a new trial.

ÆTNA LIFE INS. CO. v. FRIERSON.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1902.)

No. 988.

1. ACCIDENT INSURANCE—CONSTRUCTION OF APPLICATION.

A man being about to start for Seattle with the intention at the end of six months of going from there to Alaska on an exploring trip, applied to a soliciting agent of an insurance company for an accident policy, provided it would cover the risks incident to such trip. At the suggestion of the agent, two applications were filled out, one for an annual and one for a six-months policy, and sent on to the general agent of the company, together with a letter from the agent, fully explaining the matter, and that the applications were to be treated as in the alternative. Each application contained a clause that, "I have not in contemplation any special journey or undertaking except as herein stated." No other reference to a journey was made in the formal application. *Held*, that the letter accompanying them, and which was necessary to an understanding of them, must be regarded, as the parties intended, as a part of the application itself.

2. SAME—WAIVER.

An incorporated insurance company may waive conditions which are for its benefit, notwithstanding a provision that no waiver shall be valid, unless made in a prescribed way and by certain officials. Such a provision may be itself waived, as well as any other; the question in every such case being as to whether the waiver has been made by the corporation or one authorized to act for it in the matter.

3. SAME—WAIVER BY RECEIPT OF PREMIUM.

The receipt and retention of a premium at the "home office" of an accident insurance company, after knowledge of facts and circumstances which called upon the company to elect whether it would recall the policy or assume the risk of an extrahazardous journey contemplated by the assured, is an election to ratify the contract and continue the policy.

4. SAME.

A general agent of an accident insurance company, being fully advised by a letter accompanying an application that the applicant contemplated a journey not stated in the formal application, and desired the insurance only in case the policy would cover the risks of such journey, issued the policy, and forwarded it to the soliciting agent, who collected the premium and delivered the policy. A short time thereafter the general agent, by direction of the home office, wrote the local agent to withdraw the policy, but, the insured having gone away, this was not done, and the local agent later sent in the premium, which was received and retained by the company without objection. *Held*, that the company must be presumed to have been advised of all the facts shown by the letter prior to its directing the withdrawal of the policy, and that its subsequent action was a waiver of the right to invoke provisions of the formal application to avoid the policy on account of the journey.

5. SAME—CONDITIONS—BREACH.

A provision of an accident policy exempting the company from liability for injury sustained when the insured was engaged in "adventures

into wild and uninhabited or uncivilized regions" did not become operative because the insured had started on an exploring or prospecting journey into the interior of Alaska, where he was drowned in a storm while navigating a well-known bay on the seacoast, before he had entered upon the inland journey.

6. SAME—CHANGE OF OCCUPATION.

An insurance company cannot claim that an insured had changed his occupation from that stated in his application to that of a prospecting miner, which was one more hazardous, merely because he was, when he lost his life, on his way to Alaska, with the intention of engaging in such pursuit, when he had not entered upon it at the time of his death.

7. SAME—AMOUNT OF RECOVERY—PASSENGER ON STEAM VESSEL.

An insured under an accident policy which provided that, "if injured while riding as a passenger in any passenger conveyance using steam * * * as a motive power the amount to be paid shall be double that above specified," with others, formed a party for the purpose of ascending an Alaskan river and prospecting for gold in its vicinity. A steamship company contracted to furnish them with transportation to the coast of Alaska in one of its steamships, and from there in a river steamer, which they were to use as a base of supplies during their explorations, the company to receive as compensation one-half the profits of the expedition. After leaving the steamship, and while passing up the bay at the mouth of the river, the river steamer was wrecked, and the insured was drowned. *Held*, that he was a passenger, and the beneficiary was entitled to recover double the principal sum named in the policy.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

This was an action on a policy of accident insurance. The insured was Robert P. Frierson. The loss, in case of death, was payable to the mother of the insured, who is the defendant in error. There was a stipulation waiving a jury and submitting the case to the court. The court rendered judgment for the plaintiff upon a special finding of facts, made a part of the record.

The company presented a number of defenses, which, so far as now material, were as follows: First. That the contract was void in consequence of a false statement in the application, in which the applicant stated, "I have not in contemplation any special journey nor hazardous undertaking, except as herein stated," whereas the applicant at the time contemplated a journey to the gold fields of Alaska for the purpose of prospecting for mines, and in fact did go to Alaska during the life of the policy, and was there drowned while prosecuting the journey to the gold fields in contemplation when he applied for insurance. Second. That the deceased at the time of his death was in violation of a condition of the policy which exempts the company from liability for injury sustained when the insured is engaged in "adventures into wild and uninhabited or uncivilized regions." Third. That the insured was placed in the preferred class as a lawyer. That he changed his occupation by going to Alaska as a "prospecting miner," and thereby rendered applicable the fourth condition of the policy, which is in these words: "If the insured is injured in any occupation or exposure classed by this company higher than the premium paid for this policy covers, the sum insured and weekly indemnity shall be only such amounts as said premium will purchase at the rate fixed for such increased hazard." Fourth. The policy insures the principal sum of \$5,000, but provides for the payment of double that sum if the injuries from which death ensued "are sustained while riding as a passenger in any passenger conveyance using steam, cable, or electricity as a motive power." The company denied double liability under this clause, upon the ground that he was not at the time of his death a passenger in a passenger conveyance, within the meaning of this clause. The court below held upon the law and facts that the company was estopped from making the three defenses first mentioned, and that the de-

ceased was a passenger, within the meaning of the policy at the time of his death. There was, therefore, a judgment for double the principal sum insured, with interest from the date of the refusal of the company to pay. The application upon which the policy issued was made upon a printed form. All the written parts, except the signature, were filled in by the local agent of the company at Shelbyville, Tenn. The insured, Robert P. Frierson, was a lawyer living at Shelbyville.

The facts found by the court below in relation to the application for and issuance of this policy, as found by the court below, are as follows:

"(1) Robert P. Frierson, the insured, was a lawyer. On September 29, 1897, he applied to a soliciting agent of defendant at Shelbyville, Tennessee, for a policy of accident insurance, stating that he intended going in a few days to Seattle, Washington, where he would remain about six months, preparing and arranging for a speculative and prospecting trip into Alaska or the Klondike, prospecting for gold. He inquired of the agent whether defendant company would issue a policy to cover such a trip as he expected to take at the end of about six months. The agent, who had no authority to issue policies, replied that he did not know, but suggested that the way to ascertain was to send to the defendant company two applications, one for a six-months policy and the other for a twelve-months policy, and that he (the agent) would accompany them by a letter fully explaining the facts as to the proposed trip, and that the company could then determine for itself whether it would take the proposed risk, and, if not, could issue the policy for six months to cover the time assured would be in Seattle. Insured assented to this plan. The two applications were accordingly prepared and inclosed by the agent in a letter to Myron L. Long, manager of defendant company, at Cincinnati, to whom he forwarded all applications taken by him, fully explaining all the facts with respect to the stay in Seattle, and the proposed speculative and prospecting trip to Alaska or the Klondike, and that a policy for twelve months was wanted only in the event it would cover the risk of the latter trip.

"(2) Upon receipt of this letter, and with a full knowledge of the facts that, unless the insurance would cover the risk of a speculative or prospecting trip to the Klondike, a policy for only six months was desired, the manager of defendant company, at Cincinnati, Ohio, dating it September 29, 1897, mailed the policy to the agent at Shelbyville, and about October 13, 1897, forwarded the application to the home office of defendant company at Hartford, Connecticut. Upon receipt of the policy the agent mailed it to the insured, who had then gone to Seattle, and collected the premium of twenty-five dollars (\$25.00), which had been left by the insured at Shelbyville for that purpose.

"(3) On October 9, 1897, the manager at Cincinnati wrote the agent at Shelbyville, as follows: 'I regret the ordering up of the policy of Robert P. Frierson. We have written him a policy for \$5,000, dated September 29th, for five months. You can advise him that policy is in full force and effect, and will be mailed you immediately upon receipt of return of the other policy. I tried my best to favor you in this matter, and regret my inability to do so.' Insured was then in Seattle, and the agent did not in any way communicate with him, the beneficiary, or any one connected with either of them, the fact that the policy had been ordered up. Subsequently, and in due course of business, the agent remitted the full premium for twelve months to the manager at Cincinnati, who received it without objection, and remitted it to the chief office at Hartford, where it was received and retained. No further effort was made to cancel the policy."

In respect to the questions as to whether the assured was engaged in "adventures into wild and uninhabited or uncivilized regions," or was a "passenger in any passenger conveyance using steam, etc.," at the time of his injury, there was no specific finding of fact. The facts bearing upon both these questions, as found by the court below, constitute the sixth finding of fact, and is as follows: "Insured remained in Seattle until May 31, 1898, preparing for the proposed trip. He and a number of other young men organized a party for the purpose of ascending the Kuskokwim river in Alaska,

and prospecting the interior of Alaska or the Klondike for gold. They arranged with the Columbia Navigation Company, a common carrier, engaged in the carriage of passengers by water from Seattle to Alaska, for transportation. The relation of the party to the company is found to be as stated by Richard Chilcott, president of that company, and R. P. Camdon, stockholder and officer in the company, which the court here restates and adopts in the language of the witness. Chilcott says: 'Q. What compensation was the Columbia Navigation Company to receive for transporting the party from Seattle to Kuskokwim Bay and thence up the Kuskokwim river?' A. It was to receive one-half of what the party realized in two years.' Cross-examination: 'Q. Who furnished the general stores for this party? A. I did, or the Columbia Navigation Company. When I use the personal pronoun, I am merely speaking of my company. Q. The twelve or more men you sent up there were to operate the boat and do all the other work? A. Yes. Q. They were crew and everything else? A. Yes.' Recross-examination: 'Q. Captain, were the members of the Jessie party at expense themselves in making this expedition? A. They contributed one thousand dollars each towards their supplies, but they paid no passage money. They were to pay from the proceeds of the expedition. Q. You testified, I believe, that the proceeds were to be divided half and half between your company and the individuals? A. Yes, sir. Q. Did any person on the Jessie pay fare? A. Yes, a man named Anrud. Q. Was he the only passenger from Seattle? A. Yes, with the exception of the party named. Q. This party also manned the boat? A. No. Q. You mean she was manned by others outside of the party? A. No, they were inside the party, but they were men on pay. Q. State, if you can, the names of the party on pay who manned the boat. A. Kinsler, Hare, Knudsen, and the Jap cook. Q. Who furnished the steamer Jessie for the purpose of transporting the party up the Kuskokwim river? A. The Columbia Navigation Company. Q. State fully, if you know, what instructions were given to this party with respect to communicating with the Columbia Navigation Company after they should reach Alaska. A. Each member was given a pass over all the boats of the company, and, in case any of them at any time crossed over to the Yukon river, they had the right to take the river boats up or down, and it was through these river boats that they were expected to communicate. Q. What compensation was the Columbia Navigation Company to receive for transporting the party from Seattle to Kuskokwim Bay, and thence up the Kuskokwim river? A. The Columbia Navigation Company was to get half the profits of the expedition. Q. State whether the members of this party were all, or most of them, and particularly if Robert P. Frierson was a stockholder in the Columbia Navigation Company. A. Nearly all of the party were stockholders of the Columbia Navigation Company.' Cross-examination: 'Q. You have stated that the Columbia Navigation Company was to share profits with this party. Did this party charter the steamer Jessie, giving as a price one-half of the profits of the expedition? A. No, sir; there was nothing in the way of a charter. Q. Did these fourteen names you gave us constitute the entire party which was to go on the Jessie? A. Yes, sir, with the exception that they knew that they would have to put on a pilot. Q. Then, if I understand you, the party of fourteen which left Seattle were to go up Kuskokwim river on the steamer Jessie, and the consideration moving to the navigation company was half of the profits of the expedition? A. Yes, sir; half to the navigation company and half to them. Q. At what time was the Columbia Navigation Company entitled to call for their half of the profits of the expedition? A. At any time. Q. Within the two years or later? A. Well, there was no agreement made as to that, but the understanding was they were to have our half interest in any profits. Q. That is to say, the Columbia Navigation Company assisted this party of fourteen to ascend the river a thousand miles or more to look after gold, and they were to give the Columbia Navigation Company one-half the gold which they found in consideration of the supplying the boat and provisions for the period of two years, and the other half of the gold found was to be divided equally between the party? A. That is right so far as it applies to the gold; but the party expected to find a town site, and, of course, they would simply be

deeded their one-half interest.' For the purpose of this expedition the company built a river steamer known as the *Jessie*. She was stocked with provisions sufficient to last two years, and was to remain with the party, and be used as the base of supplies while they were prospecting. The *Jessie* and the party who were to ascend the Kuskokwim river were transported on the *Lackme*, an ocean steamer belonging to the Columbia Navigation Company, from Seattle to a point near Kuskokwim Bay. On June 27 or 28, 1898, the *Jessie* was launched off Kuskokwim Bay, and started on her journey, manned by the crew, who were in the pay of the company; that is, the Columbia Navigation Company. In addition to assured and his party, whose passage was to be paid for by a share in the profits of the expedition, she carried one passenger, who paid a regular fare, and another, who paid the fare for himself and wife and child by his services as guide and pilot. The Kuskokwim river had not been previously navigated by steamboats. The region traversed by it is sparsely inhabited by Indians of a low degree of civilization, together with a few white missionaries at one point about two miles from its mouth, and traders."

Further facts essential to the determination of the questions arising upon the errors assigned will appear in the opinion.

W. B. Stephens and W. D. Carswell (Lewis Sperry, of counsel), for plaintiff in error.

Shepherd & Frierson, for defendant in error.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

For the company it is said: (1) That the consideration upon which the policy issued was the premium paid and "the warranties made in the application." (2) That the statement in the application that "I have not in contemplation any special journey or hazardous undertaking, except as herein stated," constituted a warranty, the breach of which was not waived as a consequence of the facts communicated by the assured to either the soliciting agent at Shelbyville or the company's "manager" at Cincinnati. (3) That the conceded fact that the insured lost his life while upon a "special journey" and "hazardous undertaking," which he had in contemplation when he made his application, constitutes a breach of the warranty, and defeats the policy.

Among the conditions made a part of the policy is this:

"No agent has authority to waive any condition of this policy; and no waiver will be recognized unless in writing, signed by either the president, vice president, secretary, or assistant secretary of the company."

It may be conceded that a contract of insurance in writing, if in unambiguous terms, must speak for itself, and cannot be altered or contradicted by parol evidence, in the absence of fraud or mistake. This ancient rule has been lately applied in respect of a fire insurance policy which was held void in consequence of the existence of other insurance at inception of contract, because consent to same was not indorsed thereon, although the fact of its existence was communicated by the assured to the company's agent before the policy was delivered. *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 22 Sup. Ct. 133, 46 L. Ed. —. In that case the policy provided that it should be "void if the assured now has or shall hereafter make or procure any other contract of insurance," etc., unless otherwise provided by agreement

"indorsed hereon or added hereto." The policy also provided that no officer or agent of the company "shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions or conditions *unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or remission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.*" We have underscored certain parts of the policy there involved for the purpose of calling attention to the specific character of the agreement sought in that case to be avoided by evidence tending to show knowledge of other existing insurance by the agent who issued the policy. If the defendant in error had rested her case upon an estoppel arising from the mere fact that the soliciting agent who received and forwarded these applications knew the truth as to the purposes of the applicant, the case, in that aspect of it, would, perhaps, be controlled by the case last cited. But we think the facts of the case are such as to distinguish it from *Northern Assur. Co. v. Grand View Bldg. Ass'n*. The statement relied upon as constituting an untruthful representation of the purposes of the applicant indicates upon its face that it was accompanied by some other statement upon the same subject. It reads thus: "I have not in contemplation any special journey or undertaking, except as herein stated." To what do the words "as herein stated" refer? No journey or undertaking was "herein stated" unless the statement which the parties agreed should accompany Frierson's applications is to be regarded as constituting a part of the application upon which the policy issued. The facts found by the court below were that two applications were made at the same time, one for a six-months policy and the other for an annual policy. The latter was desired only in case the policy would cover a trip such as he expected to make. The soliciting agent agreed to accompany these applications with "a letter fully explaining the facts as to the proposed trip." This the agent did. Upon this accompanying part of the application the general agent acted. Clearly, this statement accompanying the applications must be regarded, as both parties then intended, as a part of the application itself. The letter and the formal application should be regarded as together constituting one document. *Greenl. Ev. § 283; Lee v. Dick, 10 Pet. 482, 493, 9 L. Ed. 503; Bell v. Bruen, 1 How. 169, 183, 11 L. Ed. 89.*

The question is not, therefore, one of waiver; for, if the letter of the soliciting agent constituted a part of the written application for the policy upon which the policy was issued, there has been no breach of the warranty to be waived, the application truly stating the purpose of the applicant to take the very journey in course of which he met his death. But if we assume that the communication which accompanied the two applications is not to be regarded as a part of the application upon which the policy in suit issued, it is, nevertheless, operative as notice to all of the agents and officers of the company who saw it or learned of it that the applicant did contemplate the journey and enterprise in course of which he met his death, and that he had not applied for two policies of insurance, but for the annual policy if the company should consent to issue it in view of his purposes, and for

the shorter one only if it declined the risk of his contemplated journey. If the Cincinnati agent who received this communication and issued the annual policy, with all the light which that document gave him, had been himself the insurer, there could be no possible doubt of his authority to bind himself, and to waive any and every condition of the policy made for his benefit. So, too, it is not to be doubted that an incorporated insurer may waive any condition intended for its protection, even though it has prescribed that such waiver must be in writing; for it may as well waive such a condition as any other. This power of an insurance company to waive any provision or condition solely for its own benefit was affirmed in *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387, and *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689. However much those decisions may be regarded as doubted by *Northern Assur. Co. v. Grand View Bldg. Ass'n*, the doubt does not extend to the question of the power of an insurance company to waive any provision or condition of the policy intended for its protection. "As to this proposition," said Justice Shiras, in the case last cited, "there was, and could have been, no disagreement among the judges, but the difference arose over the sufficiency of the evidence to show the waiver." The question we must, then, meet in this aspect of the case is one of the evidence relied upon to establish that the company issued this policy with knowledge that the statement in the formal application relied upon as a warranty had been inserted by its own agent under an agreement with the applicant that he would forward therewith a full statement as to the journey and enterprise which the applicant had in view. For the purposes of this case we shall assume that the manager at Cincinnati, who received the two applications and the soliciting agent's accompanying communication, did not and could not waive the condition of the policy in respect to any breach resulting from any misrepresentation in the application. The court found that on October 2, 1897, this managing agent issued the policy now in suit, dating it September 27, 1897. On October 9, 1897, he wrote this Shelbyville agent, to whom the policy had been sent, and by whom it had been delivered to the assured, as follows:

"I regret the ordering up of the policy of Robert P. Frierson. We have written him a policy for \$5,000, dated September 29th, for five months. You can advise him that that policy is in full force and effect, and will be mailed you immediately upon receipt or return of the other policy. I tried my best to favor you in this matter, and regret my inability to do so."

This act was the act of the company, and the plain inference, in the absence of explanation, is that the company had disapproved the issuance of this policy in view of the knowledge communicated to its home office through the letter of the local agent which had accompanied the application. It is true that at another point in the finding of facts it is stated that this manager had, "about October 13, 1897," forwarded the application to the home office of defendant company at Hartford, Connecticut. The date, "about October 13th," is probably a mistake, as every inference is that the home office received the application and accompanying communication prior to the direction to cancel the policy, which undoubtedly emanated from the "home office." The company could have made plain just when the home office received

these applications, and just why the cancellation of the policy was directed. Its silence justifies the presumption that the direction to recall the policy came from the managing officers of the company, and that it was due to an unwillingness to accept the risk incident to the contemplated journey of the assured, and therefore preferred to issue to him the short policy which he had applied for as an alternative. The agent did not communicate with the assured, and withdraw the annual policy, as directed. Upon the contrary he, "in due course of business," "re-mitted the full premium for twelve months to the manager at Cincinnati, who received it without objection, and remitted it to the chief officer at Hartford, where it was received and retained." "No further effort was made to cancel the policy." The proposal submitted by the assured to accept an annual policy, provided it would cover his contemplated journey, was accepted by the company's agent, and the act of this agent, when submitted to the company, was ratified by the receipt and retention of the premium with full knowledge of all the facts.

In *Northern Assur. Co. v. Grand View Bldg. Ass'n*, cited above, it is said to be sustained by all the authorities "that, when waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that, when the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to take the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent." The receipt and retention of the premium at the home office of the company, after determining to recall the policy because unwilling to take the risk incident to the journey and business contemplated by the assured, was a distinct election to ratify the contract and continue the policy. *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387; *Madden v. Brown*, 97 Mass. 148; *Kirkpatrick v. Insurance Co.*, 11 App. Cas. 177; *North Berwick Co. v. New England F. & M. Ins. Co.*, 52 Me. 336; *Miner v. Insurance Co.*, 27 Wis. 693, 9 Am. Rep. 479. In *Madden v. Brown*, cited above, Judge Gray, speaking for the court, said:

"Although an agent of the company had no authority to bind them by receiving payment of a premium note after it was due, the company might receive such payment at any time. If they received the amount of the note from their agent after it was due, they were bound to inform themselves of the time when it had been paid to him; and by receiving it from him without inquiry they waived the right to insist on the delay in the payment as a ground of forfeiture of the policy."

This waiver, being the act of those officials constituting the "home office," was the act of the corporation. The fact that the premium was received and retained with knowledge of the facts constitutes in itself a waiver of the right to rely upon the known breach of the condition of the policy. It was likewise a waiver of the stipulation of the policy that "no waiver will be recognized unless in writing, signed by either the president, vice president, secretary, or assistant secretary." It was just as competent for the company to dispense with the observance of this condition, being one made for its own benefit, as any other. *Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills*,

54 U. S. A. 291, 27 C. C. A. 212, 82 Fed. 508; *Insurance Co. v. McCrea*, 8 Lea, 513, 41 Am. Rep. 647; *Pechner v. Insurance Co.*, 65 N. Y. 195; *Insurance Co. v. Earle*, 33 Mich. 143; *Dilleber v. Insurance Co.*, 76 N. Y. 567. In *Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills*, cited above, this court said:

"Neither is it competent for the parties to disqualify themselves from ability to agree by parol to any contract which, under the law, need not be in writing; and an agreement in the terms of a policy that no change or alteration thereof shall be valid unless in writing, indorsed thereon, may itself be changed by parol."

In *Northern Assur. Co. v. Grand View Building Ass'n*, there is nothing in conflict with this. The court there upheld a provision in the policy which required consent to other insurance to be indorsed thereon in writing by the agent issuing the policy. The waiver then relied on was waiver resulting from the mere knowledge of the agent that such other insurance existed at the time he issued the policy.

2. What we have said applies as well to the defense that the assured lost his life through "adventures into wild, uninhabited, or uncivilized regions." The assured lost his life by a storm while a passenger on board a steam vessel called the *Jessie*, belonging to the Columbia Navigation Company, while crossing Kuskokwim Bay, a bay on the coast of Alaska, for the purpose of ascending the Kuskokwim river, one of the rivers of Alaska. He, with others, had been carried from Seattle as passengers upon an ocean steamer to a point off Kuskokwim Bay, where they took the *Jessie* for the purpose of continuing a journey to the gold fields of Alaska. The journey was not completed which the company knew he had in contemplation. It cannot be said that he was, at the time of his death, engaged in adventures in a wild, uncivilized region. He was crossing a well-known arm of the sea, and had not reached the river which it was proposed to ascend. His adventure in a wild and uncivilized region—if that may be regarded as a proper characterization of the mining regions of Alaska—had not begun.

3. The fourth condition of the policy was in these words:

"If the insured is injured in any occupation or exposure classed by this company higher than the premium paid for this policy covers, the sum insured and weekly indemnity shall be only such amounts as said premium will purchase at the rate fixed for such increased hazard."

The contention is that the insured had changed his occupation from that of a lawyer, as stated in the application, to that of a "prospector miner." But there are no facts upon which to base this defense. If the assured had lived to begin his work of prospecting for mines, there might be some room for the contention now made. That he intended to engage in "prospect mining" is not enough. To bring this provision of the policy into effect, the company must show that he was actually engaged in an occupation, at the time he sustained his injury, "classed higher than the premium paid for the policy covers." This the company has not done, for it is clear that he lost his life in a storm while a passenger on a steamer crossing the Kuskokwim Bay for the purpose of going up the Kuskokwim river, and thus into the interior of Alaska. The journey which he contemplated when he applied for insurance, and about which he informed the company through the com-

munication accompanying his application as a part thereof, had not been completed when he met his death. This defense was properly held to be unavailing by the court below.

4. It is next assigned as error that the court allowed a recovery for double the sum named as the principal sum insured. Clause "F" of the policy is in these words:

"If such injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable, or electricity as a motive power, the amount to be paid shall be double the sum above specified."

There is no specific finding that the assured was a passenger at the time of his death, but the court adopted as its finding the facts testified to by Richard Chilcott, president of the Columbia Navigation Company. There was no specific finding that the assured was riding as a passenger in a passenger conveyance at the time of his death. The court, however, did find certain facts which tended to show what his relation was to the owner and navigator of the steam vessel upon which he was traveling. These facts have been elsewhere set out in full. Upon this finding of facts the court below held that the assured was a passenger, within the meaning of the double indemnity clause of the policy. While some of the persons composing the party, of whom Frierson was a member, did constitute the crew employed and paid by the navigation company to navigate the steamer, Frierson was not one so paid. He owed no duty to the navigation company in respect to the navigation of the Jessie. The agreement of the navigation company, so far as it involved the transportation of Frierson from Seattle up the Kuskokwim river, created the relation of carrier and passenger. There were other parts of the contract, by which the Jessie was to be used as a base of supplies up the river, which do not affect the carrier agreement one way or the other. The Jessie at all times continued to be under the control and management of the navigation company. The Frierson party had no exclusive rights, for she was under no charter, and she had on board a passenger who had paid a separate fare, not being a member of the Frierson party, nor within the terms of the contract under which he was being carried. The Jessie was a passenger conveyance, whose motive power was steam. Frierson was not at the time a servant, or in the employment of the owners or navigators of the Jessie. He was riding on the boat under a contract based upon a good consideration, by which the Columbia Navigation Company undertook to carry him up the Kuskokwim river. These facts constitute him a passenger. Wood, Ry. Law, § 298. The fact that the Jessie was to remain up the river, and be used as a base of supplies for exploring or mining parties, does not affect the carrier agreement which was being executed when the Jessie was wrecked. That for the service in carrying his party up the river and for the subsequent use of the boat as a warehouse or place of shelter the navigation company was to receive a definite share in the results of the expedition does not change the carrier relationship which existed while the journey was in progress. There was no partnership or charter relation in the ownership or navigation of the steamer. The counsel for defendant in error has cited and relied upon a class of cases holding that employés of railroad companies, while being carried to and from

their work, are not passengers, but employés. The cases relied on are cited and approved by this court in *Railroad Co. v. Stuber*, 48 C. C. A. 149, 108 Fed. 934. They have no possible application to the case at bar, for the reason that the assured was not an employé of the navigation company. That the *Jessie* was not "a public conveyance in the usual lines of travel as a common carrier of passengers" may be true. But, if the insurance company intended to limit the benefits of its contract to passengers who travel "in conveyances operated in the usual lines of travel as common carriers," it should have so stipulated. This it did not do.

The judgment must be affirmed.

ALASKA UNITED GOLD MIN. CO. v. MUSET.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1902.)

No. 710.

1. WRIT OF ERROR—FILING BEFORE ASSIGNMENTS OF ERROR—APPLICATION TO CORRECT—MOTION TO DISMISS.

Where a writ of error is issued and filed before the assignments of error are filed, in violation of rule 11 of the circuit court of appeals, and at the time of filing the latter, and before the time for suing out a writ of error has expired, plaintiff in error applies to the court for leave to withdraw the writ and correct the proceeding by presenting a new petition, writ, and bond, and such application is opposed by the defendant in error, his motion thereafter made to dismiss the writ because of such irregularity should be denied.

2. MINES AND MINING—PRINCIPAL AND AGENT—FOREMAN—VICE PRINCIPAL—NEGLIGENCE.

Where a corporation owning two mining plants has a general superintendent, with general oversight over both plants, and a foreman of each mine, who employs and discharges the men, and directs and controls the entire operations of his mine and of the various gangs of men there employed, such foreman is a vice principal, for whose acts and negligence in the conduct of such mine the owner is responsible.

3. SAME—SHAFT—BLASTING—MEANS OF ESCAPE.

Plaintiff's intestate and another were employed in defendant's mine at the bottom of a shaft. There was an elevator in the shaft, and when about to blast they gave a certain signal to the engineer, who signified that he understood, by raising the bucket a few feet and then lowering it. They then ignited the fuse, and signaled the engineer to hoist, and were raised a short distance, and then lowered, and the engineer shouted down the shaft that the compressed air by which the elevator was operated was cut off. Deceased's companion climbed up the elevator rope and escaped, but deceased could not do so, and was killed by the explosion. The air was cut off by the foreman, who had full charge of the operation of the mine. There had been an iron ladder in the shaft, which was removed some weeks before the accident to be replaced by a new chain ladder, which was on the ground, and was to be placed in the shaft that day. *Held*, that defendant was negligent in failing to provide adequate means of escape for the men engaged in the blasting.

4. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTIONS FOR JURY.

The question of contributory negligence of deceased and of his fellow workmen in not having the chain ladder in place before the accident was properly left to the jury, there being evidence that the mine foreman had directed the foreman of the gang in which deceased worked to

place such ladder in the shaft at noon, the accident occurring in the forenoon, and also that deceased and the other men did not know the ladder had been furnished ready to place in the shaft.

In Error to the District Court of the United States for Division No. 1 of the District of Alaska.

Henry Musket, the administrator of the estate of Edward Hegman, deceased, brought an action against the plaintiff in error, the Alaska, United Gold Mining Company, to recover damages for the death of the decedent, which it was alleged was caused by the negligence of the plaintiff in error. At and prior to the date of his death, the deceased was an employé of the plaintiff in error, working in the Seven Hundred mine, under the direction of the foreman of the mine. The evidence was that Musket and the deceased were working together in a shaft, and that when they were ready to set off a blast at the bottom of the shaft Musket went up the shaft by the elevator to obtain a hot iron to light the fuses. Having secured the hot iron, he went down the shaft, and then rang five bells as a signal to the engineer in charge of the hoist to indicate they were about to blast. In response thereto the engineer lifted the bucket about three or four feet from the bottom of the shaft, and then dropped it down, which was his signal that he understood, and stood ready to hoist them up. When the men had lighted the fuses they rang one bell as a signal to hoist, and were raised a short distance, and let down again, when the engineer called down the shaft that the compressed air, which was the motive power of the hoist, was cut off. Musket climbed the cable, which was a quarter inch steel cable, and escaped. The deceased, it seems, was unable to do so, and was killed by the blast. It was shown that the property of the plaintiff in error was situated on Douglas Island, Alaska. That it consisted of two mines and two stamp mills, one for each mine, the mines being known as the "Ready Bullion" and the "Seven Hundred," the latter of which was situate a distance from the mill, to which the ore was carried by a tramway. C. A. Weck was the general superintendent of the plaintiff in error. Under him were four foremen, one for each mine, and one for each stamp mill. H. B. Pope was the foreman of the Seven Hundred mine. According to the testimony, it was he who personally cut off the air supply which deprived the engineer of the power of lifting the hoist. It was shown, also, that he had personal notice that the blast was about to be set off, and that he directed Musket to hurry down the shaft with the hot iron. Concerning his relation to the plaintiff in error and his powers and duties as foreman, the testimony was that in the operation of the Seven Hundred mine there were several bosses of the men engaged in the different branches of the work, such as the shop boss, the shift boss, and the pit boss, and that Pope was the general foreman or supervisor of all; that he was the man who directed the men and told them what to do, hired and discharged all the men employed in and about the mine, and gave them their time checks, upon which they were paid by the general superintendent. Musket testified: "No man showed me anything, only Pope, or gave me any orders." Another witness testified that the mine was under Pope's supervision; that his duties were to advise the men, and show them what to do and where to work; and that he had charge of the blacksmith shop and hoist, the men working in the elevator, and the miners and the direction of them, and of the entire mine. Another witness testified that the men employed in the various departments of the Seven Hundred mine, such as blacksmiths, engineers, miners, and drill men, were under Pope's immediate supervision. Evidence was introduced by the plaintiff in error to show that it had provided a way of escape from the shaft by means of an iron ladder, and that its absence from the shaft at the time when the accident occurred was owing to the negligence of the deceased or that of his fellow workmen in that shaft. The testimony of Pope was not taken on the trial, but Pianfetti, who was the boss of the particular shift in which the deceased was working when the accident occurred, testified that he and the others had received instructions to put in the shaft a new chain ladder on the morning of October 9th, the date of the accident, and that on talking the matter over

with the deceased and Muset they concluded not to put in the ladder until after the blast went off, and that at the time of the accident the chain ladder was lying in the blacksmith shop ready for their use, and that at 8 o'clock that morning Pope had told Pianfetti that the chain ladder was ready to be put in the shaft. This conversation was denied by Muset. Another witness testified that he heard the conversation between Pope and Pianfetti, and that the former instructed the latter to put the ladder down at noon. The accident occurred a little before noon. The jury returned a verdict for the defendant in error for the sum of \$10,000. On motion for a new trial, the court required that \$7,000 be remitted, and thereupon rendered judgment for \$3,000.

Malony & Cobb and John Flournoy, for plaintiff in error.

Lorenzo S. B. Sawyer and Crews & Hellenthal, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

A motion is made to dismiss the writ of error. The principal ground of the motion, involving the only question which we find it necessary to discuss, is that the writ of error was issued and filed 20 days before the assignments of error were filed, whereas rule 11 of this court provides that no writ of error shall be allowed until the assignment of errors shall have been filed. The record shows, however, that on the day when the assignments of error were filed, the plaintiff in error applied to the court for leave to withdraw its writ of error, and to correct the proceedings by presenting a new petition, writ, and bond at the same time with the assignments of error. The application was opposed by counsel for the defendant in error. In view of that fact and the failure of the court to allow the application, we think the present motion should be denied. The substantial result secured by rule 11 is that the assignment of error shall be on file at the time when the writ of error is taken out and the citation issued. The defendant in error has no ground of complaint if he had notice of the filing of these papers, and in open court opposed the application for leave to file a new writ. To dismiss the writ of error would have the effect only of imposing upon the plaintiff in error the additional burden of bringing up a new transcript on a new writ of error, the time for suing out the same having not yet expired.

The assignments of error present two principal questions—First, was Pope, the foreman in charge of the mine, a fellow servant with the deceased? Second, if he was not a fellow servant, and the plaintiff in error was answerable for his negligence, did the plaintiff in error supply an adequate means of protecting the deceased against danger from blasts by providing a means of escape from the shaft other than the hoist?

Upon a consideration of the whole evidence concerning the duties of the foreman of the Seven Hundred mine, and his relation to the plaintiff in error, we are of the opinion that the trial court committed no error in ruling that he was the representative of the plaintiff in error. The plaintiff in error was a corporation owning large mining

and milling properties on Douglas Island, Alaska, all of which were placed under the charge of a single superintendent. Its properties consisted of two distinct mines, and a separate stamp mill for each. The men employed in each mine were engaged in different classes of work. They consisted of blacksmiths, engineers, miners, and drill men, with different shifts for each branch of the work. Pope, the foreman, had general supervision of the Seven Hundred mine, and of all the men employed therein or connected therewith. There was evidence that he hired and discharged the men and directed their work. He was, we think, the general superintendent in charge of that branch of the business of the plaintiff in error. Although he was called a foreman, his duties were evidently more than those of an ordinary foreman. It is not shown that Weck, the general superintendent, had any direct supervision over the men, or ever inspected the premises in which they worked, or was present at any time to see personally that they were supplied with proper appliances and a safe place wherein to work, or that it was his duty so to do. One of the witnesses, who was a workman at the Seven Hundred mine, testified: "I have no idea who was the superintendent of the mine. No man showed me anything, only Pope, or gave me any orders. They told me Mr. Weck was superintendent, but I didn't know it." We think, within the principle of the case of *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, the representative of the defendant corporation, so far as the question of the duty which the corporation owed to the employes who worked in and about the Seven Hundred mine was concerned, was Pope, and not Weck, notwithstanding the fact that Weck was the superior officer of Pope, and was the disbursing officer who had the power to approve or disapprove the acts of the foreman in hiring and discharging the men, and through whom the corporation paid all the employes of its various properties upon time checks furnished by the foreman of each. The plaintiff in error was a corporation whose home office was at a distance from the place where its properties were situated. Being a corporation, it could act only by means of officers and agents. It placed all of its properties and business on Douglas Island in charge of a general superintendent. It placed its four distinct and separate departments of business each under the charge of a foreman or superintendent, who was subject to the general superintendent, but who was given substantially the entire control of that department. The general superintendent had no personal relation to either of the four departments. He had no office or place of business at either of the mines or the mills. It is not shown that he was ever present at the Seven Hundred mine, or inspected it, or had personal knowledge of its operation or its appliances. The only officer or agent of the corporation who had such knowledge of that mine was Pope. He it was who stood in the place of the master to the men. His duty it was to see that the men were supplied with the necessary appliances for their safety. Before he cut off the supply of compressed air which operated the hoist in the shaft, on the morning of the accident, it was his duty to see that the men therein working were furnished other safe means of escape therefrom. In relation to that duty, he stood in the place of the corpora-

tion, and for his neglect to discharge it the corporation is liable. He was not a mere foreman of a gang of men, as was the case of the negligent foreman in *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994, and *Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390. He was the representative of the corporation placed in charge of its servants in a separate department of its business, and as such he was the vice principal, within the definition furnished in the *Baugh Case*. The plaintiff in error could not meet the full measure of its duty as a master to its servants by placing its various properties under the charge of a general superintendent, who was not a superintendent in fact as to any particular branch of its service, and say that, because the general superintendent who had no knowledge of the want of proper appliances or defects in machinery or apparatus was not negligent, the master shall not be held for damages for the negligence in those respects of the foreman, who had the particular supervision and control over its property and its servants. The plaintiff in error owed a positive duty to its employés,—the duty of affording them a safe place to work, and safe tools to work with. That duty was necessarily delegated to a representative,—an individual who, for that purpose, should stand in the corporation's place. We have no hesitation in saying that that duty as to the men employed in the Seven Hundred mine was delegated to the foreman, Pope.

The question of the contributory negligence of the deceased was properly left to the jury. Some of the testimony tended to show that the plaintiff in error, through its foreman, Pope, had made ample provision for the safety of the workmen in the shaft by providing a ladder whereby they might escape after blasts were lighted, and that the ladder would have been available for the deceased but for the negligence of himself or that of his fellow workmen in the shaft. There was other evidence, however, to the effect that the men who worked in the shaft had been working there and setting off blasts for three weeks without a ladder, and that when on the morning of October 9th, the day of the accident, a ladder was ready in the blacksmith shop, the foreman instructed Pianfetti, one of the fellow workmen with the deceased, to place it in the shaft that day at noon. The accident occurred a little before noon. There was other evidence that the workmen in the shaft had on several occasions mentioned the absence of the ladder in that shaft, and that none of them knew or heard that the ladder was ready for them until after the accident. It was for the jury, under these circumstances, to say whether or not the deceased was guilty of contributory negligence, and whether the negligence of his fellow workman was the cause of his death, and there was no error in submitting that question to the jury, as the court did, with proper instructions.

The judgment of the district court is affirmed.

GAZZAM et al. v. SIMPSON et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

1. STATUTE OF FRAUDS—AVOIDING CONTRACT—RECOVERY OF BENEFITS.

Defendants, stockholders in a corporation, receive no benefits under a contract by which plaintiffs, also stockholders therein, advance money to the corporation, but not to relieve defendants from pecuniary liability, and defendants agreed to vote their stock so as to keep plaintiffs in control; so that defendants, protected by the statute of frauds from liability for breach of the contract, are not liable for such money.

2. ACTION ON CONTRACT—RECOVERY ON IMPLIED ASSUMPSIT.

Plaintiff, in an action to recover on a contract, cannot recover on an implied assumpsit, defendant having set up the statute of frauds as against the contract.

In Error to the Circuit Court of the United States for the Southern District of New York.

Before WALLACE, Circuit Judge, and COXE and HAZEL, District Judges.

WALLACE, Circuit Judge. The plaintiffs in error were the plaintiffs in the court below, and challenge the ruling of the trial judge in directing a verdict for the defendants. That ruling proceeded upon the ground that the action was one to recover damages for the breach of the oral contract between the parties made in January, 1890, and as the contract was not to be performed within a year it was void by the statute of frauds. The plaintiffs in error concede that the contract was void, but insist that they were entitled to recover of the defendants the sum of \$9,500 advanced to the Chautauqua Lake Railroad Company pursuant to the contract. They invoke the well-settled rule that the statute of frauds cannot be interposed as a shield by a party who has refused to perform a contract to enable him to retain without consideration a benefit which he has received under it.

The question whether the defendants received a benefit from the advances made to the railroad company is to be ascertained by the averments of the complaint, as no evidence was offered upon the trial. It appears by the complaint that June 20, 1899, the parties entered into an agreement whereby the plaintiffs were to make advances to the Chautauqua Lake Railroad Company in a sum not exceeding \$12,000, and were to be given an option for one year to purchase of the defendants certain shares of the stock of the corporation owned by the defendants and certain of its bonds and obligations. It also appears that the stock controlled by the plaintiffs, together with that owned and controlled by the defendants, constituted a majority of the whole stock of the corporation. The complaint avers that by the agreement of January, 1890, the prior agreement was extended for the term of one year, and the defendants promised during the extended time to keep the plaintiffs in control of the corporation by voting their stock according to the direction of the plaintiffs, and to protect the plaintiffs from the appointment of a receiver of the corporation. It avers that in consideration of this agreement, and at the instance and request of the defendants, the plaintiffs loaned \$9,500 to the Chautauqua Lake

Railroad Company, and that the loan was made by the plaintiffs "for the benefit of the defendants as owners of stock and bonds in the said railroad company." The complaint further alleges that by reason of the breach of their promise by the defendants to vote their stock as directed by the plaintiffs, and to prevent a receivership, the plaintiffs "absolutely lost the sum of \$9,500."

It is apparent by these averments that the \$9,500 was not advanced to the railroad company to relieve the defendants from any pecuniary liability, and that, if they were benefited by the advance at all, it was only in the sense that all the stockholders and creditors of a corporation may be remotely benefited by some advantageous transaction of the corporation. It is quite impossible to define or ascertain the pecuniary value to any stockholder or creditor accruing from a loan received by the corporation. The facts fail to disclose that the defendants received in any manner or to any extent the fruits of the performance of the contract by the plaintiffs. The advance was not made in the contemplation that it would be reimbursed by the defendants, and the circumstances are inconsistent with any implied promise by them to pay it in the event of the failure of the company to do so. This being so, the plaintiffs were not entitled to recover unless the law permits a party to recover his damages who has sustained loss by the refusal of the other party to perform a void contract. Such a recovery would amount to a rehabilitation and enforcement of the contract. Performance, either complete or partial, by one party of a contract which is void by statute cannot give him a right of action upon the contract, although it may give him one upon an implied assumpsit. If he has conveyed land, delivered goods, paid money, or rendered services under the contract, and the other party then repudiates it, he may treat the contract as a nullity, and recover what in justice the other party ought to pay for the benefit he has received without any consideration. The rule is expressed in Keener, Quasi Cont. p. 279, as follows:

"It is not, however, sufficient to enable the plaintiff to recover for him to prove that he has suffered damage in consequence of the defendant's breach of the contract. He must show that the defendant will, if he is not compelled to pay the plaintiff for that which he has received from the plaintiff, unjustly enrich himself at the plaintiff's expense."

In Browne, St. Frauds (5th Ed.) § 118a, it is said:

"The rule that where a party pays money or performs services for another upon a contract void under the statute of frauds he may recover the money upon account for money paid, or recover for the services upon the quantum meruit, applies only to cases where the defendant has received and holds the money paid or the benefit of the services rendered; it does not apply to cases of money paid by the plaintiff to a third party in execution of a verbal contract between the plaintiff and the defendant, such as by the statute of frauds must be in writing."

In Dowling v. McKenney, 124 Mass. 478, the plaintiff and defendant entered into an oral agreement by which he was to complete a monument for her, and she was to accept it in part payment of the price of a lot of land. He completed the monument, and thereafter she refused to accept it or convey the land. The court held that he was not

entitled to recover for his labor in completing the monument. In its opinion it used the following language:

"It is true that when a person pays money, or renders a service, or makes a conveyance, under an agreement within the prohibition of the statute of frauds, and the other party refuses to perform it, an action will lie to recover the money so paid, or the value of the service rendered, or the property conveyed, but it is on the ground that a party who has received a benefit under an agreement which has been repudiated shall be held to pay upon an implied assumpsit for that which he has received. In the case at bar the defendant received no benefit from the labor performed in completing the monument, although the plaintiff may have suffered a loss because he is unable to enforce his contract, and no recovery can be had for the labor on the monument."

In the present case not only have the defendants received no pecuniary benefit from the loan to the corporation, but the plaintiffs are precluded from a recovery, as upon an implied promise, by that provision of the statute of frauds by which no action can be brought to recover upon a promise, not in writing, to answer for the debt of a third person. The law does not raise an implied promise from an invalid express promise.

The ruling of the trial judge was correct, not only because upon the facts the plaintiffs were not entitled to recover the money loaned upon the theory of an implied assumpsit, but also because the complaint did not proceed upon that theory, but went upon the ground of a breach of the agreement. Like the case of *Dunphy v. Ryan*, 116 U. S. 491, 6 Sup. Ct. 486, 29 L. Ed. 703, the suit was based upon, and its purpose was to enforce, the void contract, and, as was there pointed out, "in such cases the suit should be brought upon the implied promise." So, in *Reed v. McConnell*, 133 N. Y., 425, 31 N. E. 22, the court held that a cause of action founded on a contract to recover damages for its breach, and a cause of action to recover the value of property received thereon by the party who afterwards repudiates it as void by the statute of frauds, are fundamentally different, and the fact that the defendant set up the statute as a defense to the cause of error pleaded did not authorize a recovery upon the implied assumpsit. The court said: "The claim that there was no valid contract, and that, therefore, there is a right of action for the value of property received under it, is totally inconsistent with the claim to enforce the contract and recover upon it."

The judgment is affirmed.

MEXICAN CENT. RY. CO. V. KNOX.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,071.

MASTER AND SERVANT—LAWS OF MEXICO—FELLOW SERVANTS IN RAILROAD SERVICE.

Under the laws of the republic of Mexico, an employé of a railroad company does not assume the risk of injury through the negligence of a co-employé, but the company is liable for such an injury in the absence of contributory negligence.

In Error to the Circuit Court of the United States for the Western District of Texas.

Mr. Davis, for plaintiff in error.

Millard Patterson and C. N. Buckler, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. An examination of the record, in connection with the very able and elaborate briefs of counsel, satisfies us that the pleadings and evidence in the case warranted the trial judge in charging the jury to the effect that, under the laws in force in the republic of Mexico at the time the defendant in error received his injuries, railway corporations were liable for all faults or accidents occurring through tardiness, negligence, imprudence, or want of capacity of their employés, and this although the injury resulting was to another employé of the company, himself without fault; or, in other words, in the Republic of Mexico the employé of a railway corporation does not assume, as one of the risks of his employment, the negligence of a co-employé.

This disposes of the first assignment of error. The remaining assignments of error complain in different ways of the failure of the trial court, in view of plaintiff's contributory negligence, to instruct the jury to find a verdict for the defendant; and, in regard to these assignments, all that it is necessary to say is that, while the evidence is neither very complicated nor conflicting, yet it is not clear that from it all reasonable men would draw the same conclusions in respect to whether the plaintiff below, through his own fault and negligence, contributed to his own injury.

The case seems to have been submitted on a very fair and impartial charge, to which no objection is made, and in which the jury were distinctly and specifically instructed that if they "found from the testimony that the plaintiff himself was guilty of negligence in the respects mentioned by defendant's counsel (which were recited), or in any other respect, and this negligence or want of due and proper care for himself contributed to his injuries, then he could not recover."

The judgment of the circuit court is affirmed.

MORRIS v. WILSON, SONS & CO., Limited.

(Circuit Court of Appeals, Second Circuit: March 15, 1902.)

No. 161.

1. EVIDENCE—COMPETENCY.

There is no competent evidence of the weight of cattle, J. having weighed them, and called off their weight to W., who entered them on slips, and J. having then copied into a memorandum book the total of the figures, and the original slips not having been given in evidence, nor their absence accounted for, and W. not having been called to prove the accuracy of his original entries, but J. alone having testified.

2. ASSUMPTION OF CONTRACT.

A contract of a steamship company to carry cattle on certain of its steamers, with right to substitute another steamer for any of those named, is assumed by a corporation which purchases the property and assets of such company, and thereafter, through its agents, notifies the shippers of substitution of another vessel for one named in the contract.

2. SHIPPING—RIGHT TO DAMAGES.

One who contracts to furnish a certain lot of cattle to be carried by a ship, agreeing to pay for any detention of the ship while waiting for them, may, without proof that the cattle are his, there being no stipulation that they should be, recover on the stipulation in the contract for payment by carrier of expense of feed, in case of delay in sailing.

4. SAME—LIQUIDATED DAMAGES.

Provision in contract of carriage of cattle that "steamer guaranties to sail on day named, * * * or pay expenses of keep of animals at rate of fifty cents per head per day in full," is a liquidation of damages, for expense of feeding cattle, in case of delay in sailing.

Appeal from the District Court of the United States for the Southern District of New York.

The suit was instituted in 1893, in personam, against the owner, an English corporation, of the steamer Sorrento, to recover damages for breach of contract to carry live cattle to England. The breach consisted in seven days' detention of said steamer beyond the agreed date of sailing.

David Thomson, for appellant.

Alfred Opdyke, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The contract sued upon was made December 22, 1890, between Edward Morris, of Chicago, and "Sanderson & Son, agents of the steamships of the Wilson Line." It provided for the shipment of live cattle from New York to London on various specified steamers of that line, including about 250 head per Lepanto. Subsequently the steamship Sorrento was substituted for the Lepanto by oral arrangement, it being provided in the contract that any equally good Wilson Line steamship might be substituted for any ship named. The contract covered the period of January, February, and March, 1891. At the time of making the contract the Lepanto of the Wilson Line was owned by a copartnership known as Thomas Wilson Sons & Co. The defendant was not incorporated until January 26, 1891, and the Sorrento did not become the property of defendant until March 3, 1891. After such transfer Sanderson & Son acted as agents for the firm and for the corporation in the same manner as they had previously acted for the firm. On March 16, 1891, Sanderson & Son notified Barrie, general agent of the libellant, that the Sorrento would sail March 22d, and take 300 head. On March 21, 1891, Barrie notified Sanderson & Son that the 300 cattle were at this port ready for delivery to the steamer. They were in fact there at that time and ready for delivery. On March 19, 1891, after the cattle had started from Chicago, a flaw was discovered in the thrust shaft of the Sorrento, the result of a latent defect. Steps were at once taken to repair it, but such repair delayed the vessel until March 29th. The contract contained the following clauses:

"Steamer to give five running days' notice of her intended departure, and twelve hours' notice of the hour the cattle must be delivered to her, but such notices to be given or received are subject to become inoperative in case of strikes or stoppage of labor. Steamer guaranties to sail on day named in notice, as soon after shipment of all the animals as tide and weather permit, or pay expenses of keep of animals at rate of fifty cents per

head per day in full. * * * Shippers guaranty to deliver animals by expiry of notice, provided vessel is ready for them, or pay for detention of steamer at the rate £50 per day. * * * The line form of live stock bill of lading to be used for cattle shipped under this contract, and its conditions to govern any questions not provided herein."

The district court held the defendant liable for expenses of keep of animals for seven days, at 50 cents per head per day, amounting to \$1,050 and interest. It also included in the decree \$417 and interest for loss of weight.

We find in the record no competent evidence of the weight of the animals. They were weighed by one John Haggerty. He called off the weights to his brother William, who entered them on slips. Subsequently the figures on the slips were added up, and the slips sent to Nelson Morris. Before sending them, John Haggerty, for his own accommodation, copied the totals into a memorandum book of his own. John was present, and testified to the method of weighing and to these copies of totals in his memorandum book, but the original slips were not presented, nor their absence accounted for, nor was William Haggerty called to prove the accuracy of his original entries on the slips. There was no competent evidence of the weight, and to that extent the decree cannot be sustained.

It is contended by respondent (appellant) that the corporation is not liable upon the contract, inasmuch as the contract was made before respondent was incorporated, and before it bought the Sorrento. This contention is unsound. The Sorrento was one of the Wilson Line; Sanderson & Son were agents of that line; they were agents also of the owners of the Sorrento; the contract which they made as agents of such owners bound the ship, and remained an obligation upon her when she passed to her new owners. Not only the vessels named, but such other vessels of the line as the agents of the line and owners might elect to substitute, were within the terms of the contract. The sailing notice substituting the Sorrento for the Lepanto was given, as admitted by the answer, by Sanderson & Son as agents of the steamship, then owned by respondent. In the absence of any proof of charter or special ownership it must be held that the notice of the agents of the steamship was the notice of her owners. Such a notice brought her within the terms of the contract as fully as if she had been named with the Lepanto. For delay in shipment she would be liable in rem, and her owners in personam. The suggestion in appellant's brief that there is no evidence that appellant assumed the contract or had any intention so to do begs the whole question. When the respondent corporation acquired the property and assets of the old firm, including the steamships of the Wilson Line, and thereafter itself ran the line, and appointed Sanderson & Son its agents and the agents of its steamships, the act of the agents in substituting the Sorrento in place of another ship of the same line, owned by the same corporation, was in fact an assumption of the contract by the respondent, and no evidence of intention was necessary.

We find no force in the contention that libellant was not entitled to recover because it was not shown that he owned the cattle. He had contracted to provide a certain lot of cattle to be carried by the ship

(which would thus earn freight), and to pay, for any detention of the steamer while waiting for them, \$50 per day. It was not stipulated that the cattle should be his own. He might get them where he pleased, and under whatever arrangements with the owner he might make. He did get the cattle; had them at the proper place, at the proper time, and tendered them. Because the ship was not ready to take them, they had to be fed at the place of detention for seven additional days. Libellant was the one in control of the cattle. Whether he owned them, or acted for some undisclosed principal, he was the one to pay the expenses of their keep, and whatever arrangements he might have had with others for a division of that loss is no concern of respondent. It caused this loss by its delay, and an award of the amount against it in this decree in favor of the libellant, with whom the contract was made, and payment of the same, will relieve it from any possible harassment by any other claimant. The language of the paragraph, "steamer guaranties to sail on day named, * * * or pay expenses of keep of animals at rate of fifty cents per head per day in full," clearly imports a liquidation of damages; and it being proved, as it was, that the animals were kept and fed during the seven days, it was not necessary to give evidence as to the details of the cost,—the liquidated amount stipulated in the contract became the measure of damages.

The decree is modified by striking out the item of \$471 and interest for loss of weight, and as modified is affirmed, with interest and costs of appeal.

COLD BLAST TRANSP. CO. v. KANSAS CITY BOLT & NUT CO.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1902.)

No. 1,585.

1. CONTRACTS FOR FUTURE DELIVERY—VOID IF QUANTITY INDETERMINABLE.

A contract for the future delivery of personal property is void, for want of consideration and mutuality if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties, but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty.

2. SAME—VALID IF MUTUAL AND QUANTITY SPECIFIED.

An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles required by his business during this time from the party who makes the offer.

3. SAME—VOID FOR WANT OF MUTUALITY IF QUANTITY IS NOT SPECIFIED.

But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration and void, because the acceptor is not bound to want, desire, or take any.

4. VOID CONTRACTS FOR FUTURE DELIVERY VALID FOR GOODS ACTUALLY DELIVERED, BUT VOID AS TO THOSE NOT DELIVERED.

Accepted orders for goods under such void contracts constitute sales of the goods thus ordered, on the terms of the contracts; but they do

not validate the agreements as to articles which the one refuses to purchase or the other refuses to sell or deliver under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder.

5. CONTRACTS—INTENTION OF PARTIES CANNOT PREVAIL OVER TERMS OF.

The intention of parties cannot be imported into a contract where its terms are plain and unambiguous, and they do not express it.

6. VERIFIED ACCOUNT PREVAILS OVER UNVERIFIED ANSWER.

A verified account must be taken as true, against a denial and an offset pleaded in an unverified answer under Gen. St. Kan. 1897, c. 95, § 108. (Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Kansas.

This writ of error challenges a judgment on the pleadings in favor of the defendant in error, who was the plaintiff in the court below. For convenience, the plaintiff in error will be called the "defendant," and the defendant in error the "plaintiff," in this statement, and in the opinion which follows it. The plaintiff's petition stated a cause of action upon a verified account for \$5,573.43. The defendant in its answer denied the averments of the petition, and pleaded a counterclaim for \$5,341.04 damages for the failure of the plaintiff to deliver to the defendant after June 1, 1899, certain manufactured articles which it ordered and needed, and which the defendant alleged that the plaintiff was bound to deliver under an alleged written contract, which it averred was made and broken in this way: On October 27, 1898, the plaintiff sent to the defendant this letter:

"Kansas City, Mo., Oct. 27, '98.

"C. S. Ullman, Esq., Purchasing Agent Cold Blast Transportation Co., S. & S. Packing Co.—Dear Sir: We offer to deliver at your works, during six months from November 1st, 1898, the following materials at the prices stated:

Bar iron, \$1.20 flat delivered by car, \$1.25 by wagon.
Soft steel bars, \$1.25 car load, 1.30 by wagon.
Machine bolts, 80 and 10 % discount.
U. S. Std. sq. nuts, \$6.50 off.
" " hex. " 7.40 off.
70 % off extras for tapping.

—and will make in part payment No. 1 wrought scrap at \$8.50 net ton, or arch bars and transoms at \$10.50 net ton, or wrought iron car axles at \$12.50 net ton, delivered your works; the quantity of scrap to be taken not to exceed the weight of materials sold to you.

"Yours truly,

R. C. Howes, Secy.

"With option of renewal for 6 months from June 1st, 1899.

"The K. O. Bolt & Nut Co.,

"R. C. Howes, Sec'y."

On receipt of the proposition contained in this letter the defendant accepted it; and between November 1, 1898, and June 1, 1899, it ordered, the plaintiff delivered, and the defendant paid for, nuts, bolts, and bars of the character specified in the letter, under the terms and at the prices there stated. Before June 1, 1899, the defendant notified the plaintiff that it exercised its option to renew the contract evidenced by the letter and acceptance. Between June 1, 1899, and December 1, 1899, the defendant ordered of the plaintiff nuts, bolts, and bars of the character described in the letter, which it needed in its business, which the plaintiff refused to deliver, and which the defendant was forced to purchase of others at prices which, in the aggregate, exceeded those specified in the alleged contract between the parties by \$5,341.94. In addition to the counterclaim, which has been stated, the defendant pleaded an offset of \$2,727.18, founded on the alleged fact that the plaintiff had charged that amount in excess of the prices specified in the alleged contract for nuts, bolts, and bars which it had furnished to the defendant on its orders between June 1, 1899, and December 1, 1899. The

answer of the defendant was not verified. There was a reply to it. But upon this review of a judgment upon the pleadings against the defendant the averments of the reply become immaterial, because the allegations of the answer stand admitted, and those of the reply which assert new matter are denied. The only question for consideration is whether the answer stated any legal defense, counterclaim, or offset to the cause of action pleaded by the plaintiff.

N. H. Loomis, R. W. Blair, and O. L. Miller, for plaintiff in error.
W. Littlefield, D. S. Alford, and Ord Clingman, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The main question in this case is whether or not the answer states a legal counterclaim. The basis of this counterclaim is that the plaintiff failed to deliver nuts, bolts, and bars between June 1, 1899, and December 1, 1899, under the alleged renewal of the so-called contract of October 27, 1898. This supposed contract consisted of a written offer to deliver manufactured articles in unnamed quantities at certain specific prices at any time between October 27, 1898, and June 1, 1899, and the acceptance of that offer, without more. The answer contains no averment that either the plaintiff or the defendant paid any consideration or performed any act to induce the contract, except the remitting of the offer by the plaintiff, and the sending of its acceptance by the defendant. There was therefore in the inception of this alleged agreement no consideration for the promise of either of the parties to it, except the promise of the other. Neither the letter nor the acceptance names any quantity or amount of the articles specified that is to be delivered or received under it. The plaintiff does not agree to deliver, nor does the defendant contract to receive or pay for, any quantity or amount whatever of the articles named in the writings. A promise is a good consideration for a promise. But no promise constitutes such a consideration which is not obligatory upon the party promising. It must bind the promisor, so that the promisee may maintain an action for its breach, or it is without legal effect and void. A promise to furnish, deliver, or receive specified articles at certain prices, without any agreement to order or to accept any amounts or quantities of the articles, is without binding force or effect, because neither party is thereby bound to deliver or to accept any quantity or amount whatever. Such promises are void, because they lack one of the essential elements of an agreement,—certainty in the thing to be done. Contracts for the future supply during a limited time of articles which shall be required or needed or consumed by an established business, or used in the operation of certain steamships or other machinery, are no exceptions to this principle, because they fall under the rule, "Id certum est quod certum reddi potest." But an accepted promise to furnish goods, merchandise, or other property, at certain prices, during a limited time, in such quantities as the acceptor shall require or want in his business, is without consideration and void, because the acceptor is not bound thereby to require or take

any articles whatever under the supposed agreement. The line of demarkation between valid and invalid contracts here runs between the requirements of machinery, or of an established business, and the wants, desires, or requirements of the tentative vendee; and that because the former are either reasonably certain, or may be made so by evidence, while the latter are conditioned by the will of the tentative vendee alone, and are both uncertain and capable of infinite variation.

It is, however, contended that, even if this alleged contract was void in its inception, it became valid and binding upon the parties when the defendant ordered, and the plaintiff delivered and received payment for, a large quantity of the manufactured articles at the prices and in accordance with the terms of the letter of October 27, 1898. But the fatal defect in the alleged contract was that the plaintiff was not bound to deliver, nor the defendant to take and pay for, any specific quantity of the offered articles. As to all undelivered articles, that defect still inheres in the agreement. The plaintiff is not bound to deliver, nor the defendant to take and pay for, any articles that have not been delivered, because there is no specification in the alleged contract of the amount or quantity which the one is to deliver and the other to receive. The orders for these articles which have been filled by their delivery specified the amounts so delivered, and thus effected contracts for their sale. But these orders and deliveries have in no way remedied the fatal defect of the offer and acceptance regarding those articles which the defendant has ordered, and the plaintiff has refused to deliver. The defendant never agreed to order or to pay for any quantity of these undelivered articles. If it had refused to order and take them, no action could have been maintained for its failure, because no court could have determined what amount it was required to take. Nor can an action be better maintained against the plaintiff for its failure to deliver the articles which the defendant has ordered, because the offer contains no measure of the quantity which the plaintiff was to deliver, and consequently no agreement on its part to deliver any whatever. As the contract was void in its inception, and has continued to be void as to all undelivered goods, the notice of its renewal which was delivered by the defendant was futile, since the renewal of a void contract but continues its invalidity.

It is said that the intention of the parties was to make an agreement that the plaintiff should sell and deliver, and the defendant should buy, all the articles of the character specified in the offer which should be needed or required by its business between October 27, 1898, and June 1, 1899; that the purpose of the construction and interpretation of contracts is to ascertain the intention of the parties, and that this contract should be interpreted to effect this intent. The answer is that, while ambiguous terms and doubtful stipulations may be interpreted to carry out the intention of the parties when they fairly evidence it, their secret intention cannot be imported into contracts whose terms and meaning are plain and unambiguous, and do not express it. It is only the intention of the parties which the contract itself expresses that the courts may enforce. In the case at bar the offer of the plaintiff is nothing but a price list. The acceptance

of the defendant contains no agreement to buy any of the articles specified in the list, and there is no ambiguity in the terms, or doubt in the meaning, of the writings in issue. To give effect to the intention of the parties which the defendant now alleges would be to ascribe to them a purpose, and to make and enforce for them a contract, which their writings neither express nor suggest; and this is beyond the province of the courts. *Railway Co. v. Bagley*, 60 Kan. 424, 431, 56 Pac. 759; *Woolsey v. Ryan*, 59 Kan. 601, 54 Pac. 664; *Davie v. Mining Co.*, 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357; *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; *Campbell v. Lambert*, 36 La. Ann. 35, 51 Am. Rep. 1; *Turnpike Co. v. Coy*, 13 Ohio St. 84; *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205.

The rules applicable to contracts of this class may be thus briefly stated: A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty. An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer. *Wells v. Alexandre*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; *Minnesota Lumber Co. v. Whitebreast Coal Co.* (Ill. Sup.) 43 N. E. 774, 31 L. R. A. 529; *Parker v. Pettit*, 43 N. J. Law, 512. But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration and void, because the acceptor is not bound to want, desire, or take any of the articles mentioned. *Bailey v. Austrian*, 19 Minn. 535 (Gil. 465); *Tarbox v. Gotzian*, 20 Minn. 139 (Gil. 122); *Railway Co. v. Bagley*, 60 Kan. 424, 433, 56 Pac. 759; *Oil Co. v. Kirk*, 15 C. C. A. 540, 68 Fed. 791; *Crane v. C. Crane & Co.*, 45 C. C. A. 96, 105 Fed. 869. Accepted orders for goods under such void contracts constitute sales of the goods thus ordered at the prices named in the contracts, but they do not validate the agreements as to articles which the one refuses to purchase, or the other refuses to sell or deliver, under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder. *Crane v. C. Crane & Co.*, 45 C. C. A. 96, 105 Fed. 869; *Oil Co. v. Kirk*, 15 C. C. A. 540, 68 Fed. 791; *Campbell v. Lambert*, 36 La. Ann. 35; *Railway Co. v. Mitchell*, 38 Tex. 85, 95; *Ashcroft v. Butterworth*, 136 Mass. 511, 514; *Drake v. Vorse*, 52 Iowa, 417, 3 N. W. 465; *Thayer v. Burchard*, 99 Mass. 508, 520; *Hoffmann v. Maffioli* (Wis.) 80 N. W. 1032, 1035, 47 L. R. A. 427; *Railroad Co. v. Jones*, 53 Ill. App. 431, 437; *Rafolovitz v. Tobacco Co.* (Sup.) 25 N. Y. Supp. 1036.

Tested by these rules, the accepted offer of October 27, 1898, was void in its inception for want of consideration and mutuality. No quantity of nuts, bolts, or bars was named in the offer or in the

acceptance. The defendant was not bound to order, to receive, or to pay for any of the articles named in the offer; and there was therefore no consideration for the offer itself, and no mutuality in the supposed agreement. The orders which were made and filled prior to June 1, 1899, constituted valid contracts for the purchase and sale of the goods so ordered at the prices named in the offer. But they effected no agreement on the part of the defendant to order, or on the part of the plaintiff to deliver, any other goods under the offer, because the amount of goods whose delivery was contemplated was still unnamed. The defendant was not legally bound to order, to receive, or to take any articles which it had not ordered, so that there was still no consideration and no mutuality in the contract as to any articles which the defendant had not ordered, or which the plaintiff had not delivered. The refusal of the plaintiff to honor the orders of the defendant was therefore no breach of any valid contract, and formed no legal cause of action for the counterclaim.

It is specified as error that the court refused to permit the defendant to amend its answer at the trial so as to allege that it orally, and by the written contract, agreed to purchase all of the goods of the kinds mentioned in the offer of October 27, 1898, "that it might use or desire to use during the times mentioned in the contract"; but no argument is presented in support of this specification, and no plausible reason for its assignment is suggested. If the amendment had been allowed, the alleged contract would still have been void, because, under the agreement stated in the amendment, the defendant would not have been bound to desire to use, or to use, any of the articles mentioned in the price list, and there would still have been no mutuality in the contract. Moreover, the granting of the motion was discretionary with the court below, and it was made so late that it would have been no abuse of discretion to have denied it if the amendment had been material. It was properly denied because the amendment was immaterial, because if it had been allowed the answer would not have stated facts sufficient to constitute a legal counterclaim, and because its allowance was discretionary, and there was no abuse of that discretion.

In addition to the counterclaim which has been considered, the answer contained a denial of the allegations of the complaint, and an offset against the plaintiff's claim for the sum of \$2,727.18, which the defendant alleged the plaintiff had charged it in excess of the prices specified in the offer of October 27, 1898, for goods delivered subsequent to June 1, 1899. But the statutes of Kansas provide that:

"In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." Gen. St. Kan. 1897, c. 95, § 108.

The correctness of the account set forth in the plaintiff's petition was verified by affidavit. The denial in the answer and the offset which it pleads challenge the correctness of this account. But the answer was not verified. Consequently, under the express provisions

of the statute which has been quoted, the verified account must be taken as true, and neither the denial nor the offset can be considered under the pleadings.

The judgment below was right, and it is affirmed.

In re LESSER et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 124.

BANKRUPTS—DISCHARGE—CONCEALMENT OF ASSETS.

On an application by a bankrupt firm for its discharge, it appeared that the partner having charge of its financial affairs made a statement to a commercial agency on January 10th, showing a surplus of \$153,000; that at the time of the failure in October the surplus had been used up and debts incurred to over \$230,000, making an apparent loss for eight months of \$383,000. Testimony was offered by the bankrupts accounting for the loss of all but about \$100,000 of this sum. The partner in question admitted making the statement to the commercial agency, but stated that "the bookkeeper gave it to him, and he thought it was true"; that he did not know "whether as a fact it was \$150,000 or not," because "the bookkeeper gave him the figures," etc. *Held* insufficient to show that the \$100,000, not accounted for, ever existed, and it was error to refuse the bankrupt's discharge on the ground that such sum was concealed.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 108 Fed. 205.

Alexander Blumenstiel, for appellants.

Otto T. Hess, for respondents.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The specifications in opposition to the discharge of the bankrupts were 28 in number, some of them duplicating each other, and several presenting different phases of the same question. Except as to such as deal with an alleged concealment of \$100,000, and the taking of a false oath as to the same, the full and careful report of the commissioner, to whom the issues raised by the specifications were referred, sufficiently disposes of these specifications adversely to the objectors. It will be sufficient to discuss the alleged concealment, as to the effect of which the commissioner and the district judge differed.

The firm consisted of three brothers, Tobias, Israel, and Simon, and up to 1896 had been engaged in business in New York City as manufacturers of clothing. On October 2, 1896, the firm failed, confessed judgment in favor of certain creditors, assigned certain book accounts to others, and secured the appointment by the state court of a receiver of the remaining assets. Proceedings were instituted by some of the creditors to set aside the receivership; such application was denied, but the court appointed an additional receiver. Since that time said receivers have been acting as such, and their appointment remains unrevoked and in full force, except that in a judgment creditors' action brought by one Metcalf and some others a final judg-

ment has been entered setting aside the transfers and the lien created by the appointment of the receivers as to such creditors, so as to enable them to obtain a priority of payment out of the firm assets. In May, 1899, the firm filed a voluntary petition in bankruptcy, were adjudicated on the same day, and trustee appointed June 7, 1899.

The referee finds that on January 10, 1896, Tobias Lesser, who had charge of the financial affairs of the firm, made a statement to Dun's Commercial Agency showing a surplus of \$153,858.24 (a similar statement made the year before showed a surplus of \$145,739.18); that at the time of the failure, however, in October, 1896, this surplus of \$153,858.24, which was stated to exist in January, was entirely used up, and in addition an indebtedness for money loaned and merchandise purchased had been incurred, amounting to over \$230,000, showing a loss for eight months of \$383,000. Testimony was offered by the bankrupts to show in what ways heavy losses had been incurred during that period, but this testimony accounted only for some \$285,000. The commissioner, therefore, reported that in his opinion "there has been a disappearance of assets amounting to at least the sum of \$100,000, which is entirely unexplained, and consequently the bankrupts must be presumed to have the same in their possession or under their control." The commissioner, however, reached the conclusion that there was no concealment by the bankrupts from their trustee of any of the property belonging to their estate in bankruptcy (section 29b [1]), because the whole title to all the bankrupts' property owned by them in October, 1896, passed to the receivers in the state court action. He held that:

"The bankrupts at that time parted with the title to all their property, and, so far as they are concerned, they cannot recover it. The receivership still remains, it has never been set aside, and all the property of the bankrupt that existed in October, 1896, whether then or since reduced to possession by the receiver, belongs to the receivers for the purposes for which they were appointed, and, even if property should now be discovered, it would, in my opinion, belong to the receivers. If that be so, there has been no concealment from the trustee in bankruptcy. In the schedules this receivership was fully set forth, and all the necessary information given. There was no concealment of the fact of the receivership, and a general statement was made of the property in their hands. The bankrupts have withheld or concealed nothing from their trustee in bankruptcy for the reason that they had nothing to withhold, the title to all that they had in October, 1896, having passed to the receiver."

The district judge held that the testimony seemed to justify the finding as to an actual disappearance of \$100,000, but further held that the proposition enunciated in the above-quoted paragraph is "a technicality which ought not to shield the bankrupts from the consequences of their fraudulent acts, or to defeat the intention of the bankrupt law"; and that, "after a trustee has been appointed in bankruptcy proceedings, a concealment of assets, which have not been turned over to a previous receiver, is equally a concealment from creditors, the actual beneficiaries, whether through a receiver or through a trustee."

We incline to the opinion expressed by the commissioner, in view of the plain language of the act defining the offense (section 29b [1]); but it is not necessary to enter into any discussion of that point, be-

cause examination of the record has satisfied us that the \$100,000 is mythical, it never disappeared because it never existed, and never having existed it has never been concealed. That Tobias Lesser stated to the agent of Dun's Commercial Agency that the firm's surplus in January, 1896, was \$153,858.24, is abundantly proved, but proof that the statement was made is not proof that it was correct. When subsequent investigation shows that \$100,000 of the \$153,858 is not to be found, the most natural conclusion is that the statement was false as to the amount of surplus. It cannot be assumed, in the absence of any testimony to that effect, that the statement was truthful, and the surplus actually as large as Tobias Lesser then represented it to be. And there is no testimony at all that the surplus in January, 1896, was actually \$153,000. Tobias Lesser was examined at length as to the statement he made to Dun. He didn't dispute that he gave Dun a statement, nor that the statement testified to by the agent was the statement he made; but, as to the accuracy of the statement, the most he could be got to say was that "the bookkeeper gave it to him, and he thought it was true"; that "as far as he knew it was true"; that "it must have been true at the time he gave it"; that he "does not know how much surplus they had," nor "whether as a fact it was \$150,000 or not," because "the bookkeeper gave him the figures," which he "didn't compare with the books." The record is so barren of competent evidence that the alleged concealed \$100,000 ever existed that, in our opinion, the commissioner was clearly in error in finding that the "bankrupts must be presumed to have the same in their possession or under their control."

A second specification, which was sustained by the district court, that the bankrupts made a false oath in verifying their schedules, depends also for support on the existence of this alleged \$100,000, and therefore need not be further considered.

The decree of the district court is reversed, and discharge ordered.

KIMBALL v. E. A. ROSENHAM CO.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1902.)

No. 1,615.

1. BANKRUPTCY—PAYMENTS ON ACCOUNT CURRENT NO PREFERENCE WHERE SUBSEQUENT CREDITS EXCEED THEM.

The receipt by a creditor of payments upon an account current in the usual course of business, which are followed by new credits for property delivered to the debtor which becomes a part of his estate, for which the creditor is not paid, and which equals or exceeds in amount and value the payments, does not constitute a preference, under section 60a, and does not require the creditor to surrender such payments as a condition of the allowance of his claim, under section 57g, of the bankrupt act of 1898.

2. SAME—CREDITOR'S CLAIM ON ACCOUNT CURRENT NOT DIVISIBLE.

The claim of a creditor for a balance due upon an account current with the bankrupt is one single claim, and, in determining its allowance and the existence of alleged preferences arising out of the acts it evidences, it must be so considered. It may not be divided into its items or into separate claims for that purpose.

(Syllabus by the Court.)

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Eben W. Kimball, for appellant.

E. B. Kinsworthy, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The E. A. Rosenham Company, a corporation, sold and delivered merchandise to the Max Elkan Company, another corporation, from time to time, on credit, in the usual course of business, and the Elkan Company paid the Rosenham Company, on account at different times, sums which aggregated \$850. Of this sum payments amounting to \$550 were made within four months of the date of the order which adjudged the Elkan Company a bankrupt, and payments to the amount of \$300 were made more than four months before that adjudication. Some of the credits for the goods sold were evidenced by acceptances of the Elkan Company and others by the usual book account. When the Elkan Company was adjudged a bankrupt, it was indebted to the Rosenham Company in the sum of \$3,384.13 on account of the goods which its creditor had sold to it on credit. \$1,878.13 of this amount was owing by it when it paid the \$850, and \$1,506 of the amount consisted of new credits which the Rosenham Company had extended to it for goods actually sold to it, and which became a part of its estate after all the payments were made, and on account of which nothing has ever been paid to the creditor. In this state of the case, the Rosenham Company proved and asked the allowance of its claim of \$3,384.13 against the estate of the bankrupt. It was met by the objection of the trustee that its claim should not be allowed unless it first surrendered, under section 57g of the bankrupt act, the alleged preference it received by its acceptance of the \$850 which the debtor had paid or some of the acceptances it had given for some of the goods. The order of the district court was that the part of the claim of the creditor which arose out of the \$1,506 of new credits which were extended after the \$850 was paid should be allowed without the return of the money thus paid, but that the portion of its claim which was based on the amount owing before the \$850 was paid should not be allowed unless the creditor paid the \$850 back to the trustee. The trustee has appealed from this order, and he assigns as error the allowance of the portion of the creditor's claim founded on the new credits without requiring the surrender of the \$850.

The order is erroneous, but not for the reason alleged by the appellant. The portions of the bankrupt act pertinent to this inquiry are:

"Sec. 57g. The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

"Sec. 60a. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The term "transfer" in the last section includes a payment. This section gives the legal and controlling definition of the preference mentioned in section 57g and other parts of the bankrupt act. It declares that it is not every transfer of property or payment of money that will constitute a preference, but such transfers or payments only as enable the creditors receiving them to obtain greater percentages of their debts than other creditors of the same class. Is a creditor who, subsequent to the receipt of payment on an account current, extends to his debtor new credits in excess of the amount of the payments for merchandise which actually becomes a part of the debtor's estate, thereby "enabled to obtain a greater percentage of his debt" than other creditors of the same class? Take the case in hand. Before the \$850 was paid the creditor had a claim for \$1,878.13 still owing for goods sold before that time, and \$850 more, in all \$2,728.13. After the payments were made it extended new credits, and put into the estate of the debtor new goods, which amounted to \$1,506, on account of which it has received nothing. Hence at the time of the adjudication in bankruptcy its claim was \$3,384.13, while it was only \$2,728.13 before the payments were made. The result is that by virtue of the payments and the subsequent credits the estate of the bankrupt has been increased to the amount of \$656, the claim of the creditor has been enhanced by the same amount, and its loss in a proportionate sum. It has received no benefit, but, on the other hand, has incurred a positive loss by the transaction. If it had received no payments and extended no credits subsequent to the time of the payment, it would have lost that portion of \$2,728.13 which will not be paid by the estate of the bankrupt, while it will now lose that portion of \$3,384.13 which that estate will not pay. On the other hand, the other creditors receive their proportionate share of \$656 more than they would have received if the payments had never been made and the new credits had never been extended because the estate of the bankrupt has goods of the Rosenham Company of the value of \$656 more than it would have had in that event.

It may be said that before the \$850 was paid the claim of the Rosenham Company was \$2,728.13, that after its payment it was only \$1,878.13, and that the moment the payment was made the creditor had secured thereby a preference. This would undoubtedly have been true if the account and the transaction had closed there. But it did not, and it is the actual account and the real transaction, and not those which might have been, but were not, that condition this case and its decision. It was not the purpose or the intention of the parties to this transaction to give the creditor a preference by the payment of this \$850, and that payment never had that effect. Parties are presumed to intend the ordinary and natural consequences of their acts. The customary and natural effect of payments upon a live account current is the continuance of the account and the extension of new credits. Stop payments upon such an account, and new credits are not extended, and the account closes. Make payments, and the account continues and further credit is given. The payments upon the old credits constitute the inducement for the extension of new credits, without which those credits would not be made. If the \$850 had not been paid

to the Rosenham Company on the then existing debt of \$2,728.13, it is improbable that that corporation would have extended to its debtor the subsequent credits of \$1,506 on account of which it has received no payments. These motives, purposes, and practices of parties to mutual running accounts are common knowledge, and courts cannot and ought not to be blind to them. The bankrupt act should be read and construed, and the transactions of the parties affected by it should be judged in the light of them.

If at the time when this debtor paid the \$850 on the old credits it had bought goods of the value of \$1,506 of its creditor, and had paid \$850 therefor, leaving a balance of \$656 owing for them, no one would have claimed that it had thereby given a preference. No more did the payment of the \$850 on the old credits which induced the new credits of \$1,506. The actual effects of the two transactions upon the claim of the creditor, upon the estate of the bankrupt, and upon the claims of the other creditors would have been identical, and their legal effects could not be different. In neither the partial payment which induces the supposed sale and immediate delivery of goods nor in the payment upon the old credits which induces new sales upon credit in excess of its amount is "the effect of the enforcement of" the payment "to enable" the creditor, in the words of the law, "to obtain a greater percentage of his debt than other of such creditors of the same class." In both the loss is the creditor's and the gain is the estate's. Nor can the payment of the money on the old credits which induces the new credits be either justly or lawfully segregated from the new credits it induces for the purpose of finding a preference that never in fact existed, and never was intended, any more than the partial payment for goods when bought can be segregated from that sale for such a purpose. The payments and the new credits they induce are parts of the same transaction, inseparable in the intent of the parties and in their actual and legal effect. The items of an account current do not constitute separate claims of the creditor who presents them in a court of bankruptcy. They constitute one single claim. They cannot be lawfully separated and adjudicated without considering their mutual interdependence and relation. Nor can the claim they constitute be legally divided into claims, and a lawful adjudication of these claims be made as though they were not affected by each other. The entire account is not only one single claim, but it is one single continuing transaction, and in determining the existence of the alleged preferences and allowing its proof it must be so considered. In *re Richter's Estate*, 20 Fed. Cas. 749,752 (No. 11,803); In *re Dickson*, 49 C. C. A. 574, 111 Fed. 726, 728. If, when the claim is thus considered, the payments made, and the new credits which follow them, decrease the amount owing upon the claim, they may constitute a preference to the creditor; but if they increase it, or leave it unaffected, it is impossible for them to work such a "preference" in his favor, within the true meaning of that term in the bankrupt law. Our conclusion is that the receipt by a creditor of payments upon an account current, in the usual course of business, which are followed by new credits for property delivered to the debtor, which becomes a part of his estate, for which the creditor has not been paid, and

which equals or exceeds in amount and value the payments, does not constitute a preference, under section 60a, and does not require the creditor to surrender such payments as a condition of the allowance of his claim, under section 57g of the bankrupt act of 1898.

The order below must accordingly be reversed, the appellant must pay the costs, the case must be remanded to the district court, with instructions to allow the claim of the appellee, without requiring it to surrender any of the payments it has received; and it is so ordered.

NICHOLSON et ux. v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1902.)

No. 711.

PASSENGERS—INJURY WHILE ALIGHTING—EVIDENCE.

There is evidence to go to the jury on the question whether injury to the internal organs of a passenger was not caused by her fall, when thrown to the ground from the lower step of a car, by the negligent starting of the train, while she was alighting, though the distance to the ground was only two feet, she having been a woman 40 years old and of delicate health, the ground having been covered with stones, and she having struck in a sitting posture, and, in addition to the testimony of physicians that her condition might have been caused by a severe jar, she having testified that she received a severe jar, and that this was the cause of her injury.

In Error to the Circuit Court of the United States for the Northern Division of the District of Idaho.

W. W. Woods and J. H. Forney, for plaintiffs in error.
Stephens & Bunn, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The plaintiffs in error, Charles Nicholson and Mary E. Nicholson, his wife, brought an action against the Northern Pacific Railway Company, the defendant in error, to recover damages for injuries alleged to have been sustained by Mary E. Nicholson on January 28, 1899, through the negligence of the defendant in error in operating its railway train at the station of Manchester, in the state of Idaho. Mrs. Nicholson, at the time of the accident, was returning from Wallace to Manchester as a passenger on the train of the defendant in error. As the train approached Manchester, the conductor called out the name of the station, and the train then came to a standstill. Mrs. Nicholson proceeded to get out of the car and go down the car steps. While she was in the act of swinging herself to the ground, the train, without any warning or signal, started forward, causing her to fall upon the ground, whereby she received, as she alleges, internal injuries which have caused her great pain and suffering. It was shown that there was no platform at the station of Manchester, and no means of getting off the train other than by stepping or jumping from the car steps to the ground.

Testimony was introduced by the plaintiffs in error which tended to show that Mrs. Nicholson, while she had been a woman of delicate health and had been the subject of surgical operations, was, during the two years prior to the accident, in reasonably good health. She testified that when she fell she was "jarred dreadfully," and thought she had bones broken. She testified, further, and her evidence is corroborated, so far as such evidence can be corroborated, by that of her husband and others, that immediately after the accident she suffered very severe pains in the back and groins, and through the abdomen, and was so weak that she had to lie down, and was thereafter for two months under the treatment of a physician on account of the injury, and that she went to a hospital, where she remained 11 days, undergoing treatment, and that subsequently she was under the care of another physician, who performed an operation upon her, and that thereafter she submitted to another operation, all of which trouble, pain, and suffering she testifies was the result of the fall. Upon the close of the testimony, the court instructed the jury to find a verdict for the defendant in error. In so ruling, the court, according to the report of his oral instructions contained in the record, seems to have been moved by two considerations: First, that the evidence showed that Mrs. Nicholson had been in very delicate health for some years prior to the accident, and several years before had suffered miscarriages, and had submitted to surgical operations, concerning which and the nature of her ills the court remarked: "So it is to my mind utterly impossible that this distress that she may be in could have resulted from that accident." The second consideration was that the shock or injury which the plaintiff suffered could not, in the nature of things, have been severe, owing to the short distance which she fell. The court said: "She could not have had, when the car moved, more than one and a half to two feet at the outside to jump. Now, I cannot for a moment believe from my own observation and experience and from the testimony of physicians in cases like this that that kind of a fall could have injured her seriously. If so, four-fifths of the women in the United States would have the same trouble. * * * It could not have been possible that a little jump of that kind could have created the serious state of her health to which witnesses have testified." The court then referred to the testimony of physicians, and said: "They have said that a certain state of her organs testified to might have occurred from an accident, but they acknowledge that it would require a very severe accident."

We are unable to agree with the trial court that the case should have been taken from the jury. The negligence of the railway company was fully proven. It was shown that, after the train had come to a stop at Manchester, one of the passengers, a young lady who was acquainted with the conductor, called his attention to the fact that there was snow at the point where the train had stopped, and requested him to have the train moved further up, so that she might get out at a better place. The conductor, without looking to see whether other passengers were descending from the train, gave the signal to move the train forward, and it started, according to some

of the testimony, with quite a jerk, and proceeded a distance of 50 or 100 feet. Mrs. Nicholson, at the moment when the train started, was standing on the lowest step of the car. It is not disputed that she was thrown to the ground. The distance which she fell is not definitely shown. According to the evidence of the only witness who testified on the subject, the height of the lowest step from the ground was 25 or 30 inches; but, conceding that it was not more than 2 feet, as stated by the court, it is, in our judgment, quite conceivable that a woman over 40 years of age, falling that or even a less distance, and striking the earth in a sitting posture, as it has been testified Mrs. Nicholson fell, might receive a very severe shock. We do not think it would follow, as a conclusion to be deduced by a court, that a fall such as that might not have produced all the injuries of which Mrs. Nicholson complained. The testimony of the physicians was that the condition in which they found her internal organs might have been caused by a severe jar. The test of a carrier's liability in a case of this kind is not whether the accident, if it had occurred to one in robust health, would have resulted in a permanent or serious injury. The carrier is bound to carry, with due care, the weak, the blind, and the lame, and is responsible for the injuries which they sustain by reason of its negligence. It cannot wholly absolve itself from liability by proving that the injured passenger was in delicate health or diseased before the accident. It is true the plaintiff in such an accident must make out his case. He must show with reasonable certainty that the injury which he suffered resulted from the negligence complained of. Mrs. Nicholson testified that she received a severe jar, and that that was the cause of her injury. The physicians testified that the condition in which she was might have resulted from a severe jar. The photographs of the place where she fell show that the ground was considerably lower than the track, and that it was covered with stones and boulders. According to some of the witnesses there were from two to seven feet of snow on the ground, and according to others there were but a few inches. Wholly aside from the testimony of the physicians and the question whether the serious condition in which they found Mrs. Nicholson's organs was attributable to her fall, there was her own direct and positive testimony as to her acute and long-continued pain and suffering, which she declared was the result of the accident, and for which, if the jury found her evidence true, damages were recoverable under the pleadings. We think the court erred in ruling that there was no evidence to go to the jury.

The judgment will be reversed, and the cause remanded for a new trial.

GIVEN v. TIMES-REPUBLICAN PRINTING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1902.)

No. 1,608.

1. ESTOPPEL IN PAIS.

One who, by his acts or representations, or by his silence when he ought to speak out, either intentionally or through culpable negligence, induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial.

2. SAME—VENDOR OF STOCK ASSERTING INDEBTEDNESS OF CORPORATION TO HIM.

The vendor of stock may, by his representations or silence, estop himself from asserting against a purchaser an indebtedness of the corporation to him. The sole stockholder of a corporation, by his management thereof, by his treatment of his account with it, by his statement of its resources and liabilities, and by his silence regarding any liability of the corporation to him, induced a purchaser to buy his stock in the belief that the corporation was not indebted to him. *Held*, the vendor was estopped from asserting or enforcing any indebtedness of the corporation to him as against the purchaser of his stock.

3. EQUITY—STOCKHOLDER MAY MAINTAIN BILL TO ENJOIN ACTION AT LAW AGAINST CORPORATION.

A stockholder of a corporation, who has been induced by the representations or culpable negligence of a vendor to buy his stock in the belief that the corporation is not indebted to him, may maintain a bill in equity to restrain the vendor from prosecuting an action of debt against the corporation.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

J. M. Parker, for appellant.

A. B. Cummins, James P. Hewitt, Craig T. Wright, and T. Binford, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree in favor of S. C. McFarland and the Times-Republican Printing Company, a corporation, to the effect that the defendant, Welker Given, is estopped from maintaining an action at law against the corporation, which he commenced on March 15, 1898, in the circuit court for the Southern district of Iowa, to recover the sum of \$3,375 and interest. 106 Fed. 253. In the petition in that action Given alleged that the corporation was indebted to him (1) for \$6,000, which he loaned to it on December 9, 1895, and on a promissory note which the corporation made and delivered to him for this \$6,000; (2) for \$2,000, which he loaned to the corporation on November 25, 1895, and on a promissory note which the corporation made and delivered to him for this \$2,000; and (3) for \$375 on account of his salary for the months of July, August, and September, 1895. The gravamen of the bill to restrain this action is that Given was the owner of all the capital stock of the printing company from February, 1893, until May, 1896, and that in the latter month, by representations, and by

silence when he ought to have spoken out, he induced the complainant, who did not know that the corporation was indebted to him, to buy all its stock, and to pay him \$19,000 for it, in the belief that the printing company was not indebted to him in any amount whatever.

The decree which grants the relief sought by the bill is assailed upon two grounds,—that there was no equity in the bill, because the complainants had an adequate remedy at law, and that the proof did not sustain its allegations. In support of the first contention the rules that an estoppel is sometimes a complete defense at law, and that a bill to restrain an action at law cannot be maintained on grounds which would constitute a complete defense to it, are invoked. They have no application to this suit, however, because the estoppel pleaded in this bill would have been no defense to the action at law, which has been enjoined. That action was against the corporation. The printing company was the only defendant in it. But the printing company had not purchased any of its stock or of its property from Given, had not been misled into the belief that it owed him nothing, and had not acted on that belief to its injury. There was, therefore, no estoppel in its favor, and it could not successfully defend the action against it upon that ground. And yet, if it was true that McFarland had been induced by the deceitful representations or silence of Given to buy all the stock of this corporation for \$19,000 in the belief that it owed him nothing, a judgment against the corporation for the \$8,375 and interest, which Given claimed in his action at law, would inflict a great injury upon McFarland, against which he would be utterly remediless at law, because the judgment against the corporation would be conclusive evidence against him, its only stockholder, of its indebtedness to Given, and it would be paid out of his property, because the corporation was solvent, and all its assets were really the property of McFarland. In this way it appears that the estoppel which lies at the basis of this suit in equity constituted no defense to the action at law. It was no defense for the corporation, because no estoppel had arisen in its favor. It was no defense for McFarland, because he was not a party to that action, and therefore he could not interpose any defense to it. He was, therefore, remediless at law, and the bill well stated a perfect cause of action in equity in his behalf. Nor is the rule that a stockholder cannot maintain a suit unless he has first called upon the corporation to bring it, and been met by a refusal, which is cited by counsel, applicable to this case, because the estoppel which lies at the foundation of this suit did not arise in favor of the corporation, and it could not have maintained a bill to restrain the action at law upon that ground.

The second objection to the decree is that it is not sustained by the evidence. But the proof discloses these facts: Given owned all the stock of the printing company from 1893 until May, 1896. During a large portion of this time it was managed by McFarland, because Given was ill. At times its business was profitable, and at other times it was not so. Neither Given nor McFarland paid much attention to the corporate organization. No dividends were declared when profits were earned, and no corporate action was taken when losses

were incurred. The bookkeeper of the corporation kept an account with Given upon its books, in which the latter was charged with the moneys which he drew out and credited with those which he paid in. But none of the parties to this transaction treated this account as evidence of any indebtedness of Given to the corporation or of the corporation to Given. It stood as a mere memorandum of the amounts drawn out and paid in by the sole stockholder of the corporation. This is well exemplified by the fact that at the close of the year 1894 this account disclosed a balance due to Given from the corporation of \$3,134.07, which was charged off to profit and loss, so that the account was balanced by direction of Given, because he was the sole stockholder; and if there were any profits he was entitled to them, and if there were any losses he must suffer them. In November and December, 1895, Given furnished to the corporation \$6,000 and \$2,000 to buy needed machinery, and these amounts were placed to his credit on his account in the books of the corporation. On May 13, 1896, when the sale to McFarland was consummated, there was, according to this account, a balance of \$3,638.35 due from the corporation to Given. The account books of the printing company contained no reference to the promissory notes set forth in Given's petition in his action at law. In this state of the case Given, on May 4, 1896, wrote to McFarland:

"Mr. McFarland: An offer has come to me suddenly for the T-R.—or a large interest in it,—just at a time when I need money. But I wish first to make you an extraordinarily low offer & hope you can arrange to accept it at once, for others are urgent. Give me \$7,500 cash and my note and assume my paper at Marshalltown Bank, and the T-R is yours. But it will be necessary to act at once."

The "T-R" was the Times-Republican Printing Company. The note referred to in this letter was a promissory note made by Given and held by McFarland, on which a balance of \$4,000 was owing, Given's paper at the Marshalltown Bank, mentioned in the letter, consisted of his promissory notes for \$7,500, which were held by that bank. Four days after this letter was delivered, Given directed McFarland, who was managing the business of the printing company, to have a statement of the resources and liabilities of the corporation made, which should exclude the account with him; and this statement was made, dated May 10, 1896, and delivered to Given by McFarland. Given procured this statement to use in a negotiation which was then pending for a sale by him of the Times-Republican to one Dotson. None of the notes or accounts on which Given based the action at law here in issue were mentioned in this statement. Given never informed McFarland of the existence of the promissory notes set forth in his petition, and never claimed or suggested to him at any time during the negotiation for the sale that the corporation was indebted to him for the \$8,375, for which he has sued. McFarland did not know that any such promissory notes had been made, but he knew the condition of the account books of the company, and the manner in which the account with Given had been treated, and he knew the contents of the statement prepared by direction of Given for use in his negotiation with Dotson. The negotiation with

Dotson did not result in a sale, and on May 13, 1896, McFarland complied with the terms of Given's offer to him of May 4, 1896. Given assigned to him all the stock of the corporation, and he took possession of all its property. He testified that by the acts of Given which have been mentioned, by his treatment of his account with the corporation, by his exclusion of it from the statement of the resources and liabilities of the printing company which he caused to be prepared for use in his attempted trade with Dotson, by his failure to speak of the notes upon which he has now sued, of the existence of which McFarland was ignorant, and by his failure to claim or suggest that the corporation was indebted to him in the sum of \$8,375, which he now claims from it, he was induced to believe, and did believe, that the corporation owed Given nothing. He further testified that this belief induced him to make the purchase of the stock, and to pay the sum of \$19,000 for it, and that he would not have done either of these things if he had been notified of this indebtedness of the corporation to Given. There is much more evidence in this record, but none which materially affects the conclusion which the facts and the evidence which have been recited, compel.

No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself or more salutary in its effects, than that one who, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial. This principle is equitable, because it forbids the untruthful or culpably negligent deceiver from profiting by his own wrong at the expense of the innocent purchaser or contractor who believed him. It is salutary, because it represses falsehood and fraud. It rests on the solid foundation of our common sense of justice, which revolts at the idea of rewarding the intentional or culpably negligent deceiver at the expense of the innocent purchaser who believed him. *Paxson v. Brown*, 61 Fed. 874, 882, 10 C. C. A. 135, 143, 27 U. S. App. 49, 60; *Union Pac. R. Co. v. United States*, 67 Fed. 975, 979, 15 C. C. A. 123, 127, 32 U. S. App. 311, 318; *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 293, 22 C. C. A. 171, 192, 40 U. S. App. 257, 293, 34 L. R. A. 518; *Cairncross v. Lorimer*, 3 Macq. 828; *Dickerson v. Colgrove*, 100 U. S. 578, 582, 25 L. Ed. 618; *Kirk v. Hamilton*, 102 U. S. 68, 75, 26 L. Ed. 79; *Evans v. Snyder*, 64 Mo. 516; *Pence v. Arbuckle*, 22 Minn. 417; *Crook v. Corporation of Seaford*, L. R. 10 Eq. 678; *Faxton v. Faxon*, 28 Mich. 159. The case at bar falls far within this just and salutary rule of equity jurisprudence. The acts of Given in the management of the business of this corporation, in the treatment of his account with it, and in the preparation of the statement of its resources and liabilities for the purpose of making a sale, without including therein any statement of his account, and his silence concerning any indebtedness of the printing company to him during his negotiations with McFarland, when it was his duty to speak out and give warning of his unknown notes and his concealed claim, were

well calculated to lead a reasonably prudent man to believe that the corporation owed him no debt or obligation. The evidence is convincing that McFarland was induced by these acts and this silence to entertain this belief, that Given intended that his acts and silence should have this effect, and that, in the absence of this belief, McFarland would never have paid or agreed to pay the sum of \$19,000 for this stock. Here is every element of an equitable estoppel. McFarland has acted on the belief which Given intentionally induced him to form, and he cannot now be permitted to deny its correctness, and to mulct him in the sum of more than \$8,000, because he relied on his acts and his silence.

The decree below is affirmed.

CITY OF SEATTLE v. THOMPSON.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1902.)

No. 781.

APPEAL—CONSTITUTIONAL QUESTION—JURISDICTION.

Under Judiciary Act March 3, 1891, § 5, providing that appeal may be taken from the district or circuit courts directly to the supreme court, in any case that involves the construction of the constitution of the United States, the appellate jurisdiction of the supreme court is exclusive, where the record shows, from plaintiff's own statement, that the suit really and substantially involves a controversy as to a right depending on the construction or application of such constitution, and the jurisdiction of the circuit court is invoked on that ground alone.¹

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

John W. Pratt and Pratt & Riddle, for appellant.

Frederick Bausman, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The jurisdiction of the circuit court in this case was invoked, not upon the ground of the diverse citizenship of the parties, but upon the ground that the case directly involved the construction of the fifth and fourteenth amendments of the constitution of the United States, in that, as alleged in the bill, the appellant, the city of Seattle, in a proceeding to appropriate a part of an unplatted tract of land for use as a public street, without compensation to the owner, and creating a lien upon the owner's other land abutting on such street, deprived the appellee of his property without due process of law. It is now moved to dismiss the appeal upon the ground that this court has no jurisdiction thereof.

By the fifth section of the judiciary act of March 3, 1891, it is provided that appeals or writs of error may be taken from the district or circuit courts directly to the supreme court in any case that "involves

¹ Jurisdiction of supreme court on direct review of trial courts, see note to *Lau Ow Bew v. U. S.*, 1 C. C. A. 9.

the construction or application of the constitution of the United States." In the case of *American Sugar Refining Co. v. City of New Orleans*, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859, it is held that, where it appears on the record from the plaintiff's own statement that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends upon the construction or application of the constitution or some law or treaty of the United States, and the jurisdiction of the circuit court is invoked upon that ground alone, the case falls strictly within the terms of section 5, and the appellate jurisdiction of the supreme court in respect thereto is exclusive. Upon the authority of that decision the appeal in the present case must be dismissed.

PARRAMORE V. TAYLOR.

(Circuit Court of Appeals, Second Circuit. March 10, 1902.)

No. 31.

PATENTS—STOCKING SUPPORTER—INFRINGEMENT.

The Parramore patent, No. 629,391, for a new stocking supporter to be used in connection with corsets, and having as its main and novel feature a single connection with a stud or clasp of the corset, thus dispensing with all other means of attachment thereto, *held* infringing.

Appeal from the Circuit Court of the United States for the District of Connecticut.

Appeal from decree of the circuit court for the district of Connecticut (105 Fed. 965), which dismissed a bill in equity for the infringement of letters patent 629,391, granted to the complainant July 25, 1899, for a new stocking supporter.

Edwin H. Brown, for appellant.

J. Edgar Bull, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The invention was a stocking supporter to be used in connection with corsets, and its main and novel feature was a single connection with a stud or clasp of the corset, thus dispensing with all other means of attachment thereto. Tapes or elastics at the end of two members, called "suspension elastics," engaged with the upper edges of stockings. The upper ends of these suspension elastics were connected to a "hanger," which was a device consisting of a fabric body and a metal hanger piece formed with an elongated loop or eye, and "adapted to be fitted to the lowermost stud of the series of studs forming a part of the clasp of an ordinary corset." Before the date of the invention, stocking supporters were in use which were fastened to the corset by buttons or hooks upon the corset engaging with buttonholes or other devices at the top of the elastics, but attached to two points on the corset. The Lennon supporter, patented June 21, 1898, had two supporters connected by a cross strap. The device was attached to the corset by two catches, which engaged

loops or rings upon the corset. The patented device was "the first to design a complete detachable device, which sustained both stockings from a single existing point of support on the corset," and, notwithstanding the apparent simplicity of the improvement, the record discloses the labor and experiments required to produce a patentable supporter fastened to the front of the corset by a single point of support on the corset, and the inventive character of the device is made apparent despite first impressions as to triviality. Its novelty and utility "in its limited field" are manifest.

The two claims which are said to have been infringed are as follows:

"(1) A stocking supporter consisting of the duplicate suspension tapes or elastics, and a single hanger to which the upper ends of the tapes or elastics are connected, said hanger being provided with an eye or loop adapted to be detachably engaged with the stud of a corset clasp, substantially as described. (2) A stocking supporter consisting of the duplicate stocking engaged members, and means for permanently uniting the two members at their upper ends, said means being in the form of a hanger piece, which is adapted to be engaged with the corset at the point where the sections of the corset meet, substantially as described."

The defendant's supporter is a substantial copy of the patented device, with the exception of the eye of the hanger. This hanger piece is in the form of an anchor, which is slipped over the top edges of the two parts of the corset clasp. The anchor is "inserted after the corset is fastened, between the abutting edges of the corset, with its two arms extending behind those edges. When drawn downward, there is thus formed a lock for the corset, which prevents its unfastening." It does not directly engage with the stud of the corset, but does engage indirectly, because the stud of the clasp holds the two parts together, and the anchor is anchored between the two abutting edges of the corset. A difference between the two structures is that in the defendant's clasp the hanger does not engage with the corset clasp until after the two parts of the clasp are fastened together, whereas by the patent the loop of the hanger piece engages with the stud before the corset is clasped.

The circuit court was of opinion that there was no infringement of either claim because the defendant's supporter had no eye or loop adapted to be detachably engaged with the stud of a corset clasp, and that his means for permanently uniting the two members of a duplicate stocking supporter were not the described means of the patent. It seems to us that the circuit court limited the claims too strictly to form, and that the defendant's anchor is a loop which performs the functions of the loop of the patent in substantially the same way, and is, in fact, detachably engaged with the stud of the corset clasp, and that the anchor is the equivalent of the described means of claim 2 for permanently uniting the two members of the supporter at their upper ends, and is in the substantial form of the patented hanger piece adapted to be engaged, and, in fact, engaged, with the corset at the point where the sections of the corset meet.

The decree of the circuit court is reversed, with costs of this court, and the cause is remanded to the circuit court, with instructions to enter a decree in accordance with the foregoing opinion.

SMITH v. YELLOW PINE CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 92.

REMOVAL OF VESSEL FROM WHARF—LIABILITY FOR INJURY.

A company at whose wharf a vessel is unloading cargo for it is liable for injury to her, through its superintendent, acting within the sphere of his authority, removing her, without knowledge of her owner, who was in command of her, to a place which her owner had told him was unsafe.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 108 Fed. 881.

Otto Hess, for appellant.

Martin A. Ryan, for appellee.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

PER CURIAM. The court below found, in substance, that the libelant's steam canal boat was moved from the end of the wharf of the Yellow Pine Company, where she was unloading cargo for that company, into the adjoining slip by the orders of the company's superintendent, the libelant who was in command of the boat being temporarily absent; that the libelant had previously been requested by the superintendent to move the vessel into the slip, but, having sounded the bottom and found it uneven and unsafe for his boat, so informed the superintendent, and refused to consent to have her moved there; that the vessel was moved at high water, and was strained and damaged when the water receded by grounding amidships with her stern afloat. These findings of fact, made upon conflicting testimony quite evenly balanced, and its weight depending upon the credibility of witnesses who were examined in the presence of the district judge, should not be disturbed by this court (*The Jersey City*, 2 C. C. A. 365, 51 Fed. 527; *The City of New York*, 4 C. C. A. 268, 54 Fed. 181), and are decisive of the case. The superintendent, having assumed upon his own responsibility to remove the boat to a place which her owner had told him was unsafe, acted at his own risk, and, as his act was within the sphere of his authority, the company became liable for its legitimate consequences. Different considerations would arise if the libelant had been present when the boat was moved, but as the grounding, as well as the removal, took place before he had returned to the dock, he was in no respect guilty of contributory fault.

The decree is affirmed, with interest and costs.

BRADY v. CHICAGO & G. W. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1902.)

No. 1,543.

1. MASTER'S AND SERVANT'S DUTY IN OPERATION OF RAILROAD—NEGLIGENCE.

The duty of so operating a safely constructed and equipped railroad, subject to the rules and general supervision of the master, as to keep it reasonably safe for those employed upon it, is not a positive duty of the master, but a primary duty of the servant.

2. CARRIERS—LIABILITY TO PASSENGERS OF RAILWAY COMPANY OPERATING OVER ANOTHER RAILROAD.

A railroad company operating its trains over the railroad of another corporation by permission is liable to its passengers for the negligence of the servants of the licensing corporation.

3. MASTER AND SERVANT—LIABILITY TO SERVANTS OF RAILWAY COMPANY OPERATING OVER ANOTHER RAILROAD.

A railway company running its trains over another road by permission is liable to its employes for the negligence of the servants of the licensing corporation in the discharge of the absolute duties of the master.

4. SAME.

But such a railway company is not liable to its servants for the negligence of the employes of the licensing corporation in the discharge of their duties as servants.

5. SAME—RESPONDEAT SUPERIOR—POWER OF CONTROL TEST OF APPLICATION.

The power of the alleged master or principal to command or direct the alleged servant or agent is the test of the liability of the former for the acts of the latter, under the maxim respondeat superior. If the master or principal has no power to command or direct the alleged servant or agent, he is not responsible for his acts, because there is no superior to respond.

6. SAME—EMPLOYEE OF RAILWAY COMPANY NOT FELLOW SERVANT OF EMPLOYEE OF DEPOT COMPANY.

The G. W. Ry. Co. was operating a train through the yards of a depot corporation, under the customary contract for the use of the yards and depot jointly with other companies having like contracts, when one of its employes was killed by the alleged negligence of the servants of the depot company in failing to properly turn the switches, which were under the control of the latter company. *Held* the switchmen of the depot company were not the fellow servants of the employes of the railway company, nor were they the agents or servants of that company, within the meaning of the fellow servant statute of Minnesota (St. 1894, § 2701).¹

7. SAME—RESPONDEAT SUPERIOR—TERMINAL YARDS—CONTRACT FOR USE OF CREATES NO PARTNERSHIP OR AGENCY.

The ordinary contracts between a depot corporation and several railroad companies for the use of a depot and transfer yards do not establish a partnership relation between the companies, nor make the depot corporation the servant or agent of the railroad companies, so that they become liable for the negligence of its servants, under the maxim respondeat superior.

Caldwell, Circuit Judge, dissenting.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Northern District of Iowa.

¹ Who are fellow servants, see note to Railroad Co. v. Smith, 8 C. C. A. 668; Railway Co. v. Johnston, 9 C. C. A. 596; Flippin v. Kimball, 31 C. C. A. 286.

Charles A. Clark (James W. Clark and William G. Clark, on the brief), for plaintiff in error.

Carroll Wright (A. B. Cummins and James P. Hewitt, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Elizabeth Brady, as administratrix of the estate of John J. Brady, brought an action against the Chicago & Great Western Railway Company for negligence resulting in the death of Brady, and at the close of the evidence produced on her behalf the court instructed the jury to return a verdict in favor of the defendant. The judgment, based upon this instruction, is challenged by this writ of error.

The facts established at the trial were these: John J. Brady was the foreman of a switch crew in the employment of the Chicago & Great Western Railway Company, engaged in discharging the customary duties of such crews at the city of St. Paul. In the early morning of November 1, 1896, while it was yet dark, it became Brady's duty to take his train, which consisted of an engine, tender, and caboose, from West St. Paul across the Mississippi river, and through the yards of the St. Paul Union Depot Company, to Mississippi street, a distance of two or three miles. He had exclusive charge of this train, and he directed the crew to couple the caboose on to the rear of the engine, and to back the train across the river and through the yards. He took his station on the forward end of the caboose as it was sent into the darkness. The only light he had at that end of the train was a lantern. As he was backing this train through the yards at a speed of about six miles an hour it collided with a refrigerator car on a portion of one of the transfer tracks of the depot company, called the "dead track," and so injured Brady that he died. This dead track was long enough to hold four or five cars. It was used by several railroad companies as a place of deposit of cars that were ready to be transferred from one railroad to another. It was provided with a switch at each end, by means of which trains could be sent around it when it was occupied by cars. When the switches were turned to send trains around it they displayed red switch lights, and when the dead track was clear, and was lined up with that on which Brady approached it, the switches displayed green lights. At such times it formed a part of the main track through the depot yards used by the defendant for the passage of its freight trains. At the time of the accident the switch lights were green, thus indicating that the dead track was clear. It was not the duty or the privilege of the servants of the Great Western Railway Company to operate these switches. The dead track, the switches connected with it, and all the railroads and switches in this yard were the property of the St. Paul Union Depot Company, a corporation of the state of Minnesota. This company had the exclusive management and control of all these tracks and switches, and the Great Western Railway Company had a contract with it for a transfer of its cars and engines and for permission to run its trains through

the yards. Six other railroad companies had similar agreements with the terminal company. The depot company employed three or four switchmen whose exclusive duty it was to throw the switches in the yards for those who were entitled to use them under these contracts. The dead track on which the accident happened was used largely in the daytime for the deposit of cars to be transferred from railroad to railroad, but it was used at night only for special work, such as perishable freight and stock. One of the plaintiff's witnesses said that from his experience it was lined up anywhere after 10 o'clock at night until 5 o'clock in the morning so that it was proper to proceed without delay or bothering a switch tender to be there; that there was liable to be some transferring at night, and the placing of cars upon this dead track; that all the trainmen and switching crews knew that this track was used for standing cars; and that the customary way of protecting these cars on this dead track was to set the switches so that they would display red lights, and send approaching trains around it. He also testified as follows:

"The crew of one railroad company would set cars there, to be afterwards received and taken by the crew of another company. But the cars were to be immediately afterwards taken or protected. To the best of my knowledge, they were always immediately taken or else protected. If they were protected, then they might remain there for some considerable length of time. It is a piece of track that is busily used for transfer work, and very seldom anything stands there long, but there may be some delay where they could not possibly get the car, and it would stay there for half an hour. They couldn't allow anything to stand there any longer, you know, to make a rule of it. It is true that this dead track was very much in use, and that cars were frequently stood there for a greater or less length of time,—freight cars which were not attached to an engine. At various times in the evening they wouldn't even allow you to cut your engine from the car there at all, and leave it there. You could stay right there and hold the car until the other engine was ready to take right hold of it; that is, at certain times. The Union Depot yards at the place in question are very thickly laid and covered with switches. The yards at that time consisted of almost a complete network of railway tracks running in all directions, used by the various railroad companies I have referred to and by the Union Depot Company for transferring, switching, and handling freight trains, and also passenger trains. * * * It was not defendant's custom to have any one at the dead track in question to watch or protect cars placed upon the dead track by other companies. It was the custom for the Union Depot switch tenders to protect those cars."

There was no evidence that the defendant or any of its servants placed the refrigerator car with which Brady's train collided upon the dead track.

Upon this state of facts counsel for the plaintiff in error insist that the direction of the court to the jury to return a verdict for the defendant was erroneous (1) because the railway company was liable for the negligence of the depot company in its discharge of the positive duty of the master to exercise ordinary care to provide a reasonably safe place for the servant to work, and there is some evidence of such negligence on the part of the terminal company; and, (2) because the servants of the depot company were the fellow servants of the employes of the railway company, there was some evidence that the servants of the former company were negligent in the discharge of their primary duties as servants, and under the statute of Minnesota

a railway company is liable to its employes for injuries inflicted upon them by the negligence of their fellow servants.

Before entering upon a discussion of these contentions, it will be well to fix clearly in mind the negligence and the nature of the negligence which was the cause of this deplorable accident. Was it negligence in the construction, repair, or maintenance of the road, its switches and appurtenances, or was it carelessness in their operation? for the line of demarkation which separates the absolute duty of the master from the primary duty of his servants lies here. It is the duty of the railroad company to use ordinary care to furnish a reasonably safe railroad machine; to exercise reasonable diligence to keep it in repair; to use ordinary care to employ a sufficient number of reasonably competent servants to operate it; to establish reasonable rules for, and to exercise proper supervision of, its operation. But when this duty is performed an equally positive duty rests upon the servants to keep the great machine from becoming dangerous by their operation of it and to work it with reasonable care. The railroad tracks, the switches, the engine, and the caboose were on November 1, 1896, well constructed and in good repair. If they had been operated with ordinary care, they would not have caused the death of Brady. If the servants who put the refrigerator car on the dead track had placed red lights upon it, if when it was placed there the switchmen of the depot company had turned the switches so as to display red lights and so as to send Brady's train around it, or if Brady had run his train through the yard in the dark with the engine and its blazing headlight foremost rather than the caboose (*Southern Pac. Co. v. Yeargin*, 48 C. C. A. 497, 109 Fed. 436), the fatal result could not have followed. The failure to do these things was negligence, but it was not negligence in the discharge of any duty of the master. It was negligence in the discharge of the duties of the servants; negligence in the operation of the railroad machine, which had been safely constructed and maintained, and which was made dangerous by the negligent discharge of the duties of these servants in its operation. *Railroad Co. v. Needham*, 63 Fed. 107, 109, 11 C. C. A. 56, 58, 59, 27 U. S. App. 227, 231; *Railroad Co. v. Mase's Adm'x*, 63 Fed. 114, 115, 11 C. C. A. 63, 64, 27 U. S. App. 238, 240.

Bearing in mind the nature of the negligence which caused the accident, let us now consider the first position of counsel for the plaintiff in error. It is that the defendant was liable for the death of Brady because the depot company was negligent in the discharge of the positive duties of the master. The defendant was operating its trains in the yard and over the railroads of the depot company under a contract which excluded it from all management and control of this yard, its railroads and switches, and imposed upon the depot company exclusively all the positive duties of the master in this regard. The rules of law governing the liability of a railroad company while running its trains over the railroad of another corporation are too well settled to admit of discussion. Such a company is liable to passengers and shippers for the causal negligence of the licensing company and of its servants, whether this negligence occurs in the discharge of the positive duties of the master or in the performance of the primary

duties of the servant. *Railroad Co. v. Barron*, 5 Wall. 104, 18 L. Ed. 591; *McElroy v. Railroad Corp.*, 4 Cush. 400, 402, 50 Am. Dec. 794; *Central Trust Co. v. Denver R. G. R. Co.*, 97 Fed. 239, 38 C. C. A. 143; *Murray v. Railroad Co. (Conn.)* 34 Atl. 506, 508, 32 L. R. A. 539. The reason for this rule is that the carrier contracts with the passengers and shippers to carry them and their property with reasonable safety, and the failure so to do is equally a breach of this contract, whether it results from negligence in the discharge of the duties of the master or of those of the servants. There is, however, no such contract between the railroad company and its employés. Their relations and their liabilities are governed by the relative duties imposed upon them by the law. They join in a dangerous occupation. The servants know its dangers as well as the master. If they are operating over the railroad or in the yards of a corporation which does not employ them, they are aware of that fact and of the risk of accident from the negligence of the employés of that corporation. All these risks which they know, or which they might know by the exercise of reasonable prudence and diligence, excepting only those dangers which it is the positive duty of the master to protect them from, they assume as between themselves and their master when they enter upon and continue in the employment. They may undoubtedly recover of those who are guilty of the negligence which causes their injury just as they may recover of any stranger who commits a tortious act that inflicts injury upon them while they are operating their trains. This is all that the cases of *Lockhart v. Railroad Co. (C. C.)* 40 Fed. 631, and *McMarshall v. Railway Co.*, 80 Iowa, 757, 45 N. W. 1065, 20 Am. St. Rep. 445, cited by plaintiff in error's counsel, decide.

But their master does not assume and is not liable to them for the negligence of the servants of the licensing company when the latter are not engaged in the discharge of the positive duties of the master. *Clark v. Railroad Co.*, 92 Ill. 43; *Byrne v. Railroad Co.*, 9 C. C. A. 666, 61 Fed. 605, 608, 24 L. R. A. 693; *Miller v. Railway Co.*, 76 Iowa, 655, 659, 39 N. W. 188, 14 Am. St. Rep. 258; *Hilsdorf v. City of St. Louis*, 45 Mo. 94, 98, 100 Am. Dec. 352.

On the other hand, the master cannot renounce his absolute duties to his servant, or so delegate them to another as to relieve himself from liability for their discharge, and a railroad company which operates its train over another's road remains liable to its servants for any failure of the employés of the latter in their discharge of the positive duties of the master. *Stetler v. Railway Co.*, 46 Wis. 497, 1 N. W. 112; *Harding v. Transfer Co. (Minn.)* 83 N. W. 395; *Railroad Co. v. Dorsey (Tex. Sup.)* 18 S. W. 444.

The Great Western Railway Company, therefore, was liable to the plaintiff for any negligence of the servants of the depot company in the discharge of the absolute duties of the master which contributed to the death of Brady, and for that negligence only; and the first question presented to the court was whether or not the testimony presented any substantial evidence of such negligence which would warrant the jury in returning a verdict to that effect. There is always a preliminary question for the judge at the close of the evidence before a case can be submitted to the jury, and that question is not whether

or not there is any evidence, but whether or not there is any substantial evidence upon which the jury can properly render a verdict in favor of the party who produces it. *Railway Co. v. Belliwith*, 83 Fed. 437, 441, 28 C. C. A. 358, 362, 55 U. S. App. 113, 121; *Association v. Wilson*, 100 Fed. 368, 370, 40 C. C. A. 411, 413; *Commissioners v. Clark*, 94 U. S. 278, 284, 24 L. Ed. 59; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 733, 8 Sup. Ct. 266, 31 L. Ed. 287; *Railway Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; *Laclede Fire-Brick Mfg. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 60 Fed. 351, 354, 9 C. C. A. 1, 4, 19 U. S. App. 510, 515; *Gowen v. Harley*, 56 Fed. 973, 6 C. C. A. 190, 12 U. S. App. 574, 585; *Motey v. Granite Co.*, 74 Fed. 155, 157, 20 C. C. A. 366, 368, 36 U. S. App. 682, 687.

It is not claimed that the railroad, the switches, or any of the apparatus of the Union Depot Company were defective, or that there was any negligence in their construction or maintenance. It is, however, urged that there was evidence that that company was negligent (1) in promulgating reasonable rules, (2) in failing to employ a sufficient number of switchmen, and (3) in exercising control and supervision of the operation of its yard. The argument in support of this position proceeds upon the assumption that there was evidence in this record from which the inference may properly be drawn that there was no rule or supervision of the depot company which required a switchman to be in attendance in the yards and to protect cars placed upon the dead track by turning the switches between 11 o'clock at night and 5 o'clock in the morning. But this assumption is unwarranted by the evidence. It rests on this statement of one of the witnesses: "From my experience these tracks were lined up anywhere after 11 o'clock at night until 5 o'clock in the morning, so that it was proper to proceed without delay or bothering a switch tender to be there." This testimony does not indicate that no switchman was required to be there or that no switchman was there during these hours. It tends to show that there was one in attendance, because it speaks of bothering him, and, if he had not been there, he could not have been bothered. If it shows anything, it proves that there were one or more switchmen in attendance, but that it was proper for Brady to proceed without bothering them, because at the hour when he passed through the yards the tracks were usually lined up and clear. Other portions of the testimony of this witness make it plain that it was the custom and practice of the depot company to have switchmen in the yards, to protect cars left on this dead track, at all hours of the day and night. He says:

"There was liable to be some transferring at night, and placing of cars on the dead track. * * * It was the duty of the switch tenders employed by the Union Depot Company to set the switches in this locality, including the switches that led to and from the transfer track referred to. * * * The crew of one railroad company would set cars there to be afterwards taken and received by the crew of another company, but the cars were to be immediately afterwards taken or protected. To the best of my knowledge, they were always immediately taken or else protected. * * * It was not the defendant's custom to have any one at the dead track in question to watch or protect cars placed upon the dead track by other companies. It was the custom for the Union Depot switchtenders to protect those cars."

The plain effect of this testimony is that, while it was not the duty or the custom of the defendant to protect these cars, it was the invariable custom and the practice of the switch tenders of the depot company to do so, both by night and by day.

Now, the burden was on the plaintiff to prove the negligence upon which its counsel relies. The legal presumption was that the depot company made and announced reasonable rules, and that it exercised reasonable supervision. Conceding that it should have made such rules, and should have exercised such supervision, that it would have been the duty and the practice of its switchmen to protect this refrigerator car on the dead track by turning the switches at night, the legal presumption is that it made such rules and exercised such supervision. There is no evidence to the contrary, and the necessary inference from the testimony is that this terminal company fully discharged its duty, for the evidence is that it was the duty and custom of all the switchmen to protect these cars, and the only conceivable way in which this duty could have been imposed and this custom established was by a rule and supervision which required it. Such a rule and supervision constitutes the discharge of the whole duty of the depot company in this regard. It was not required to go farther. The duty of supervision does not require a master to place a spy or a watchman by the side of each switchman or employé to see that he discharges his duty. It is enough that reasonable rules are established and made known to him, and that a supervision and control are exercised which establish the custom of compliance with them. The legal presumption is that the servant as well as the master will discharge his duty, and upon this presumption the master has the right to rely in the performance of his duty. There was no evidence in this case which would have sustained a finding of the jury that there was any negligence on the part of the depot company in promulgating rules for, or in exercising supervision over, the operation of its railroads and yards.

There is no claim that it did not employ competent servants, but it is said that it did not engage a sufficient number of them. The suggestion is without support in the evidence. The only testimony on the subject is that there were something like 100 switches in the yard, and three or four switchmen, who did nothing but throw them. There was no evidence that these switchmen were at any time insufficient in number to speedily and carefully work the switches, much less that they were so in the night when this accident happened and when the business in the yard was necessarily light. Nor was there any evidence that the accident was the effect of a lack of employées. The result is that there was not only no evidence from which the inference could have been fairly drawn that the depot company was guilty of negligence in the discharge of any of the positive duties of the master, but the legal presumptions and the testimony alike concur in establishing the conclusion that it completely discharged these duties, and that the sole cause of the accident was the negligence of one or more servants in the discharge of the primary duties imposed upon them. The defendant, therefore, was not liable on account of its

own negligence or on account of the negligence of the depot company in the discharge of the absolute duties of the master.

The second proposition of counsel for the plaintiff in error is that the depot company and its employes were fellow servants of Brady and the other employes of the defendant, and that the latter is liable for their negligence in failing to turn the switches and protect the refrigerator car under the Minnesota statute, which reads:

"Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part." St. Minn. 1894, § 2701.

Let it be borne in mind in the consideration of this contention that, if there was any act of negligence on the part of the servants of the depot company established in this case, it was the failure of its switchmen to throw the switches and protect the refrigerator car when placed on the dead track. The question, then, is whether at the time this car was set upon the track, and the switchmen of the depot company failed to turn the switches, they were the agents or servants, or their master was the agent or servant of the defendant, so that the latter may be held for their carelessness under the doctrine of respondeat superior. This question must be answered by a determination of the question whether or not the defendant had the power to command these switchmen, and to direct them what to do and where to do it, when that car was set upon the track. The power of control is the test of liability, under the maxim respondeat superior. If the master cannot command the alleged servant, then the acts of the latter are not his, and he is not responsible for them. If the principal cannot control and direct the alleged agent, then he is not his agent, and the principal is not liable for his acts or his omissions. In such case the maxim respondeat superior has no application, because there is no superior to respond. In an action against an alleged master or principal for the act of his alleged servant or agent under the maxim respondeat superior, there can be no recovery in the absence of the right and power in the former to command or direct the latter in the performance of the act charged, because in such a case there is no superior to answer. *Atwood v. Railway Co.* (C. C.) 72 Fed. 447, 454, 455; *Byrne v. Railroad Co.*, 9 C. C. A. 666, 61 Fed. 605, 608, 24 L. R. A. 693; *Hilsdorf v. City of St. Louis*, 45 Mo. 94, 98, 100 Am. Dec. 352; *Town of Pawlet v. Rutland & W. R. Co.*, 28 Vt. 297, 300; *Miller v. Railroad Co.*, 76 Iowa, 655, 659, 39 N. W. 188, 14 Am. St. Rep. 258; *Wood, R. R.* § 388; *Donovan v. Construction Syndicate* [1893] 1 Q. B. Div. 629; *Rourke v. Colliery Co.*, 2 C. P. Div. 205.

Let us test the claim of the counsel for the plaintiff by this rule. The defendant was a railway corporation which owned and operated railroads from St. Paul to Chicago and from St. Paul to Kansas City. The depot company was a corporation of the state of Minnesota which owned and operated the union passenger depot and the transfer yard in the city of St. Paul. Its capital stock was \$350,000, and this stock had been taken in equal amounts by seven railroad corporations, which used the yard and the depot. It had mortgaged its property for

\$250,000. On January 15, 1894, it made a contract with the defendant in which the parties agreed that the railway company should have the use of the station and yard of the depot company with the other six railroad corporations until 1979, and that it would make this station its main passenger depot in St. Paul; that the depot company would maintain and operate with its own employes its station and its yard; that it would provide all necessary buildings and machinery and all needed mechanics and workmen; that the defendant would pay its proportionate share to be fixed by the board of directors of the depot company of the aggregate annual rental of the property of the latter company, which should consist of the current expenses of maintaining and operating the depot and yards, the interest on its mortgage debt, and a dividend of 6 per cent. on its capital stock, less the income derived from the rent of the use of the privileges in or on the property to others than the seven railroad companies; that the depot company should have the exclusive right and power to establish reasonable rules and regulations for the operation of the property used, and that the railway company should comply with them; that the depot company would permit the railway company to transfer to and receive from other companies passenger and freight cars, engines, and trains through its yard; that the depot company should have the general control, management, and supervision of the passenger depot, grounds, tracks, and railways constituting its property, and of the business conducted thereon; "that inasmuch as the officers, agents, and employes of the party of the first part (the depot company) are in fact employed for and in furtherance of the business of the companies using said grounds" the depot company shall not be liable to the railway company for any damage resulting to the latter from the negligence of the servants of the former, and the railway company will indemnify the depot company against any claims for damages caused by its engines or cars, or by the negligence of the employes of the depot company while acting for or in furtherance of the business of the railway company, or as the mutual servant of both.

Counsel seize upon the stipulation of this contract last quoted, and insist that by it the depot company and its servants are made the agents and the servants of the defendant, because it recites that they are employed for and in furtherance of the business of the companies using the grounds, and because it promises indemnity against their negligence when acting in furtherance of the business of the defendants or as mutual agents of both. But the relation of the parties to this contract is not to be determined by a single excerpt from it. It must be found by a careful perusal and interpretation of the entire agreement. When the entire contract is read, the true intent of the parties is ascertained, and the test of the power of the defendant to command and direct the switchmen in the performance of the fatal act of negligence is applied, there can remain little doubt that they were neither the servants nor agents of the defendant, and that it was not liable for their omission. The express provisions of the contract that the depot company should have the exclusive management and control of the station grounds and railroads and of the business thereon, the exclusive right and power to make rules and regulations for their operation,

and that it should furnish the employés to carry on this business, cannot fail to prevail over the mere recital on which counsel relies for success, and they demonstrate the fact that the defendant company was without any power or authority to control or direct the switchmen in the discharge of any of their duties. It had no right to turn a switch or to command any employé of its own or of any other company to throw one. The limit of its privilege was its right to demand that its cars and trains should be transferred under its agreement; but the exclusive power to determine and to direct its servants how, when, and where this transfer should be made was expressly reserved to the depot company.

The provision that the defendant will indemnify the terminal company against claims for damages arising out of the acts and omissions of the latter's servants while acting in furtherance of the business of the defendant or as the mutual agents of both cannot change the established relations of the parties. It is nothing but a contract of indemnity, and a contract of indemnity does not make the persons against whose acts the indemnity is promised the agents or servants of the indemnifier.

Nor is there anything inconsistent with this conclusion and with the express stipulations of the contract that the depot company shall have the exclusive control and management of its yards and servants in the recital that the latter are employed for and in furtherance of the business of the companies using the grounds. The servants of contractors for the construction of buildings, of railways, and of machinery are employed in furtherance of the business of the parties with whom such contracts are made. But the latter are not the superiors of such servants, within the meaning of the doctrine *respondeat superior*. In the same way the servants of the depot company were employed for, and in furtherance of the business of, the companies using the yards. Yet not one of those companies was their superior, within the true interpretation of the maxim here invoked, because no one of them had the right to control, direct, or command these servants how, when, or where they should discharge their duties. Their acts and omissions, therefore, were not the acts or omissions of the railway companies, and they cannot be charged with liability for them.

The next contention of counsel is that, if the switchmen were not the general agents of the defendant, yet in the omission to throw the switches when the refrigerator car was set upon the track they were acting in its business, and were its servants *pro hac vice*. This position is untenable for two reasons. In the first place, the act of negligence was not committed when the switchmen were acting for, or in the business of, the defendant. It was committed when they were acting for, and in the business of, one of the other companies using the grounds, viz., in the business of that company which deposited the car upon the dead track. The testimony is that it was the duty and the custom of these switchmen to protect every car deposited on the track at the time it was left there by then throwing the switches. It was in the transaction of the business of the company which left this car, and not in the transaction of the business of the defendant or of any other company, that this duty devolved upon the switch-

men. This is demonstrated by the fact that this duty never would have been imposed upon them at all if the car had not been left upon the track. Before it arrived there the switches and the track were in proper position for the passage of the defendant's train. If the car had not been placed there, no change of the switches, no act on their part, would have been required of the switchmen. The deposit of the car imposed upon them the duty to immediately throw the switches to protect it. This duty would have been as fully imposed and the negligence of these switchmen would have been as complete if the defendant had never run another engine or train upon the tracks after the car was deposited. The fatal act of negligence was not committed in furtherance of any business of the defendant, and it is only when the servant of another is engaged in transacting the business of the defendant that he can be held to be the latter's servant *pro hac vice*.

In the second place, if the switchmen had committed the act of negligence in furtherance of the business of the defendant, they would not have been the servants of the latter, because by the express terms of the contract between the two corporations and by the testimony these switchmen would not have been subject to the control or the direction of the defendant. The testimony is that they were employed and paid by the depot company, that they had exclusive control of the switches, and that no servant of the defendant was permitted to touch them. The contract is that the depot company has the exclusive management and control of the grounds, railways, business, and necessarily of the employés who do the business of that corporation. This stipulation vests this power of control and direction of the switchmen in the depot company just as absolutely, and deprives the defendant of it just as completely, when they are assisting to transact the business of the latter, as when they are acting in furtherance of the business of other railway companies or of the depot company. They could not, therefore, have been the servants *pro hac vice* of the defendant in the transaction of its business in this yard, because they could not have been subject to its command or direction, under the contract and the testimony. *Railroad Co. v. Craft*, 16 C. C. A. 175, 69 Fed. 124, 129; *Railroad v. Stoermer*, 2 C. C. A. 360, 51 Fed. 518, 520; *Kastl v. Railroad Co.*, 114 Mich. 53, 55, 58, 72 N. W. 28; *Phillips v. Railway Co.*, 64 Wis. 475, 486, 25 N. W. 544; *Sawyer v. Railroad Co.*, 27 Vt. 370, 380; *Zeigle v. Railroad Co.*, 52 Conn. 543, 555, 556; *Railroad Co. v. Armstrong*, 49 Pa. 186; *Philadelphia, W. & B. R. Co. v. State*, 58 Md. 372.

The cases cited by counsel for the plaintiff in error where, as in *Rourke v. Colliery Co.*, 46 Law J. C. P. 283, an employer lends his men to another to perform services for him and under his direction; as in *Johnson v. City of Boston*, 118 Mass. 114, where he rents them to a city to work with its servants under its direction in constructing a sewer; or as in *Ewan v. Lippincott*, 47 N. J. Law, 192, 54 Am. Rep. 148, and *Wiggett v. Fox*, 11 Exch. 832, where he furnishes them to others to perform services for them under their control; or as in *Railway Co. v. Peyton*, 106 Ill. 534, 46 Am. Rep. 705; *Vary v. Railroad Co.*, 42 Iowa, 246; *Taylor v. Railroad Co.*, 45 Cal. 323; *Miller*

v. Railroad Co., 154 Pa. 474, 26 Atl. 779; and Mills v. Railroad Co., 2 MacArthur, 314,—where, under the agreement between two individual companies, the employé of the one becomes subject to the control and direction of the other in the very matter wherein the negligence is committed,—are plainly distinguishable from the case before us by the fact that in each of these cases the power to command, direct, and control all the employés in respect to the negligent act was vested in the master of the servant injured. The case of Murray v. Railroad Co. (Conn.) 34 Atl. 508, 32 L. R. A. 539, is not in point, because the cause of action in that suit was based on a contract with a passenger; and the case of Railroad Co. v. Dorsey (Tex. Sup.) 18 S. W. 444, has no application to this issue, because the negligence there charged was a breach of one of the absolute duties of the master resulting in a defect of the cars and track.

In the case in hand Brady was employed, paid, and commanded by the defendant. The switchmen were employed, paid, and directed by the depot company. Neither corporation had any control over the men in the employment of the other; neither corporation could select, employ, or discharge them. The defendant never had any right or power to direct the switchmen of the depot company what to do or where or how they should discharge their duties. Their acts, therefore, were not its acts, it was not liable for their negligence, and they were not the fellow servants of Brady.

Finally, it is contended that the seven railroad companies which held the stock of the depot company were partners, and that each of them is therefore the co-employé of all the servants of the depot company and liable for all their torts. In the discussion of this proposition cases are cited wherein one corporation which held all the stock of another owned a part of its motive power, and employed and controlled its agents and servants, was held liable for its infringement of a patent (Railroad Co. v. Winans, 17 How. 30, 15 L. Ed. 27), and where three individual partners in operating a coach line were held liable for the negligence of the driver of one (Bostwick v. Champion, 11 Wend. 571). But these and similar authorities have little tendency to support the theory that this depot company is a partnership, and that each of its stockholders is liable for all of its torts. It acquired its charter from the state of Minnesota. The requisite acts have been done under the statutes of that state to make it a corporation. Those statutes declare that, those acts having been performed, it is a corporation. It has issued and sold its stock. It has made its mortgage and it has transacted the business for which it was chartered for many years. The laws of Minnesota prescribe the duties and fix the liabilities of its stockholders. These are not the duties and liabilities of partners. The stockholders, it is true, have made contracts with the corporation; but there is nothing in those contracts which dissolves the corporation, impairs its existence, or changes the legal relation of the holders of its stock to the legal entity which issued it from that of stockholders to that of partners. There is nothing illegal or inequitable in the contracts. The law of the land fixes the liability of the parties to them, and that liability is not that of partners. The

fact that under these agreements the stockholders share the prosperity and adversity of their corporation has no tendency to prove that they are partners, because the stockholders of all corporations share the same fate. The deeds of these stockholders will not convey the property of the corporation. Their only control of it is by the vote of its stock, and by the contracts it makes, and it has every attribute of a corporate entity, while they have every attribute of stockholders. Neither it nor its employes are subject to the command or control of any of its stockholders, within the maxim *respondeat superior*, and neither it nor its servants are either the agents or the servants of the defendant, under the fellow servant law of the state of Minnesota.

The result is that there was no substantial evidence in support of the alleged cause of action in this case, and the court's instruction to the jury to return a verdict for the defendant was right. That judgment is accordingly affirmed.

CALDWELL, Circuit Judge, dissents.

GREENE v. BENTLEY et al.

(Circuit Court of Appeals, Fifth Circuit. February 18, 1902.)

No. 1,068

CHattel Mortgages—REMOVAL OF PROPERTY BY MORTGAGOR—LACHES OF MORTGAGEE.

A mortgagee in a chattel mortgage taken under the laws of Texas, which require him, in case the property shall be removed into another county, to record his mortgage in such county within four months, under the penalty of rendering the mortgage void as against creditors of the mortgagor or purchasers without notice, is bound to exercise reasonable diligence to give notice of and protect his lien in case the property is removed into another state; and where a mortgagee had knowledge that property included in his mortgage had been taken by the mortgagor into an adjoining county in Louisiana, but permitted it to remain there three years without taking any steps to assert his claim or give notice of it, although it was long past due, he will be barred by laches from enforcing his lien after the property has been surreptitiously brought back into Texas by the mortgagor, as against one who purchased it for value and without notice under an execution sale in Louisiana; and this although he could not have recorded or enforced his mortgage under the laws of Louisiana, where he had ample time to have reduced his claim to judgment and sold the property on execution.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

F. H. Prendergast, for appellant.

Chas. S. Todd, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. On November 9, 1895, one L. C. Smith executed a chattel mortgage to W. S. Johnson, on 15 mules and other personal property, to secure said Johnson for his indorsement of the note of said Smith to the First National Bank of Atlanta, Tex., for

\$875, and "also to secure the payment of an open account due E. M. Greene [appellant] amounting to \$1,340, which stands charged to Smith & Johnson." The mortgage was executed and duly recorded in Cass county, Tex., and all the parties to it reside there; but it did not recite where the property was situated at the time, and it does not clearly appear from the evidence. At that time Smith was at work with the mules on the Kansas City, Pittsburg & Gulf Railroad, and hauling from Atlanta to said railroad. The railroad runs through Cass county, Tex., a short distance (about 10 miles), then crosses the state line, and continues southward through Caddo parish, in the state of Louisiana, for about 200 miles. Soon after the execution of the mortgage, Smith carried 10 of the mortgaged mules to Louisiana, and they were in Louisiana nearly all the time from the fall of 1895 until September, 1898. On June 21, 1897, Smith executed his note to I. L. Safferstone, at Shreveport, La., for \$334.44, on which Safferstone brought suit in the First judicial district court of Caddo parish, La., on the 20th day of December, 1897. On February 7, 1898, I. L. Safferstone recovered judgment against Smith in said suit on said note. On February 24, 1898, a writ of fieri facias was issued on said judgment, and on February 28th it was levied on 10 of the mules in controversy, and they were duly advertised to be sold on April 2, 1898. On that day they were sold under said writ to Hunter Bros., of Shreveport, for \$350. The 10 mules were immediately delivered to Hunter Bros., who permitted them to remain in Smith's apparent possession until September 20, 1898, when they sold them, with 4 others which they had bought from Manning or Prater, for \$700, to appellees, W. J. Bentley & Co., for \$1,200, taking three notes, at 30, 60, and 90 days, for \$400 each, which notes were paid in due course by appellees. At the time Bentley & Co. purchased the mules they had no notice, actual or constructive, of any claim of appellant, Greene, and they bought in good faith, for value. Hunter Bros. delivered the mules to Bentley & Co., and they, being engaged in United States government levee work on Red river, put them on their work, and, at Smith's request, employed him to work them, which he did for their account until December 4, 1898. There is much evidence tending to show that the sale under execution on the Safferstone judgment, the purchase by Hunter Bros., and the subsequent sale by Hunter Bros. to W. J. Bentley & Co. were simulations, whereby Smith actually retained his ownership of the mules in question, as he certainly did the possession; but, on the whole case, we follow the trial judge in holding to the contrary. December 4, 1898, without the knowledge or consent of Bentley & Co., Smith took the mules off the work in Louisiana, and carried them to Atlanta, Cass county, Texas, and turned them over to appellant, Greene, to satisfy the mortgage debt Smith owed to Greene. Hedberg, of the firm of Bentley & Co., immediately followed, and found the mules in Greene's possession, and demanded them of him, but Greene refused to give them up; claiming them under his mortgage, and a sale by Smith to satisfy same. Bentley & Co. instituted a suit at law against Greene in the United States circuit court for the Eastern district of Texas to recover the mules, or their value, and for damages. Greene, defendant in that suit, pleaded

to the jurisdiction of the court, but the plea was overruled on hearing of testimony. Greene then filed this bill to stay the action at law, and for foreclosure of the mortgage. No injunction was granted, but, on full hearing of the evidence, the court rendered a decree in favor of the appellees, Bentley & Co., for title and possession of the mules, and also for \$70 as damages, from which decree Greene has sued out and perfected this appeal.

The appellant contends in his first assignment of error that a valid lien in his favor having been fixed on the mules in Cass county, Tex., the lien could not be divested or destroyed by Smith's removing the mules into Louisiana. As against Smith, this proposition is probably correct; but as against Bentley & Co., who acquired the mules in Louisiana in good faith and without notice, and under the circumstances shown by the evidence, it is not necessarily correct. Chattel mortgages are unknown to the laws of Louisiana, and cannot be enforced in that state. *Delop v. Windsor*, 26 La. Ann. 185. It would seem, therefore, that when the mules in controversy were moved into Louisiana, with or without the consent of the appellant, they became subject to the laws of that state, and the lien of the Texas mortgage lapsed, or at least remained in abeyance, as long as the mules remained in Louisiana. It follows that the mules in Louisiana were subjected to seizure and sale under execution against Smith, the owner, the same as if no mortgage had ever been granted; and, if full faith and credit are to be given to the judicial proceedings in Louisiana (as to which see *Green v. Van Buskirk*, 5 Wall. 307, 18 L. Ed. 599; *Id.*, 7 Wall. 139, 19 L. Ed. 109), the purchaser in good faith at such execution sale took title to the property. But it is not necessary in this case to go to this extent to negative appellant's right to recover. The mules in question were removed to a parish in Louisiana adjoining Cass county, Tex., where the appellant and his debtor both lived, and were allowed to remain in Louisiana for nearly three years without any assertion or notice whatever of appellant's mortgage rights; and this, taken in connection with the fact that Smith's debt to appellant was long past due, was such laches as, in our judgment, precludes the appellant from now asserting his title on the unlawful and surreptitious return of the mules by Smith to Cass county, Tex. The Texas statute under which appellant claims his lien reads as follows:

"Every deed, mortgage, or other writing respecting the title of personal property hereafter executed, which by law ought to be recorded, shall be recorded in the clerk's office of the county court of that county in which the property shall remain; and if afterwards the person claiming title under such deed, mortgage or other writing shall permit any person in whose possession such property may be, to remove the same or any part thereof out of the county in which the same shall be recorded, and shall not, within four months after such removal, cause the same to be recorded in the county to which such property shall be removed, such deed, mortgage, or other writing, for so long as it shall not be recorded in such last mentioned county, and for so much of the property aforesaid as shall have been removed, shall be void as to all creditors and purchasers thereof for valuable consideration without notice." 2 Sayles' Ann. Civ. St. art. 4651.

If the mules had been removed to an adjoining county in Texas, and the appellant had remained quiet for four months, he would undoubtedly, under the above statute, have lost his lien, as against purchasers

for a valuable consideration, without notice. While it is very true that appellant could not have made a valid record of his lien in Louisiana, yet with diligence he could have there asserted his claim by otherwise giving notice; and, as his claim was long past due, he could have brought a suit in the Louisiana courts, and, if his claim was valid, have obtained judgment, and, on execution, could have subjected the mules to the satisfaction of his claim long before the appellees' rights attached. In his evidence, appellant admits that he had learned that Smith had taken the mules to Louisiana, but he does not say when he learned the fact; nor does he testify to any diligence whatever in regard to asserting his lien. If, in order to preserve his lien when the mortgaged property is removed to an adjoining county in the same state, diligence on the part of the mortgagee in the assertion of his rights is required, a fortiori diligence in the assertion of his right is required when the mortgaged property is removed to an adjoining parish in another state, where such mortgages are not enforced. This disposes of the first assignment of error, and also of the second, which asserts the same contention in another form.

The third and fourth assignments of error, which assert the proposition that Bentley & Co. had only a lien on the mules in controversy to secure a debt, which lien was void under the law of Louisiana, and the fifth and sixth assignments of error, which deny title of Bentley & Co. to two of the mules in controversy, are none of them well taken, because they are not supported by the facts as shown by the evidence, and hereinbefore recited.

The seventh assignment of error, to the effect that the court erred in granting to W. J. Bentley & Co. affirmative relief to the extent of awarding them a judgment for \$70 damages, is well taken, because there are neither pleadings nor evidence to warrant such judgment.

This disposes of all errors assigned, and our conclusion on the whole case is that the decree appealed from should be amended by striking out the judgment for \$70 damages, and, as so amended, the same should be affirmed, at costs of the appellees, and it is so ordered.

THE NO. 6.

THE NO. 7.

(Circuit Court of Appeals, Second Circuit. March 18, 1902.)

Nos. 55, 56.

MARITIME LIEN—REPAIRS.

Where libellant was asked by the captain of certain scows of which he was in charge to repair the same, and the repairs were necessary, and were made in a foreign port at the direction of such captain, who was without funds of the owner, the libellant is entitled to a lien therefor on the scows, which were the only means of credit for the bills incurred.

Appeals from the District Court of the United States for the District of Connecticut.

This cause comes here upon appeals from decrees of the district court for the district of Connecticut in favor of libellants, to sustain a lien against proceeds of the vessels for certain repairs.

Le Roy S. Gove, for-appellant.
Henry A. Hull, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit

SHIPMAN, Circuit Judge. The Providence Dry Dock Railway, libellant, a corporation, in the city of Providence, in June, 1899, indispensable repairs to the scows No. 6 to the amount of about \$1,000. The scows had no indorsement upon them, and were without record of temporary possession and charge of the scows when they were taken into the possession of the libellant. He ordered the repairs, and oversaw the work. At this time the libellant was repairing the scows at the Kershaw plant,—a plant which was not owned by the libellant, but which he had been using. The libellant at first thought that scows belonged to this plant, and charged the repairs accordingly. He discovered the mistake, and subsequently kept the account of the scows 6 and 7; each scow being charged for its own share. During the repairs, Ferret had entire control of the scows, and the repairs were made by his direction, who was acting as the agent of the libellant and who was directing the repairs in the interest of the libellant. The repairs were made in a foreign port at the direction of the acting captain, who was without funds of the owner, and were made upon the credit of the scows, which were the only means of credit for the repairs which were incurred. The Grapeshot, 9 Wall. 129, 19 L. ed. 2d 100. The decrees are affirmed, with interest and costs.

MELLOR v. SMITHER.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1900.)

1. EQUITY—PLEADING—AMENDED AND SUPPLEMENTAL BILLS.

A plaintiff who had no cause of action at the time of the filing of the bill cannot, by amendment or a supplemental bill, introduce a new cause of action; but where the original bill states a cause of action, although defectively, the defects may be cured by amendment. Material facts occurring after the bill was filed may be brought in by a supplemental bill.

2. SAME.

Where leave is given to file a supplemental bill to introduce a new cause of action arising subsequent to the filing of the original bill, the court may allow the plaintiff to introduce other matters to be incorporated therein which might have been introduced into the original bill by amendment.

3. PARTNERSHIP—ACCOUNTING BETWEEN PARTNERS—RIGHT OF ACTION.

Plaintiff was surviving member of a firm which had been engaged in business transactions with defendant relating to the purchase and sale of cotton. The firm had rendered defendant accounts covering business transactions, which had been received without objection, and defendant subsequently made a written assignment to another of its "claim of action" against defendant "for a balance due upon an account rendered," specifying two accounts which had been rendered, together with all of such transactions. The assignee brought an action at law against defendant for the balance due.

accounts, against which defendant successfully defended, on the ground that the relations between him and the firm in respect to the transactions in question were those of partners, and that there had been no accounting between them. *Held*, that plaintiff, as surviving partner of this firm, had the right to maintain a suit in equity against defendant for an accounting, notwithstanding the assignment.

SUPREMACY—PLEADING—SUPPLEMENTAL BILL.

Having instituted such a suit, an amended and supplemental bill, filed by leave of court, setting out that since the filing of the original bill the assignee of the account stated, who had been made a party defendant, had died, but had previously disclaimed any right, title, or interest in the cause of action, and that his executors had executed a release of the same to plaintiff, did not state a new cause of action, but supplied pertinent facts showing that plaintiff was entitled to receive whatever sum should be shown to be due from defendant on the accounting.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

This is an appeal from a decree sustaining a demurrer to the amended supplemental bill of complaint in the cause. The plaintiff, Mellor, his original bill of complaint in the case May 30, 1898, as surviving partner of the commercial firm of Mellor & Fenton, of Liverpool, his co-partner having died in 1896. The bill shows an agreement between plaintiff and the defendant John T. Smither for the purchase of cotton in the State of Texas and the sales of cotton for future delivery, and certain purchases and sales in accordance with such agreement, and certain losses in such business, and purchases and sales of cotton and futures for the joint account of Smither, and certain losses in such business. It is alleged that in conducting the business on joint account, and attending to individual transactions of the defendant Smither from September 15, 1893, to September 15, 1893, the plaintiff's firm paid out various sums for losses and expenses, and sustained certain losses, whereby, upon an accounting between the parties, there became due to the plaintiff's firm from defendant Smither the sum of £1,424. 19s. 10d.; that on or about January 12, 1894, the plaintiff's firm sent to Smither an account of all the transactions on joint account between them and Smither, and also on the individual account of Smither, showing the balance above stated to be due to plaintiff's firm, which balance represented one-half the loss on transactions on joint account and the entire loss on individual transactions of Smither, and the expense and charge of conducting said joint and individual business; and it was further averred that on or about the 30th day of March, 1894, the defendant Smither paid on account of said indebtedness the sum of £711. 10d. The bill further averred other transactions of a similar character between September 15, 1893, and January 12, 1895, in consequence of which, certain errors made by Smither in the deduction of profits and drawing of dividends, whereby Smither became further indebted to plaintiff's firm in the sum of £3,851. 5s. 9d.; and that the total amount due to the plaintiff's firm for the transaction of both seasons, from September 15, 1892, to September 15, 1893, and from September 15, 1893, to January 12, 1895, was the sum of £4,505. 10s. 1d., which, in the currency of the United States of America, amounted, on the 12th day of January, 1895, to the sum of \$21,982.50. The bill further averred that on or about the 27th day of March, 1895, plaintiff's firm assigned in writing to the defendant William H. T. Hughes all claim and demand based upon the accounts rendered and stated by plaintiff's firm to the defendant Smither for the individual and joint transactions of the two separate periods from September 15, 1892, to September 15, 1893, and from September 15, 1893, to January 12, 1895; that in April, 1895, Hughes commenced an action at law in the supreme court of the State of New York, for the county of New York, against the defendant Smither, to recover upon said account stated and rendered the amount thereof, namely the sum of \$21,982.50, with interest, said action being based upon the

said account stated and the acceptance thereof by John T. Smither, the theory that the original parties, Mellor & Fenton, on the one hand, T. Smither, on the other, bore the relation to each other of consignee, or principal and agent, and that the account should be set between them as in ordinary cases between merchants, and not as partners; that Smither defended the action upon the theory that the partners were co-partners, and that the action on the account stated not lie, and that the issues in this action in New York were duly tried to trial, and resulted in a judgment in favor of the defendant Smither, dismissing the complaint upon the merits, but expressly without precluding an action or suit in any court having jurisdiction thereof and of the plaintiff for a settlement of the account of said partnership transaction. It is further averred that an appeal was taken from the above judgment to the appellate division of the supreme court for the First department in New York, where the judgment was affirmed, expressly on the ground that the account was brought by the assignee of the claim for an account stated as principal and agent, and that, the relation between the parties being that of partners, there could be no settlement of the partnership transaction in the suit. It was further averred that Hughes had appealed from the adverse judgment of the appellate division of the supreme court of New York to the court of appeals of that state, and that such appeal was pending and undetermined; but the plaintiff, desiring to avail himself of the privilege of a suit for an accounting as between himself as survivor and the defendant Smither, brings this suit, and also joins Hughes as a defendant. The bill further averred that by the judgment of the court of New York the actions in respect to the above-mentioned transactions and dealings between plaintiff's firm and Smither were still unsettled, and that, if the accounts between the plaintiff and the defendant Smither should be properly taken, a considerable balance would be due to the plaintiff from said Smither, and that such an accounting could be properly taken except in a court of equity. The plaintiff, therefore, prays that the defendant Smither might make a full and true discovery and disclosure of and concerning all and singular the transactions and matters set forth in the bill, and that an account might be taken, by and with the direction of the court, of all dealings and transactions between the plaintiff as surviving partner and the defendant Smither; that in taking such an account the defendant Smither might be charged with overpayments made by plaintiff's firm on account of fictitious profit, and also with sums of money as were paid, laid out, and expended by plaintiff's firm on account of the individual transactions of the defendant Smither during the periods referred to in the bill of complaint; that the rights of the defendant Hughes might be determined; that the balance which might be found upon the taking of such account to be due by Smither to the plaintiff's firm might be paid by the defendant Smither to the plaintiff; and that such other and further relief might be granted as might seem just and equitable.

The defendant Smither demurred to the bill for want of equity, because it was claimed that the demand of plaintiff had been assigned to Hughes, and there was no explanation in the bill under which such assignment could be ignored; that no estoppel was set up against Smither for errors and omissions; and, finally, that the bill does not set forth the accounts in a proper manner.

On October 22, 1900, the case came on to be heard upon demurrer. The demurrer was sustained, but no order was made to dismiss, and, on the motion of plaintiff, leave was granted to amend the bill. Thereupon, on November 3, 1900, the plaintiff, Mellor, filed his amended and supplemental bill of complaint. This amended and supplemental bill in some respects amended the allegations of the original bill, and in other respects it stated matters in dispute since the filing of the original bill by way of supplement. It set forth more particularly and at large the various transactions between plaintiff's firm and John T. Smither, both on joint account and on the individual account of Smither, and claims Smither to be indebted to plaintiff's firm as surviving partner, in the same sum of \$21,982.50. It further avers that the dealings and transactions between the plaintiff's firm and Smither,

were interested together, in accordance with and pursuant to the agreement between them entered into on or about September 30, 1892, for the purchase of cotton and the sales of cotton futures and spot cotton, did not until January 12, 1895, when the final account between the parties was by plaintiff's firm to Smither. It further shows that on or about the day of January, 1894, plaintiff's firm sent to Smither an account of the transactions relating both to the joint account business and the individual transactions of Smither, covering the period of the first cotton season from November, 1892, to the close of the year 1893, claiming a balance due in United States currency of \$3,188.32, and that on or about January 12, 1895, plaintiff's firm sent to Smither an account of the firm's transactions, and the individual transactions of Smither, for the second cotton season, from September, 1893, to the close of the year 1894, claiming a balance of \$18,794.18. It further alleged that about March 27, 1895, the plaintiff's firm, assuming these accounts had become accounts stated and that Smither had admitted his liability, duly assigned to one William H. T. Hughes, by an assignment in writing and under seal, all its claim and cause of action against Smither for the balance, \$21,982.50; and it was alleged that Hughes, who had been named as a party in the original bill, was now deceased. The assignment to Hughes was annexed as an exhibit to the amended and supplemental bill. The amended and supplemental bill further set forth the fact that had been brought by Hughes in the supreme court of the state of New York; the method of defense adopted there by Smither; the dismissal of the suit without prejudice to an action or suit for a settlement of account of partnership transactions; the appeal to the appellate division of the supreme court of New York; the affirmance of the judgment dismissing the suit on the ground that the action was brought by the assignee in claim for an account stated as between principal and agent; and that, in relation between the parties being that of partners, there could be no assignment of the partnership transactions in that suit. The affirmance of judgment by the court of appeals of New York, in May, 1900, is further alleged. It is also averred that Hughes had died, and that Hall and Dunne were duly qualified as his executors, and that prior to his death Hughes disclaimed any right, title, or interest in the cause of action embraced in the original bill of complaint, and, although named as a party, had not defended or filed any pleading. It is averred that the executors, on or about November 23, 1900, had executed and delivered to the plaintiff an instrument transferring or releasing to the plaintiff all right, title, and interest in the cause of action embraced in this case, and disclaiming any right, title, and interest in any cause of action whatsoever against the defendant Smither, arising out of the partnership transactions between Mellor and Smither, at law or in equity, of any kind, nature, or description, and also all right to an accounting of Smither, and all right to participate in the result or proceeds of any accounting in this suit. It is also alleged that the executors had surrendered and delivered up to the plaintiff the original assignment, and had executed the instrument of release and discharge. It was further averred that the accounts in respect to the mentioned transactions and dealings between plaintiff's firm and Smither are still open and unsettled, and that upon an accounting in this case a balance of at least \$21,982.50, with interest from January 12, 1895, would be found due the plaintiff's firm from Smither, and that an accounting properly had only in a court of equity. There was a prayer for an accounting between plaintiff and defendant, for discovery, for general relief, and for a decree for the amount found due to the plaintiff. In this amended and supplemental bill Smither filed a demurrer upon the grounds, substantially, that the bill was not properly entitled; that it set out no cause of action; that, if it be a supplemental bill, then it appears plaintiff had no cause of action at the time of filing the original bill; that if it be construed as an amended or supplemental bill, the plaintiff admitted that he had no interest when he filed his original bill; that, as upon the face of the amended and supplemental bill, the cause of action upon which was transferred to Hughes, and sued upon by him in New York, had never passed to plaintiff in manner and form as required by law;

that the amended and supplemental bill fails to set forth items of account, and fails to allege and show that plaintiff is not already in possession of full itemized accounts; that the individual transactions plaintiff's firm and respondent cannot be embraced in the bill; and that the plaintiff has a plain, adequate, and complete remedy at law.

The cause came on to be heard upon the demurrer of defendant was sustained by the court. The plaintiff having refused to amend of complaint, it was dismissed, and thereupon an appeal was taken by plaintiff to this court. It is assigned that the court erred in sustaining demurrer and dismissing the bill.

William Wirt Howe (Hatch & Wickes, W. B. Spencer, C. P. and J. W. Davis, on the brief), for appellant.

W. S. Banks, Geo. Clark, and D. C. Bollinger, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The correct decision of this case turns on the question whether or not the plaintiff at the time he filed his bill had a cause of action. If he had no cause of action then, he cannot, by amendment or supplemental bill, introduce a cause of action that accrued thereafter, though it arose out of the same transaction that was the subject of the original bill. 1 Beach, Mod. Eq. Prac. § 496; Straughan v. Wood, 30 W. Va. 274, 4 S. E. 394, 8 Am. St. Rep. 29; Hill v. Hill, 10 Ala. 527. But where a cause of action exists at the time the bill is filed, though the bill is defectively presented, the defects may be cured by amendment (Equity Rules 28, 29), and matters occurring after the filing of the bill may be presented by supplemental bill. Equity Rule 57; Jenkins v. Bank, 127 U. S. 484, 486, 8 Sup. Ct. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200. L. Ed. 189; Hoxie v. Carr, 1 Sumn. 173, Fed. Cas. No. 10,000. Where material facts have occurred subsequent to the beginning of the suit, the court may give the plaintiff leave to file a supplemental bill, and where such leave is given the court will permit other matters to be introduced into the supplemental bill which might have been incorporated in the original bill by way of amendment. Starnes v. Howlett, 1 Paige, Ch. 200. But, in cases where the plaintiff has no cause of action when the bill was filed, neither amendment nor supplemental bill presenting occurrences subsequent to the filing of the bill can prevent its dismissal.

The application of these principles to this case presents this question: Did the assignment by Mellor & Fenton to William Hughes deprive the former of the right to file a bill to have accounted for the partnership transactions between themselves and John T. Smither? The assignment in question is as follows:

"Know all men by these presents that, for and in consideration of the sum of one dollar and other valuable consideration, we, William Mellor and Edward Kentish Barnes, composing the firm of Mellor & Barnes, of Liverpool, England, do hereby assign, transfer, and set over to H. T. Hughes, of the city of New York, all our claim and cause of action against John T. Smither, of Temple, Texas, for a balance due upon account stated and rendered to said Smither on the 5th day of February, 1892, of transactions between June 10, 1892, and September 30, 1893, and certain other account rendered and stated to said Smither on Jan-

with respect to transactions between September 30, 1893, and January 1895. In witness whereof we have hereunto set our hands and seals this day of March, 1896.

Mellor & Fenton.

"E. Kentish Barnes."

The bill alleges that a partnership existed between the firm of Mellor and John T. Smither for the purpose of dealing in cotton. Mellor & Fenton had prepared an account of their partnership dealing during certain periods, and sent it to Smither. He having made objection to the account, they transferred it to Hughes, who sued at law as a stated account. Smither defended on the ground that the account between him and Mellor & Fenton had not been stated. It was decided that the action at law on the account would lie, and the suit was dismissed without prejudice to the right to sue for an accounting. *Hughes v. Smither*, 23 App. Div. 590, 49 N. Y. Supp. 115, 163 N. Y. 553, 57 N. E. 1112. After the dismissal of the action at law by the supreme court of New York, and pending appeal, this suit was begun by Mellor, surviving partner of Mellor & Fenton, against Smither, making Hughes also a party, for an accounting of the partnership transactions. Smither demurred to the bill, claiming that the assignment of the stated account to Hughes gave him no right of action in Mellor for an accounting. The demurrer was sustained, but leave given to file a supplemental bill. An amended supplemental bill was then filed, to which the defendant renewed his demurrers, as shown in the statement of the case.

It is a general rule that when a partnership is ended, or where the grounds for its dissolution exist, the right of a partner to maintain an action is undoubted. As said by the text writers: "The right of every partner to have an account from his copartners of their dealings and transactions is too obvious to require comment." *George, Partn. § 142*.

Smither contended in the litigation at law in New York that the account had not been stated between him and Mellor and Fenton. He claimed that, as the accounts not having been settled, the right to have them stated had only existed after the assignment either in Mellor & Fenton, or to Hughes, or in both. Smither could not successfully contend that the assignment transferred no account stated, and yet that it had the effect of destroying the right as against him to secure a statement of the account. Whether or not the assignment conferred such rights on Hughes that he could have sued in equity for an accounting we do not consider. We have here to deal only with the question of Mellor's right to have an accounting, notwithstanding the assignment. It is stated by more than one learned author that a partner, after he had parted with his entire interest in the partnership, was entitled to an accounting. *Lindley* says: "If a partner's share is sold in execution, the purchaser from the sheriff is entitled to an account from the solvent partners, as is also the execution debtor himself." 2 *Lindl. Partn. § 493*. This is quoted with approval in *George, Partn. § 142*. *Bates*, also, maintains the right of the partner whose interest in the firm has been sold under execution to have an accounting, but he says this is true, "for he may still have an interest inasmuch as the sheriff cannot sell book debts." 2 *Bates, Partn. § 148*.

In *Habershon v. Blurton*, 1 De Gex & S. 121, a case ver-
quoted by text writers, the sheriff under execution took possession
and sold "all the share and interest of the said Charles Habershon
as partner, with one John Blurton, of and in," etc.; described the
partnership property. Habershon after this sale by the sheriff filed
a bill against his former partner, Blurton, for an accounting, and
point was made against the bill that he had no interest, having
having been sold by the sheriff. The vice chancellor sustained the
bill, and allowed the accounting "notwithstanding * * * the assur-
zure by the sheriff and the language of the assignment by him."

In *Ketchum v. Durkee*, 1 Hoff. Ch. 538, the court said that a
partner has a right to file a bill for a settlement of the affairs of the
firm and a due application of the assets, even after an absolute trans-
fer by himself to his copartner of the property charged with the debt.

We do not find that the supreme court has ever decided the ques-
tion. The case of *Fourth Nat. Bank of New York v. New York*
& C. R. Co., 11 Wall. 624, 20 L. Ed. 82, is, however, very instructive
as discussing principles necessarily involved in this suit. One of the
in that case made an assignment of an interest held by him in the
nership. The court said that "the words of the assignment were very
broad." It purported to transfer all of the estate, right, title, and in-
terest which Graham had in a certain lease, and also all his interest
title, and interest in any property and effects of the partnership, and
all debts due to him from the partnership or any member thereof.
In a bill filed by the assignee of Graham's right, which involved a
settlement of a partnership, the court held that Graham, the assignor,
was a necessary party; that the only effect of the assignment was
to transfer any interest that Graham might have after a proper settle-
ment of the partnership. The case could not proceed without Graham
as a party, although he had assigned his interest in the partnership.
This case, and others that we have cited, strongly indicate that a partner,
ner, even after he has transferred all of his interest in a partnership,
would not lose the right to have a settlement in equity of the partnership
accounts. See, also, *Hoxie v. Carr*, supra.

The assignment under consideration here, however, does not pur-
port to transfer all the right, title, and interest of Mellor & Smith-
er in the partnership with Smither. It purports only to transfer the
account relating to certain periods embraced within the partnership.
Smither has successfully contended that the account was not assigned,
and that no right of action on it as a stated account passed to the
assignee. The amended and supplemental bill shows that Smither
prior to his death disclaimed any right or interest in the claim of the
accounting asserted here, and that since his death his executor (the
the original bill was filed) have formally released and transferred to
the plaintiff the alleged stated account against the defendant. If the
averments of the bill are true,—and they are so considered on the
merits,—the defendant on settlement owes the plaintiff \$21,982.50.
claim for this sum cannot be asserted at law. The partnership ac-
counts must be adjusted in equity. Hughes' representative (the
Hughes in his lifetime) disclaim any right to proceed to have the
account stated. We cannot think that an ineffectual effort of o-

to state and assign an account against the other partner defeats right of the former to have an accounting. The right to have accounting of the partnership transaction remained in the plaintiff, notwithstanding the assignment to Hughes. The disclaimer by Hughes, his death, and the formal release by his executors of his interest, though not necessary to show a right of action in plaintiff, are properly brought before the court in the amended supplemental bill. These facts show that the defendant will not be allowed on to settle with Hughes' representatives after his settlement with the plaintiff; that any sum which he may owe, if it be found that he owes anything, is due to the plaintiff.

The demurrer to the amended and supplemental bill should have been overruled.

The decree of the circuit court is reversed, and the cause remanded, with instructions to overrule the demurrer and to allow the defendant to answer. Reversed.

PURPLE v. UNION PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1902.)

No. 1,591.

CARRIERS—ONE ENTERING TRAIN WITH UNDERSTANDING WITH CONDUCTOR NOT TO PAY FARE A TRESPASSER—DUTY OF CARRIER.

One who, knowing that a conductor has no authority to grant free transportation, enters and rides upon his train with the deliberate intention not to pay his fare, under an agreement or under a tacit understanding with the conductor that he shall ride free, commits a fraud upon the railroad company, and is not a passenger, but is a mere trespasser, to whom the only duty of the company is to abstain from willful or reckless injury.

DUTY.

One who enters and rides upon a car or train which he knows, or by the exercise of reasonable diligence would know, is prohibited from carrying passengers, is a trespasser, and not a passenger, and the only duty of the railroad company toward him is to abstain from wanton or reckless injury to him.

CARRIER—ALLEGED PASSENGER ON FREIGHT TRAIN PRESUMPTIVELY A TRESPASSER.

In the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that one riding for his own convenience on a freight train, an engine, a hand car, or any other carriage of a common carrier not designed for the transportation of passengers, is unlawfully there, and is a trespasser.

CARRIER—FREIGHT TRAINS—PASSENGER—KNOWLEDGE OF FACTS SUGGESTING INQUIRY.

One about to board a train who has knowledge of facts which would put a person of ordinary prudence and diligence upon inquiry to ascertain whether or not the train is permitted to carry passengers is charged with a knowledge of all the facts which a reasonably diligent inquiry would discover.

NEGLIGENCE—NO SUCH DEGREE AS "GROSS."

It is not error to refuse to instruct the jury that a defendant is guilty of gross negligence as distinguished from ordinary negligence on the one hand, and willful or reckless negligence on the other, because there is no such legal degree of negligence as "gross" negligence. The word "gross" in this connection is a mere epithet used to characterize one of the two legal classes of negligence mentioned.

6. BILL OF EXCEPTIONS—STATEMENTS IN, CONCLUSIVE UNLESS EXCEPTED WHEN BILL IS SETTLED.

The statement of facts in a bill of exceptions is conclusive upon the appellate court unless it is excepted to and the exceptions are sustained in the bill when it is settled.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Kansas.

On the 9th of January, 1900, Cassandra Purple, who is the widow of G. Purple, brought an action against the Union Pacific Railroad Company for negligence causing his death. She alleged that on October 16, 1899, between Laramie and Cheyenne, in the state of Wyoming, he was a passenger upon a train of the railroad company, and was killed through the negligence of the latter by another train which ran into the rear of that upon which Purple was riding. The railroad company denied these allegations, and averred that Purple was riding upon an extra freight train, which was prohibited from carrying passengers, that he knew that this train was not authorized to carry passengers, and that he was riding without paying for free transportation, with the intention of paying no fare. The issues presented by these pleadings were submitted to a jury, which returned a verdict for the defendant, and a writ of error has been sued out to review the judgment founded upon this verdict. The case is presented upon a bill of exceptions which contains but a portion of the evidence. It discloses the following facts: The train upon which Purple was riding was an extra freight train running east from Laramie to Cheyenne. It was prohibited from carrying passengers by the rules of the company, but those rules permitted extra freight trains to take passengers. At Sherman, on its way from Laramie to Cheyenne, it became a section of passenger train No. 6. The coupling of a train is the act of the train dispatcher. It is an act of technical application, and may be discontinued at any suitable point. Its purpose is to give certain track rights that a train does not possess before the order is issued. The order at Sherman which made this train a section of regular passenger No. 6 directed a freight train ahead of this one, the regular passenger No. 6, another passenger train, and another freight train to run as sections 1, 2, 3, 4, and 5 of the regular passenger No. 6. These sections were running in this way when the accident occurred. The evidence of the defendant tended to show that an extra freight train did not have a distinctive character as such by being made a section of a passenger train, but that it still remained an extra freight train. One of the rules of the company was that, where "freight trains on which passengers are not to be carried are run in sections, the last section of the train only" is permitted to carry passengers, and another was that "conductors are to collect fare from all persons traveling without a ticket or pass, and are to allow no discretion in the matter."

Harry G. Purple was an employé on the Union Pacific Railroad from 1883 until 1893, and a part of the time was a conductor. The rules of the company in operation at the time of his death were the same as those in force when he was employed upon the road, and at that time he was thoroughly familiar with them. The train upon which Purple was riding left Laramie at 8.15 p. m. on October 15, 1899. Its conductor was a friend and acquaintance of Purple. The train consisted of 27 or 28 passenger cars and a caboose. Purple had been visiting at Laramie for two days, and he had in his pocket on this day a time card which disclosed the fact that this train which he boarded was not a regular freight train, and therefore was not entitled to carry passengers. He was in the train dispatcher's office before the departure of the train, and that dispatcher had informed him that this was not a regular freight train. The evidence of the defendant tended to prove that he had no intention of paying for the ride, and that there was a tacit understanding between him and Davis, the conductor of the freight train, that he was to be permitted to ride on the freight train from Laramie to Cheyenne without the payment of any fare. He

offer to pay fare, nor did the conductor or any one else ask him to bill of exceptions contains a statement that all evidence tending to the fact or character of the defendant's negligence is found in it, that there was no evidence in the case tending to show wanton, willful, or reckless disregard on the part of the company of the safety of the defendant. These are the principal facts disclosed by the record which condition the determination of the questions presented by the alleged errors in this case, which all relate to the charge of the court and to its instructions to give certain requested instructions.

W. Keplinger (C. F. Hutchings, on the brief), for plaintiff in

H. Loomis (A. L. Williams and R. W. Blair, on the brief), defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The court refused to instruct the jury that the deceased was a passenger on the freight train of the defendant at the time he was killed, and that if he was killed by the negligence of the company the plaintiff was entitled to recover. This ruling is the first and chief complaint of counsel for the plaintiff in error. There are, however, two reasons why this specification of error cannot be sustained.

In the first place, Purple had no pass, ticket, or permit to ride upon this train, he paid no fare, and there was evidence tending to prove that he did not intend to pay fare, and that there was a mutual understanding between him and the conductor, Davis, that he was to ride free. He was a man of years, intelligence, and experience. He had been employed upon this railroad for about nine years. He knew that he had no right to ride, and that the conductor of this train had no authority to permit him to ride without the payment of his fare. The rules governing the operation of the railroad during the nine years when he was employed upon it invited this course of action, and they forbade it when he was not.

He had been familiar with these rules during the nine years of his employment upon this railroad, from 1884 to 1893, and in the seven years which followed, from 1893 to 1899, before he was killed, it is hardly possible that he could have forgotten or could become ignorant of the specific fact that conductors were not authorized to grant free transportation upon this railroad, or of the general and universally known fact that it is not the custom to permit men to do so upon any railroad. If, knowing this fact, he nevertheless rode upon this train with the deliberate intention not to pay his fare, under the tacit understanding between himself and the conductor that he should not pay it, the entire transaction was a fraud upon the railroad company, and a deliberate attempt to appropriate transportation without compensation, in violation not only of the rules of the company, but also of the civil and the moral law. If he entered and continued upon this train under this under-

standing with the settled intention not to pay his fare, the contract of passenger and carrier was never created between him and the railroad company, but he was a mere trespasser upon its property, willfully appropriating his ride, and the only duty which the railroad company owed to him was to abstain from willfully or recklessly inflicting injury upon him. One who, knowing that a conductor has no authority to grant free transportation, enters and rides upon the railroad with the deliberate intention not to pay his fare, under no express agreement or under a tacit understanding with the conductor, shall ride free, commits a fraud upon the railroad company, not as a passenger, but is a mere trespasser, to whom the only duty of the company is to abstain from willful or reckless injury. See *Brook v. Railroad Co.*, 67 Fed. 522, 523, 14 C. C. A. 506, 507, 9 S. App. 182, 185, 28 L. R. A. 749; *Railway Co. v. Brock*, 250; *Railroad Co. v. Michie*, 83 Ill. 431; *Railway Co. v. Brock*, 85 Ill. 84, 28 Am. Rep. 613; *Railroad Co. v. Mehlsack*, 122 N. E. 812, 19 Am. St. Rep. 17; *McVeety v. Railway Co.*, Minn. 269, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 17; *Robertson v. Railroad Co.*, 22 Barb. 91; *Railway Co. v. Robertson*, 8 Kan. 505, 12 Am. Rep. 475; *Prince v. Railway Co.*, 64 Kan. 175, 13 S. W. 19; *Way Co. v. Campbell*, 76 Tex. 175, 13 S. W. 19; *Way Co. v. Campbell*, 64 Iowa, 48, 19 N. W. 828, 52 Am. Rep. 431; *Same*, 73 Iowa, 463, 35 N. W. 525; *Hendryx v. Railroad Co.*, Kan. 377, 25 Pac. 893; *Railway Co. v. Whipple*, 39 Kan. 730; *Railway Co. v. Gants*, 38 Kan. 608, 17 Pac. St. Rep. 780. A contract is indispensable to the relation of carrier and passenger. The minds of the parties must meet upon the subject that the carrier will transport and the passenger will accept the transportation, in the absence of a specific agreement or commission by the proper officer of the transportation company. If the latter will carry the passenger without compensation, no contract of carriage may, it is true, be express or implied, but if no contract does not exist in either form the relation of carrier and passenger cannot have been created. An implied agreement to pay for the transportation hence the relation of carrier and passenger, undoubtedly arises when one enters a passenger car and rides towards his destination. It is equally true that if one enters and rides under an express agreement with a conductor, whom he knows of, and for a reasonable cause to believe has no authority to make such an agreement, that he shall not pay his fare, but shall cheat the company out of the transportation, no contract of carriage is created, but the absence of such an agreement is conclusively negated by the existence of a fraudulent contract so that it cannot exist. Therefore, no contract of carriage entered and rode under the fraudulent understanding of the conductor that he should pay no fare and with the settled intention to pay none, there was neither an express nor an implied agreement that he should pay for his transportation, and no relation of carrier and passenger arose, because the minds of the parties never met upon any such contract, and together upon the contrary understanding that Purple should pay no fare and should not be a passenger, but should fraudulently

iate his transportation. The bill of exceptions instructs us that was evidence tending to establish this state of facts, and in presence of it the court properly refused to instruct the jury Purple was a passenger, and that the plaintiff was entitled to recover if he was killed by the negligence of the defendant, because this state of facts existed he was not a passenger, and the limit on the duty of the defendant toward him was to refrain from willful or reckless injury to him.

In the second place, Purple was riding on a train which was prohibited from carrying passengers by the rules of the company, and there was evidence tending to prove that he either knew this fact, or had notice of such facts as would have led a person of ordinary prudence and diligence to an inquiry which would have disclosed its nature. The record is clear that at the time Purple boarded the train on which he rode to his death that train was an extra freight train which was forbidden to take or carry passengers. After he embarked upon his ride and at Sherman it was made the second section of regular passenger train No. 6 by the orders of the train dispatcher, the character of the train and the number of the cars remained unchanged. It still contained the 27 or 28 freight cars and cabooses which it started from Laramie, and it contained no passenger cars.

The orders of the dispatcher made this the second of five sections running on the time of regular passenger train No. 6. The section which preceded it was a freight train, the two sections which followed it were passenger trains, and the fifth or last section was a freight train. Thus, this passenger train No. 6 consisted of five sections, the first, second, and fifth of which were composed exclusively of freight cars and cabooses, and were in fact freight trains. It will be convenient to notice here the earnest argument of counsel for the plaintiff presented in the discussion of another specification of error to establish the proposition that, if the extra freight train on which Purple was riding was prohibited from carrying passengers before it reached Sherman, it was permitted to do so after it passed Sherman, so that at the time Purple was killed it was not under this prohibition.

Stated in syllogistic form, this is the contention: The rules prohibited regular freight trains to carry passengers and forbade extra freight trains to do so. They declared that regular freight trains were those running on schedule time, while extra freight trains were those which did not run upon such time. Prior to its arrival at Sherman the train on which Purple rode was not running on the schedule of any train. After it passed Sherman it ran on the schedule of regular passenger train No. 6. It therefore became from that time a regular train, because it was running on the schedule time of a regular passenger train, and hence it became authorized to carry passengers before the fatal injury was inflicted. This argument is not very persuasive or convincing, because the composition, character, and function of the train on which Purple rode remained the same after it became a section of the passenger train that it was before that time, and because after it passed Sherman it was not running on any schedule time prescribed for it upon the time card, but upon the schedule of a passenger train, under the special and temporary orders of

the train dispatcher. It is, however, unnecessary to discuss this question, because the right of the conductor of this train to carry passengers upon it after it passed Sherman is conclusively negated by another admitted rule of the company. That rule is that, when a freight train is on the main line, the last section of the train only will be permitted to carry passengers. If, therefore, this became a regular freight train, it was not authorized to carry passengers when it passed Sherman, it was only the last section of this freight train which was permitted to do so. The conductor of the second section, on which Purple was riding, was expressly prohibited from exercising this privilege. The time at which Purple rode, therefore, was when he boarded it, and it was not until the fatal collision, a train which was forbidden by the company to accept or carry him as a passenger.

Purple had worked on this railroad for nine years from 1893. During a part of this time he had been a conductor on the railroad. The rules for the operation of the railroad were the same in 1899, when he was injured, that they were in 1893, when he began his employment. At and before that time he was familiar with the rules. It is difficult to believe that in 1899 he could have forgotten the rules which permitted some freight trains to carry passengers and others from doing so. For a day or two before he started on his ride he had been visiting at Laramie, where he boarded the train on the day upon which he started he had been in the office of the dispatcher, where he could have readily learned by a simple inquiry whether or not the train upon which he entered was permitted to carry passengers. Beyond all question, these facts charged Purple with notice sufficient to put any man of ordinary prudence upon inquiry for the answer to the question whether or not the train was authorized to carry passengers, and brought him far more than the established rule that notice sufficient to put one on inquiry is notice of all the facts relative to the matter in question. A reasonably diligent investigation and inquiry will disclose. In view of the evidence the court below rightly charged the jury with the duty of the deceased to inquire whether this train was authorized to carry passengers. It does not appear that he did so; consequently he was charged with such knowledge and inquiry as reasonable inquiry would have elicited." No exception was taken to this portion of the instructions of the court, and it was the established law of this case. If, therefore, Purple knew that by a reasonably diligent inquiry he could have learned, that the train upon which he boarded was not permitted to carry passengers, he was guilty of carrying a passenger upon it, but was a mere trespasser on that train, and in the eyes of the law he was there knowingly violating the rules of the company. There was evidence tending to show this state of facts, and in the presence of it the court could not have lawfully charged the jury that Purple was a passenger, and that the defendant was liable for his death if it was caused by its negligence, because, if the facts existed, Purple was a trespasser, and not a passenger. The only duty of the defendant to him was to abstain from carrying him, or recklessly inflicting injury upon him. One who enters

a car or train which he knows, or by the exercise of reasonable care would know, is prohibited from carrying passengers, is a conductor, and not a passenger, and the only duty of the railroad company toward him is to abstain from wanton or reckless injury to him. *Gray Co. v. Roach* (Va.) 5 S. E. 175; *Robertson v. Railroad Co.*, 100 Ark. 91; *Eaton v. Railroad Co.*, 57 N. Y. 382, 384, 15 Am. Rep. 101; *Pennsylvania R. Co. v. Langdon*, 1 Am. & Eng. R. Cas. 87; *Wells v. Railroad Co.*, 153 Mass. 188, 191, 192, 26 N. E. 446; *Wells v. Railroad Co.*, 69 Pa. 210, 8 Am. Rep. 251; *Ecliff v. Railway Co.*, 104 Mich. 196, 31 N. W. 180.

The conclusions which have now been announced have not been reached without a careful perusal and consideration of the authorities by counsel for the plaintiff in error, such as *Dunn v. Railway Co.*, 58 Me. 187, 4 Am. Rep. 267; *Lucas v. Railway Co.*, 33 Wis. 40, 14 Am. Rep. 735; *Railroad Co. v. Derby*, 14 How. 468, 484, 15 Ed. 502; *Gradin v. Railroad Co.*, 30 Minn. 217, 220, 14 N. W. 101; *Railroad Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; and *White v. Railway Co.*, 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409,—in all of which cases boys and men who had never been employed upon the railroad, and who had no notice of facts sufficient to put them upon inquiry as to the power of the conductor or officer in charge of the train to permit them to ride upon it as passengers, were held, under the circumstances of these particular cases, to stand in this relation to the railroad companies. The rules and principles announced in those cases are inapplicable to the facts of the case in hand, because the evidence here conclusively establishes the fact, which did not exist in those cases, that before the alleged passenger boarded the extra freight train he was fully aware of the facts which would put any man of reasonable prudence upon inquiry as to the right to ascertain—First, whether or not that train was permitted to carry passengers; and, second, whether or not the conductor had any authority to allow him to ride upon it, and because there was evidence in this case, which was not presented in any of those cases, tending to show that the alleged passenger entered and rode upon the train with a deliberate intention not to pay his fare, under a tacit understanding with the conductor that he should ride free. Purple did not approach the train in the relation to the company of a boy or of an ordinary passenger, but as a dual honestly seeking transportation without knowledge of the rules or practices of the company. The conceded facts that he had been employed upon the railroad for nine years, had been familiar with the rules and practices upon the road and the evidence of his intention not to pay, and tacit understanding with the conductor that he would not pay fare, gave him notice of facts, and suggested inquiry as to the right of the ordinary applicant for passage upon the train of a railroad company does not have. This case is not governed by the authorities cited by the plaintiff in error, which declared the liabilities of railroad companies upon very different states of facts, but is controlled by the rules and the decisions to which reference has been made in the earlier portion of this opinion.

It will be convenient to notice here another contention of counsel for the plaintiff in error allied to those which have already been considered. It is that although Purple was not a passenger he was

not a trespasser, and the court should have instructed the defendant was liable to him for gross negligence. In this proposition cases are cited like *Railroad Co. v. D.* 14 How. 483, 14 L. Ed. 502, where a passenger who was riding upon the railroad by the invitation of the president of the company was carelessly injured, and *Farmers' Loan & Trust Co. v. B.* 102 Fed. 17, where one riding upon a pass sustained injury through the negligence of the company, and it was held that the defendant was liable to persons for the exercise of ordinary care and diligence, and any failure to exercise such care might well be characterized as gross. These authorities, and the rules of law upon which they rest and which they announce, have no application to the case at hand. Purple was not traveling on a free pass. He was a licensee. He was either a passenger without knowledge of the facts or out notice of facts suggesting an inquiry which would have led a prudent man to knowledge of the fact that the conductor of the train was not authorized to permit him to ride upon it as a passenger, or he was a trespasser with knowledge, or with notice, giving him with knowledge, of this fact, engaged in executing a deliberate intention to ride upon the train in violation of the rules of the company. He was not a licensee, and he could occupy no legal position. There was therefore no error in the refusal of the court to charge that if he was not a passenger the railroad company was liable to him for gross negligence. The term "gross negligence" in this connection is nothing but an epithet. It means more than the failure to exercise ordinary diligence in the circumstances of the particular case. It distinguishes no legal degree of negligence, and it is not error to refuse to apply it to the negligence for which a defendant may be liable, because its use merely tends to create doubt and to increase confusion. *Wilson v. L.* 113 Mees. & W. 113; *The New World v. King*, 16 How. 47, 14 L. Ed. 1019; *Milwaukee Railroad Co. v. Arms*, 91 U. S. 489, 14 L. Ed. 374; *Beal v. Railway*, 3 Hurl. & C. 337; *Grill v. Railroad Co.* [1865-66] L. R. C. P. 600; *Perkins v. Railroad Co.*, 186, 207, 82 Am. Dec. 281.

Another complaint of the plaintiff in error is that the court instructed the jury that there was no evidence in the case to warrant them in finding that there was any wanton, willful, or reckless disregard by the company of the safety of the passenger. But the bill of exceptions contains these two statements: "Evidence tending to show the fact or character of defendant's negligence is contained in this bill of exceptions;" and "there is evidence in the case tending to show wanton, willful, or reckless disregard on the part of the company of the safety of the defendant." Counsel review the evidence contained in the bill of exceptions and ask a holding that there was evidence tending to show willful or reckless injury. But this question is not here for our consideration. The only way in which it could have been presented in the state of the record was by an exception to the statement in the bill of exceptions that there was no such evidence in the case.

and recorded in the bill itself. No such objection or exception was taken, so that the question whether or not there was such evidence was not presented to the court below when it certified the record, and as, in an action at law, this is a court for the correction of errors exclusively, there could have been no error in the court below, because that question was not presented to or ruled upon by that court when the bill of exceptions was made. In this court the record presented by that bill, in the absence of objection or exception thereto, is conclusive.

It is assigned as error that the court refused to instruct the jury that, although the conductor did not intend to demand transportation, the fact that he had such intention could not in any way affect the right of the plaintiff to recover, in the absence of evidence to show that Purple in some way induced the conductor to form such intention. But there was evidence tending to show that Purple did induce him to form this intention by presenting himself for transportation, by forming with him the tacit understanding that he should ride free, and by entering and riding upon the train without the payment or the offer to pay fare, in pursuance of his deliberate intention and tacit understanding that he should ride without the payment of any. The instruction requested was therefore inapplicable to the facts of this case, and there was no error in its refusal. It is not the duty of a trial court to instruct the jury what the law would be in the absence of material evidence which has been presented and submitted to the jury upon the crucial issues in the case. It completely discharges its duty when it gives the law applicable to the evidence before the jury.

For the same reason there was no error in the refusal of the court to charge the jury that some of the defendant's freight trains carried passengers, that Purple was riding on one of them with the knowledge and assent of the conductor in charge, and that under these circumstances, in the absence of evidence to the contrary, it would be presumed that he was a passenger. This instruction ignored all the material evidence in the case upon which the jury based its finding that he was not a passenger, the evidence of his deliberate intention not to pay fare, of the tacit understanding that he should ride free, of his employment upon the road for nine years, and his familiarity with the rules, and of his presence and opportunity to learn the facts at Laramie before he started upon his fatal ride.

It is said that it was error for the court to refuse to charge that the payment of fare is not necessary to give rise to the liability to pay it, and that if the carrier permits the passenger to take his seat without requiring payment the obligation to pay will stand for actual payment. But the rule of law embodied in this request was fairly given to the jury in the general charge of the court. Although the evidence was conclusive that Purple never paid any fare, and never was asked to pay any, the court instructed the jury that if he was invited onto a train authorized to carry passengers, either by express words or by a tacit understanding between him and the conductor, he became a passenger, and it was the duty of the com-

pany to exercise the highest degree of practicable care for transportation.

It is contended that the court erred because it failed to give instructions (1) that if the car on which Purple was riding had the same general appearance of other trains on which passengers were carried on that division of the railroad, but by reason of facts, unknown to Purple, the train was not permitted to carry passengers, and if the failure of the conductor to demand a ticket not procured by Purple, he was a passenger; and (2) that a passenger riding by the unauthorized permission of the conductor on a train not intended for the carriage of passengers is not a trespasser unless it was known to him that the conductor exceeded his authority. It may be conceded for the purpose of this discussion, although the proposition is not considered or decided, that without any knowledge and without any notice of facts sufficient to put him upon inquiry which would lead to knowledge of the lack of the authority of a conductor upon or of the character of the train which was not permitted to carry passengers might be a passenger upon that train under the circumstances stated in the propositions. The difficulty with the instructions is that Purple was in no such situation. He was an old employé on the road. In the practical operation he had known and had experienced the fact that in nine years that regular freight trains might carry passengers and that extra freights might not. It is certainly probable that he knew this fact when he boarded the train, seven years before. Whether he did or not, the record clearly shows that he had knowledge of facts to put him upon an inquiry which would have led to an acquaintance with this fact. Under these circumstances he could not escape this duty of inquiry. He was in this situation. If he had forgotten the rules and the practices, then he could not know that any freight trains on that railroad carried passengers and the fact that he placed himself upon a freight train was to him that he was wrongfully there, because the presumption was that freight trains are for freight and passenger trains for passengers. In the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that one riding on his own convenience on a freight train, an engine, a hand car or any other carriage of a common carrier that is evidently not designed for the transportation of passengers, is unlawfully there and is a trespasser. *Bryant v. Railroad Co.*, 53 Fed. 997, 998, 100 A. 146, 147, 12 U. S. App. 115, 123; *Powers v. Railroad Co.*, 188 Mass. 188, 190, 26 N. E. 446; *Eaton v. Railroad Co.*, 53 Mass. 382, 15 Am. Rep. 513; *Files v. Railroad Co.*, 149 Mass. 311, 14 Am. St. Rep. 411; *Hoar v. Railroad Co.*, 70 Conn. 72, 73, 35 Am. Rep. 299; *Gardner v. New Haven & N. Y. R. Co.*, 143 Conn. 143, 50 Am. Rep. 12; *Graham v. Railway Co.*, 23 U. S. P. 541; *Sheerman v. Railway Co.*, 34 U. C. Q. B. 451; *1 Co. v. Michie*, 83 Ill. 427.

If, on the other hand, Purple knew the rules and the practices of the railroad company, then he knew that conductors were forbidden to carry passengers, and passengers were prohibited from

extra freight trains. So that, whether he knew the rules or not, duty was imposed upon him to inquire and to ascertain whether the train upon which he entered was a regular or an extra freight train. The instructions under consideration ignore this duty of inquiry which the situation and knowledge of Purple imposed upon him, and for that reason they were properly refused. He was not a passenger, not only if he knew that the train on which he rode was not permitted to carry passengers and that the conductor was not authorized to allow him to ride upon it, but also if he knew the facts relative to this matter as would have put a man of ordinary prudence and diligence upon an inquiry which would have led to knowledge of these facts.

The specifications of error in this case are numerous. They have all been specifically set forth, but the rules and principles of law and the facts, by which they must be judged, have now been carefully considered and declared. Our conclusion is that the trial issues in this case were fairly and impartially tried, that the charge of the court tersely and correctly presented to the jury the rules of law applicable to the evidence, and that there was no error in the refusal of the court to submit the requested instructions in favor of the plaintiff.

The judgment below is accordingly affirmed.

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LESSER COTTON CO. et al. v. ST. LOUIS, I. M. & S. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1902.)

No. 1,582.

ROADS—EVIDENCE—SETTING FIRES—FIRES SET BY OTHER ENGINES.

Where the engine which alone could have set the fire is identified, testimony that other engines of the defendant set fires or threw sparks at other times is incompetent in the absence of proof of similar condition and operation.

HABIT OF PUNCHING SPARK ARRESTERS IMMATERIAL WHERE ENGINE IDENTIFIED.

Where the engine which alone could have set the fire is identified, and its spark arrester is shown to have been without holes punched in it at the time of the fire, it is incompetent to show a habit of the engineers of the defendant to punch such holes in the spark arresters of their engines.

TESTIMONY AS TO FIRES SET BY OTHER ENGINES.

Where the engine which might have set the fire is not identified, and the issue is either whether or not some unknown engine set the fire, whether or not sparks could have flown from the engine to the burned building, testimony that other engines of the defendant at other times and places set fires or threw sparks the requisite distance away is competent.

DUTY OF RAILWAY COMPANY AS TO PREVENTIVE MACHINERY.

It is the duty of a railway company to exercise reasonable care to provide itself with the most effective mechanical contrivances in known and critical use to prevent the escape of sparks and coals from its engines, but the law does not impose upon it the duty to absolutely provide such contrivances, or make it the insurer of their completeness or perfection.

5. APPEALS—OBJECTIONS NOT PRESENTED BELOW UNAVAILING IN COURT.

The federal appellate courts are courts for the correction only, in actions at law; and questions which were not presented to the court below may not be reviewed there, because the trial court cannot be guilty of errors in rulings they have never made and questions that never were presented to them.

6. APPEAL—MISTAKES OF FACT IN CHARGE NOT REVIEWABLE.

The opinion of a federal court upon the facts, expressed in a charge to a jury, is not reviewable on error, so long as no rule of law is correctly stated, and all matters of fact are ultimately submitted to the determination of the jury.

7. SAME—TRIAL ON ONE THEORY WAIVES RIGHT TO REVERSE ON ANOTHER THEORY.

One who tries his case upon one theory may not reverse on another theory against him upon an inconsistent theory which was not urged at the trial.

8. SAME—ALL RELEVANT EVIDENCE NECESSARY TO REVIEW SUCH A TRIAL THEREOF TO WARRANT CHARGE.

The legal presumption is that the evidence warranted a verdict for the defendant, and, if the plaintiff in error would attack it on the insufficiency of the evidence, he must either present all the evidence in support of the trial court, or all the evidence relative to the subject in that part of the charge challenged, together with the evidence in support of the trial judge that the bill of exceptions contains such evidence.

9. RAILROADS—SETTING FIRES—REASONABLE CARE IN DRY AND WINDY WEATHER.

It is not error to refuse to give or to give a charge that a railway company is required to protect against fires from operating engines in the presence of inflammable materials in a dry and windy time than on ordinary occasions, because it is not error to refuse to insert instructions which are a part of the common knowledge and experience of all men who have arrived at years of discretion, although error to insert such statements.

10. CHARGE—NOT ERROR TO REFUSE TO REPEAT RULE SUBMITTED BY COUNSEL.

Where a rule of law has been fairly submitted to the jury in a general charge, it is not error to refuse to repeat it in response to the counsel's request.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Arkansas.

About 10 o'clock at night on Sunday, the 1st day of April, 1901, a fire broke out in the barn of one Best, in the town of Newport, in the State of Arkansas, which spread to a quantity of cotton near by, owned by the Lesser Cotton Company, and insured against fire by 14 insurance companies. The cotton was burned. The insurance companies paid the Lesser Cotton Company \$195,000 on account of its loss, and then joined with the Lesser Cotton Company in an action against the St. Louis, Iron Mountain & Southern Railway Company to recover the amount which they had paid, on the ground that the fire was set by the negligence of the railway company, and that the Lesser Cotton Company had been subrogated to the rights of the cotton company. The railway company denied its liability, and at the trial there was testimony on the part of the plaintiffs tending to show that the fire was set upon the roof of the barn by sparks which the railway company permitted to escape from the engine No. 577 while the testimony for the defendant was to the effect that the engine was perfect in construction and condition, and was skillfully operated, and that the fire was set on the inside of the barn either by tramp or a camp fire which was burning in the yard within 75 feet of the barn. The court submitted to the jury the issues whether or not the fire was set by the sparks from the engine, and whether or not the railway company was guilty of any negligence in the construction, repair, or management of the engine.

locomotive. They returned a verdict for the defendant, and judgment was entered accordingly. This writ of error has been sued out to reverse this conclusion.

Ashley Cockrill and Joseph M. Stayton, for plaintiffs in error.

George E. Dodge and B. S. Johnson, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The trial of this case occupied 12 days. The bill of exceptions is a statement of the issues, the tendency of the evidence of the respective parties, the rulings of the court upon the exclusion of evidence and its charge to the jury. It is a model of clearness and brevity. A large number of errors are assigned, and the logical and facile method of treating them will be to consider them in three groups: First, those relating to the exclusion of testimony; second, those relating to the charge of the court; and, third, those relating to its refusal to give requested instructions.

1. It is assigned as error that the court refused to permit witnesses produced by the plaintiffs to testify that other engines of the defendant than the one which alone could have set the fire, under the evidence, "threw sparks a considerable distance, sufficiently large and live to set inflammable material on fire"; that it was the habit of operatives of engines on the defendant's road to punch large holes in the spark arresters of those engines, so that large cinders would be thrown through those holes; and that other engines of the defendant than the one which alone could have set the fire, under the evidence, contained defects, and were negligently handled, although they were similarly constructed. The bill of exceptions contains no record of the offer and rejection of any other evidence of negligence in the operation of, or of defects in, other engines than No. 577, except that relating to their scattering of sparks, and to the habit of punching holes in their spark arresters, so that the only question to be considered under this assignment is whether or not the latter testimony was improperly excluded. The record discloses the fact that the court refused to admit it because it was conceded in the case that, if the fire was caused by sparks from any of the defendant's engines, they came from engine No. 577, and the spark arrester of that engine had been produced in evidence in the court, and had been shown to be in the same condition as on the night of the fire, and no holes had been punched in it. It is insisted that these rulings were erroneous, because (1) there is evidence tending to show that the fire might have been caused by some other engine; and (2) because, even if the engine and spark arrester were identified, the testimony was competent to show a habit of negligence in operating and caring for the engines of the defendant. The first reason presents a question of fact, and it challenges a portion of the charge of the court; for the court instructed the jury, in effect, that, if the barn was set on fire by

sparks from one of the defendant's engines, it was done by engine No. 577. The consideration of this question of fact is, foreclosed by the bill of exceptions, which in one place states that the defendant introduced evidence tending to show "that there was no other engine there, and that, if the fire was set out, it was set out by a spark from engine No. 577. This fact was not controverted by the evidence, nor denied,"—and in another place states that the evidence under consideration was offered, recites that the evidence was excluded by the court upon the ground that it was conceded in this case that, if the fire was caused by sparks from one of defendant's engines, it was caused by engine No. 577. The evidence as is offered would only be admissible if it could be shown that these engines were of a like kind, and had the same spark arrester, and were in the same condition that engine No. 577 was at the time of the fire." The evidence upon this subject is not before us for consideration. This issue is concluded by the bill of exceptions, and this case must be considered and decided upon the conceded fact that engine No. 577 was the only one which could have set the fire of which the plaintiffs complain.

This brings us to the question whether or not after it was established that the only engine which could have set the fire was engine No. 577, and after its spark arrester, in the same condition that it was in when the fire was set, and without holes punched in it, was in evidence, it was competent to introduce testimony that other engines of the defendant threw igniting sparks at other times and places, and that the engineers were in the habit of making holes in their spark arresters. In support of the position that this evidence should have been admitted, the counsel cite a large number of cases which recite the remarks of the supreme court in *Railroad Co. v. Richardson*, 91 U. S. 478, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, that "such evidence has, we think, been generally held admissible as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a habit of the officers and agents of the railroad company." The court is not concerned in this case with the rule announced in *Richardson Case*. That rule is that, where the engine which could have set the fire is unknown, it is competent to show, not that other engines of the defendant sometimes set fires, but that some of the engines of the defendant set such fires. The reason of this rule is that, where it is uncertain which engine caused the fire, evidence generally that the engines of the defendant set other fires before and after the fire which is the subject of the litigation has some tendency to prove that the latter fire was set by some unknown engine of the company, and that its servants are habitually negligent in caring for or operating the locomotives. There is plausibility in this theory, because, where the engine charged is unknown, it may be that this unknown engine was one of those which set fires at other places and times; and that the engines of the defendant set out such fires become admissible as a way testimony from which the jury may reasonably infer that the fire under consideration was set by some engine of the defendant. However, it is conceded or established beyond dispute, as in *Richardson Case*, that there was only one engine which could possibly have set the fire.

and its spark arrester is produced, without any holes punched in it, and proved to be in the same condition in which it was at the time of the fire, it is difficult to perceive how the testimony that other engines threw sparks, or that the engineers of the defendant were in the habit of punching holes in the spark arresters of engines, could have had any tendency to show that the fire in question was set out by the identified engine. The only question at issue was whether or not engine No. 577 set the fire. If the offer of counsel had been to show that some of the engines of the defendant set fires at other times and places, it might have formed the basis for a more plausible argument, because it might have been said that engine No. 577 might have been one of the engines which set fires at other times. This, however, was not their offer. Their proposal was to prove that other engines threw sparks sufficiently large and live to set fires. They did not offer to show that such engines were constructed in the same way or were in the same condition as the locomotive which alone could have set the fire. How this testimony could have had any tendency to lead a rational mind to the belief that engine No. 577 was the cause of this fire, passes our understanding. Neither the fact that other engines set fires, nor the fact that they threw sparks, nor the fact that their operators were in the habit of negligently constructing, repairing, or caring for them, had any logical or rational tendency to show that the engine here in question either set the fire, threw the sparks, or was negligently cared for or operated, because there was better and conclusive evidence upon all these questions,—the evidence of its actual construction and condition, and of the method in which it was actually operated at the time when the fire occurred. Nor was the testimony that it was the habit of the servants of the defendant to punch holes in the spark arresters more competent or persuasive. The spark arrester of engine No. 577, according to the recital of the bill of exceptions, was before the court in the same condition in which it existed when the fire was set, and no holes had been punched in it. In the presence of this evidence, proof of the habit of engineers to punch holes had no tendency to show that such holes were made in the spark arrester of this engine, because higher and better evidence had demonstrated the fact that no such holes had been made. The true rule upon this subject is that, in an action against a railway company for setting a fire by means of defects in the condition or operation of an engine, it is competent, where the engine that might have set the fire is unknown or unidentified, to introduce testimony that some of the defendant's engines set fires or threw igniting sparks at other times, within a few weeks, and at other places in the vicinity. *Railroad Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356; *Railroad Co. v. Gilbert*, 52 Fed. 711, 3 C. C. A. 264, 10 U. S. App. 375; *Railroad Co. v. Lewis*, 2 C. C. A. 446, 51 Fed. 658, 664; *Campbell v. Railroad Co.*, 121 Mo. 340, 351, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530; *Piggot v. Railway Co.*, 3 Man. G. & S. 229; *Webb v. Railroad Co.*, 49 N. Y. 420, 10 Am. Rep. 389; *Sheldon v. Railroad Co.*, 14 N. Y. 218, 67 Am. Dec. 155; *Cleveland v. Railway Co.*, 42 Vt. 449; *Railroad Co. v. McClelland*, 42 Ill. 355, 358; *Smith v. Railroad Co.*, 10 R. I. 22; *Hoover v. Railway Co.* (Mo.) 16 S. W. 480.

But where the engine which alone could have caused the fire was identified, and its spark arrester is produced, testimony that the engines of the defendant at other times and places set fires or that igniting sparks is neither competent nor relevant to the issue, and proof that they were in the same condition and operated in the same way as was the engine charged when the fire occurred. *Gilbert v. Railroad Co.*, 58 Wis. 335, 17 N. W. 132, 134; *Boyce v. Railroad Co.*, 42 N. H. 97; *Phelps v. Conant*, 30 Vt. 277; *Malton v. Nesbitt & P.* 70; *Hubbard v. Railroad Co.*, 39 Me. 506; *Standish v. Railroad Co.*, 21 Pick. 237; *Collins v. Inhabitants of Dorchester*, 306; *Robinson v. Railroad Co.*, 7 Gray, 92; *Jordan v. Osgood*, Mass. 457, 12 Am. Rep. 731; *Smith v. Railroad Co.*, 37 Mo. 37; *Coale v. Railroad Co.*, 60 Mo. 227, 233; *Railroad Co. v. Doak*, 379, 91 Am. Dec. 166; *Allard v. Railroad Co.* (Wis.) 40 N. W. 426; *Ireland v. Railroad Co.* (Mich.) 44 N. W. 426; *Railroad Co. v. Ruff*, 4 Md. 242, 59 Am. Dec. 72. The distinction between the lines of authorities is plain upon principle, and is clearly made by the opinions in the cases upon which counsel for the plaintiff relies. In the case at bar and in the cases last cited the crucial issue is whether or not the identified engine set the fire, and the competent evidence on that issue is the construction, condition, and operation of that engine, and of those similarly constructed, repaired, and operated. In the cases first cited this issue is not presented, and the crucial questions are whether any of the unidentified engines of the defendant set the fire, or, as in *Matthews v. Railroad Co.*, 645, 44 S. W. 802, whether or not a spark could be thrown from the railroad to the site of the building burned. These issues do not arise in the case at bar, and for that reason the evidence competent in cases where they do arise is not relevant to the issue in this case. Thus, in *Railroad Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 111, the engine which caused the fire was unidentified. The plaintiff attempted to show that it was one of two locomotive engines belonging to the railroad company, but there is nothing in the case to indicate that these engines were pointed out so as to separate them from the other engines of the defendant, or that the condition or the mode of operation of either of them was in any way shown. The crucial question in that case was whether the fire was set by some unknown engine of the defendant, or by a conflagration which the plaintiff maintained in the vicinity. In *Railroad Co. v. Gilbert*, 52 Fed. 711, 713, 10 A. 264, 265, 10 U. S. App. 375, 378, the court well said, after citing the authorities which sustain the rule that governs the case at bar:

"We must not, in the consideration of this question, lose sight of the issues involved. In the case at bar it was not admitted by the complaint that the fire was caused by sparks escaping from a particular engine, and the event the query would be as to the condition of that particular engine, and the mode in which it was handled."

In the case at bar it was conceded that, if the fire was set by a particular engine, it was set by engine No. 577. In *Campbell v. Railroad Co.*, 121 Mo. 340, 25 S. W. 936, the court says:

"If the issue had been of negligence in the construction and management of the engine only, and the engine which could only have caused the fire was identified, and its spark arrester is produced, testimony that the engines of the defendant at other times and places set fires or that igniting sparks is neither competent nor relevant to the issue, and proof that they were in the same condition and operated in the same way as was the engine charged when the fire occurred."

been clearly identified, evidence that other engines emitted sparks and set fires would have been inadmissible, under the decisions of this court. *Coale v. Railroad Co.*, 60 Mo. 227; *Patton v. Railroad Co.*, 87 Mo. 117, 56 Am. Rep. 446."

These are the cases upon which counsel for the plaintiffs seem to place their chief reliance. They do not sustain their contention, but concede the existence and reason of the rule that, where the engine charged with the injury is known, testimony of defects in the condition or negligence in the operation of other engines at other times and places is neither competent to prove, nor relevant to establish, the real issue in controversy. There was no error in the rejection of the testimony of this character, or of that relative to the habit of the engineers to punch holes in the spark arresters of the defendant. The evidence offered upon these subjects was properly excluded.

2. Complaint is made that the court charged the jury in this way:

"In order to entitle the plaintiffs to recover in this action, you must find from the evidence—First, that the fire which destroyed the cotton, for which the suit is instituted, was caused by the defendant railroad company; second, that it was caused through the negligence of the railroad company. Unless both of these facts are found in favor of the plaintiffs, they cannot recover in this action."

But in another part of the charge it told the jury:

"If you determine that the fire which destroyed the cotton of the Lesser Cotton Company was caused from sparks or cinders communicated from the defendant's engine, then the burden of proof is shifted upon the defendant, and it must overcome the presumption of negligence arising from this finding. It must show that there was no defect in the engine, that there was no negligence in the manner of its operation by its employes, and that they were skillful men. In other words, it must prove by a preponderance of evidence that there was no negligence, within the definition of the term as I have described it to you. It must show that it has used all reasonable and proper care, caution, diligence, and skill in the construction of the locomotive which caused the fire, and that at the time of the fire it was skillfully operated. That is all the railroad company would be required to do,—to use all due and reasonable care and caution in providing appliances for the prevention of the emission of sparks and cinders from the locomotive, and skill in the management of it by its operatives at the time."

All of the charge upon the burden of proof, and relative to the rules of law, challenged by this specification of error, must be read and construed together. When it is thus read it will be found to state the established rules of law relative to the subjects under consideration in that part of the charge assailed as favorably to the plaintiffs as controlling authorities will warrant. The burden of proof was upon the plaintiffs to establish the causal negligence of the defendant. When they proved, if they did, that the fire was caused by sparks emitted by the defendant's engine, that burden shifted to the defendant, and required it to establish by a fair preponderance of evidence that it had exercised reasonable care to provide the most effective mechanical contrivances in known practical use to prevent the burning of private property by the escape of fire from its engines. *Rosen v. Railroad Co.*, 83 Fed. 300, 205, 27 C. C. A. 534, 539, 49 U. S. App. 647, 656; *Railroad Co. v. Schultz*, 93 Pa. 341, 344; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* (C. C.) 89 Fed. 637, 638; *Thomas v. Railroad Co.* (C. C.)

91 Fed. 206, 208; *Railroad Co. v. Fox*, 34 C. C. A. 497, 494, 497; *Fletcher v. Railroad Co.*, 168 U. S. 135, 18 Sup. 42 L. Ed. 411; *Bevier v. Canal Co.*, 13 Hun, 254; *Collins v. Railroad Co.*, 5 Hun, 503, 506; *Railroad Co. v. Larmon*, 67 Ill. 111. Those portions of the charge which have been quoted fail to state these rules to the jury for their guidance, and no just exception of them can be sustained.

Another objection to the portion of the charge here challenged is now urged is that the defendant was operating its engine and train on Sunday; that this act was in violation of the law of Arkansas, which forbids work of this character on that day (*Sanderson v. State*, 18 Ark. 1887); and that the defendant is consequently liable for damages resulting from its violation of the law, without regard to the question of negligence. But under the record presented, and the bill of exceptions this court has no power or jurisdiction to consider or determine this question in this case. It was not presented to the court below, and no ruling was made upon it in that court. The Counsel for the plaintiffs presented to the court nine requests for instructions. They were all based upon the theory that the question to be tried was whether or not the defendant was guilty of negligence in setting out the fire. They contained no request for instruction that the court ought to instruct the jury that the defendant was entitled to recover in the absence of negligence, because the defendant had violated the Sunday law. The portion of the charge now challenged was excepted to at the close of the trial, and the exception was general, and contained no statement that the error in the charge was erroneous because the plaintiffs were entitled to recover on account of a violation of the Arkansas statute prohibiting work on Sunday. Thus it appears that the issue of law here urged for our consideration was not presented to, considered, or ruled upon by the court below. It is not, therefore, here for our consideration, and we must decline to enter upon its discussion. In any event, at law, this is a court for the correction of the errors of the court below, exclusively. Questions which were not presented to, considered, or ruled upon by that court are not open for review here, because the trial court cannot be guilty of any error in a ruling it has made upon an issue to which its attention has never been called. See *Association v. Wilson*, 100 Fed. 368, 373, 40 C. C. A. 414; *Railway Co. v. Henson*, 58 Fed. 531, 532, 7 C. C. A. 349; *U. S. App.* 169, 171; *Schneider Brewing Co. v. American Ice Co.*, 77 Fed. 138, 149, 23 C. C. A. 89, 100, 40 U. S. App. 3; *Board v. Sutliff*, 97 Fed. 270, 38 C. C. A. 167; *Railroad Co. v. Krohne*, 29 C. C. A. 674, 86 Fed. 230, 235; *Davis v. Town of* 52 Wis. 657, 9 N. W. 809.

In the portion of the argument addressed to the refusal of the court to give certain instructions requested, that portion of the charge of the court relative to the degree of diligence required of the railway company, which has been quoted, is assailed on the ground that the court should have instructed the jury that it was its duty to provide the best machinery in known practical use to prevent the emission of sparks, and not simply to exercise

able care to make this provision. As the quotation assailed has been recited, it will be more convenient to treat this objection here. The railway company had a charter from the state, and a vested right to operate its railroad by the use of steam produced by fire. On the other hand, the owner of buildings and property along the line of its railroad had a right to construct and maintain them. The action against the railroad company for damages for destroying them is not based upon any contract of insurance. It arises out of a breach of a legal duty. That duty is not to insure the property of the plaintiff, nor is it to insure the safety or the perfection of the devices and appliances which it adopts to prevent fires. The limit of that duty is the exercise of ordinary and reasonable care to avail itself of the best mechanical contrivances in known practical use for the purpose. The essence of this action for damages is the breach of this duty. Negligence in the discharge of it is the basis of the cause of action, and the true rule is that, where the defendant has exercised reasonable care to provide the most effective machinery in known practical use to prevent the burning of private property, it has fully discharged its duty in that regard. *Rosen v. Railroad Co.*, 83 Fed. 300, 304, 305, 27 C. C. A. 534, 539, 49 U. S. App. 647, 656, and cases cited *supra*. If there was any error in the charge of the court below upon this subject, it was not against the plaintiffs. While the court charged that the railway company must exercise reasonable care and diligence in this regard, it also charged that:

"It must have the apparatus complete, as far as the appliances used for the prevention of the escape of sparks and cinders from its smokestacks are concerned. * * * Everything, as I have stated to you before, must be properly constructed, and the appliances must be the best in known practical use, and perfect in form."

This portion of the charge is subject to the criticism that it does not limit, as it should, the duty of the railway company to the exercise of reasonable care to provide the most effective appliances in known practical use, but places upon it the absolute duty to attain perfection in this regard,—a duty which the law does not impose. This, however, is an error of which the plaintiffs do not and cannot complain.

The theory on which the plaintiffs tried this case was that the sparks from the defendant's engine set a fire on the roof of the barn, and the theory on which the defendant tried it was that tramps or smokers or a camp fire set fire to hay inside the barn. This barn was about 10 feet high. The roadbed was elevated so that the roof of the barn was about on a level with the track. The walls of the barn were constructed of 12-inch perpendicular boards, with cracks between them about an inch wide; and there was hay on the floor of the barn, on the side toward the railroad, in a pen about 25 feet from the north end. The court charged the jury: That the plaintiffs had introduced evidence tending to show various facts, indicating that the fire was first discovered on the top of the roof; that it burned a hole through the roof; and that the sparks dropped into the hay from that point. That the defendant, on the other hand, had introduced evidence to the effect that the fire was set in the hay inside the barn, either by

a camp fire in the yard or by smokers; that the engine was constructed that it could not have set the fire. And that it was left to the jury to determine from all the evidence whether the fire was caused by sparks from the defendant's locomotive, or from some other source. It then added, "Of course, if the fire started inside the barn, it would have been impossible for it to have been caused by sparks from the defendant's locomotive." This statement is assigned as error, because there was evidence of the cracks in the side of the barn through which sparks from the engine might have flown into the barn, and thus have set the fire within the barn. But all the questions, including this one, were submitted to the jury by the court. The declaration of the court here challenged was nothing more than its expression of opinion upon a question of fact which the jury was permitted to determine. No rule of law was incorrectly stated at all, in this portion of the instructions. And the opinion of the trial court upon matters of fact which are ultimately submitted to the jury is not reviewable on error, so long as no rule of law was incorrectly stated therein. *Lovejoy v. U. S.*, 128 U. S. 171, 173, 32 Ct. 57, 32 L. Ed. 389; *Rucker v. Wheeler*, 127 U. S. 85, 93, 8 Ct. 1142, 32 L. Ed. 102; *Railroad Co. v. Putnam*, 118 U. S. 54, 32 Sup. Ct. 1, 30 L. Ed. 257; *Railroad Co. v. Vickers*, 122 U. S. 7, 32 Sup. Ct. 1216, 30 L. Ed. 1161; *United States v. Philadelphia & R. Co.*, 123 U. S. 113, 114, 8 Sup. Ct. 77, 31 L. Ed. 138.

There is another reason why this judgment ought not to be reversed upon this specification of error. It is that this objection rests upon a different theory from that upon which the plaintiffs presented their case. The court charged the jury that their evidence tended to show that the fire was set on the roof of the barn, and that the defendant's evidence tended to show that it was set inside the barn. An exception was taken to this portion of the charge. That portion of the evidence which appears in the bill of exceptions sustains it. In any way it becomes plain that at the trial one of the main issues presented to the parties, if not the crucial issue, was whether the fire was set on the outside or in the inside of the barn. It is evident that both parties tried the case on the theory that, if the fire was set on the roof of the barn, the defendant might be liable for it, while, if it was set inside the barn, it was exempt from responsibility. The court charged the jury in accordance with this theory, and it undoubtedly made the remark that, if the fire started inside the barn, it could not have been set by sparks from the locomotive, because it was imbued with the contents of the parties that the defendant was liable for the fire set on the outside, and that it was not responsible for the fire set on the inside of the barn. It is too late for the plaintiffs, at the trial of the case upon this theory, to challenge in the appellate court the ground upon which they sought a recovery, and to insist that the defendant was liable for a fire set within the barn, because in fact the real issue which they presented some testimony crept into the record, upon which they asked no instruction, and to which the court did not seem to have called the attention of the court at the trial. It might have warranted a recovery on account of a fire set within the barn. One may not try a case upon one theory, and then reverse

judgment against him in the appellate court upon another and inconsistent theory, which was not presented, urged, or tried in the court below. *Insurance Co. v. Frederick*, 58 Fed. 144, 149, 7 C. C. A. 122, 127, 128, 19 U. S. App. 24, 34; *Walker v. Collins*, 59 Fed. 70, 72, 8 C. C. A. 1, 3, 4, 19 U. S. App. 307, 311, 312; *Speer v. Board*, 32 C. C. A. 101, 88 Fed. 749, 753; *Burbank v. Bigelow*, 154 U. S. 558, 14 Sup. Ct. 1163, 19 L. Ed. 51; *Railroad Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292; *Horne v. George H. Hammond Co.*, 18 C. C. A. 54, 71 Fed. 314.

Complaint is also made of these portions of the charge:

"There was also evidence introduced tending to show that young man Best, who was in charge of the stable, smoked a cigar, which is claimed to have been thrown away by him carelessly, and caused the fire which burned the stable, and afterwards the cotton. * * * There was also evidence tending to show that a young man by the name of Davidson spent the night with young man Best at the stable, and that he smoked cigarettes there, which might have caused the fire."

There was testimony that Best smoked a cigar, and that Davidson smoked cigarettes. But it is claimed that these portions of the charge were erroneous, because that testimony was insufficient to warrant the conclusion that the fire could have resulted from these acts. The question of law, whether or not this testimony was sufficient to warrant a finding that the fire was set by the cigar or cigarettes, was not presented to the court below by any request to withdraw this testimony from the jury. Consequently it is not here for our consideration. The portions of the charge of the court excepted to are mere statements of fact, which are not reviewable in this court, for the reasons which have already been stated.

There is another reason why these portions of the charge cannot be considered in this case, and that is that the bill of exceptions does not show that all the testimony relative to the smoking of the cigars and cigarettes is presented in the record. The legal presumption is that there was evidence sufficient to warrant the submission of the questions which the court presented to the jury. The only way the plaintiffs could have overcome this presumption was to present all the evidence relating to this matter, with a certificate of the judge below to the effect that the bill of exceptions contained all the testimony upon this subject. This they have not done, and consequently they have failed to overcome the presumption that the charge of the court was right. *U. S. v. Patrick*, 73 Fed. 800, 806, 20 C. C. A. 11, 17, 36 U. S. App. 645, 656; *Railroad Co. v. Price*, 97 Fed. 423, 434, 38 C. C. A. 239, 250.

3. It is assigned as error that the court refused to charge that when the wind blew in a dry time in such a way as to carry sparks emitted from a smokestack away from the railroad, toward an inflammable building, greater diligence was required of the railway company than would be required on ordinary occasions. The statement contained in this request is the truth, and there would have been no error in stating it to the jury. *Railroad Co. v. Richardson*, 91 U. S. 454, 470, 23 L. Ed. 356; *Railway Co. v. Kellogg*, 94 U. S. 469, 472, 24 L. Ed. 256. But it was not reversible error to

refuse to submit it. Instructions to the jury are for the purpose of informing them upon subjects with which they are not familiar. No rational man is ignorant of the fact that greater care is required in handling fire on a windy day, in the presence of flammable material, than in a quiet time, in a moist place, on ordinary occasions. The court charged the jury that they were, in their discretion, to allow interest upon the amount paid by insurance companies for this loss if they found in their favor. It would not have been error for the judge to have submitted to the jury the multiplication table, to enable them to compute this interest. Nor would it have been error to refuse to submit that table, because the legal presumption is that the jury was not ignorant of the fact. The court instructed the jury that it was the duty of the railway company to exercise reasonable care in the operation of its road and engines. The legal presumption was that every juror knew that it was reasonable to use more care in a dry time, in the presence of inflammable materials, than on ordinary occasions. The fact that the engine was a part of the common knowledge and experience of the jury was of no kind, and it is not error to refuse to insert in a charge the legal presumptions which are a part of the common knowledge and experience of all men who have arrived at years of discretion.

Complaint is also made of the refusal to charge that when an engine emits sparks of a large and unusual size, or when sparks are thrown to a great height or far from the track, it is to be inferred that the engine is not provided with a proper spark arrester. There was, however, no error in the refusal to give this instruction, because it was fairly covered by the general charge. There was evidence in the case that sparks escaped from the engine of sufficient size and life to ignite the barn. There was testimony that, if the spark arrester was in proper condition, sparks could have escaped. There was testimony that it was on this condition on the night of the fire. The court stated that the deficiency of all this evidence to the jury, and then told them that it was a question for them to determine whether or not sparks escaped from this engine, which set the barn on fire. This was the natural and inevitable conclusion which every judge who has read the evidence and every juror who heard, this charge, must have reached, in the absence of evidence of the emission of sparks of a large and unusual size from the engine. It warranted the inference that it was not provided with a proper spark arrester. Where a rule of law stated in a requested instruction is fairly submitted to the jury in the general charge, it is no error to refuse to repeat it in the very words of counsel's request, and there was no error in refusing to submit this instruction.

The fifth, sixth, seventh, and eighth specifications of error allege the refusal of the court to give requests of the plaintiffs to shift the burden of proof, and the care required of the defendant in providing and using appliances to prevent fire. This complaint already discloses the fact that the general charge of the court fully treated all these subjects. The plaintiffs' complaint that this charge does not clearly state (1) that, if the jury found that the fire was set by the railway company, the burden of proof

upon the defendant; (2) that the defendant was absolutely bound to provide the best preventive appliances; and (3) that the engine must have been in suitable order and repair at the time of the fire. The first two grounds of objection to this charge have already been considered and overruled. The third is equally untenable. When the entire charge is carefully read, it is plain that no juror could have misunderstood that it was the condition of the engine at the time of the fire, and at no other time, that was involved in this trial. There was therefore no error in the refusal to submit to the jury the requests of counsel upon these subjects, because the proper rules of law upon them were delivered to them in the general charge.

The consideration and discussion of the numerous questions presented in this case have now been concluded. The result is that there was no reversible error in the exclusion of evidence, in the charge of the court, or in its refusal to submit to the jury the various requests for instructions which the plaintiffs presented; but the real issue in the case—the issue of fact, whether or not this destructive fire was the consequence of the negligence of the defendant, or of some other cause—was fairly tried by the jury, under correct and impartial rulings of the court, and was found in favor of the defendant. The judgment which is based upon this finding must accordingly be affirmed, and it is so ordered.

FOSTER et al. v. McALESTER et al.

(Circuit Court of Appeals, Eighth Circuit. February 10, 1902.)

No. 1,583.

1. CHATTEL MORTGAGES—IMPEACHMENT FOR FRAUD.

Plaintiffs, who held a chattel mortgage on two stocks of goods in Arkansas, permitted the mortgagor to remove the goods to the Indian Territory, and transfer them to a firm of which he became a member, under an agreement that the firm should assume the debt, and would give plaintiffs a mortgage on its stock at any time when requested. Some 18 months later such mortgage was given to secure the amount then remaining due on the old debt and a subsequent indebtedness, and plaintiffs took possession of the stock thereunder. *Held*, that an instruction in an action by plaintiffs against attaching creditors of the mortgagors, who had seized the goods, that the failure of plaintiffs to record their Arkansas mortgage in the Indian Territory was a badge of fraud, which, if unexplained, entitled defendants to a verdict, was erroneous, since plaintiffs made no claim under such mortgage, and, as its recording in the Indian Territory would have been a useless act, they were under no duty to so record it.

2. SAME—EVIDENCE.

Under an allegation of the answer in an action by a chattel mortgagee against attaching creditors charging a secret agreement between plaintiff and the mortgagors to conceal the indebtedness to plaintiff for the purpose of enabling the mortgagors to purchase on credit the goods which were afterward included in the mortgage, evidence that the mortgagors made false statements to some of their creditors in regard to their financial condition is admissible; but it cannot affect the rights of plaintiff, in the absence of evidence that he had knowledge of such statements, and was in some manner connected with them for the fraudulent purpose alleged.

3. SAME.

A wholesale mercantile firm, in answer to a general inquiry other house for information "regarding the credit, promptness, financial standing" of a customer, is not bound to disclose its business relations or the state of its account with such customer where such an inquiry was answered in good faith and truth. So far as the firm inquired of then had knowledge, it is not charged with fraud because it did not state the fact that it had an account with the customer to give it a mortgage to secure its account ever demanded, which will affect the validity of such a mortgage over a year afterward.

4. SAME—PRIOR AGREEMENT TO GIVE MORTGAGE.

An agreement between a wholesale mercantile firm and a customer that the latter will give a mortgage on his stock, when demanded to secure his indebtedness to the firm, is entirely legal; and, unless it is in fact, such an agreement cannot be held to constitute a badge of fraud, in law, or a badge of fraud, to affect the validity of a mortgage subsequently requested, and voluntarily given by the debtor.

5. FRAUD—WHEN QUESTION FOR JURY—PRESUMPTIONS.

The law will not deduce fraud from any number of acts, each of which is lawful and innocent in itself; but one who seeks to attack the innocent character to such acts must go further, and show that they in fact done with a fraudulent intent and for a fraudulent purpose, and whether they were so done or not is a question of fact, which must be submitted to the jury when there is evidence justifying such a conclusion.

6. SAME—EVIDENCE TO ESTABLISH.

Slight circumstances, or circumstances of an equivocal tenor, or circumstances of mere suspicion, leading to no certain result, are not sufficient to establish fraud; but they must not be, when taken together, and aggregated,—when interlinked and put in proper relation to each other,—consistent with an honest intent. If they are, the fraud is wanting.

7. CHATTEL MORTGAGES—VALIDITY—PREFERENCE OF CREDITORS.

A chattel mortgage, valid on its face, taken by a bona fide creditor for the purpose of securing his debt, and not for the purpose of shielding his debtor and assisting him to hinder his other creditors, is valid, and impervious to attack from any other creditor, in the absence of a bankruptcy law which renders it invalid.

8. SAME—ACTION BETWEEN MORTGAGEE AND CREDITORS—INSTRUCTIONS.

Instructions which convey to a jury the impression that a debtor was in haste in a transaction by which a debtor secures one of his creditors, or the fact that the giving of such security operates to hinder other creditors, are badges of fraud, which place the burden on the creditor to sustain the validity of his security, are mistaken, and erroneous, without a full explanation of the legal right of a creditor to obtain security for his debt to the exclusion of other creditors, in good faith; and such instructions are not warranted in any case, unless there is other evidence tending to impeach the good faith of the transaction, since such facts are entirely consistent with the rights of the creditor of his legal rights.

In Error to the United States Court of Appeals in the Territory.

This action was brought by J. Foster & Co., the plaintiffs in error, against James J. McAlester and others, the defendants in error, to recover the value of a stock of general merchandise. The plaintiffs claimed their right to the goods under a chattel mortgage thereon executed by G. Terrell, Elmer Terrell, and J. C. Terrell, composing the firm of Terrell & Co., retail merchants doing business at Wagoner, in the Indian

to secure the payment of a note executed by the mortgagors to the mortgagees for the sum of \$3,971.56, and for another purpose not necessary to be mentioned. The mortgage was duly executed and acknowledged on the 28th day of January, 1895, and duly recorded on the next day. In pursuance of a stipulation contained in the mortgage, the mortgagees, through their agent, took immediate possession of the mortgaged property, and, in conjunction with the mortgagors, proceeded to sell the goods in the usual course of business, applying the proceeds of the sale daily to the mortgage debt. In the month of March following the execution of the mortgage, Tootle, Wheeler & Motter and Tennent-Stribling Shoe Company severally brought their actions against E. Terrell & Co., and sued out writs of attachment, which were placed in the hands of the defendant McAlester, as United States marshal for the Indian Territory, who, with the other defendants, his deputies, levied the writs on the stock of goods covered by the plaintiffs' mortgage, took them out of the plaintiffs' possession, and sold them. In their answer the defendants alleged they had good right to seize the goods on the writs of attachment, because they say, in substance, that the plaintiffs' mortgage was fraudulent and void for the following reasons: That John G. Terrell was during the year 1893 engaged in the mercantile business in the town of Waldron, in Scott county, and in the town of Mansfield, in Sebastian county, Ark., and that on the 11th day of February, 1893, he executed a chattel mortgage to the plaintiffs on his stocks of goods at each of these places to secure an indebtedness of \$4,300; that this mortgage was duly recorded in the counties in Arkansas, where the goods then were; that afterwards, about July 5, 1893, the plaintiffs permitted Terrell to remove both stocks of goods from Arkansas to Wagoner, in the Indian Territory, while the Arkansas mortgage thereon was in full force and effect; that it was understood and agreed that upon the removal of the goods to Wagoner the firm of E. Terrell & Co. was to be formed, consisting of John G. Terrell, Elmer Terrell, and J. C. Terrell, which firm was to be the successor of John G. Terrell, and assume the payment of his debts, including his indebtedness to the plaintiffs, and that it was also agreed after the goods were removed from Arkansas to the Indian Territory the firm of E. Terrell & Co. was to give the plaintiffs a chattel mortgage on the goods whenever they deemed it necessary for their protection, and the same should be demanded; that it was agreed that the indebtedness of Terrell & Co. to the plaintiffs should be kept concealed from the attaching creditors and other creditors of Terrell & Co. for the purpose of enabling Terrell & Co. to purchase goods on credit, in order that the plaintiffs might secure the benefit of such purchase, by demanding the mortgage; that, in furtherance of this alleged fraudulent scheme, E. Terrell & Co. made in writing, and mailed to the attaching creditors, false and fraudulent statements of their financial condition; and that the plaintiffs made to Tootle, Wheeler & Motter, one of the attaching creditors, a false and fraudulent statement of the financial condition, promptness, and ability to meet their obligations, of E. Terrell & Co.

Charles E. Warner, for plaintiffs in error.

Harrison O. Shepard, Richard B. Shepard, Charles B. Stuart, and J. H. Gordon, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Indisputably, on the record before us, the chattel mortgage executed by E. Terrell & Co. to the plaintiffs on the 28th day of January, 1895, was on its face a valid instrument; and the debt it was given to secure, a bona fide debt. There is, indeed, no pretense that Terrell & Co. did not honestly owe the plaintiffs the debt the mortgage was given to secure. This being so, we proceed to a

consideration of the grounds upon which the defendant sought to avoid it. The only testimony in the record relating to the removal of the goods from Arkansas to the Indian Territory—and which is set forth in the bill of exceptions that it contains all the testimony—

"That shortly prior to July 5, 1893, the said Terrell went to Josiah Foster, and told him that they had just had three successive failures in his section, and it was useless for him to continue in Waldron, and hope to pay his debts, and that he wanted to find a new location in the Indian Territory, and locate there, moving his merchandise over there, but that he could not do so unless he had the consent; that he selected Wagoner as the place, and wanted to move his goods in with him, move the merchandise over there, and begin business at that place; that, if Foster would agree for him to move the merchandise, new concern would assume all indebtedness to plaintiffs, and would give a new mortgage upon the stock of merchandise at Wagoner to secure the indebtedness to plaintiffs whenever Foster called upon them for payment; that upon these statements and agreements on the part of Terrell, Foster consented for him to carry his stock of merchandise from Waldron, Arkansas, to Wagoner, in the Indian Territory. That Terrell transferred the said stock of merchandise to Wagoner, and opened up the store in the firm name of E. Terrell & Co. about July 5, 1893. That after removing to Wagoner said Terrell had not paid any part of the debt to plaintiffs, and that they moved about \$10,000 worth of merchandise to Wagoner. That the plaintiffs' debt was embraced in one note for \$1,400, two notes each for \$1,400; and in the fall of 1893 and part of 1894 the sum of \$1,400 notes was paid off, and about \$600 or \$700 was paid on the balance of the notes out of the proceeds of sales of merchandise brought from Arkansas, and subsequent purchases. That after the said business began at Wagoner the plaintiffs continued to sell the said E. Terrell's goods in the regular course of trade, and received payment from time to time, until January 28, 1895, at which time due the plaintiffs from said firm of E. Terrell & Co., for balance of merchandise sold them at Wagoner, the sum of \$1,175.41, and upon payment of said notes the sum of \$2,796.15, making a total indebtedness \$3,971.56."

Upon this evidence the court charged the jury as follows:

"The omission of J. Foster & Co. to file in the Indian Territory a mortgage executed in Arkansas, when they consented that Terrell move his merchandise covered by such mortgage from Arkansas to the Indian Territory, is a badge of fraud, which, if unexplained, would authorize the jury to find that the mortgage executed on January 28, 1895, by E. Terrell & Co. was fraudulent, and to render your verdict for the defendant."

This charge is erroneous, for several reasons. The court charged the plaintiffs to file in the Indian Territory the mortgage on the goods while they were in Arkansas, and duly record it in that state, was not of itself a fraud, or a badge of fraud, and would not authorize the jury to render a verdict for the defendant. The plaintiffs had a perfect right to permit J. G. Terrell to move his goods from Arkansas into the Indian Territory. The mortgage was on stocks of goods owned by J. G. Terrell, and described as being in storehouses in Waldron and Mansfield, Arkansas; and its record in the Indian Territory would not operate as a mortgage on a stock of goods belonging to J. G. Terrell & Co., or as a security for the plaintiffs' debt, and would not have been a useless and vain act. It is said that the plaintiffs were not putting the mortgage on record in the Indian Territory.

concealed the same, and enabled Terrell & Co. to contract debts upon the presumption that the goods were unincumbered. But there was no concealment of an incumbrance on the goods in the Indian Territory, because there was no incumbrance on the goods in that territory prior to the execution of the mortgage under which the plaintiffs claim, which was placed on record the day following its execution. As the plaintiffs could gain nothing by recording the Arkansas mortgage in the Indian Territory, and as they could not and do not claim the goods under that mortgage, we do not think there was any legal or moral obligation resting on them to have that mortgage recorded in the Indian Territory merely for the information of Terrell & Co.'s other creditors. That mortgage remained of record in Arkansas unsatisfied, and thus the defendants and all other persons had legal constructive notice of its existence all the time at the only place its record could have any legal effect. By the use of the words "if unexplained" in this instruction, the jury were told, in effect, that the burden of proof rested on the plaintiffs to show that an act which in itself was perfectly lawful and innocent was not done for a fraudulent purpose, or in furtherance of a fraudulent scheme. But an act which in itself is lawful and innocent is never presumed to be fraudulent, and the burden rests on the party assailing it as fraudulent to prove it. Moreover, there is no evidence in the record tending in the slightest degree to show that the plaintiffs omitted to record the Arkansas mortgage in the Indian Territory for any fraudulent purpose, and any instruction based on the assumption that there was such evidence would have been erroneous.

The defendants offered, and the court, over the objection of the plaintiffs, admitted in evidence, statements made by Terrell & Co. to some of their creditors touching their financial condition. There was no error in admitting these statements. They were competent evidence against Terrell & Co. for whatever they tended to prove, but they were not evidence against the plaintiffs, and could not affect their rights, unless it was shown they had knowledge of them, and were in some manner connected with them for the fraudulent purpose alleged. *Brittain v. Crowther*, 4 C. C. A. 341, 54 Fed. 295. No such showing was made. There is not a syllable of evidence or a single circumstance in the case tending in the remotest degree to show the plaintiffs knew that any such statements had ever been made, or that they had any connection whatever with them. The plaintiffs requested the court to instruct the jury that if the plaintiffs were in no manner parties to or connected with these statements, and had no knowledge of them, their rights were not affected thereby. The court gave the instruction, with this qualification:

"Unless you should further find from the evidence that there was a secret or tacit agreement between them to conceal the true condition of E. Terrell & Co., and thus enable them to procure a greater amount of credit than they could otherwise procure."

As there was a total lack of evidence tending to show, or from which the jury could rightfully infer, any such "secret or tacit" agreement, it was error to qualify the plaintiffs' request as was done.

The defendants introduced in evidence the following correspondence:

"St. Joseph, Mo., Feb.

"J. Foster & Co., Fort Smith, Ark.—Dear Sir: Will you kindly confide in me, and give me the same confidence, such information as you may have regarding the credit, business, and financial standing of E. Terrell & Co., Wagoner, Indian Territory. Please answer upon this sheet, and oblige,

"Yours truly,

Tootle, Wheeler &

"Successors to Tootle, Hos-

"Gentlemen: We are selling Messrs. E. Terrell & Co., and find them very creditably prompt. Think they are good for what they want.

"Truly,

J. Foster

The court gave the following instruction relating to the correspondence:

"The failure of J. Foster & Co. to disclose to Tootle, Wheeler & Motter when they made inquiry as to the financial standing of E. Terrell & Co. that they held a mortgage, recorded in Arkansas, upon the property in the Indian Territory, with an agreement from E. Terrell & Co. to give a mortgage on the Indian Territory upon this property whenever demanded by Tootle, Wheeler & Motter, badge of fraud, and, unless it has been explained to your satisfaction, the evidence in this case, would justify you in finding for the defendants.

And after 24 hours' deliberation the jury were brought back and instructed as follows:

"If you find from the evidence that J. Foster had of record in Arkansas a mortgage upon the stock of goods and merchandise of J. G. Terrell & Co. you further find that the said J. Foster & Co. agreed that the said J. G. Terrell might carry said stock of goods and merchandise to the Indian Territory, and expose them for sale under the firm name of E. Terrell & Co. that the said J. G. Terrell and E. Terrell & Co. agreed with the said J. Foster & Co. that, whenever demanded by said J. Foster & Co., the said E. Terrell & Co. would give to them a mortgage covering the stock of goods and merchandise in the Indian Territory; and if you further find that, when J. Foster & Co. made reply to the inquiry of Tootle, Wheeler & Motter as to the financial standing of E. Terrell & Co., the said J. Foster & Co. did not disclose to them that they held the mortgage recorded in Arkansas, and an agreement from E. Terrell & Co. whenever demanded; and if you find that the said J. Foster & Co. made disclosure of these facts to Tootle, Wheeler & Motter, the firm of Tootle, Wheeler & Motter would not have sold the stock of goods and merchandise which they did sell to E. Terrell & Co.,—then you should find for the defendants."

As these instructions cover in part the same ground, they should be considered together. It will conduce to a clearer understanding of so much of these instructions as relate to the plaintiff's case, if we set out the substance of Tootle, Wheeler & Motter's letter of inquiry to set out the substance of the testimony relating to that subject, as it is brief:

"Defendants proved by Tootle, Wheeler & Motter that, had they known, they would have advised that E. Terrell had a chattel mortgage on their stock of goods and merchandise, and could not have gotten any goods from them on credit, and that Tootle, Wheeler & Motter relied greatly on the information furnished by J. Foster & Co. in extending the line of credit to E. Terrell & Co. (as they did); and the plaintiffs proved "that about the 1st of February, 1896, (the date of the letters), E. Terrell & Co. were solvent and sufficient to pay their debts, and that after that time they lost about \$5,000 in stock speculation, and that a few days before they made the mortgage to plaintiffs, they paid Tootle, Wheeler & Motter on account of \$300."

The instructions must be considered in the light of this testimony. The matters embraced in these charges will be considered in their order.

The plaintiffs were under no obligation, in answering the letter of Tootle, Wheeler & Motter, to disclose the fact of the existence of the Arkansas mortgage. That mortgage was duly recorded in the proper recorder's office of that state, and Tootle, Wheeler & Motter and all other persons were bound to take notice of its existence; and, in contemplation of law, they had such notice. Moreover, it will be observed that this letter was written more than six months after the goods had been removed into the Indian Territory, and the Arkansas mortgage abandoned as a security. Nor were the plaintiffs bound to disclose the fact that Terrell & Co. had promised to give them a mortgage to secure their debt whenever demanded. Merchants and business men are not required, in answering general letters of inquiry "regarding the credit, promptness, and financial standing" of a named person, to disclose their business relations or the state of their accounts with such person. No such information was called for by the letter of Tootle, Wheeler & Motter, and they had no right or reason to expect it. The supreme court of Michigan, in *First Nat. Bank v. Marshall & Isley Bank*, 65 N. W. 604, said:

"It is insisted that it was the duty of the plaintiffs, in replying to the letter of the defendant inquiring as to the character and financial standing of Mr. Hale, to state the indebtedness of Mr. Hale to it. No statement of liabilities was called for, but only his character and financial standing as a business man. Banks, as well as individuals, frequently write for information of this character. When an inquiry comes to such bank asking simply for the character and financial standing of the merchant, the bank is not bound, at its peril, to report any loans which said merchant may have at its bank."

It will be observed that, by the terms of the instructions we are considering, the plaintiffs are held responsible, not for what they did say in their letter, but for not saying something the court erroneously held they should have said. If the statements contained in the plaintiffs' answer to Tootle, Wheeler & Motter's letter were made in good faith, and true so far as they then knew and believed, they imposed no liability on the plaintiffs, and cannot affect the validity of the mortgage taken months afterwards. Confessedly, the testimony, all of which we have set out, would not support a finding that the plaintiffs purposely and intentionally misrepresented the business standing and credit of Terrell & Co., with the view and intention of inducing Tootle, Wheeler & Motter to sell them goods, in the hope and expectation that they might profit thereby. But however this may be, the court did not leave that question to the jury, as it should have done if there had been any testimony justifying its submission.

The understanding that Terrell & Co., when required to do so, would give the plaintiffs a mortgage on the goods in the Indian Territory, did not, of itself, render the mortgage fraudulent and void in law. *Smith v. Craft*, 123 U. S. 436.¹ As bona fide creditors of Terrell & Co., they had a right at all times, independent of any previous understanding to that effect, to demand of Terrell & Co. such security for their debt, and Terrell & Co. had an undoubted right to give it.

¹ 8 Sup. Ct. 196, 31 L. Ed. 267.

These being the unquestioned legal rights of the parties, the principle can it be said to be a legal fraud, or a badge of the parties to stipulate in advance for doing that which they be perfectly free to do, and which it would be perfectly them to do, independent of such stipulation? Why should gage which the creditors had a legal right to demand, and a good right to give, be held void because the parties had agreed that such security should be given when demanded is no such rule of law. It is everyday practice for debtors to give their creditors security when demanded, and where a promise affords slight protection to the creditor, and is specifically enforced, when it is voluntarily complied with, security is not thereby invalidated. *Bank v. Whitmore*, 10 N. E. 297, 10 N. E. 524; *Day v. Goodbar*, 69 Miss. 689, 12 S. C. 297, 10 N. E. 524; *Teitig v. Boesman*, 12 Mont. 450, 31 Pac. 371, 384; *Blanks v. C. C. A.* 588, 53 Fed. 436; *Anderson v. Lachs*, 59 Miss. 1. An agreement, like all agreements that men are capable of making, may be made under circumstances and for purposes which will render it fraudulent in fact. But the court did not put before the jury the question whether this agreement was entered into for a fraudulent purpose, and was fraudulent in fact. For this was not done because the court took the view that the understanding or agreement was fraudulent in law; and, besides, it would have been error to submit the question of fact to the jury on the reason that there was a total absence of testimony tending in the slightest degree to show that this understanding was had with a view of deceiving or defrauding the other creditors of Terrell & Co., or for any purpose other than the protection of the debtors by giving them the same security for their debt which they had while the property remained in Arkansas.

We have seen that the law did not impose on the plaintiffs in answering Tootle, Wheeler & Motter's letter, the obligation to disclose the facts enumerated in the court's final charge. Therefore, so, it was clearly erroneous to tell the jury that if they found that Wheeler & Motter would not have sold the goods they owned to Terrell & Co., had they known all these facts, they were liable for the defendant. What Tootle, Wheeler & Motter would have done, had they known all about the financial condition and prospects of Terrell & Co., cannot be admitted to prejudice the plaintiffs, if they had done no wrong and committed no fraud. It may be observed that in this, as in the other instructions, no reference was made of the motive or intent with which these acts were done. The acts are treated as fraudulent in law, irrespective of the facts with which they were done. Many innocent and lawful acts are linked together, apparently on the assumption that their aggregation would impart to them an odious quality which separately they did not possess. But the law will not decide against a man from any number of lawful and innocent acts. One who attaches a fraudulent character to such acts must go further and show they were in fact done with a fraudulent intent and for a fraudulent purpose; and whether they are so done or not is a question for the jury.

of fact, which must be submitted to the jury when there is evidence justifying its submission. The transaction between the plaintiffs and Terrell & Co. which is assailed was perfectly consistent with honesty and good intentions, and, in the absence of proof to the contrary, the law presumes it was of that character. Mere suspicion, unsupported by evidence, cannot be allowed to deprive a creditor of his legal rights; and fraud cannot be inferred either by the court or jury from acts legal in themselves, and consistent with an honest purpose. The settled rule on this subject is that slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results, are not sufficient to establish fraud. They must not be, when taken together and aggregated,—when interlinked and put in proper relation to each other,—consistent with an honest intent. If they are, the proof of fraud is wanting. *Bank v. Frank*, 63 Ark. 16, 37 S. W. 400, 58 Am. St. Rep. 65; *Shultz v. Hoagland*, 85 N. Y. 464.

Several requests preferred by the defendants and given by the court are prefaced with the statement that "a secret trust between parties is a badge of fraud," and "secrecy is a badge of fraud." These opening statements are followed by a recital of what the parties did, and conclude with the declaration that if these actions have not "been explained," or have not been explained to the satisfaction of the jury, they would find for the defendant. The frame of these charges is extremely objectionable, because of their misleading tendency under the proof in the case. There was no evidence of "a secret trust," or that the plaintiffs concealed any fact they were under legal obligations to make public. These instructions are infected with the same vice as those we have considered. They declare innocent acts to be badges of fraud, which, if unexplained by the plaintiffs, would authorize the jury to find a verdict for the defendants. Secrecy or haste in a business transaction, or the fact that it took place out of business hours, are spoken of in the books as badges of fraud; and these so-called badges of fraud are sometimes brought to the attention of the jury in cases where they have, under the proof, no application, or in a manner that conveys to the jury an entirely erroneous notion of the law applicable to the rights of bona fide creditors; and the same may be said of the statement that a transaction between a debtor and one of his creditors which has the effect to hinder and delay the other creditors of the debtor is a fraudulent and void act as to such other creditors. The statement of these propositions to a jury without the full explanation of the legal rights of a bona fide creditor is necessarily misleading and erroneous. A bona fide creditor has a legal right to demand of his debtor that he pay or secure his debt, and, in the absence of a bankrupt law, a debtor may lawfully pay or secure one of his creditors to the exclusion of all others. The necessary effect of one creditor taking a mortgage on all his debtor's property to secure the payment of his debt is to hinder and delay the other creditors of the debtor in the collection of their debts, because it leaves them nothing out of which to make their debts but the debtor's equity of redemption in the mortgaged property, which is valueless,

except in so far as the property exceeds in value the mortgage. But this is not hindering or delaying the debtor's other creditors in a legal sense; and it is not fraudulent as to them, because the creditor had the legal right to demand security for his debt, and the debtor a legal right to give it, regardless of how other creditors might be affected thereby. It is just what every other creditor would have done if he had been equally diligent, and had the good fortune to be in like favor with the debtor. The question in such cases are: Is the mortgage a valid instrument on its face, and was it executed in good faith to secure the payment of a bona fide debt, with no reservation or secret trust for the benefit of the debtor? When these questions can be answered in the affirmative, the mortgage is impervious to attack from any quarter. The essential facts to constitute a valid mortgage of property to secure the payment of a bona fide debt, and when they are established it is wholly immaterial whether the transaction was consummated in haste and secretly, or openly and leisurely, in the light or in the nighttime. Lawful contracts made in good faith for a lawful purpose may be made at any hour of the day or night, publicly or secretly, and leisurely or hastily, as best suits the convenience and interest of the parties to them. When a creditor is seeking payment or security for his debt from an insolvent debtor, it is commonly to his interest to act with celerity and secrecy. He made open proclamation of his intended action, it would probably result in some other creditor obtaining the preference. *Commission Co. v. Rummel*, 18 C. C. A. 15, 71 Fed. 151; *Williams v. Rummel*, 16 C. C. A. 628, 70 Fed. 40; *Repauno Chemical Co. v. Victor Chemical Ware Co.*, 42 C. C. A. 106, 101 Fed. 948. In *Huiskamp v. Rummel*, 121 U. S. 310, 319, 7 Sup. Ct. 899, 902, 30 L. Ed. 977, the supreme court of the United States say:

"In order to invalidate the mortgage of Rummel to Huiskamp Bros. must have been made with the intent on the part of Rummel to hinder and delay his other creditors, and Huiskamp Bros. must have accepted the mortgage with the intent of assisting Rummel to hinder and delay his other creditors. The debtor being in failing circumstances and having the right to prefer his mortgage, if the preferred creditor has a bona fide debt, and takes a mortgage with the intent of securing such debt, and not with the purpose of hindering the debtor to hinder and delay other creditors, the mortgage is valid, although the mortgagee knows that the debtor is insolvent, and that the debtor's intention is to hinder and delay other creditors."

In a word, the law is that when a mortgage is taken by a bona fide creditor for the purpose of securing his debt, and not with the purpose or with the intent of shielding his debtor and enabling him to hinder and delay his other creditors, the mortgage is valid, although its necessary effect is to hinder and delay other creditors and to deprive them of all remedy against their debtor's assets.

The judgment of the United States court of appeals for the Ninth Territory and the judgment of the United States court for the Northern district of the Indian Territory are reversed, and the case is remanded to the latter court, with instructions to grant a

DELAWARE, L. & W. R. CO. v. DEVORE.

(Circuit Court of Appeals, Second Circuit. March 10, 1902.)

No. 70.

1. POSITIVE AND NEGATIVE TESTIMONY—WEIGHT—INSTRUCTIONS.

A requested instruction that positive testimony of witnesses that a whistle was blown and a bell rung is entitled to more weight than testimony of other witnesses that they did not hear the one or the other is too broad, without reference to the credibility of the witnesses in other respects.

2. NEGLIGENCE OF PARENTS—IMPUTING IT TO CHILD—DRIVERS.

Negligence of the father, as well as of the mother, in not discovering a train, is imputable to a child, held in the arms of his mother, who was sitting by the side of the father, who was driving, as the father is not acting as a driver merely.¹

3. PERSONAL INJURIES TO CHILD—DAMAGES.

A child made a mental and physical wreck may recover of the one by whose negligence it was caused, not only for physical suffering, but for loss of earning capacity.

In Error to the Circuit Court of the United States for the Southern District of New York.

Writ of error to review a judgment rendered by the circuit court for the Southern district of New York upon a verdict against the Delaware, Lackawanna & Western Railroad Company for the sum of \$10,000 in favor of the plaintiff in an action to recover damages for personal injuries sustained by him at a grade crossing known as "Hope Crossing," on the line of the defendant's railroad in New Jersey, on the evening of November 22, 1892.

Hamilton O'Dell, for plaintiff in error.

Walter K. Barton, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. At the time of the injury the plaintiff was about one year and four months old. His parents had been living at Wallpack, N. J. On the morning of November 22, 1892, they drove from their home with this child to Belvidere, N. J., a distance of about 26 miles from Wallpack, and about 6 o'clock in the evening started to return home. On their way to Belvidere they had crossed the railroad track at Hope crossing, but Mrs. Devore (now Mrs. Heater) had never driven on that road before, and did not know that her husband had, and did not know the name of the railroad which they crossed. They were in a smoothly running top buggy, and had an old and gentle horse. The father drove the horse, and was seated on the right side of the buggy. The mother sat on the left side with the child in her arms. The evening was very dark and cloudy. "It was storming some,—a sort of hail, sleeting." The wind was on the right side of the buggy, and was blowing hard. The top part of the buggy was put down so as to prevent the wind from striking the baby. Hope crossing is about 2½ miles from Belvidere, and as they ap-

¹ Negligence imputed to infants, see note to *Railway Co. v. Kowalski*, 34 G. C. A. 4.

proached it Mrs. Devore asked her husband if they were not crossing which they had crossed in the morning. He replied "ahead," and pulled the horse down to a walk. The horse continued to walk until the crossing was reached. Mrs. Devore, from the horse began to walk, looked both ways and listened for the train, and testified that her husband did the same, but that she saw nor heard anything; heard neither bell nor whistle, and nothing, until, "just as we got on the tracks, I saw the glittering and that is all I saw." Mr. Devore was injured, and his child and the child was terribly injured, so that he is now, and permanently, a mental and physical wreck. He was previously a strong, healthy child. The train had left Bridgeville Depot about a third of a mile to the right from Hope crossing, somewhere between 6 o'clock, and at the time of the disaster was going at the rate of 15 miles an hour. It does not appear that Mrs. Devore knew the existence of this depot or of the time when trains might be expected to pass the crossing.

The issues were as to the negligence of the defendant in failing to give the statutory requirements as to bell or whistle; as to the contributory negligence of the parents of the child in omitting to take proper precautions when approaching a railroad crossing; and in connection with the question of contributory negligence, the question was examined whether upon a very dark and stormy evening an approaching train could be seen or heard by the occupants of a buggy which approached the crossing. A further issue was made in the case and the testimony as to the especially dangerous character of the crossing, which should have compelled the defendant to take extra precautions, other than those provided by statute, to prevent accidents of the character encountered by the Devores.

Upon the question of obedience to the statute of New Jersey which requires the ringing of a bell or the blowing of a whistle before a train until the engine of a railroad train has crossed a grade crossing, the witnesses differed; the majority in number being in favor of the defendant's compliance with the statute on the evening of the disaster. The court did not charge, as requested by the defendant, a "presumption" that "upon the question whether the bell was rung and the whistle blown, the positive testimony of witnesses that the one was blown and the other was rung is entitled to more weight than testimony of other witnesses that they did not hear the one or the other,"—and to this request an exception was taken. The request asserts the proposition that the positive testimony of witnesses is entitled to more weight than the negative testimony of other witnesses, and makes no distinction in regard to the credibility in other respects of the two classes of witnesses. The positive class may impress the triers with confidence in their trustworthiness, their disinterestedness, their honesty, but the request establishes as a rule of law that positive testimony is entitled to superior credit whether other things are equal, and is, we think, a broader rule than a court should be called upon to give to a jury, without reference to the credibility of the witnesses in other respects. In reply to the following question put by the

of the jury: "Supposing the jury believe that the bell was rung and the whistle sounded, and suppose, at the same time, that Mrs. Heater used her best diligence in trying to see whether the train was coming or not, does that relieve the railroad from responsibility?" the court said: "If they rang the bell and sounded the whistle they are relieved from responsibility, unless you reach the conclusion that the crossing there was such a peculiarly hazardous one that it was necessary to adopt further precautions, for the reason that the sounding of bells and whistles could not be heard by travelers on the highway."

To that part of the instruction commencing "unless you reach" the defendant excepted for the reason that there was no proof before the jury showing, or tending to show, that the crossing was "a peculiarly hazardous one," or that "it was necessary to adopt further precautions, for the reason that the sounding of bells and whistles could not be heard by travelers on the highway." Much of the argument of the plaintiff in error is directed to an alleged entire or substantial absence of proof that the crossing was a peculiarly hazardous one. If peculiarly hazardous, the fact bore upon the question of the defendant's negligence. *Railroad Co. v. Ives*, 144 U. S. 421, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railroad Co. v. Moore*, 45 C. C. A. 21, 105 Fed. 725. The traveled road from Belvidere as it approaches Hope crossing is a gradual ascent until the top of a hill or "rise" in the ground is reached. As the road descends there is a homestead on the right occupied by Mr. Emery, consisting of a house, barn, and other outbuildings. A few trees are in the yard. The view towards Bridgeville Depot is to some extent interfered with by these buildings. The corner of the Emery fence nearest the crossing is about 70 feet from the first rail of the north-bound railroad track. The corner of the Emery house is 127 feet distant from that rail. At 735 feet from the crossing towards Bridgeville the railroad track enters a cut, which at 855 feet from the crossing is about 5 feet above the top of the rail, and at its extreme height is about 12 or 12½ feet above the top of the rail. A defendant's witness testified that in the daytime, from a point in the highway 47 feet from the crossing towards Belvidere, the whistling post, 1,460 feet away towards Bridgeville, could be seen through the cut. A civil engineer in the defendant's employment testified that "at a point 56½ feet from the center of the north-bound track I saw an engine 550 feet. Just an engine happened to come along there, and I made those measurements. I could see the whole engine. At a point 40 feet from the track I could see the Bridgeville depot very plainly, from the intervening road. At that same point, 56½ feet, I could see part of the depot."

This testimony was not contradicted by measurements made by the plaintiff's witnesses, who relied on the testimony of one McConnell and of Mrs. Heater. McConnell's testimony was of the most importance. He testified in chief as follows:

"I have often driven and walked over this wagon road at the crossing. I have driven from Belvidere to the crossing several times. It is a crooked and winding road all the way through, up and down hill. It is crooked and winding and up and down near the crossing." "Q. What view have you got

of the railroad to the right, standing two or three hundred yards back from Hope crossing towards Belvidere? A. You can see the track at this end of the cut. Q. How much can you see? A. Just a little. You cannot see the crossing when you stand back a quarter of a mile or three hundred yards. Q. When you stand back 105 or 170 feet from the crossing, passing the Emery house towards Belvidere, at the top of the rise that exists there, can you see the crossing there? A. No. Q. How near must you be to the crossing to see? Where would you stand with reference to this house? There is a house in the angle formed by the railway and the highway, is there not? A. Yes, sir. Mr. Emery lives there in that house. He lived there at the time of the accident. Q. Where would you stand with reference to that house to see this crossing? A. About the end of his fence,—the dooryard fence. To the Court: The end towards the railroad. By Mr. Tyndall: Q. What is the reason the crossing cannot be seen before getting so close as that? A. There is a sort of a wind in the road. There are some grades too. When you stand in front of the Emery house,—directly in front of it, in the road,—or if you are seated in a buggy directly in front of the Emery house, nothing can be seen of this railroad track to the right. Mr. Emery's house and trees prevent. There are buildings in his plot of ground there besides the house. He has a barn and chicken coop down below the house. When you get to the corner of the fence towards the railroad you can see the whole of the railroad there. By the Court: Q. Where is this place? Mr. Tyndall: At the corner of the fence nearest the railroad. The Witness: I mean by that 'see the whole of it' straight ahead. You can see the crossing,—nothing else. Q. Can't you see up and down the track a little ways? A. It might be a trifle; I couldn't say exactly as to that. To the Court: You could see a trifle towards the right. By Plaintiff's Counsel: Q. Can you see the cut from that point? Suppose you just got clear of the fence, and you are seated in a buggy or walking, how far down the track towards the Bridgeville Station can you see? A. I couldn't say exactly as to that. I never took particular notice how far I could see down. I could see down a ways,—a small distance. Q. Do you think you could see to the cut? A. I would not say as to that. When you are on the crest of the hill, on the Belvidere side of the house, you can see nothing of this railroad. Q. You can see nothing of the crossing, but can you see anything of the tracks in the distance? A. You can see just a little of the track next to the cut. What I have said in regard to seeing this railroad is said with reference to the daytime. You can't see anything if it is dark. If you stopped on the top of the hill back of the Emery house, you could not see anything at night, on a dark, cloudy night. You would have to be right on the track to see anything of them on a dark, cloudy night. I have been a railroad man, and I am familiar with the lights used on the locomotive as a headlight. These headlights throw their light straight ahead. It does not give much, if any, light to the side. I do not think that on a dark night approaching this crossing from Belvidere, and looking towards Bridgeville Station in a position of safety, say about the corner of the fence, that any headlight could be seen on a locomotive coming through the cut. I do not think I could see anything in the way of a light."

This testimony could not be ignored by the trial judge, and he could not properly have prevented an inquiry by the jury as to the credibility of Mrs. Devore's testimony that she did not see or hear an approaching train, though in the active exercise of attempts to discover whether she was in danger. Neither could he have properly prevented an inquiry as to the practicability of the sight of a moving train in a dark and rainy night by a stranger to the locality, who did not know of the existence of the cut, or the Bridgeville Depot, or of the Emery house, or of her distance from the crossing. A person familiar with a locality and its surroundings may be able to take a position in the highway in the daytime from which objects can be seen which

would not be discovered in the dark by a stranger who knew nothing of the peculiarities of the road or of any obstructions to sight.

The defendant requested the court to charge as follows:

"Even if the defendant's servants failed to blow the whistle or ring the bell as the train approached the crossing, the plaintiff's mother was not thereby relieved from the necessity of exercising proper care for her own safety and the safety of the plaintiff. She was bound to look and listen before attempting to cross the track. A railroad track is a place of danger. It can never be assumed that cars are not approaching on the track or that no danger is to be apprehended therefrom."

The court charged as follows:

"Should, however, you reach the conclusion that there was negligence on the part of the railroad in running its train silently and without proper warning down on the crossing, you then come to the second aspect of the case, was there any negligence on the part of the plaintiff contributing to the happening of the accident? * * * For an infant of tender age, in the custody and care of his mother at the time, there is to be imputed to him, when he asks damages from somebody else at whose hands he has been injured, whatever negligence may have been shown by his mother, who at that time had him in custody. So the next question for you to determine is whether Mrs. Heater was or was not negligent, and whether her negligence contributed in any way to the happening of the accident. The negligence, of course, with which she is charged, is negligence in failing to watch for or to discover the presence of this train in time to warn her husband (with whom conjointly, she says, she was looking out) to stop the horse, which she says was on a walk, and might easily have been stopped within five or ten or fifteen feet of the railroad track, if either of them had seen the train. * * * It will be for you, taking all the testimony and all the assistance you have from photographs and maps, to determine, in the first place, whether it was practicable for a person approaching that road on a walk, and keeping a careful lookout, to see that train coming in the nighttime, when a sufficient distance away from the track to avoid it by stopping. And, if you reach that conclusion, then it will be for you to determine whether, in view of that fact, despite her testimony here, Mrs. Heater, the guardian of the child, at the time was exercising reasonable care and prudence in approaching that crossing; because, of course, you all know that it is a rule of law that a railroad crossing—a grade crossing—is necessarily a place of danger, and persons approaching it are required to exercise a greater degree of care and caution than if they are walking or driving along a roadway, where there are no railroad trains to be met with."

The position of the defendant was properly and clearly presented to the jury.

It will be recollected that, on the return trip to Hope crossing, Devore, the father of the plaintiff, was driving, and the mother was holding the child in her lap. The court charged that, while any negligence on the part of the mother which contributed to the accident was imputable to the child, for any negligence on the part of the father, who for the moment was not so much his father as he was the mere driver of the vehicle, the child was not responsible, and he was not chargeable with the negligence of the driver. To this charge the defendant excepted. The rule of law that the negligence of the parent of a minor who is suing a third person to recover damages for an injury caused by negligence at the time of and which contributed to the injury, and while the minor was under the protection and control of the parent, is imputable to the minor, is now well settled. Lapsley

v. Railroad Co. (C. C.) 50 Fed. 181; *Id.*, 2 C. C. A. 174, 16 L. R. A. 800; *Morris v. Railroad Co.* (C. C.) *Holly v. Gaslight Co.*, 8 Gray, 132, 69 Am. Dec. 233; *Little* 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652.

The history of the general rule with respect to the negligence of a driver upon the right of a passenger to recover injury occasioned by the negligence of a third person is given in *Sanborn* in the second *Lapsley* decision. In the present case the father was driving, and the mother was holding the child, and the court made a distinction which had been previously made by the supreme court of the state of New York (*Hennessey v. Railroad Co.*, 6 App. Div. 206, 39 N. Y. Supp. 805; *Lewis v. Railroad Co.*, 52 App. Div. 72, 65 N. Y. Supp. 49), but has not been considered by the New York court of appeals (165 N. Y. 630, 301). We do not see any adequate reason for the distinction. The father was the natural protector of the child, and was bound to exercise of prudence and care for his welfare. The child was too young to exercise thought on the subject, bound to yield to the protecting care and control of the father, whose care was his and whose negligence was his negligence. The father was not as driver merely, but was also acting as father and caring for the child, and his negligence, if it existed, was as imputable as that to the child. There is no evidence on the subject of the conduct except that which was given by the mother, but the negligence was of importance, and for the error, though perhaps innocent, the judgment must be set aside.

Upon the subject of damages the court charged as follows:

"The child would be entitled, in the event of recovery, to compensation for the pain and suffering that it has endured, and to such reasonable compensation as may make up to it the loss of earning capacity which it has sustained in consequence of the accident. If you reach the conclusion that the accident was the cause of the present condition of the child, regard to that, it is not a matter as to which any calculation of damages or cents can be given to you. It has got to be intrusted to you and in such a matter you are required to be reasonable and just."

To this part of the charge the defendant excepted.

The complaint had alleged that by reason of the injury to the child the act of the defendant the plaintiff's life and prospects were ruined. If the collision was caused by the negligence of the defendant there is no doubt of the truth of the averment. At the time of the collision he was about 10 years old, and it was apparent that his physical capacity had been permanently ruined. We see no reason why the loss of his earning capacity should not have been taken into account by the jury as well as his physical suffering.

The judgment is reversed, with costs, and a new trial is

TEXAS & P. RY. CO. v. PARKS et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,100.

MASTER AND SERVANT—ACTION FOR INJURY OF SERVANT—CONTRIBUTORY NEGLIGENCE.

In an action by a servant against the master to recover for an injury, where the negligence of the master is established, evidence of contributory negligence must be undisputed and conclusive to warrant the court in directing a verdict for defendant.

In Error to the Circuit Court of the United States for the Northern District of Texas.

Geo. Thompson and T. J. Freeman, for plaintiff in error.

R. L. Carlock, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is a suit brought by Sabina Parks, for herself and her minor son, Frank, to recover damages for the death of John B. Parks, husband of the said Sabina and father of the said Frank. It is alleged that on the 13th day of January, 1900, the said J. B. Parks, while in the employ of the Texas & Pacific Railway Company, was killed in the yards of the said company at Ft. Worth, Tex., while working with a crew to unload certain cars of dirt by the use of a large plow. Negligence of the railway company was charged: First, in not furnishing safe appliances; and, second, in that the conductor in charge of the work was negligent in starting the engine without giving sufficient notice and time to said Parks to put himself in a place of safety. On the trial a verdict was rendered against the railway company, which sues out this writ of error, contending that the court below erred in refusing certain special charges instructing the jury to find a verdict for the defendant on the ground of contributory negligence.

On the evidence submitted to the jury, the negligence of the railway company in not furnishing proper appliances was well established, but the evidence to show that the deceased, Parks, was guilty of contributory negligence, while perhaps strong enough to have warranted the jury in finding for the railway company, was not sufficiently undisputed and conclusive to warrant the court in taking the case from the jury. While the evidence shows that, after the cable was attached to the unloader plow, and before the locomotive was started, there was sufficient time and notice for Parks to have sought a place of safety, there is evidence to the effect that the conductor had instructed Parks and others to go back by the cars to the rear end of the train as a place of safety, and to watch the operation of the unloader plow, and that Parks was proceeding with due diligence, and had nearly attained the rear of the train, when the accident happened.

The case was properly submitted to the jury, and, as we find no reversible error in the record, the judgment of the circuit court is affirmed.

CITY OF COLUMBUS v. WOONSOCKET INSTITUTION OF S

(Circuit Court of Appeals, Fifth Circuit. February 25, 19

No. 1,055.

1. MUNICIPAL CORPORATIONS—VALIDITY OF BONDS—TEXAS CONSTITUTIONAL STATUTES.

The constitution of Texas (article 11, §§ 5, 7) provides that no tax shall ever be created by any city or town unless provision is made for the time of creating the same for levying and collecting an annual sufficient tax to pay the interest thereon, and create a sinking fund of at least 2 per cent. Rev. St. Tex. 1879, art. 370 et seq., vests in the legislature the power to levy and collect ad valorem, poll, and license taxes, to make all appropriations, create special funds, and in general, the management and control of the finances of the state. The council of a city passed an ordinance authorizing the issuance of municipal bonds, and appropriating \$3,000 per annum out of the revenues of the city for the payment of the interest on such bonds, and the creation of a sinking fund of 4 per cent. It directed the treasurer to open a special account for the purpose, and to place therein all revenues of the city, from whatever source, until he had accumulated yearly to the credit of such fund the sum of \$3,000. At the time it passed an ordinance declaring that all taxes theretofore levied, whether ad valorem, poll, occupation, or otherwise, were levied for the purpose of paying the interest, and providing a sinking fund for the payment of the principal, of such bonds, and another making provision for the levy of an ad valorem tax to the constitutional limit. No levy of such taxes was made at that time. *Held* that, under the constitutional provisions cited, the bonds were valid to the amount, and only to the extent that the tax contemporaneously levied would provide for, by the interest and creating a sinking fund of 2 per cent. per annum out of the revenues to be determined by the last preceding assessment.

2. SAME—PARTIAL INVALIDITY OF BOND ISSUE—APPORTIONMENT.

Where a city has issued bonds to an amount in excess of the constitutional authority, all of which were created by the same ordinance, and sold at the same time, each bond is valid to the extent of its proportionate share of the debt lawfully contracted.

In Error to the Circuit Court of the United States for the District of Texas.

This is a suit against the city of Columbus, a municipal corporation in the county of Colorado, state of Texas, to recover on municipal bonds issued by said corporation in the year 1883 for the purpose of erecting a school building. The issue was \$25,000 in coupon bonds, of \$500 each, bearing interest at 6 per cent. per annum, payable semiannually; one-half falling due on the first of January, the other half, in 25 years. Interest was paid on the whole issue until December 8, 1893, after which the city neglected and refused to pay. The present suit is to recover interest on the whole issue in default, and principal on one-half of the principal now due. In the circuit court, trial by jury was had, and the case submitted to the court, which made a finding of fact that thereon rendered judgment for the full amount of the interest on the whole issue, one-half the principal; reserving the right of the bondholders to recover principal and interest on the other half of the issue. The city of Columbus sues out this writ of error, contending in this court that the court below, that the city of Columbus had no power to issue the bonds in question, and that the said bonds were void, having been issued in violation of the constitution of the state of Texas in force at the time of their

M. E. Kleberg, for plaintiff in error.

J. W. Terry, Rudolph Hatfield, and C. C. Everett, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). From the facts as found by the trial judge, it appears that the city of Columbus, a municipal corporation in Colorado county, state of Texas, was in the year 1883 a city of less than 10,000, and about 3,000, inhabitants, with taxable property within its limits of the assessed value of \$600,000, upon which was levied a tax of one-fourth of 1 per cent., and for that year there was levied and collected as occupation taxes the sum of \$1,350, and as poll taxes the sum of \$150, and during the same year the revenues of the city, collected and received in the shape of fines, amounted to \$225; making a total revenue for the year 1883 of the said city of \$3,225. It further appears that the current expenses of the city for the year for salaries and fees of its marshal and collector, per diem, of the council, etc., did not exceed the sum of \$1,100, which would leave as net revenues for the year 1883 the sum of \$2,115. On the 8th day of June of that year the city council of said city adopted an ordinance providing for the issuance by the city of coupon bonds to the amount of \$25,000, to provide means for the erection of waterworks, and on June 15th following the said city council adopted an ordinance levying an ad valorem tax as follows:

"There shall be levied and collected, an annual ad valorem city tax of $\frac{1}{4}$ of 1 per centum of the cash value thereof, estimated in lawful money of the United States, on all the movable property and all the real property situated and owned in this city, on the first day of January of each and every year, except so much thereof as may be exempted by the constitution and laws of the state of Texas, and by ordinances of this city."

On July 30, 1883, the city council of said city, by ordinance duly passed, repealed the aforementioned ordinance of June 8th, and at the same time passed a new ordinance whereby the said city of Columbus created a debt for the purpose of providing waterworks for the said city in the sum of \$25,000, and authorized to be issued, to represent the same, coupon bonds for the said amount, bearing 8 per cent. interest per annum from the 8th day of June, 1883, payable semi-annually,—one half to fall due in 15 years, and the other half to fall due in 25 years, from June 8, 1883. At that time the constitution of the state contained provisions as follows:

"Sec. 9. The state tax on property, exclusive of the tax necessary to pay the public debt, shall never exceed fifty cents on the one hundred dollars valuation, and no county, city or town shall levy more than one-half of said state tax, except for the payment of debts already incurred, and for the erection of public buildings, not to exceed fifty cents on the one hundred dollars in any one year, and except as in this constitution is otherwise provided." Article 8.

"Sec. 4. Cities and towns having a population of ten thousand inhabitants or less, may be chartered alone by general law. They may levy, assess and collect an annual tax to defray the current expenses of their local government, but such tax shall never exceed, for any one year, one-fourth of one per cent., and shall be collectible only in current money. And all license and occupation tax levied, and all fines, forfeitures, penalties and other dues accruing to cities and towns, shall be collectible only in current money." Article 11.

"Sec. 5. Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the legislature, and may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful, for any one year, which shall exceed two

and one-half per cent. of the taxable property of such city; and shall ever be created by any city, unless at the same time provision to assess and collect annually a sufficient sum to pay the interest and create a sinking fund of at least two per cent. thereon." Article "Sec. 7. * * * But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made, at the time incurring the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as a sinking fund." Article 11.

Statutory provisions of the state in 1883 granting and regulating the powers of cities and towns suggested as pertinent to the question at hand, and as shown by Rev. St. 1879, were as follows:

"Art. 370. The city council shall have the management and control of the finances and other property, real, personal and mixed, belonging to the corporation.

"Art. 371. The city council shall have power to appropriate money and provide for the payment of debts and expenses of the city.

"Art. 372. To provide by ordinance special funds for special purposes, to make the same disbursable only for the purpose for which the funds are created; and any officer of the city misappropriating said special funds shall be deemed guilty of malfeasance in office, and shall, on complaint of any person interested in said funds misappropriated, be removed from office, and shall be incapable thereafter to hold any office in said city."

"Art. 374. To provide, or cause to be provided, the city with water, to make, regulate and establish public wells, pumps and cisterns, hydrants, reservoirs, in the streets or elsewhere within said city, or beyond the limits thereof, for the extinguishment of fires and the convenience of the inhabitants, and to prevent the unnecessary waste of water."

"Art. 419. To pass all necessary ordinances to provide for the payment of the whole or any part of the existing debt of the city or of any future debt, by canceling the evidences thereof, and issuing to the holders or creditors bonds or treasury warrants, with or without coupons, bearing interest at an annual rate not to exceed ten per cent. The council shall also have power to pass an ordinance for issuing the bonds of the city in such sums as may be deemed expedient upon for railroad subsidies heretofore voted, or that may be hereafter voted, in accordance with the laws of this state.

"Art. 420. To appropriate so much of the revenues of the city, or of any source, from whatever source, for the purpose of retiring and discharging the existing indebtedness of the city, and for the purpose of improving the streets, markets and streets, erecting and conducting city hospitals, city works, and so forth, as they may from time to time deem expedient. In furtherance of these objects they shall have power to borrow money on the credit of the city, and issue coupon bonds of the city therefor, in such sum or sums as they may deem expedient to bear interest not exceeding six per cent. per annum, payable semi-annually at such place as may be determined by city ordinance: provided, that the aggregate amount of bonds so issued by the city council shall, at no time, exceed six per cent. of the value of the property within said city subject to ad valorem tax."

"Art. 428. The city council shall have power to levy and collect a poll tax, not to exceed one dollar, of every male inhabitant of said city of the age of twenty-one years (idiots and lunatics excepted), who is not exempted therefrom by law, at the time of such annual assessment.

"Art. 429. The city council shall have power to levy and collect a license tax on all persons and firms engaged in the following professions, callings and businesses, among others, shall be liable to a license tax; but this enumeration shall not be construed to deprive the council of the right and power to levy and collect other license taxes on persons and firms, under the general authority herein conferred."

At the same time that the ordinance authorizing the issuance of the bonds aforesaid was passed, the city council also passed an ordinance wherein it was provided:

"That all taxes for the purpose of raising revenues for the city of Columbus, ad valorem, poll, occupation, or otherwise, heretofore levied, are hereby declared to be levied for the purpose of paying the interest and providing a sinking fund of four per cent. for the payment of the water works bonds, provided for by ordinance adopted on the 30th day of July, 1883, and the city clerk is hereby ordered to furnish the mayor a certified statement of the income of the city from all sources of revenue."

The ordinance authorizing the issuance of the bonds, among other things, provided:

"Sec. 5. That three thousand dollars per annum is hereby appropriated out of the general revenues of the city for the payment of the interest on said bonds, and the creating of a sinking fund of four per cent. for the payment of the principal as in this ordinance provided.

"Sec. 6. The city treasurer shall immediately open in his books an account to be known as the 'Waterworks Fund Account,' and he shall place, each year, to the credit of said account, all revenues of the city, from whatever source, received by him, until he shall have yearly to the credit of said account the aforesaid sum of three thousand dollars, which fund shall not be drawn upon for any other purpose than the payment of the interest, semi-annually, upon said bonds and the payment of the said bonds at maturity, provided, that after the redemption of twelve thousand and five hundred dollars of said bonds, the treasurer shall set only aside and credit to the said fund fifteen hundred dollars per annum until the final payment of all of said bonds.

"Sec. 7. The fund herein created is set apart exclusively for the payment of the principal and interest of the bonds herein authorized and required to be issued, and no part of the same shall ever be diverted to any other purpose."

The constitution of the state of Texas (sections 5, 7, art. II, above quoted) forbids the creation of any debt by any city or town, unless, at the same time the debt is created, provision be made to assess and collect annually a sufficient sum or tax to pay the interest thereon, and create or provide a sinking fund of at least 2 per cent. These two provisions of the constitution apply to all cities and towns alike, without regard to the number of their inhabitants. *City of Terrell v. Dessaint*, 71 Tex. 770, 9 S. W. 593. It is well settled that the creation of a debt by any city or town in the state of Texas, and the bonds issued to evidence such debt, without a compliance with the said provisions of the constitution, are wholly void. See *Millsaps v. City of Terrell*, 8 C. C. A. 554, 60 Fed. 193; *Gould v. City of Paris*, 68 Tex. 517, 4 S. W. 650; *City of Terrell v. Dessaint*, supra; *Citizens' Bank v. City of Terrell*, 78 Tex. 450, 14 S. W. 1003; *Nolan Co. v. State*, 83 Tex. 182, 195, 17 S. W. 823. As recited above, the provision made at the time for payment of the interest, and to create a sinking fund for the payment of the bonds in suit, consisted of the declaration by ordinance that all taxes for the purpose of raising revenues for the city of Columbus—ad valorem, poll, occupation, or otherwise—theretofore levied were levied for the purpose of paying the interest and providing a sinking fund for the payment of the waterworks bonds, and an appropriation of \$3,000 out of the general revenues of the city for the same purpose. The ad valorem tax of one-

quarter of 1 per cent. upon the assessed value of all the movable and immovable property within the limits of the city, levied on June 8, 1883 (the same being the date given to the bonds in suit), appears to have been levied about the time of, and in connection with, the first ordinance providing for the issuance of waterworks bonds; and as that ordinance was repealed in the second ordinance to the same intent and purpose, so far as the levy of that tax goes and is concerned, it may be considered that it was contemporaneous with the creation of the debt, and was so much towards making provision for the waterworks bonds at the time of their issuance, by levying a tax for the payment of interest and to create a sinking fund, as required by the constitution. As to the poll and occupation taxes theretofore levied, the case does not show when, nor at what rate, nor for what amount, nor for what time, the same were levied, and, so far as the said taxes are declared levied for and appropriated to the payment of interest and sinking fund of the waterworks bonds, it is difficult to see how therein was any compliance with the constitutional requirements. Under the statutes in force at the time these waterworks bonds were issued, and as hereinbefore quoted, the city council of the city of Columbus had the management and control of the finances and other property belonging to the corporation; had the power to appropriate money providing for the payment of debts and expenses of the city; to provide by ordinance special funds for special purposes to protect the same; to provide, or cause to be provided for the city, water and waterworks; to provide for funding existing or future debts of the city, issuing therefor certain notes, creditors' notes, bonds, and treasury warrants; to levy and collect an annual poll tax, not to exceed \$1 for every male inhabitant of over 21 years; to levy and collect taxes commonly known as "occupation taxes"; and, specially, under article 420, had the power to appropriate the revenues of the city, emanating from whatever source, for general purposes, including erecting waterworks; and, in furtherance thereof, the power to borrow money upon the credit of the city, and issue coupon bonds therefor, in such sums as deemed expedient. It must be understood, however, with regard to all these statutes, that they must be construed and enforced under and in connection with the paramount authority of the constitution, and that in, and making part of, article 420, authorizing the borrowing of money and the issuance of coupon bonds, must be read sections 5 and 7 of article 11 of the constitution. See *Gould v. City of Paris*, 68 Tex. 511, 4 S. W. 650. This is a sufficient answer to the contention, so earnestly pressed by counsel for appellee, that article 420 is in all respects constitutional, and that it, in connection with other legislative provisions, authorized the issuance of the bonds in suit, based upon a continuous appropriation of the general revenues of the city, made up of ad valorem, poll, and occupation taxes theretofore levied.

The case shows that the revenues of the city from all tax sources amounted to \$3,000, all of which was required and was appropriated for the interest and sinking fund of the waterworks bonds; and the counsel for appellant contends with great force that the city council had no power, constitutional or legislative, to pledge for subsequent years all of the city's revenues in payment of a bonded indebtedness,

leaving nothing for necessary alimony, and cites this court in *Millsaps v. City of Terrell*, supra, and the supreme court of Texas in *Citizens' Bank v. City of Terrell*, supra. This contention presents a very important question, but it may be pretermitted here, because it does not appear that the city of Columbus provided for the levy and collection of a poll tax or an occupation tax to pay the interest and create a sinking fund for the principal of the bonds in suit; and it does affirmatively appear that the poll and occupation taxes theretofore levied produced more revenue than was required for the alimony of the city.

Our conclusion is that the only lawful and constitutional provision for the payment of the interest, and to create a sinking fund of at least 2 per cent., made at the time the bonds in suit were issued, was the continuing levy of an ad valorem tax of one-fourth of 1 per cent. on all the movable and immovable property situated and owned in the city, and that said bonds are valid to such amount, and to such amount only, as that tax, according to the assessment of 1883, could provide for. This conclusion is in accord with *Citizens' Bank v. City of Terrell*, supra, which was a case in which the city of Terrell in the same year (1883) issued a series of waterworks bonds based on a levy of taxes and an appropriation of certain general revenues; and as decidedly in point, supporting all our conclusions, we quote from the opinion of the court:

"The command of the constitution that no debt shall be created without at the same time providing for the levy and collection of a tax for its payment was evidently designed not more to insure the payment of honest debts than to admonish the people whose property was being charged with them of that fact. The other provision, limiting the amount of debt that cities can charge themselves with, had its foundation in a wise public policy. These constitutional restrictions were made for observance, not evasion. * * * The command of our constitution is that, when the debt is created, provision shall then be made for levying and collecting a tax to discharge it. It amounts to more than a direction that no debt shall ever be created above such a sum as the directed levy will pay. The constitution will not be obeyed unless it shall be ascertained, when and before a debt is created, whether one-fourth of one per cent. or less on the taxable valuation will annually pay the interest and sinking fund. The debt is not to go beyond what a tax can be levied to pay, and the clause in the constitution that defines how much may be levied shows that it is to be done on a 'valuation,' one meaning of which, given by Webster, is 'appraisement; as a valuation of lands for the purpose of taxation.' * * * There is nothing in the record before us showing when any of the bonds were issued, nor whether they were all disposed of at the time, or at different dates. There is nothing to distinguish those issued under the last ordinance from those issued under the first one, unless we can look for that purpose to the numbering of the bonds. The city had no authority to pledge or appropriate any part of the current revenues to the payment of the principal or interest of the debt. That fund is devoted by the constitution to the support of the city government, and is always under the control of the council for that purpose. The net proceeds from the waterworks, if there had been such, would have likewise been under the control of the council, and was not a basis for the creation of debt. The action of the council on the 25th day of June, 1884, was utterly void. The ordinance of the 12th day of December, 1883, was valid for such an amount as a tax of 25 cents upon the \$100 of valuation, according to the last-taken assessment of the taxable values of the city, would provide for. If the bonds were delivered at different dates, those first delivered, up to the amount of the debt that the city could lawfully create, should be paid, and the remainder of them should be treated as nullities.

Davless Co. v. Dickinson, 117 U. S. 657, 6 Sup. 897, 29 L. Ed. 1023. If all of the bonds under the first ordinance were delivered at the same time, so that none of them have priority over the others, the amount of valid debt should be distributed equally between said bonds. *McPherson v. Foster*, 43 Iowa, 72, 22 Am. Rep. 215. * * * Under the view we take of the law, the original holders, as well as any subsequent holders, of the bonds or coupons, may recover so much of the debt as was lawful." Pages 457, 459, 460, 461, 78 Tex., pages 1005, 1006, 1007, 14 S. W.

As we have found that the bonds in suit are valid to the extent that the ad valorem tax was sufficient to provide the interest and sinking fund, and invalid beyond, the question arises as to the proper judgment to be entered. In *Francis v. Howard Co.* (before this court in 1893) 13 U. S. App. 126, 4 C. C. A. 460, 54 Fed. 487, a similar question was presented; and, as that case was properly ruled, we quote from Judge Maxey's opinion on circuit, which we fully indorsed, as follows:

"It has been shown that bonds numbered 1 to 35, inclusive, are in part valid, and partly void. The question now arises, is the county liable for the amount of indebtedness within the restricted limit? The supreme court of this state replies in the affirmative. *Citizens' Bank v. City of Terrell*, supra; *Davless Co. v. Dickinson*, supra; *Ætna Life Ins. Co. v. Lyon Co.* (C. C.) 44 Fed. 329. The supreme court of Iowa holds the same view, and in *McPherson v. Foster*, 43 Iowa, 48, 72, 73, 22 Am. Rep. 215, says: 'As we have seen, the constitutional inhibition operates upon the indebtedness, not upon the form of the debt. The district may become indebted to the amount of \$2,057.50 by bond. If the debt exceeds that amount, it is void as to the excess, because of the inhibition upon the power of the district to exceed the limit, and the bonds as to the same excess are void because of the nonexistence of a valid debt therefor. But this restriction does not extend to the sum of \$2,057.50, for which the district had power to issue its bonds. That sum is a valid debt. The bonds to that extent are valid. It is no unusual thing for instruments of this character to be partly valid and partly invalid. So far as they secure a lawful debt, they are valid. So far as the debt is unlawful, they are invalid. * * * It appears that the bonds all bear the same date, and were issued, though at different times, as a part of one transaction. They were intended as security for a debt of \$15,000 which was attempted to be contracted in building the school house. It cannot be said that, in justice, invalidity should attach to certain particular bonds, while others, to the amount for which the district could lawfully contract indebtedness, should be held valid. Each bond, being but a part of the whole debt, must partake alike of invalidity and validity. It must be partly valid and partly invalid. The whole alleged debt is \$15,000. Of this sum, \$2,057.50 is valid. Each bond will be valid to the extent it represents a portion of the debt lawfully contracted. Such a sum is the proportion of the amount of the bond as \$2,057.50 bears to \$15,000; that is, $\frac{2,057.5}{15,000}$ of the principal of each bond is valid and collectible. The interest on each bond is determined by the same rule, or calculated upon the amount of each bond held to be valid.' *Howard county* could lawfully issue on November 12, 1883, bonds to the amount of \$14,982.77. It did in fact issue bonds, partly valid and partly invalid, aggregating \$35,000. Bonds to the extent of its power to issue (\$14,982.77) became a valid indebtedness against the county, and enforceable by suit. Bonds in excess of that limit or amount are invalid and uncollectible. The thirty-five bonds were all issued and delivered at the same time to *Milliken & Co.*, and they were subsequently bought at the same time by the plaintiff and another citizen of St. Louis. None, therefore, have priority over the others, and the amount of valid debt should be equally distributed among them all. According to the rule laid down by the supreme court of Iowa, each one of the thirty-five bonds of one thousand dollars issued represents a valid indebtedness of four hundred and twenty-eight dollars, and each

coupon of eighty dollars a valid debt of thirty-four dollars and twenty-four cents. * * * Judgment should be rendered for the foregoing amount, with six per cent. interest thereon from date (Gen. Laws Tex. 1891, p. 87, c. 68; constitutional amendment adopted August, 1891), if, indeed, it be proper to enter judgment in favor of the plaintiff for any amount in this suit at law. This question presents a serious difficulty. The supreme court of Iowa, in *McPherson v. Foster*, supra, and Judge Shiras, in *Etna Life Ins. Co. v. Lyon Co.*, supra, declined to enter judgment; the latter basing his refusal on the grounds that the rights and equities of the bondholders could only be adjusted by a proper proceeding in equity, with all the parties before the court. Discussing the question, he observed: 'It is argued that the bonds would be valid until the amount needed to refund the enforceable debt had been reached, and that it will be presumed that the bonds were sold in the order of their number. Such a presumption cannot be indulged in under the facts in this case. To settle the equities and rights of the bondholders against the county, and their rights as between themselves, would seem to require the institution of a suit in equity. In this action at law between one owner of part of the bonds and the county, it is beyond the power of the court to hear and determine the question of the order in which the series of bonds was sold, or the application of the proceeds realized from the sales thereof, and whether the facts are such that a certain number of the bonds can be held valid at law, or whether it should not be held that each owner of a bond is equitably entitled to demand his share of the total sum which may be adjudged to be collectible from the county.' Touching this point the supreme court of this state says: 'Neither the pleadings nor the proof in the record before us present the case so as to authorize a judgment of the nature indicated by us as being proper. Strictly speaking, no judgment other than the one from which the appeal was taken could have been rendered. We think it right, however, to give the appellee an opportunity to amend his pleadings, and have the issues so presented as to show what proportion of the debts sued on he may be entitled to recover, under the rules that we here announce.' *Citizens' Bank v. City of Terrell*, supra. See, also, *Davless Co. v. Dickinson*, supra. This court fully concurs in what is said in the cases cited. But the rulings in those cases were predicated upon the particular facts of each case. While in this suit the court entertains serious doubts as to the propriety of entering judgment in behalf of the plaintiff, yet, after giving the question careful consideration, I am impressed with the conviction that such a judgment would be warranted both by the pleadings and proofs. And perceiving no insuperable objection in a case of this kind to the rendition of a judgment in a suit at law, my conclusion is that the plaintiff should recover the amount found due, with legal interest and costs of suit. If he be not permitted to recover all that he claims, he should at least have judgment for the amount to which he is lawfully entitled. Ordered accordingly."

As it thus appears that the appellee is entitled to a judgment, but the amount thereof depends upon estimates and calculations, which, although simple, ought, perhaps, to be settled contradictorily between the parties, the judgment of the circuit court is reversed, and this cause is remanded, with instructions, in due course, to enter a judgment in favor of the appellee in accordance with the views expressed in this opinion.

LEVY & COHN MULE CO. v. KAUFFMAN.

KAUFFMAN v. LEVY & COHN MULE CO.

Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,097.

1. **BILLS AND NOTES—TRANSFER—CONSIDERATION.**

The cancellation of a pre-existing debt is equally as valid and sufficient consideration for the transfer to the creditor of a bill or note of a third party as a payment of cash therefor.

2. **SAME—ACCOMMODATION MAKER—DEFENSES.**

An acceptor of drafts for the accommodation of the drawer cannot defend against the same in the hands of the payee or an indorsee, on the ground that he received no consideration, where full consideration was received by the drawer.

3. **SAME—CONSIDERATION—ACCOMMODATION—ACCEPTANCE OF DRAFTS.**

The purpose inducing one to accept drafts as an accommodation to the drawer does not constitute the legal consideration for his contract, and the fact that such purpose was not accomplished cannot be pleaded as a failure of consideration.

4. **SAME—ACTION ON ACCEPTANCE—EVIDENCE OF PAROL AGREEMENT.**

Evidence of a parol agreement made before or at the time of the acceptance of drafts is inadmissible to vary the absolute terms of the written contract made by the acceptance by showing that the acceptance was conditional.

5. **CORPORATIONS—NOTICE—KNOWLEDGE OF OFFICER.**

The payee of accepted drafts, for the purpose of realizing on the same for the benefit of the drawers, indorsed them to a corporation of which he was president, and the amount was placed by the corporation to the credit of the drawers, and paid out by their orders, prior to the maturity of the drafts. *Held*, that in making transfer of the drafts the president was not acting for the corporation, but adversely, and the corporation was not affected by any knowledge he might have of an infirmity in the paper.

In Error and Cross Error to the Circuit Court of the United States for the Eastern District of Texas.

This is an action at law by the indorsee against the acceptor of three bills of exchange. It was brought in the court below by the Levy & Cohn Mule Company, a corporation under the laws of Missouri, against Henry Kauffman, a citizen of Texas. The drafts in suit were for \$5,000 each, drawn March 10, 1899, by Joseph Weill & Co., of New Orleans, on the defendant, and by him accepted. They were payable to the order of Jacques Levy, and were by him indorsed to the plaintiff before maturity. The petition described the drafts, and was in due form. The answer of the defendant presented three defenses: (1) That the acceptance of the drafts was procured by fraud, and that they were fraudulently used. As no ruling of the court below is before us on this plea, and no evidence of fraud on the part of the plaintiff, no further attention will be given to this defense. (2) Failure or want of consideration. (3) The third defense pleads an oral contract made contemporaneously with the acceptance of the drafts. It will be stated with immaterial abbreviations in the language of the answer:

"That at the time he accepted the said bills in the month of March, 1899, Joseph Weill, Armand Levy, and Daniel Weill were copartners in a business carried on in New Orleans, under the style of Joseph Weill & Company. That Joseph Weill was the son-in-law of this defendant, and Armand Levy the nephew of Jacques Levy. That the said firm were greatly embarrassed financially,—had reached such a point that as a firm they could

no longer go on with their business unless some help was obtained from some outside source, as their credit in New Orleans had been exhausted.—and that, being in this condition financially, Armand Levy applied to his uncle, Jacques Levy, the president of the Levy & Cohn Mule Company, for some financial assistance; and that the firm of Joseph Weill & Company at that time was indebted to the Levy & Cohn Mule Company (the plaintiffs), and Jacques Levy replied (all of which the said Levy & Cohn Mule Company, the plaintiffs, were fully advised) that he would advance Joseph Weill & Company fifteen thousand dollars in addition to what Joseph Weill & Company then owed the Levy & Cohn Mule Company, provided that Henry Kauffman, this defendant, would advance an equal amount, thereby enabling Joseph Weill & Company to have an amount of thirty thousand dollars to be put into their business, to be used in making a crop of sugar on certain plantations which they were then operating in Louisiana. This defendant replied that if the said Jacques Levy, acting for himself and for the said Levy & Cohn Mule Company, would advance the firm of Joseph Weill & Company fifteen thousand dollars, that he would accept three drafts of five thousand dollars each, in favor of Jacques Levy, to be drawn by Joseph Weill & Company, payable at a certain time, as is stated in the three bills of acceptance declared on in this action, provided the said Jacques Levy would discount or have discounted the three certain acceptances, and turn over the proceeds of said acceptances in cash to Joseph Weill & Co., with the fifteen thousand dollars additional money to be advanced to the said firm by the said Jacques Levy for himself and the said Levy & Cohn Mule Company, all of which was fully agreed to; it being understood, not only by this defendant, but by the said Jacques Levy and the Levy & Cohn Mule Company, that the said sum of thirty thousand dollars was absolutely necessary to be used in the business of Joseph Weill & Company in cash, in order that they might live through the financial difficulties which surrounded them and make and gather the crops on the several sugar plantations operated by them. That the sole inducement to this defendant to enter into these transactions and to accept these drafts, which he honestly proposed and intended to do when such acceptances matured, had the said Jacques Levy and the Levy & Cohn Mule Company carried out their contract and agreement to advance Joseph Weill & Company fifteen thousand dollars as well as the proceeds of the three bills of acceptance of this defendant which Jacques Levy and plaintiffs were to have discounted, was not only to aid his son-in-law, but also the firm of Joseph Weill & Company, through the financial difficulties which then threatened to wreck them, because this defendant was a large creditor of the firm of Joseph Weill & Company, and because he well knew that the failure of Joseph Weill & Company would involve him in much loss. That after the said three drafts of Joseph Weill & Company, in favor of Jacques Levy, for five thousand dollars each, had been accepted, the same was turned over to Joseph Weill & Company, to be by them transmitted in due course of mail to Jacques Levy to be discounted, and the proceeds thereof to be paid to Joseph Weill & Company, together with the fifteen thousand dollars additional. That said three acceptances were received by the said Jacques Levy within a few days after their execution. That instead of being discounted, as was agreed upon, and the proceeds remitted or paid over to Joseph Weill & Company, the said Jacques Levy indorsed and transferred said three bills of acceptance over to the Levy & Cohn Mule Company as a credit, and passed the same to the credit of Joseph Weill & Company with the Levy & Cohn Mule Company in part settlement and satisfaction of an antecedent debt due by Joseph Weill & Company to the Levy & Cohn Mule Company."

The case was tried on these issues. The plaintiff offered in evidence the accepted drafts and rested; and thereupon it was proven by defendant, examined as a witness in his own behalf, and by Joseph Weill, a member of the firm of Joseph Weill & Co., also examined as a witness for defendant, that the said accepted drafts were drawn by Joseph Weill & Co., accepted by defendant, indorsed by Jacques Levy, and before maturity negotiated with plaintiff for account of Joseph Weill & Co., and the proceeds

thereof paid and applied by plaintiff as directed by Weill & Co., and for their account, as follows:

To take up a draft of plaintiff on Joseph Weill & Co. (drawn to reimburse plaintiff for that amount paid out by it for accommodation of Joseph Weill & Co.), and recalled by plaintiff at request of Joseph Weill & Co.....	\$ 5,500 00
To pay a draft of Joseph Weill & Co. drawn on plaintiff for...	2,000 00
To pay another draft drawn by Joseph Weill & Co. on plaintiff for	2,500 00
To pay another draft of Joseph Weill & Co., on plaintiff in favor of defendant, H. Kauffman (and used by Kauffman to take up and pay a draft for \$5,000.00 drawn by Joseph Weill & Co. on and accepted by him, H. Kauffman, for accommodation of Joseph Weill & Co.).....	5,000 00

Aggregating the entire amount of the acceptances..... \$15,000 00

All of these payments were made before maturity of any of the acceptances sued on. It was also proved that plaintiff advanced to Joseph Weill & Co. \$3,175 in addition to these payments, about the same time that these sums were paid. The defendant then offered evidence tending to prove the facts averred in his third defense. When evidence was offered of the oral agreement therein alleged, the plaintiff objected on several grounds stated, among them the following: "The acceptances sued upon are written contracts of defendant to pay the sums of money therein mentioned, absolutely and without condition, and it is not competent by oral testimony to show any agreement, condition, or understanding, contemporaneous or previous, whereby such written absolute contracts may be varied or qualified, so as to make their performance depend upon either the making or performance of such oral agreement, condition, or understanding." The objections were overruled, and the plaintiff excepted. Evidence was offered in rebuttal by the plaintiff, tending to show that no such agreement was made as that alleged by the defendant in the third defense. It is unnecessary to state this evidence.

On the question of the consideration of the drafts and on the alleged agreement, the court charged the jury as follows: "In this case the evidence shows that the Levy & Cohn Mule Co. paid \$15,000 on the acceptances, and it is also shown that the Levy & Cohn Mule Co. paid \$3,175 additional. The view I take of the law in this case is different from that argued by either side. I do not agree with either of them. One of them contends that the defendant has no defense whatever, and the other contends that it is a complete defense. I don't agree with the contention of either one of them. Under the pleadings and proof in this case, if it means anything, it means that Mr. Jacques Levy and Mr. Kauffman—that is, according to Mr. Kauffman's contention—were to advance \$15,000 each. The proof unquestionably shows that the Levy & Cohn Mule Co. and Jacques Levy advanced \$18,175. Now, under the contention of Mr. Kauffman, he would have been owing to the Levy & Cohn Mule Co. \$15,000, conditioned that the full \$15,000 had been advanced in addition to his acceptances. I cannot take any other view of this case than this: In view of the fact that the proof shows that Mr. Kauffman received \$5,000 of the money, in that the draft was drawn in his favor, and he applied it to a debt that he was the indorser of Jos. Weill & Co. on, I cannot look upon it as anything more than a partial failure of consideration. If you find from the evidence that this agreement was not authorized by Jacques Levy, return a verdict for the plaintiff in the full amount of the acceptances. If you find that it was authorized, and that Mr. Kauffman acted upon the authority, then you are instructed to return a verdict in this case for plaintiff for one-half the money he advanced, which, under the evidence, was \$18,175." The plaintiff duly excepted to this charge. The jury found a verdict for the plaintiff for \$9,087.50, interest to be added, on which judgment was entered. The plaintiff sued out a writ of error, and contends that it is entitled to a verdict for the full amount of the drafts in suit, and that the court erred in the instructions quoted. The defendant,

Henry Kauffman, sued out a cross writ of error, and assigns error, contending that he is not liable on the drafts at all. Under rule 25 of this court (31 C. C. A. clxvi., 90 Fed. clxvi.), both writs have been heard together.

J. H. Z. Scott (Frank M. Spencer, on the brief), for plaintiff in error and cross defendant in error.

Benjamin Rice Forman and Maco Stewart, for defendant in error and cross plaintiff in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

There is no conflict in the evidence on the question of the consideration of the contracts sued on. The drafts were drawn by Joseph Weill & Co. in favor of Jacques Levy on H. Kauffman. Kauffman accepted the drafts by writing his name across each of them. He did not owe the drawers, and had no funds of theirs in his hands. He was an accommodation acceptor, lending his name to the drawers to enable them to raise money. Before the maturity of the drafts they were indorsed by the payee to the plaintiff for the account and benefit of Joseph Weill & Co. for \$15,000, the face value of the drafts. By the direction of Joseph Weill & Co., \$10,000 of the proceeds of the drafts was applied to the payment of their past-due debts to the Levy & Cohn Mule Company, and \$5,000 to the payment of their debt to H. Kauffman. The bills sued on, therefore, cost the plaintiff \$15,000, placed subject to the order of Joseph Weill & Co. But as part of this sum came back to or never really left the plaintiff's possession, the real transaction is stated more favorably to the defendant in this way: The plaintiff obtained possession and title to the drafts by paying \$5,000 in discharge of a debt which Joseph Weill & Co. owed H. Kauffman, and canceling and discharging past-due debts for \$10,000 which Joseph Weill & Co. owed plaintiff. The application of the fund in both instances was by the direction of Joseph Weill & Co. On the question of consideration there is no difference in receiving a negotiable bill or note before maturity in payment of a pre-existing debt, and in paying cash for it. This is the conclusion of the best-considered and most numerous state authorities (1 Daniel, Neg. Inst. [4th Ed.] § 184), and is the doctrine unquestionably settled by the supreme court (*Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Brooklyn City & N. R. Co. v. National Bank of Republic*, 102 U. S. 14, 26 L. Ed. 61; 4 *Rose*, Notes on U. S. Rep. 133). And a pre-existing debt "is equally as valid and sufficient consideration for the indorsement and transfer to the creditor of the bill or note of a third party. * * *" 1 Daniel, Neg. Inst. (4th Ed.) § 184. The fact that Kauffman, the accommodation acceptor of the bills, did not receive the benefit of \$10,000 of the bills, does not affect the case. He did get the benefit of \$5,000 of the proceeds of the negotiation of the bills; but, if he had received nothing, the bills would have been valid in the hands of the plaintiff. The evidence in the case and the nature of the transaction show that it was not contemplated that the consideration for the sale of the drafts was to go to Kauffman. The parties to every accommodation note or bill by their signatures hold themselves bound to every person who shall take

the same for value, to the same extent as if that value were personally paid "to them, or on their account and at their request." Story, *Prom. Notes* (6th Ed.) § 194; *Townsley v. Sumrall*, 2 Pet. 170, 7 L. Ed. 386. It is for the benefit and convenience of the commercial world to encourage as far as practicable the credit and circulation of negotiable paper. Accommodation bills are daily placed in market for discount and sale, and an indorsee or purchaser who knows that a bill or note "still current was drawn, made, accepted, or indorsed without consideration is as much entitled to recover as if he had been ignorant of the fact." 1 Daniel, *Neg. Inst.* (4th Ed.) § 790, and cases there cited. Want of consideration to the accommodation acceptor or indorser will constitute a good defense against the party for whose accommodation it is made,—as, in this case, if Joseph Weill & Co. were suing Kauffman,—but to allow such defense to defeat a recovery by an indorsee for value, who has advanced money on it, "would be to defeat the very purpose for which such paper is made, and render the transaction absurd." *Thatcher v. Bank*, 19 Mich. 196, 202.

When Kauffman accepted the bills, he authorized the plaintiff or any one to receive them on the credit of his name, and the consideration paid by the plaintiff for them was in law paid by his direction and order. Kauffman's defense on the question of consideration is that he accepted the drafts in suit because he was the father-in-law of Joseph Weill, and a large creditor of Joseph Weill & Co., and so interested in relieving that firm of financial embarrassment; and that for these reasons, and on the promise of Jacques Levy, for himself and the plaintiff, to advance \$15,000 for the relief of Joseph Weill & Co., he (Kauffman) accepted the drafts in suit. The contention is that the advance of \$15,000 by Jacques Levy to Joseph Weill & Co. was to be the consideration for the acceptances by Kauffman, and that, as this advance was not made, the acceptances are without consideration. These mixed motives that induced Kauffman to accept the drafts cannot be separated and all eliminated but the promise of Jacques Levy, so as to hold that his failure to comply with his promise changed Kauffman's relation to the drafts from that of an accommodation acceptor to that of an acceptor for a consideration. The undisputed facts show a full consideration proceeding from the plaintiff for its ownership of the drafts. The facts, therefore, averred by Kauffman of his relationship to Joseph Weill as kinsman and as creditor of Joseph Weill & Co., and the alleged agreement of Jacques Levy, must be considered, not as consideration for the acceptance by him of the drafts, but as motive or inducement causing him to accept them. "There is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is 'the cause or meritorious occasion requiring a mutual recompense in fact or in law.'" *Philpot v. Gruninger*, 14 Wall. 570, 577, 20 L. Ed. 743; *Morris v. Norton*, 21 C. C. A. 553, 75 Fed. 912, 926; *Colorado Co. v. Stratton* (C. C.) 95 Fed. 741, 744; *Association v. Wickman*, 141 U. S. 564, 579, 12 Sup.

Ct. 84, 35 L. Ed. 860. It follows that in the record there is no evidence of entire or partial failure of consideration.

The defendant, Kauffman, by answer claims that there should be no recovery in this suit because Jacques Levy failed to comply with an oral agreement, made by him when the defendant accepted the bills, that he (Jacques Levy) would not only procure the bills to be discounted, but would himself advance to Joseph Weill & Co. \$15,000, so that the latter would have \$30,000 to aid them in their financial troubles. When oral evidence was offered tending to prove this agreement, the plaintiff duly objected to it, and reserved an exception to its admission. Part of the charge of the court to which exceptions were reserved was based on this alleged contract, and the verdict of the jury indicates by its amount that it is founded on this oral agreement. When Kauffman accepted the bills he became the primary debtor. 1 Daniel, Neg. Inst. § 532. Although he wrote nothing but his name, the acceptance was a shorthand contract in writing, and is fully protected by the familiar and fundamental rule that oral evidence will not be received to vary its terms. *Martin v. Cole*, 104 U. S. 30, 37, 26 L. Ed. 647. The contrary has been held by some courts, and notably by Mr. Justice Washington in *Bridge & Bank Co. v. Evans*, 4 Wash. C. C. 480, Fed. Cas. No. 13,635; but the latter case was expressly rejected in *Bank v. Dunn*, 6 Pet. 51, 8 L. Ed. 316. Since the decision of the supreme court in the case last cited in 1832 it has been the rule of that court, approved and followed by the weight of state authorities, that evidence cannot be received of a contemporaneous parol agreement to vary the written contract of acceptance or indorsement of negotiable paper. *Martin v. Cole*, 104 U. S. 30, 26 L. Ed. 647. In a suit by payee against drawer of a bill of exchange, parol evidence of an agreement not to present the draft until defendant should provide for a previous draft was rejected. *Brown v. Wiley*, 20 How. 442, 15 L. Ed. 965. In *Specht v. Howard*, 16 Wall. 564, 21 L. Ed. 348, in a suit by the indorsee against the indorser of a note silent as to the place of payment, parol evidence was rejected that there was an agreement between the maker and the indorsee that it should be made payable in New York. The court said with reference to the agreement that it was a nullity, and could not in any wise affect the rights of either of the parties, and quoted 2 Pars. Notes & B. § 501: "It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note cannot be permitted to vary, qualify, or contradict, to add to or subtract from, the absolute terms of the written contract." In *Forsythe v. Kimball*, 91 U. S. 291, 23 L. Ed. 352, the same rule was applied in equity. Parol evidence of the agreement which Kauffman pleads would not be admissible in litigation between Kauffman, as acceptor, and Joseph Weill & Co., as drawers, of the bill. It would be excluded upon the familiar rule already quoted. A collateral written agreement, however, is admissible in an action on an acceptance between the original parties. In a case where such an agreement was in writing the court said: "The agreement, being in writing, is to be taken and considered in connec-

tion with the indorsement, and the two are to be construed together." *Davis v. Brown*, 94 U. S. 423, 427, 24 L. Ed. 204.

It appears to be settled by the decisions of the supreme court that a relevant contemporaneous written agreement is admissible in evidence in an action on notes or bills between the original parties, but not admissible against an indorsee without notice for value, and that evidence of an oral agreement is not admissible in either case. In asserting the agreement as a defense, Kauffman merely claims that his acceptance was upon condition that Jacques Levy was also to advance \$15,000 to Joseph Weill & Co., so that with the proceeds of the accepted bills they would have \$30,000. It is a familiar principle that any conditions which are annexed to a written acceptance must appear on its face. It is true that the acceptance may be rendered conditional by another contemporaneous writing; but even then such condition would have no effect against a bona fide holder ignorant of it. It follows from the principles established by the decisions already quoted that "the terms of an acceptance in writing cannot be varied by any contemporaneous parol agreement, as that is against the first principles of the law of evidence." 1 Daniel, Neg. Inst. (4th Ed.) § 517. We cannot disregard well-settled principles of law in an effort to equalize losses between the parties. Such efforts have produced much of the conflict of authority we have on this subject. Mr. Justice Grier, in *Brown v. Wiley*, *supra*, remarked, after rejecting parol evidence that would have altered a contract shown by a bill of exchange, that "some precedents to the contrary may be found in some of our states, originating in hard cases; but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule." In what we have said we have had no reference to what would be the rule of evidence in cases of fraud or mutual mistake of facts.

There is another view that is conclusive of the case on the record now before us: The general proposition is true that notice of facts to an agent is constructive notice to the principal when it arises from, or at the time is connected with, the subject of his agency. The rule is based on the presumption that the agent has communicated such facts to the principal. On principles of public policy, the knowledge of the agent is imputed to the principal. But neither the rule nor the reasons for it apply to a transaction in which the agent is acting for himself. When, therefore, the president of a corporation is dealing with it on his own business, his interest is opposed to its interest, and the presumption is that he will not communicate any secret infirmity of the title he is about to convey to the corporation. Both the defendant's answer and the evidence show that Jacques Levy, so far as he was connected with Kauffman's acceptance of the bills, was acting with the view of aiding the firm of Joseph Weill & Co., because of his interest in his nephew, Armand Levy, a member of that firm. He was not acting in the interest of the plaintiff corporation. In assigning the bills to the corporation, he was not acting in his capacity as president of the plaintiff corporation, but individually. Under such circumstances, if it be conceded there were infirmities attending the

acceptance of the bills, and that there was, as between the parties, a failure or partial failure of consideration, he is not presumed to have informed the plaintiff of these facts. Notice of such facts, under the circumstances, to Jacques Levy, although he was president of the plaintiff corporation, was not notice to the corporation. When Jacques Levy was negotiating the notes to the plaintiff corporation, he was acting for himself, and his interest was antagonistic to that of the plaintiff. He was not the plaintiff's agent in that transaction. In making the sale of the bills he stood as a stranger to the corporation; and the plaintiff, therefore, is an innocent holder without notice, even if it be conceded that Jacques Levy had knowledge of facts that would affect the validity of the bills. Mr. Thompson says: "It should be borne constantly in mind that the cases where notice to the president, or any other officer of a corporation, will affect the corporation, are cases where such president or officer is acting exclusively for the corporation." 4 *Thomp. Corp.* § 4657. Cases applying this principle where a president or director procures the discount of notes by the corporation in which he is an officer are collected by Mr. Thompson in 4 *Thomp. Corp.* § 5208. This principle was recognized and applied by this court in *Bank v. Tompkins*, 6 C. C. A. 237, 57 Fed. 20. In that case it was held that "where a bank acquires title to real estate by conveyance from its president, who held the land under a deed reciting full payment of the purchase money, and it has no actual knowledge that the purchase money was not in fact paid, it is an innocent purchaser without notice, and is not chargeable with constructive notice because of the knowledge of its president." See, also, *Morawetz, Corp.* (2d Ed.) 540c; 4 *Thomp. Corp.* §§ 4657, 5206, 5208; *Barnes v. Gaslight Co.*, 27 N. J. Eq. 33-37; *Bank v. Cunningham*, 24 Pick. 270, 35 Am. Dec. 322; *Bank v. Lewis*, 22 Pick. 31, 32; *Koehler v. Dodge* (Neb.) 47 N. W. 913, 28 Am. St. Rep. 518; *Whelan v. McCreary*, 64 Ala. 319; 1 *Morse, Banks*, 104. The instructions to the jury by the learned judge in the circuit court were in conflict with the views we have expressed, and to the injury of the plaintiff in error, the Levy & Cohn Mule Co.

We find no error in the record on the cross writ of error to the injury of H. Kauffman.

The judgment of the circuit court is reversed, and the cause remanded with instructions to grant a new trial. Reversed.

TEXAS & P. RY. CO. v. ALLEN et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,099.

MASTER AND SERVANT—DEFECTIVE RAILROAD CAR—DUTY OF INSPECTION.

An instruction defining the inspection required to be made by a railroad company to exonerate it from liability for an injury to a brakeman resulting from a defective handhold on a freight car considered and approved.

In Error to the Circuit Court of the United States for the Northern District of Texas.

114 F.—12

Mr. Thompson and T. J. Freeman, for plaintiff in error.

R. L. Carlock, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is a suit brought by the widow and father and mother of one A. T. Allen, deceased, to recover damages from the Texas & Pacific Railway Company by reason of the negligence of said company, resulting in the death of said A. T. Allen, the same being caused by the said Allen falling from the side of a freight car while in the performance of his duties as a brakeman. The grounds of negligence relied upon are (1) in not having the proper kind of fastenings for the handhold on the car,—that is, in having used in the fastenings what is known as “lag” or “wood” screws instead of iron bolts with a nut on the end; (2) in not properly inspecting the car to see that the handholds were kept in reasonably safe condition. The bill of exceptions shows that evidence was offered tending to show that the deceased, Allen, fell from a car while the train was moving because a handhold was not securely fastened; and further tending to show that the lag screws with which the handhold was fastened were either not properly screwed in the wood, or that the wood of the car was decayed, thereby rendering the handhold insecure. There was also evidence tending to show that within a short time prior to the death of Allen the car had been inspected in the yards of the company at Baird and at Thurber Junction, division terminals, and also evidence tending to show the nature and character of the inspection made.

The trial judge charged the jury fully upon all the law applicable to the case, and to such charge no objection was made. After the jury had retired and for some time had considered their verdict, they returned into the court, and through their foreman requested the court to further define the term “inspection,” as that term was used in the court’s charge with reference to the duty of the defendant railway company towards the deceased, and thereupon the court made the following additional charge:

“Inspection, gentlemen, as used in the court’s charge, is an inquiry, by actual observation, into the state, efficiency, safety, and quality of the thing inspected. Inspection of the appliances and instrumentalities in use by a railway company should not rest alone upon the vision, because there are many defects, the existence of which could be ascertained by reasonable and ordinary tests which involve the exercise of senses other than the sense of vision. I should say the railway company would be liable for those defects in its appliances and instrumentalities which, in the course of inspection, could be perceived; that is, capable of coming under the cognizance of any one or more of the senses of man in the exercise of ordinary care. Inspection not only involves looking at cars and appliances, but as well all those tests which would ordinarily be used to ascertain the condition of cars and appliances that a reasonably prudent man would use in the exercise of such an undertaking.”

When this instruction was given, the defendant railway company duly excepted, and before the jury retired requested the court to specially charge the jury as follows:

“The court instructs the jury that the duty of a railroad company toward a servant in its employ is to exercise ordinary care to furnish such ap-

pliances as are reasonably safe for the use for which they are intended, and, within the meaning of the law, such appliances are considered as reasonably safe that are in the general, usual, and ordinary course adopted by those in the same business; and therefore if you find from the evidence that the handhold, which is alleged to have been pulled out from the car and caused the accident, was of such a character and fastened onto the car in the manner as was in general use and according to the course usually adopted by others in the same business, and that the defendant railway company, by the exercise of ordinary care, could not have discovered any defect in same, then, in such event, the defendant would not be liable to plaintiffs. The court instructs the jury that the plaintiffs cannot presume that the defendant railway company was guilty of negligence from the mere fact that the accident happened, but it is incumbent upon the plaintiffs to show that the accident happened by reason of the negligence of defendant by a preponderance of the evidence, and if a preponderance of the evidence does not establish this fact they will find for the defendant."

These special instructions were refused, and to such refusal exception was duly entered. The special charge given to the jury defining "inspection" is claimed to be erroneous, not because it is incorrect as a matter of law, but because it withdrew from the jury the question of whether the defendant company had exercised a reasonable care in the matter of inspecting the handholds of the car from which the deceased, Allen, fell.

After an attentive consideration of the brief and arguments of the learned counsel for plaintiff in error, we are unable to see wherein and how the instruction and definition given in any wise withdrew any fact from the jury or invaded the province of the jury in determining the facts in the case. The matters contained in the special instructions requested and refused seem to be in the main correct as matters of law, but we find that the judge in his general charge covered the same ground, and, so far as we are able to see, as favorably to the railway company as in the special instructions asked.

The judgment of the circuit court is affirmed.

DEWEY et al. v. STRATTON et al.

(Circuit Court of Appeals, Fifth Circuit. February 18, 1902.)

No. 1,004.

1. **EQUITY—VACATION OF DECREE—ACCIDENT, MISTAKE, OR SURPRISE.**

A circuit court has jurisdiction to entertain a bill to set aside a former decree on the ground of accident, mistake, or surprise, where the requisite facts to entitle complainant to such relief are alleged, although such bill is not presented until the time for an appeal or the filing of a bill of review has expired.

2. **APPEAL—REVIEW—ESTOPPEL BY ACQUIESCENCE IN ERRONEOUS DECREE.**

Although an interlocutory decree conditionally vacating and setting aside a former decree on the ground of accident, mistake, and surprise was irregularly entered, and therefore erroneous, where it has been acquiesced in by defendants, and the court had jurisdiction, it will be held binding on the parties on an appeal by complainants from a final decree dismissing the bill.

3. **EQUITY—SUIT TO VACATE FORMER DECREE—CONDITIONAL ORDER.**

Where, in a suit to vacate and set aside a decree in a former suit between the same parties on the ground of accident, mistake, and surprise, an interlocutory decree was entered vacating the former decree,

reopening the case, and permitting complainants, who were defendants in such suit, to answer therein, on condition that they pay the costs and make a deposit in court to abide the event, and further providing that upon their failure to make such payment and deposit or to file a full answer within the time limited the former decree should remain in full force, the only conditions precedent to the opening of the former suit are the making of the payment and deposit; the requirement with respect to the sufficiency of the answer to be filed therein being a condition subsequent, which can only be dealt with in the suit in which such answer is filed. And where in such case the payment and deposit were made and an answer filed, all within the time limited, the cause stands reopened, and must be proceeded with in accordance with the rules of equity practice; and the court has no power to render a final decree in the second suit dismissing the bill, and reaffirming the original decree in the first suit, on the ground that the answer therein is insufficient, while the issues joined upon such answer are pending and undetermined.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

This cause was before this court at a former term on an appeal from the following decree:

"This cause came on to be heard at this term, and was argued by counsel, and thereupon and upon consideration thereof it was ordered, adjudged, and decreed as follows: That the demurrers of the defendants to complainants' bill are overruled, to which rulings defendants excepted; and the court having heard the bill and exhibits, and affidavits in support thereof, and counter affidavits and exhibits submitted by defendant, it is thereupon ordered, adjudged, and decreed that complainants, Chas. P. Dewey and A. B. Dewey, shall, within thirty days from this date, pay all costs incurred in equity cause in this court No. 235 up to this date, and also all costs that have been incurred in this cause No. 294, and that they shall pay into the registry of this court the sum of four thousand dollars (\$4,000.00), with interest thereon from the 18th day of November, 1893, to the date hereof, at the rate of six per cent. per annum, to be held until the final decree shall be rendered in cause No. 235, to abide such order as may be rendered in said decree; and, upon complainants paying said costs and making said deposit within the time specified, it is ordered, adjudged, and decreed that the pro confesso taken and entered upon the order book of this court on the * * * day of August, 1893, the same being one of the rule days of this court, and also the final decree of this court pronounced, passed, and entered on the 18th day of November, 1893, in that certain cause, then pending in this court upon the equity side of the docket, wherein the said Jesse D. T. Stratton, Minnie Stratton, and her husband, J. Thomas Stratton, defendants herein, were complainants, and said Chas. P. Dewey and A. B. Dewey were defendants, and styled upon the equity docket of this court as Jesse D. Stratton et al. vs. C. P. Dewey et al., and numbered 235 on said equity docket of this court, be, and the same are, set aside, and said cause reopened, and that said complainants herein, Chas. P. Dewey and A. B. Dewey, be now permitted to answer said bill in said cause No. 235, such answer to be a full answer to the allegations of the bill, and the interrogatories therein to them propounded, and to be filed on or before the first Monday in May, A. D. 1896, and, upon said payments and deposit being so made within the time herein specified, said cause No. 235 will thereafter proceed according to rules of practice in equity. It is further ordered, adjudged, and decreed that if said costs are not paid, or said deposit not made, within thirty days from the date hereof, or if said answers are not filed within the time herein specified, then said decree pro confesso and final decree in said cause No. 235 shall be and remain in full force and not vacated by this decree, and complainants' bill in this cause will thereupon stand dismissed as on final hearing, and all costs in this cause incurred are in that event adjudged against them, for which execution may issue.

"D. E. Bryant, Judge."

The facts of the case up to the rendition of the above decree are sufficiently stated in the report of the case. *Stratton v. Dewey*, 24 C. C. A. 435, 79 Fed. 32, et seq.

The record shows that on May 2, 1896, the Deweys, defendants in equity suit No. 235, filed a lengthy answer, including answers to interrogatories; that on May 25, 1896, the complainants in No. 235 filed exceptions to said answer, and thereafter on November 13, 1897, filed further exceptions, accompanied with a motion to strike out; that matters remained in this condition until June 16, 1900, when the following order was entered in No. 235:

"Now, on this day came on to be heard the complainants' exceptions to and motion to strike out the answer of defendants, filed May 2, 1896, and the same having been argued by counsel for complainants and defendants, and duly considered by the court, and it appearing to the court that said answer is not a sufficient answer to the bill in this cause, complainants' general exception thereto, filed May 26, 1896, is sustained; to which ruling defendants except.
D. E. Bryant, Judge."

That upon the same day, upon application of the defendants in No. 235, leave was granted to file an amended answer, the same to be filed within 10 days from that date; that on June 25, 1900, the Deweys, defendants, filed in their individual capacities, and as executors of the last will of Chauncey Dewey, deceased, an amended answer to the original bill in equity suit 235; and that following this amended answer the plaintiffs submitted the following pleading:

"These complainants, Jesse D. T. Stratton, Minnie Stratton and her husband, J. Thomas Stratton, come and except to the pretended answer filed herein June 25, 1900, purporting to be an amended answer in this cause, and moves the court to strike said pretended answer from the files on the following grounds, to wit:

"First. That a final decree was rendered in this cause on the 18th day of November, 1893, and process for the enforcement of said decree by a writ of possession was issued and duly executed in 1894, and possession of the land described in said decree was delivered under said writ in 1894. That no petition for rehearing, nor to vacate nor to set aside said decree, was ever filed in this cause, nor was said decree appealed from, and said pretended amended answer was filed in this cause on the 25th day of June, 1900, and purports to be in lieu of their original answer filed in this cause on the 2d day of May, 1896. That said original answer was not filed until more than two years and five months after the rendition of said final decree, and more than two years and five months after the adjournment of the term of the court during which said final decree was rendered, and long after the time had elapsed within which an appeal from said decree could have been prosecuted. That said amended answer was filed in this cause on the 25th day of June, 1900, more than six years after the final decree was rendered in this cause as aforesaid,—all of which facts appear in the records of this cause. That no written petition or application for leave of court to file said amended answer was made, and no notice was served on or given to complainants of any application for leave to file said amended answer, and no facts set up or shown that would entitle defendants to file said amended answer. That said pretended amended answer is not sworn to by any person, and it is not competent to set aside a decree to allow an answer to the bill where the facts stated in the answer are not verified by the oath of any person. Wherefore the complainants say that there was not at the time when said original answer was filed nor when said amended answer was filed any suit pending in this cause to be answered unto. Second. That there was not when said original answer was filed, nor when said amended answer was filed, any jurisdiction, power, or authority in this court to grant leave to file an answer in this cause, because the final decree rendered therein as aforesaid was a final adjudication by this court of all matters determined in said decree, and no answer could be filed herein while said final decree remained in full force, and not reversed, set aside, or vacated. Wherefore these complainants move the court to strike said original answer and said amended answer from the files of this court and this cause.

"Masterson & Masterson, Solicitors for Complainants."

"If the foregoing motion to strike from the files defendants' amended answer is not overruled, complainants except and demur to said answer, and for cause of exceptions and demurrer set up the same causes assigned in support of the said motion to strike out, and the following additional grounds, viz.: (1) Complainants say that if said amended answer had been filed in the time and manner and form authorized and required by the practice and proceedings in causes in equity in this honorable court, that the matters set up in said answer, in the manner and form as therein set out, do not show any defense to complainants' bill, and the said answer is not such an answer as would entitle the defendants at any time to reopen the decree already rendered in this cause. (2) That said amended answer is not sworn to by any person, and for that reason is insufficient. (3) That said amended answer refers to various exhibits stated therein to be attached, when in fact no exhibits are attached or filed with said answer. (4) That the part of said amended answer beginning on the fifth line with the words 'That they are advised,' and ending on the sixteenth line with the word 'tenable,' is excepted to because the same is not properly a part of an answer to the original bill, but could only be interposed by demurrer filed in proper time and in proper form. (5) That all of the parts of said amended answer purporting to be answers to interrogatories propounded in the original bill hereafter specified are excepted to as insufficient, vague, and not responsive to the interrogatories, in this: That in the answer to the 1st interrogatory C. P. Dewey states as follows: 'The first money was paid by E. C. Dewey with money furnished to him for that purpose by Chauncey Dewey.' Said interrogatory did not ask where E. C. Dewey obtained the money to make his cash payment, and that part of the answer should be stricken out, as not responsive to the interrogatory. The answer to the fifth interrogatory is not responsive, and is evasive, and while it states that copies of certain instruments are attached, and originals are subject to inspection, no copies are attached; thus leaving it in the power of the defendant to furnish any instrument he may desire or not to furnish any, and leaves the court without possession of such instruments, so as to determine their effect, in order to determine the sufficiency of the answer to the bill. The answer to the sixth interrogatory is plainly evasive in refusing to give even an approximate of the value of the estate of Chauncey Dewey, which was in his hands as executor. The answer to the seventh interrogatory is evasive. The defendant, being executor and custodian of the books of Chauncey Dewey, could, unless he desired to withhold the information from the court, have given copies of the entries called for. The answer to the ninth interrogatory is not responsive, and is evasive. In this: The interrogatory did not relate to the land covered by the conveyance in trust to C. P. Dewey, but to instructions given by Chauncey Dewey, the father, to his sons, whom he made executors and residuary devisees to provide for E. C. Dewey, the son, who was not included as a residuary devisee, and, instead of answering the question asked, undertakes to give the legal effect of a written instrument not submitted to the court. Wherefore, for all of the causes hereinbefore set forth, complainants except and demur to said answer, and pray that each of said exceptions and demurrers be sustained, and that said amended answer be held insufficient, and be struck from the files of this court and of this cause.

"Masterson & Masterson, Solicitors for Complainants."

At this stage of the litigation in equity suit No. 235 the complainants, on leave of the court in suit No. 294, on March 1, 1901, submitted a motion for final decree, as follows: "Now come the complainants in the above entitled and numbered cause, and show this honorable court that the above cause was commenced in this court, tried, and judgment entered in favor of complainants. That the defendants appealed this cause to the circuit court of appeals of the Fifth circuit, where said appeal was dismissed, and this cause remanded for further proceedings. That the mandate of said circuit court of appeals in this cause was heretofore filed in this court on the 17th day of July, A. D. 1897. That the said circuit court of appeals in their opinion on the trial of this cause said that if the order of this court heretofore entered in this cause on the 19th day of March, A. D. 1896, was fully complied with by complainants herein, a final decree should be passed upon the ap-

plication of complainants reversing the decree in suit No. 235 on the equity docket of this court, entitled Jesse D. T. Stratton et al. v. Charles P. Dewey et al., and reopening that cause for further proceedings. And complainants say that they have fully complied with all the conditions of said decree of March 19, 1896, and this they are ready to verify by proofs. Wherefore complainants now move this court for a final decree in this cause, in conformity to the said opinion of the honorable circuit court of appeals in this cause, and for such other and further proceedings as may be necessary, that justice may be done complainants herein."

On March 11, 1901, the defendants filed the following: "Now come defendants in the above-entitled cause, and show to the court that complainants on the 1st day of March, 1901, filed in this cause a motion for final decree herein, setting aside the final decree entered into cause No. 235 on chancery docket of this court, styled Jesse D. T. Stratton et al. v. Charles P. Dewey and A. B. Dewey, which motion and the answer of defendants were duly heard and considered, and the exceptions to said motion were sustained, and the motion overruled. Complainants have not complied with the terms and conditions upon which, under the said interlocutory decree, said final decree in which cause No. 235 could be vacated, and the time limit in said interlocutory decree for compliance has expired. Wherefore these defendants move the court to enter a final decree dismissing complainants' bill, and to make such order therein as may to your honor seem meet."

The defendants also filed the following answer: "Now come defendants in the above-entitled cause, and in answer to the motion filed herein, March 1, 1901, say that complainants' said motion does not show such a state of facts as entitle them to the order prayed for, even if said motion had been promptly and in due time filed. (2) That the interlocutory order entered in this cause from which said appeal mentioned in said motion was taken was so entered on the 19th day of March, 1896. That said opinion of the court of appeals was rendered at November term, 1896. That this motion of complainants was not filed until the 1st day of March, 1901, and said complainants have been guilty of laches and have shown such want of due diligence in said cause as not to entitle them to evoke the equitable powers of this court to set aside a final decree rendered in cause No. 235 more than seven years before the filing of said motion. Wherefore defendants pray the court to refuse to grant said motion, and to make such further orders as to your honor may seem meet."

Upon this last-mentioned motion, and the responses thereto, on March 15, 1901, the circuit court rendered the following decree: "This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows: That complainants' motion filed in this cause on the 1st day of March, 1901, praying the court to enter a final decree in this cause setting aside and vacating the final decree rendered in cause No. 235, in equity, in this cause, styled J. D. T. Stratton et al. v. Charles P. Dewey and Albert B. Dewey, be, and the same is, overruled. It is further ordered, adjudged, and decreed that said Charles P. Dewey and Albert B. Dewey did pay the costs in suits Nos. 204 and 235 within the time required by said interlocutory decree entered in this cause on the 10th day of March, 1896, and did deposit in this court the four thousand dollars and interest within the time provided in said interlocutory decree, and they did file in said suit No. 235 an answer within the time required by said interlocutory decree, but said answer was by this court in said cause No. 235 held not to be a full answer to said bill and interrogatories to them therein propounded, as required by said interlocutory decree, and said answer did not present a good and sufficient defense to said bill, and did not comply with the terms and conditions stated in the interlocutory decree entered in this cause on the 19th day of March, 1896, in this: that they did not within the time required by said decree file a full answer to the allegations of the bill in said suit No. 235 and the interrogatories therein to them propounded, and have not shown to the court that they have a good and sufficient defense to said suit No. 235. It is further ordered, adjudged, and decreed that said complainants have not by the matters presented to the court in this cause shown themselves entitled to have a final

decree vacating and setting aside the final decree rendered in said cause No. 235 on the equity docket of this court, and entered on pages 48 and 49, book Vol. 9, of the minutes of this court; and thereupon came on to be heard the application of defendants praying the court to enter a final decree in this cause No. 235, dismissing complainants' suit; and, the same having been argued by counsel, thereupon, upon consideration thereof it is ordered, adjudged, and decreed that complainants' suit be, and the same is, dismissed, and that defendants Jesse D. T. Stratton, Minnie Stratton, and Thomas Stratton do have and recover of and from said Charles P. Dewey and Albert B. Dewey all costs in this cause incurred for which execution may issue. It is further ordered, adjudged, and decreed that said final decree rendered in said suit No. 235 is in full force. And upon motion of defendant in this suit it is further ordered, adjudged, and decreed that C. Dart, clerk of this court, shall pay to said Minnie Stratton, or to her solicitor, Branch T. Masterson, in this cause, the sum of forty-five hundred and sixty dollars and sixty-six cents (\$4,560.66), deposited in the registry of this court by complainants under the interlocutory decree rendered herein on the 19th day of March, 1896, upon the receipt of said Minnie Stratton or her solicitor, Branch T. Masterson, of said sum, in satisfaction of the four thousand dollars decreed to said Minnie Stratton in the decree rendered in said suit No. 235, on the 18th day of November, 1893." From this last-mentioned decree Charles P. Dewey and Albert B. Dewey, in their own right and as executors, sued out this appeal.

John Charles Harris, A. E. Harvey, and Edw. F. Harvey, for appellants.

B. T. Masterson, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). This case turns on the questions whether the interlocutory decree of March 19, 1896, was within the jurisdiction of the court, and, if so, whether it has been so far complied with as to justify and require the reopening and rehearing of matters adjudicated in 235.

When this cause was formerly before this court we dismissed the appeal, because the decree appealed from was not a final decree, and to show its character we necessarily construed it, and determined its scope and effect, and we held:

"The manner in which this cause was heard finds no warrant in the rules of correct chancery practice, and the order made upon the hearing of the demurrer is altogether irregular. This court, however, cannot enter upon a consideration of these questions, nor determine those raised by the assignment of errors, as we are satisfied the motion to dismiss the appeal must be sustained because the order made by the court is not a final decree. It is in the nature of a conditional order, its finality depending upon certain contingencies that might or might not occur. The decree passed in suit No. 235, November 18, 1893, was ordered to be vacated, and the cause reopened, and leave granted appellees to file an answer therein, if they should within 30 days deposit \$4,000 in the registry of the court, and pay all the costs of this suit and in suit No. 235. But if the costs should not be paid, nor the deposit of \$4,000 made, within the 30 days, or if the answer should not be filed within the time allowed, the decree in cause No. 235 was to remain in full force; and (using the concluding language of the decree) 'complainants' bill in this cause will thereupon stand dismissed as on final hearing, and all costs in this cause incurred in that event adjudged against them, for which execution may issue.' Something more was required to make the decree final than was done in this case. If appellees failed to do what the order required to be done within the prescribed time, appellants should have applied to the court for a final decree dismissing the bill. If the order of court was fully

complied with by appellees, a final decree should have been passed, upon their application, reversing the decree in suit No. 235, and reopening that cause for further proceedings." *Stratton v. Dewey*, 24 C. C. A. 435, 79 Fed. 32, 34.

In so holding we neither decided, nor expressed an opinion to the effect, that the decree was justified by the bill and exhibits, nor even that the bill made a case under which the court could grant relief, and now these matters must be determined. The jurisdiction of courts of equity to reopen and set aside former decrees on the ground of accident, mistake, and surprise is well recognized and is frequently invoked, and herein we now find and hold that under the facts and circumstances shown in the bill (suit No. 294) it was within the discretion of the circuit court to take jurisdiction and permit the same to be filed, and that, having permitted the bill to be filed and the defendants having appeared to answer and contest the same, the court had jurisdiction to render the interlocutory decree of March 19, 1896. That decree seems to have been granted before the bill was fully put at issue by an answer, and on a hearing on demurrer, and a rule to show cause why an injunction should not issue, and on affidavits, counter affidavits, and exhibits. That it was irregularly granted, and was probably erroneous, may be conceded; and if the appellees were now before this court, as heretofore, complaining of that action, instead of seeking to benefit by the final decree in the case awarding them the large sum paid in by the Deweys to secure a hearing in No. 235, we could see our way clear to reopen the whole litigation to that point, and correct the interlocutory decree. As the case stands, however, the appellees seem to have acquiesced in the interlocutory decree, and, instead of complaining thereof, now seek to avail themselves of all its provisions. Under this state of the case, we feel constrained to hold that the interlocutory decree is binding on the parties, and thus is presented the question whether the said decree was complied with so as to entitle the appellants to a hearing on the merits in suit No. 235.

The final decree now under review adjudges "that said Charles P. Dewey and Albert B. Dewey did pay the costs in suits Nos. 294 and 235 within the time required by said interlocutory decree entered in this cause on the 19th day of March, 1896, and did deposit in this court the four thousand dollars and interest within the time provided in said interlocutory decree," and to this extent it is sustained by the record. These conditions admitted to be performed were all and the only conditions precedent to the reopening of suit No. 235, and the setting aside of the decree pro confesso, and the final decree entered therein, and when within the time specified the Dewey complainants paid all the costs, and deposited the sum of \$4,000 and interest, they were entitled to file an answer in suit No. 235, and thereupon to have the real merits of that suit adjudged and decreed. The condition in the interlocutory decree that the Deweys were to file a full answer to the allegations of the bill and interrogatories therein propounded was a condition subsequent, default in which could only be determined and decreed in suit No. 235, which suit it was declared should proceed after answer filed according to the rules of practice in equity. The Dewey complainants did file an apparently full answer to the allega-

tions of the bill and answers to the interrogatories therein propounded, and the complainants so far followed the rules of practice in equity as to move to strike the answer out for various reasons assigned, and in the same paper to except to the sufficiency of the answer. The record further shows that on the exceptions so filed in No. 235 the court held the answer as filed not to be a sufficient answer to the bill, but thereupon on the same day granted leave to file an amended answer within 10 days. Within 10 days an amended answer was filed. To this amended answer the complainants in No. 235 filed a compound pleading made up of a motion to strike out, exceptions, and a demurrer. This pleading does not appear to have been passed upon by the court, and, so far as this record shows, said amended answer is now on file, pending and undisposed of.

In this state of the record it appears that the complainants in No. 294 have fully complied with the conditions precedent and subsequent contained in the decree of March 19, 1896; and as that decree has been acquiesced in by the parties, complainants and defendants, the scope and purpose of the bill in suit 294 has been accomplished, and the court erred in proceeding to dismiss said bill prior to the determination of the litigation in suit No. 235. It also appears that, so far as the decree appealed from reaffirms the former decrees in suit No. 235, while an answer is therein pending and undisposed of, it is erroneous, and should be reversed. So far as we can ascertain the merits of the pending litigation from the record, we are of opinion that the decrees in suit No. 235 were so far irregularly obtained through inadvertence, mistake, and surprise that equity requires that the defendants in that suit should have an opportunity to be heard on the merits, and to present their defenses, if any they have; and to that end the decree appealed from is reversed, and the cause is remanded to the circuit court, with instructions to stay further proceedings in suit No. 294 until the issues in suit No. 235 are disposed of according to the rules of practice in equity, and otherwise to proceed in suit No. 235 in accordance with the views herein set forth, and as equity and good conscience may require. The costs of this appeal to be divided equally between the appellants and appellees.

TEXAS & P. RY. CO. v. GARDNER.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,102.

1. CARRIERS OF PASSENGERS—INJURY OF PASSENGER—PRESUMPTION OF NEGLIGENCE.

Evidence of a contract of carriage between plaintiff and defendant, and that plaintiff was injured while a passenger under such contract, casts the burden on defendant to show that it and its agents were without fault, or that plaintiff was guilty of contributory negligence.

2. SAME—NEGLIGENT STARTING OF TRAIN.

It is negligence to start a railroad train from a station while a passenger is actually getting on board, regardless of the length of the stop.

3. SAME—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company to recover for an injury to plaintiff, alleged to have resulted from her being thrown down by the sudden starting of the train while she was going on board, evidence that plaintiff made a misstep is not necessarily even prima facie evidence of negligence, requiring a special instruction to the jury on the subject of contributory negligence.

4. APPEAL—REVIEW—REFUSAL TO DIRECT VERDICT.

The refusal of a trial judge to direct a verdict for defendant on the ground that a part of the plaintiff's testimony was improbable is not a ground for reversal of the judgment by an appellate court, the matter being one going to the credibility of the witness, primarily for the jury, and subject to review only by the trial court on a motion for new trial.

In Error to the Circuit Court of the United States for the Northern District of Texas.

T. J. Freeman, for plaintiff in error.

M. L. Crawford, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This suit was instituted by the defendant in error, Jabe Gardner, to recover damages for injuries suffered by his wife, Amy Gardner, while a passenger on the defendant railway company's cars from Wills Point, Tex., to Dallas, Tex. On the trial Mrs. Gardner testified as follows:

"Am the wife of plaintiff. Live in Van Zandt county, about two miles from Wills Point. About the 3d of October last I purchased a ticket from Wills Point to Dallas. I was to come on the Cannon Ball train. The train was an hour and twenty minutes late. My husband was with me. I started to get on the train. I had four children with me. I got on the platform, and the train started suddenly, and threw me down against the iron railing. There was a gentleman present who helped me up. I had my ribs broken; my teeth broken; two or three teeth broken. Have not had my teeth fixed. They are broken off. Don't know how long train remained at Wills Point. Several parties got on before I did,—from three to five persons,—and they did not wait long enough for me to get on. I got on the west end of the coach, and went across the platform to a coach in front. When I reached Dallas I went to my sister's, Mrs. W. T. Strange. Mr. Strange met me at the depot, and took me home in a hack. I sent for Dr. Moseley. I was at Mr. Strange's house from October 3d to October 13th. I think two ribs were broken. I suffered with these broken ribs and my other injuries. My head and arm was hurt. The car I was on was crowded, but I did not know any one."

On cross-examination:

"I was on platform at depot when train came up. I saw the train porter. He was standing by the steps. My husband helped me put the children on. Several passengers got on ahead of me. Do not know whether any behind me or not. The porter helped me up the steps. I was just getting up on platform when I fell. My ribs and my head struck the iron railing. My ribs, jaw, and teeth struck the railing. I had my baby in my arms. Have not had my teeth examined. Have had no dentist. My teeth bled. I never said a word to the conductor. I did not tell any one till I got to Dallas. Rode all way to Dallas, and did not say anything to any one about it. My teeth were bleeding and my ribs hurting me. I did not tell the conductor nor the porter of my injury. I told no one on the car. When I got to Dallas I went to my sister's. Had a doctor that night, Dr. Moseley. I had Dr. Eagan for my child that was sick. I never said anything to Eagan about my injury. Never had a dentist to look at my teeth. They were broken off pretty close. Can't tell who the gentleman was that helped me. Have never

seen him since. I don't know who sat next me.' I did not discuss my injury with any one. The conductor took up my ticket, but I did not say anything to him. I did not tell him I fell. I was suffering, and my teeth bleeding. I stayed in Dallas till October 13th. When I went home my husband met me at Wills Point, and I went to the wagon and got in it, and went home."

The main contention of the plaintiff in error in this court is that this evidence shows such a very peculiar character of humanity, and a state of facts so contrary to nature and humanity, that the court below should have given the general charge requested in favor of the defendant. There are other assignments of error in regard to special instructions asked and refused, but only one (the second) seems to be insisted upon in this court, and it is as follows:

"You are instructed that it is the duty of a passenger to exercise reasonable and ordinary care for his own safety in boarding or alighting from a train, and if you find and believe from the evidence that this plaintiff's wife did not use reasonable and ordinary care for her own safety in boarding the train, and if you further find that defendant was in no way negligent, you will find for the defendant,—for the reason that the plaintiff's testimony disclosed the fact that the train stopped at the station for at least one and half minutes, and the testimony of the defendant showed that it stopped from two to five minutes, and the plaintiff failed to show by any evidence that the time in which it was at the station was not ample for her to board the train, and it is a fact that common experience teaches that the time was ample for her to have boarded the train had she used care and diligence. Again, the testimony of the plaintiff's witnesses disclosed the fact that after she went upon the platform she made a false step, and if any injury occurred it occurred from her own negligence in her moving across the platform in making the false step."

The reasons here assigned to show why these instructions ought to have been given are not conclusive. Mrs. Gardner was a passenger and entitled to safe carriage, and, when the contract of carriage was proved and the injuries shown, the burden was on the carrier to show that it and its agents were without fault, or, if in fault, to show that the passenger negligently contributed to her own injury. Now, whether the train stopped at the station two or five or ten minutes, it was negligence to start the same while the passenger was actually getting aboard.

It is, not, necessarily, even *prima facie* negligence to make a false or miss step while boarding a train. If a passenger under such circumstances does make a false step, he, and not the carrier, ought to bear the consequent injuries, unless the false step is caused by or through the negligence of the carrier in starting or moving the train. If the false step is not caused by or through starting or moving the train, but the injuries were enhanced through and because the train was improperly started, then the liability of the carrier is a question for the jury.

The propositions of law contained in the requested instruction seem to be correct, and so plain that it is not a violent presumption that in substance they were given to the jury in the general charge, and this presumption is fortified by the fact that the reasons here urged why the instructions should have been given are special, and bear on particular phases of the evidence, and we can safely infer that the same reasons were given to the trial judge. The extraordinary statement

made by Mrs. Gardner in regard to her injuries and its probability in the light of human character were questions for the jury, and subject to no other review than that of the trial judge, who had power to grant a new trial if the extravagance of the case as made by the evidence overtaxed his credulity.

On the face of the record we find no reversible error of law, and the judgment of the circuit court is therefore affirmed.

CASEY v. PENNSYLVANIA ASPHALT PAV. CO.

(Circuit Court of Appeals, Third Circuit. February 12, 1902.)

No. 45, September Term, 1901.

RES JUDICATA—JUDGMENT NON OBSTANTE VEREDICTO.

A judgment entered for defendant, notwithstanding a verdict taken subject to a point reserved, is not an adjudication based upon matter alleged in arrest of judgment, but is merely the legal consequence of a ruling by the court that upon all the evidence defendant was entitled to a verdict, and its effect as an adjudication upon the merits is the same as a judgment upon a directed verdict.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

James S. Young, for plaintiff in error.

Wm. Hall, Jr., for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

DALLAS, Circuit Judge. The very ingenious argument made on behalf of the plaintiff in error ascribes to a judgment for defendant non obstante veredicto a character quite different, we think, from that which has heretofore been attributed to it. It is not, either in form or effect, an adjudication against the plaintiff upon matter alleged in arrest of judgment, but is merely the legal consequence of a ruling by the court that, upon all the evidence, the defendant was entitled to a verdict. Such a ruling, when made upon the trial, is given effect through binding instructions, and between a judgment for defendant in pursuance of a directed verdict, and a judgment entered in his favor notwithstanding a verdict which had been taken for the plaintiff subject to a point reserved, there is no substantial distinction. They rest upon precisely the same foundation.

We adopt the opinion which was filed by the learned judge of the circuit court (109 Fed. 744), and for the reasons there presented the judgment of that court is affirmed.

Georgia. A case is not presented where, in my opinion, the exemption should be approved. It may be remarked that it appears that J. K. Williamson is unmarried, and that the exemption is claimed by Mrs. Williamson "under sections 5912 and 2827 of the Civil Code of Georgia, she being an aged and infirm person, 62 years of age." In the case of *In re Waxelbaum* (D. C.) 101 Fed. 228, this question was discussed by this court, and a similar conclusion reached as to the exemption then claimed. The decisions of the supreme court of the state on the subject are there referred to.

I think that as to the exemption of household and kitchen furniture and wearing apparel the action of the trustee in setting the same apart should be approved, but as to his action in setting apart the stock of jewelry and fixtures it should not be approved, and to that extent I differ with the referee. An order may be taken accordingly.

In re STEPHENS et al.

(District Court, N. D. Georgia. January 15, 1902.)

No. 677.

BANKRUPTCY—EXEMPTION—FRAUD.

Under Code Ga. § 2830, providing that a debtor guilty of willful fraud in concealing property from creditors shall lose the benefit of his exemption, a bankrupt claiming an exemption under the laws of that state must give a better explanation than that he "sold a great deal of goods, and sold some of them at less than cost, to try to meet obligations," where his schedule in bankruptcy shows \$7,500 assets and \$9,800 liabilities, while his statement, made eight months before, and which he says was correct, showed \$13,500 assets and \$7,000 indebtedness.

In Bankruptcy.

W. C. Wright, for bankrupt.

R. W. Freeman and R. O. Jones, for objectors.

NEWMAN, District Judge. The bankrupt firm is composed of F. M. Stephens and A. J. Stephens. The entire property shown on the schedules, except a small amount of open accounts, is a stock of merchandise. Neither of the bankrupts has a wife or children. They have a mother, who is 63 years of age, and an orphan niece, 9 years of age. The two brothers, mother, and niece live together, and constitute one family. Under the constitution and laws of Georgia, it seems that the elder brother, who is the head of a family, the females of which are dependent, would be a person entitled to an exemption. Certainly, however, both brothers cannot claim an exemption with the same beneficiaries, the mother and niece. Conceding it to be true that F. M. Stephens is so situated that he is entitled under the laws of the state to claim an exemption, is he entitled to it out of the firm assets under the facts and circumstances of the case as shown in the record? There is a claim for exemption on the part of both of the bankrupts accompanying the petition in bankruptcy. Each of the bankrupts has selected certain articles of merchandise, an itemized list of which accompanies the schedule. In the case of F. M. Stephens the total amount of merchandise so claimed as an exemp-

tion is \$1,599.94, and in the case of A. J. Stephens \$1,599.84. The trustee set apart the exemptions as claimed. Objection was made to the allowance of the same before the referee, and after hearing the matter he denied the exemption as to both of the partners. This ruling of the referee is certified by him, at the request of the bankrupts, to the district court. Numerous objections were urged by the creditors before the referee against the allowance of these exemptions,—among others that the purchase price of a part of the goods claimed as an exemption was still due to the creditors who interposed objections; as to A. J. Stephens, because he contributed nothing to the partnership business; as to F. M. Stephens, because he contributed less than \$1,600; and by some of the creditors, upon the ground that they held notes containing waiver of homestead and exemption. Another objection, and a most important one, was, substantially and in effect, that the bankrupts were not in position to claim an exemption, because they had failed to make a full and free disclosure of their property, and that they did not come into court with clean hands, so as to be entitled to an exemption under the laws of this state. The law of Georgia on this subject is contained in Code, § 2830, as follows:

"The debtor guilty of wilful fraud in the concealment of part of his property from his creditors, of which he is possessed when he seeks the benefit of the exemption, shall, on account of his fraud, lose the benefit of such exemption, and his property shall be subject to the payment of all just debts which he owed at the time such fraud was committed."

The record shows that the bankrupts made a statement in January, 1901, as to the condition of their business, which showed assets amounting to \$13,475.20, and a total indebtedness of \$6,938.38, leaving a balance of assets over liabilities of \$6,536.82. When examined before the referee in the matter of exemption, they testified that this statement was correct when made. Their schedule in bankruptcy filed September 2, 1901, showed assets of \$7,474.58 and liabilities of \$9,799.96, an excess of liabilities over assets of \$2,325.38. This shows a diminution of the estate in eight months of \$8,862.20. A discrepancy of this kind, in a business no larger than that the bankrupts were conducting, needs explanation of some kind. The only explanation given, so far as appears in the record, was that they "sold a great deal of goods, and sold some of them at less than cost, to try to meet obligations." A more satisfactory explanation than this should be made by the bankrupts when an exemption is claimed. A case very much like this has been decided by this court in *Re Waxelbaum* (D. C.) 101 Fed. 228, and the conclusion reached that the exemption would not be allowed under such circumstances. The referee had the bankrupts and other witnesses before him in this case, and had opportunity for ascertaining the truth of the matter, and he evidently found that there was not such good faith and such conduct on the part of the bankrupts as would justify the allowance of an exemption to either of them. It is stated in *Re Waxelbaum*, supra, by this court, that:

"The rule is well recognized that the district court will not interfere with the action of the referee in bankruptcy as to his findings on facts, unless the same are manifestly erroneous."

There is no error of law in this case, and the conclusion of the referee is abundantly supported by the facts. The referee's decision denying the exemptions will be sustained as to both the bankrupts.

ROMARE v. BROKEN ARROW COAL & MINING CO. et al

(Circuit Court, N. D. Alabama, S. D. February 19, 1902.)

1. RECEIVERS—GROUNDS FOR APPOINTMENT—MORTGAGE FORECLOSURE.

The trustee in a mortgage securing bonds of a corporation owning about 8,000 acres of coal and timber lands, on request of the holders of about one-fourth of the bonds, brought suit to foreclose the mortgage, and applied for the appointment of a receiver to take possession of and operate the property. No interest had been paid on the bonds for 17 years, and the bill alleged, on information and belief, that the company was insolvent, that the mortgaged property was of less value than the amount due on the mortgage, and that some three or four hundred acres of the land was in possession of a lessee, which was impairing its value by taking large quantities of coal therefrom. There was no allegation of fraud, dishonesty, or incompetency in the management. The charge of insolvency was denied, and not proved; nor was there any definite evidence as to the value of the mortgaged property, the quantity of coal being mined, or the effect of the work in developing the mines. On behalf of defendant it was alleged, and there was evidence tending to prove on the hearing, that the bondholders had at all times been fully cognizant of the operations of the company, in which they had, to some extent, participated; that, up to about two years before, such operations had not been profitable, but there had at that time been a change in the management, since which time a large amount had been expended in developing the mines, which were then being operated under advantageous leases. There was testimony of disinterested witnesses that since that time the property had increased in value, and gave fair promise of yielding returns to the stockholders and bondholders. It was also shown that a majority of the bondholders approved of the management, and believed the appointment of a receiver would be detrimental to their interests. *Held*, that such evidence did not warrant the appointment of an operating receiver pending the suit.

2. SAME.

The fact that the bondholders of a corporation owning coal lands permitted the interest to become in arrears for 17 years before bringing suit to foreclose, with full knowledge of the operations of the company, during the last 2 years of which time it expended large sums in developing the property, may properly be considered in determining their equity to demand the appointment of a receiver; and the appointment ought not to be made, under such circumstances, against the opposition of the company and a majority of the bondholders, without clear proof of mismanagement, and that the receivership would better subserve the interests of all of the bondholders, at least, and is necessary for their protection.

In Equity. Suit to foreclose mortgage. On motion for appointment of receiver.

This case comes before me on motion of complainant for a receiver, and has been argued and submitted on bill and answer, and testimony as shown by the note of submission. The case, so far as it is necessary to state it, is this: Complainant, Paul Romare, is the surviving trustee under a deed of trust made by the Broken Arrow Coal & Mining Company on the 1st of November, 1888, to secure a total issue of 100 bonds, for \$500 each, payable on the 1st day of December, 1903, with semiannual interest at the rate of 7 per cent. per annum. No interest has been paid since the 1st day of December,

1884, and it is alleged in the bill that the sum of \$57,550, with interest thereon from the different dates when the coupons fell due, is now due to the owners of the bonds, exclusive of the principal. The deed provides, on default in the payment of interest continuing for six months, it shall be the duty of the trustee, upon the requisition in writing by the holders of not less than one-fourth of the total issue of bonds then outstanding, accompanied by adequate indemnity against costs and expenses, to enforce the rights of bondholders by suits in equity, or otherwise, as the trustee may be advised is most effective. In compliance with the request of the holders of 26 of the bonds (being more than one-fourth of the whole issue outstanding), the trustee, having been properly indemnified, files his bill to foreclose the mortgage. It is alleged, on information and belief, that the Broken Arrow Company is insolvent, and that the mortgaged premises are of less value than the amount due upon the bonds and coupons, and that since the execution of the deed of trust the Broken Arrow Coal & Mining Company has made a lease to the Coal City Coal & Coke Company, which is also made a defendant to the bill, which is in possession of three or four hundred acres of valuable land, mining coal therefrom every day in large quantities, and that, "by every ton of coal which is raised and moved from the lands in the mining operations, it is impairing the security of the bonds and coupons, and that after the mines are exhausted the land will be useless and valueless for any other purpose," etc. The prayer is for foreclosure, and for the appointment of a receiver to take possession of the mortgaged property, with power to operate it and to secure the earnings thereof until foreclosure sale. The answer sets up, among other things, that it was well known to the bondholders that respondents could not pay the interest unless a large amount was invested in opening and developing the mines, and that an agreement was had between the respondents and the holders of the first mortgage bonds, with the knowledge and consent of the complainant, that respondent should procure the necessary amount of money to be expended on the property to develop it until it could be put upon a paying basis, and that if this were done no attempt would be made by complainant and the bondholders to foreclose the mortgage; that, in consideration of this promise and agreement, respondents since the making of the mortgage have expended more than \$48,000 in the development of the property; and that the bill to foreclose is premature and in violation of the agreement between the respondent and the holders of the first mortgage bonds. The answer also denies that the Broken Arrow Coal & Mining Company is insolvent, or that the premises are of less value than the debt due, or that the Coal City Coal & Coke Company is in any way impairing the security of the bonds; and it is also denied that the Coal City Coal & Coke Company is working or exhausting the mines in any manner. The answer sets up that the appointment of a receiver under the existing conditions would be disastrous and ruinous to all parties in interest,—not only the respondents, but the bondholders as well; that, after the expenditure of this large sum of money put in the property by the respondents, it will soon be placed upon a paying basis, if allowed to be operated; that the mines are being operated under an arrangement with the Northern Alabama Coal, Iron & Railroad Company, which company operates the mines under an arrangement with the Talladega Furnace Company, the owners of a large furnace at Talladega, Ala., and the Birmingham & Atlantic Railroad Company, which owns a railroad extending from Talladega to a point not far distant from the mines, and that the success of the operation of the mines is altogether dependent upon their being operated in connection with said furnace and railroad; that it is fully realized by the holders of three-fourths of the mortgage bonds of the Broken Arrow Coal & Mining Company that the well-being of the enterprise depends upon its being operated as aforesaid, and they object to the foreclosure, or to the appointment of a receiver for the property, and allege that such proceedings are not in the interest of the bondholders, but in the interest of complainant and a few minority bondholders, who seek to thereby force the holders of the majority of the bonds to purchase their interests at prices dictated by them, without regard to the disastrous effect of the proceedings upon the trust estate. It is further alleged that the trustee has been removed since the filing of the

proceeding, by a majority of the bondholders, under a power to that effect in the deed of trust. It is not necessary to notice this allegation further, in the view I take of that question on the other branch of the case.

J. J. Willett, B. F. Abbot, and Jas. T. Greene, for complainant.
Knox, Bowie & Dixon, for respondents.

JONES, District Judge. The appointment of a receiver upon the evidence before me would be as hazardous as a surgeon's undertaking an operation upon his patient in the dark. The insolvency is charged on information and belief. It is met by a positive, but merely literal, denial. Such a denial, however, is good enough for a charge thus made. The only direct evidence of the value of the trust property is the "opinion" of one of the complaining bondholders that the "market value of the property is less than one hundred thousand dollars." The bonds are secured by a deed of trust "upon all the coal and other minerals" in certain described lands in St. Clair county, amounting in all to 3,156 acres, "together with the engines and machinery now used in operating the works, and such as may hereafter be used in operating the mines." Whether engines and machinery of any considerable value are now upon the premises is not stated. The answer alleges that the present management has spent in development and opening mines \$48,000, which the affidavits show has been done in the last two or three years. Complainant disputes the amount thus expended, but it is evident that large sums of money have been expended upon the mines quite recently. There is nothing to show that this money has not been judiciously expended, or that it has not correspondingly advanced the value of the mortgaged premises. There is neither allegation nor proof that the property described in the mortgage is all the property of the defendant corporation, save in the affidavit of four complaining bondholders that the coal and timber are the only security. The character and value of the timber on the land are not given. The Coal City Coal & Coke Company, of whose operations complaint is made in the bill, is charged to be in possession of only "three or four hundred acres" of the entire tract. As to the remaining 2,700 or 2,800 acres, no information is given. It does not appear how much money has been expended in development on them in the earlier operations of the company, and whether the development has added to the value, or how they compare in value with the "three or four hundred" acres mentioned. The court is not informed how far the coal and "other minerals" have been developed on the entire property, or as to the character and quantity or value of coal and other minerals therein, or how they lay, or how advantageously they may be worked. It is not shown that the respondent company owes other debts than those secured by the deed of trust. In this state of the proof, it cannot be declared, in favor of one upon whom the burden of proof rests, that the respondent company is insolvent.

It is shown by the affidavits of Alverson, Moore, Hamilton, and Daughdrill, who are entirely disinterested, and speak with knowledge of the past and present conditions of the property, that until lately the mines were not sufficiently developed to operate them at a profit, but that in the last two years the Northern Alabama Coal, Iron &

Railroad Company, out of its own funds, has spent many thousands of dollars in developing, repairing, and replacing property on the premises, and has about succeeded, after the expenditure of large sums of money without any profit to itself, in placing the property in a condition where coal can be mined at a profit, and has at the same time greatly enhanced the value of the mines, which these witnesses assert are now more valuable than at any time since the making of the trust deed. Each of these witnesses testifies positively that nothing is being done to injure the security of the bondholders, but, on the contrary, the property is being developed and greatly enhanced in value. Soley, the general manager of the Broken Arrow Coal & Mining Company, testified to the same effect, and that, from the time of the making of the trust deed until recently, the management of the respondent company has been conducted largely by certain of the bondholders who now seek foreclosure; but their management resulted disastrously; that since the present officers have been in charge of the property, and the large expenditures made upon it, it has increased in value, and gives promise of yielding returns to the stockholders and bondholders. Four of the complaining bondholders, however, state "as absolutely true that the security for the bonds is being impaired every day by the mining of coal and the cutting of timber, and that the chief and only security for the payment of the bonds secured by the deed of trust is the coal and timber upon said lands, and that the same is being exhausted every day by the mining of said coal and the cutting of said timber." They do not state the quantity of coal and timber which is being removed, nor how much money is being spent in development in the present operations, or how or in what respect the present operations are harmful to the property, save that coal and timber are being taken away from the mines. Coal and timber in considerable quantities may be taken, and yet, if there is a large quantity of coal or other minerals left upon the land, the development and the enhanced value therefrom to the remainder might more than compensate for the value of the coal and timber taken in the operations of the property, and leave it of greater value than before. The statement of these four witnesses, the honesty of which is not at all doubted, amounts to no more than their opinion that the security is being impaired merely because coal and timber are being taken from the mines, without any reference to the value and amount of the coal which remains, or the expenditures made in development, or the greater value which may thereby have been imparted to the property. It does not overcome the testimony of Alverson, Moore, Hamilton, and Daughdrill on these points.

Little need be said at this time of the defense that Romare and the bondholders agreed, if expenditures were made upon the property so as to put it upon a paying basis, they would forego the right of foreclosure, and that, in consequence of such agreement, large sums of money have been expended, whereby the property is now put upon a paying basis. The allegations as to this are vague and uncertain; it not being stated how much money was to be expended, or how long forbearance was to continue. So far as concerns Romare and the complaining bondholders, it suffices to say that the charge is made on "information and belief," and that they deny it most positively. It is

hardly necessary to say that a trustee has no authority to bind bondholders not to enforce their security in case of default, when neither the trust deed nor the individual bondholders give that authority, nor that, without specific authority to that effect, one bondholder, or a majority of them, cannot bind other bondholders to forego their rights under the trust deed. Upon the present state of the evidence, there is nothing which estops Romare and the complaining bondholders from insisting upon a foreclosure.

It is proper to refer to some other features of the case. The property is now being operated, and there is testimony which, in the least favorable view of it, certainly tends to show that the parties operating the mines, by reason of their ownership or control of a railroad and furnace, can find markets more advantageous for the coal than any other parties could. The terms of this contract, or the magnitude of the operations under it, or whether it has resulted profitably or not, are not stated. The only information given the court is that the success of the operation of the mines is "altogether dependent upon their being operated in connection with the furnace and railroad, and that under the present management the property has greatly improved, and that, if the management is allowed to continue to operate, there is reason to believe that the indebtedness of the company can soon be paid out of the earnings." The court is without any information which would enable it to judge whether this opinion is well or ill founded. It is, however, the opinion of the present management, stated under oath; and its correctness is largely supported by the affidavits of Alverson, Moore, Hamilton, and Daughdrill. All five of these witnesses testify positively that the company can operate the property to greater advantage than a receiver could, and the complainant has not furnished any testimony to the contrary. Nearly three-fourths of the bondholders insist that a receiver would be exceedingly detrimental to them. While these considerations present no bar to a foreclosure after the long default, they certainly are weighty in determining the propriety of a receiver pending foreclosure. The court cannot shut its eyes to the further facts that the complaining trustee and the minority bondholders for nearly 17 years past, in which there has been continuous default in the payment of interest, have forborne, so far as the record shows, to take any steps to collect their debts; that during this long period the property has been mined by the company in various ways,—either on its own account, or by persons who paid royalties,—without keeping down the interest, while in the last two years a new management has intervened, which has spent considerable sums of money in developing the property, under a contract of some sort with the company. These pregnant circumstances, unexplained, certainly tend to show that there was some agreement or understanding among a number of the bondholders, at least, to forbear the collection of their debt, and trust to future operations to place it on a better basis, and that the money spent in developing the property was expended on some such understanding. If not, why should the trustee remain inactive during this long period, and the complaining bondholders refrain from insisting on their right to compel him to institute foreclosure proceedings? Persons interested in property are

charged with knowledge of its vicissitudes and condition. It is unnecessary now to consider how far mere silence of bondholders, with knowledge of the agreement under which the money was expended, estops them from the right of foreclosure. It suffices here to say that the trustee and the complaining bondholders make most positive and direct denial of notice or knowledge of any agreement of the kind. Nevertheless, their inactivity and silence for so many years, and after so many and long-continued defaults, may be rightly considered in determining the equity of their sudden demand for a receiver.

It is contended on the one hand, and denied on the other, that the complainants seek foreclosure to compel the majority bondholders to purchase at a price beyond the value of the bonds, rather than submit to the sacrifice entailed by a receiver and foreclosure. In view of the vicissitudes of this property, the long delay in the payment of interest, and the various efforts to extricate the enterprise, and the abundant room for honest difference of opinion as to the best method of winding up the trust, I cannot see that this charge is made out; but, if it were, it is immaterial, since conditions have arisen which give creditors the clear and undoubted legal right to proceed, regardless of the motive which controls them. It is urged on the other hand that the majority bondholders and the managers of the property of the Broken Arrow Coal & Mining Company are so conducting it as to force the minority bondholders to sell at a sacrifice. Bearing in mind the history of this property, the long unanimity of the bondholders in foregoing their right to foreclose, and the evident hope of the majority that the debt can be worked out, it does not seem to me that this view is just. The differences of opinion among the bondholders are doubtless honest, and each side is merely trying to take care of itself without any nice calculation as to the effect of its position on the other side. The best solution of such a situation is not in litigation. Amicable adjustment would be quicker and better; but it is for the parties, not the court, to determine thus to settle the dispute.

The complaining trustee and bondholders ask for a receiver, with power to operate. They evidently believe it is not to the interest of the bondholders to shut down pending foreclosure, but, rather, to keep the mines as a going concern. The evidence, as I have stated, does not justify the conclusion that the value of the property is being impaired by the present operations, or that the company is insolvent. Suppose it is insolvent; still the question arises whether it is best for the cestuis que trustent to keep the property as a going concern pending foreclosure, or to shut down the mines. If the operations are to continue, they must be carried on by the respondent or by a receiver. In determining by whom this must be done, it should be borne in mind that the real complaint is not that the mines are being unskillfully, imprudently, or dishonestly worked, but that nothing has resulted, so far, to keep down the interest. Whether there is a profit or not, we are not told. If there be a profit which has been applied to improvements or other debts, instead of being paid on the interest, the court, by an order sequestering the income, could cure that evil. If the management is in danger of contracting debts for materials, supplies, and labor for which liens might be claimed superior

to the mortgage debt, the management could be easily controlled in this respect. So far as the evidence shows, if the mines are to be operated at all, it should be done by the present management, subject to the control of the court, rather than by a receiver. Upon the evidence, it is apparent that a receiver would not have the advantages of profitable operation possessed by the management, and a change of policy or disarrangement of the contracts under which the company is now being operated might result disastrously to respondent company as well as the creditors. If the present management is not making money, it is not at all probable that a receiver would. The alternative is plain,—either to allow the operations by respondent to continue, under proper orders of the court, or else suspend operations altogether. If it is best to shut down, the appointment of a receiver is not necessary to accomplish that result. The court could order the respondent to shut down the mines and put a watchman in charge, or the court might put a deputy marshal in possession, to prevent trespasses upon the premises, and the deterioration of machinery, and the taking out of coal, until the property could be sold. This would be far less expensive and detrimental than the appointment of a managing receiver. In no view of the situation, as it now appears, will any good be accomplished by the appointment of a receiver to operate the mines, and much evil and increased cost might result from it. Three-fourths of the bondholders—the class most interested in the property—insist that it would be harmful.

With the meager proof presented upon many matters which enter into the proper disposition of this property pending foreclosure, the court cannot foresee what relief in this respect may be necessitated by the future developments of the litigation. I will only decree now, upon the case as made, that a receiver ought not to be appointed; but the decree will be without prejudice to the right to renew the motion if, upon further proof, it be made to appear that the mortgage security is being impaired, or that a receiver will be beneficial to the enforcement of the rights of the cestuis que trustent.

MARCH et al. v. ROMARE et al.

(Circuit Court, N. D. Alabama, S. D. February 19, 1902.)

1. TRUSTS—REMOVAL OF TRUSTEES—DISAGREEMENT BETWEEN CESTUIS QUE TRUSTENT.

Cestuis que trustent may remove and appoint trustees, in the exercise of the power given them by the instrument creating the trust, although prior to the exercise of the power the trustee has filed a bill concerning the trust, which is still pending; but in such case the removal and substitution of trustees is subject to the approval of the court which has acquired jurisdiction of the trust, and where the power is vested in the majority, and has been exercised by them in opposition to a minority, although in good faith, and without any design to oppress, the court, before sanctioning the change, will inquire whether it will be detrimental to the interests of any of the cestuis que trustent, and especially where the trustee sought to be removed is proceeding in the discharge of a plain duty, which the minority had the right to demand at his hands.

2. SAME.

The trustee in a deed of trust securing bonds of a corporation, on demand of a minority of the bondholders, and being indemnified, began suit for foreclosure, and, under advice of counsel, applied for the appointment of a receiver, all of which was a duty he was required to perform by the terms of the deed, and as to which he had no discretion. This action, however, was disapproved by a majority of the bondholders, who, in the exercise of a power given them by the deed, removed the trustee and appointed others, who applied to the court to be substituted as complainants in the suit. No question was made as to the competency or good faith of the original trustee. *Held*, that since the foreclosure was a matter of right, upon which the minority were entitled to insist, and the execution of the decree therein would terminate the trust, all of which would be under the supervision of the court, which could protect the rights of all parties, it would not sanction the removal without cause of a trustee who had merely performed his duty, and the substitution of others as complainants, who owed their election to interests which were hostile to the suit.

In Equity. On motion for an injunction based on a bill in the nature of a supplemental bill to enforce the removal of defendant as trustee.

This is an original bill, in the nature of a supplemental bill, filed by March and Hoyt against Romare and others, and grows out of the litigation on the bill filed by Romare and others against the Broken Arrow Coal & Mining Company, which, briefly stated, is this: Romare is surviving trustee under a deed of trust executed by the Broken Arrow Coal & Mining Company in 1884 to secure an issue by that company of bonds, the interest upon which had long been in default. Upon demand made by one-fourth of the outstanding bondholders, and being indemnified against costs, as required by a provision of the deed of trust, he filed his bill to enforce the debt, and also prayed for a receiver pending foreclosure. Due notice of the motion for receiver was given, and the respondents to that bill were required to show cause against it on the 19th of October, 1901; but the matter was not actually heard until the 16th of January, 1902. On the 5th of December, 1901, March and Hoyt filed their petition in the case of Romare against the Broken Arrow Coal & Mining Company, alleging that a majority of the bondholders, as authorized by the deed of trust, had on the 16th day of November, 1901, removed Romare, and by like authority had appointed March and Hoyt trustees under said instrument, wherefore they prayed to be substituted as complainants, instead of Romare. On the 4th day of January, 1902, March and Hoyt filed their "original bill, in the nature of a supplemental bill," against Romare, as surviving trustee, and the other respondents in that case; reciting the proceedings commenced by Romare for foreclosure of the deed of trust; alleging that on the 16th day of November, 1901, a majority of the bondholders, exercising a power given by the deed of trust, removed Romare by an instrument in writing, and by a similar instrument had appointed March and Hoyt as successors to Romare and John H. Porter, a trustee who died several years since. The clause in the trust deed relied on to sustain these acts of the majority bondholders is as follows: "Article VIII. The trustees may, at any time, be removed by a declaration in writing signed by a majority in interest of the holders of all the bonds hereby secured, at the time outstanding. In case of the resignation, incapacity, or removal of said trustees, or either of them, the successor or successors may be appointed by the holders of a majority in interest of the bonds then outstanding, by an instrument in writing signed by them." The bill alleges proper notice to Romare of his removal, of the action by which it was effected, and the execution of the proper instruments in writing, signed by a majority of the bondholders then outstanding, appointing March and Hoyt as his successors, and offered to pay Romare the reasonable value of his services and expenses in the proper administration of the trust. Romare declined to surrender the trust, or to make any transfer to the complainants as his successors in the trust, as it

is alleged the deed obliged him to do, and has since continued to claim to be and continues to act as trustee, and to prosecute his bill. It is further alleged that March and Hoyt are entitled to conduct the foreclosure under the deed of trust, and to "manage, direct, and execute the provisions thereof," and that it is their duty to do so, and that the conduct of Romare notwithstanding his removal, if permitted to continue, would put it out of the power of orators to execute their trust, and to discharge their duty and obligations to the bondholders. The prayer is that Romare and the other defendants to the suit brought by Romare be made respondents to the present bill, and that Romare be restrained and enjoined from further proceeding with the conduct of the suit for foreclosure and for the appointment of a receiver, and from in any wise interfering with the trust estate; that he be required to transfer to March and Hoyt all interest vested in him by the deed; and that March and Hoyt be permitted and authorized by the decree of the court to proceed with the foreclosure, etc.

Knox, Bowie & Dixon, for complainants.

J. J. Willett, B. F. Abbot, and Jas. T. Greene, for respondents.

JONES, District Judge. The case is now submitted on motion for injunction against Romare. There were also argued at the same time the demurrers to the application of March and Hoyt to be substituted as trustees in Romare against the Broken Arrow Coal & Mining Company et al., and also demurrers to the supplemental bill, as well as the motion to strike it from the file; it being the understanding, in order to speed the cause, that the court, in passing upon the motion for injunction, would also indicate its opinion as to the other matters, and outline what decree it would render in term time as to them. The motion for injunction was submitted upon the same matters as those set forth in the note of testimony in the main case. The substance of the evidence has already been stated in the opinion rendered in that case.

There is no rule of law that cestuis que trustent may not remove and appoint trustees, in the exercise of the power given them by the instrument creating the trust, because prior to the exercise of the power the trustee has filed a bill, which is still pending, concerning it, or the court in any other way has undertaken jurisdiction of the trust. The exercise of such a power will be permitted or disallowed at any time as may appear to the court for the best interests of the cestuis que trustent. It is not the law, however, when the power is given in broad terms, without requiring a specification of any cause for its exercise, that the decision of a majority of the donees of the appointing and removing power cannot be questioned by the court, save in cases of fraud, oppression, or bad faith. The controlling question in every case is whether a change promotes the execution of the trust. If the court should be of opinion that the substitution is not for the benefit of the trust, it will not sanction a removal, though made in good faith and without intention to oppress. The only case, perhaps, in which the court would feel impelled to accept without question a decision appointing and removing trustees, would be where the power is lodged in the whole body of cestuis que trustent and is unanimously exercised by them. This would be only allowing all the owners of the trust property to deal with it as they thought best. But where the power is committed to the majority of the cestuis que trustent, and the minority oppose the removal, the court should always inquire not only

whether there was bad faith or oppression, but whether sanctioning the change might be detrimental to the interest of any of the cestuis que trustent. This duty becomes imperative when the majority of the cestuis que trustent remove a trustee who is proceeding in the discharge of a plain duty which the minority have a right to demand at his hands. In this case the minority bondholders, after default, had the unquestioned and clear legal right to demand of the trustee, upon giving him proper indemnity, to proceed to foreclose. He had not a particle of discretion. He would have been derelict in duty if he refrained from acting because a majority of the cestuis que trustent opposed foreclosure. The majority bondholders have no legal or moral cause of complaint against the trustee for so acting. It is not to be presumed, in a matter of this importance, that the trustee acted otherwise than on the advice of counsel, in applying for the appointment of a receiver. Indeed, the fourth article of the trust deed requires the trustee, in event of default, upon the requisition in writing of one-fourth of the bondholders, to proceed to exercise their rights, "either by taking possession of the property under the powers granted in other articles, or by suit or suits in equity or at law in aid of the execution of such powers, or otherwise, as the trustee, being advised by counsel learned in the law, shall deem most effectual." Upon the evidence, which, it is a fair inference from the attitude of the parties, was presented to him by the minority bondholders, he is not to blame for shifting the responsibility for determining whether there should be a receiver from his own shoulders to that of the court.

The case of *May v. May*, 167 U. S. 320, 17 Sup. Ct. 824, 42 L. Ed. 179, is much relied on to sustain the claim that this court has no right, under the circumstances of this case, to interfere with the change of trustees, or to refuse to sanction it. The language of the supreme court in that case must, of course, be measured and construed with reference to the facts with which it dealt, and the reasons for the conclusion it reached. In that case the defendant filed his bill against his mother, brother, and sisters to obtain instructions from the court as to the execution of the trust created by the will of his testator, and as to the effect of the omission in the will of provision for disposing of the principal of the estate after termination of the trust. It was apparent that active duties, involving large discretion, and requiring harmony and co-operation among the cestuis que trustent, would devolve upon the trustee long after the litigation closed; for, no matter what the decree rendered upon the bill filed by the trustee, May, it was evident that it would not terminate the trust, but would simply provide rules for its future administration by him. Under these circumstances, the lower court, the court of appeals, and the supreme court of the United States all held, on account of the "overbearing disposition" of the trustee, and his dissensions with the other cestuis que trustent, when harmony was essential, that the power of removal of the trustee, which the will gave the other heirs, with the approval of the testator's wife, and under which, by unanimous resolution, they removed the trustee, and appointed another person in his stead, was properly exercised, notwithstanding the pendency of his bill for the construction of the will, and that the court before which that matter

was pending properly sanctioned the removal and appointment under the power given under the will. In other words, the court held that the removal promoted the execution of the trust. In this case the execution of the decree of foreclosure, which, for aught that now appears, is inevitable, will terminate the rights of the parties, and leave the trustee no further duty or discretion in connection with the trust, save the distribution of money realized from the sale, and the exercise of the right to bid in the property in behalf of all the bondholders at a price not exceeding the amount of the bonds, with accrued interest and expenses of sale, if the decree does not take away these powers. This first duty one honest trustee could certainly perform as well as another. As to the other power, the court, in its decree, where the bondholders are at variance, as here, would, of course, provide that such a power should not be exercised, save at the instance of all the bondholders. This would in no wise sacrifice the rights of any of the bondholders in this respect, since, under the terms of the deed of trust, and also under the decree, if it contained proper provisions, the individual bondholder would be entitled to use their bonds, according to their pro rata value, in payment as cash upon any bid upon the property. No harm can come to the trust estate because of any lack of harmony between Romare and the majority bondholders, since there is no way in which his discretion can be exercised to their prejudice in the performance of the duties which will remain to him. The trust will be practically ended when the decree is executed. No further field of administration will be open, as in *May's Case*, where discordant relations between the trustee and cestuis que trustent might mar or obstruct future administration of the trust. That Romare is a man of character and business experience is not denied, and it is not charged that he is incompetent or unfaithful in the trust. He was the original choice of those who executed the trust, and has continued to discharge its duties for many years, without manifestations of want of confidence or dissent from any of the cestuis que trustent, until the dissensions and differences which have lately arisen among the bondholders as to the management of the trust property. The majority bondholders have no legal right to object to this foreclosure, and the trustee had no discretion but to proceed. It may be the misfortune of the majority that they have minority associates who are unwilling to wait until the property can be developed, and, by insistence upon a plain legal right to have a sale of the property, may entail sacrifice upon their majority associates; but "it is so nominated in the bond," and no court has power to deprive these minority bondholders of this right. What good, then, can come from relieving a trustee who is obeying the plain command of the trust, and transferring the trust and duty to another? Whatever the motive for Romare's removal, the result, if the court sanctions the act, is that a trustee who is strictly performing his duty to the minority bondholders under the trust deed is removed by the majority bondholders. Removed for what? The question, in view of the developments of the case, admits of but one answer. No court mindful of its own dignity and duty can permit litigants thus to dismiss a faithful trustee.

It is urged that the new trustees would perform their duties under

the eye of the court, and, if slothful or unfaithful, the court can compel them to do their duty. So it can. But why take chances of having to prod a lukewarm trustee? There is already a suitable trustee, loyal to the trust, who is performing its duties, which, when the final decree it is his duty to seek is rendered, will practically terminate the trust. It is therefore neither wise nor expedient to call in new trustees, who owe their election to hostile interests, which may constantly beset the trustees not to speed the performance of their duty. A change of trustees would not promote the execution of this trust, and would increase the cost and expense of foreclosure, and perhaps delay it.

A decree will be here entered denying the injunction prayed for, and counsel for Romare may draft and present decrees, to be entered in term, in conformity with this opinion, disposing adversely of the petition and the bill filed by March and Hoyt.

In re FRANKLIN SYNDICATE et al.

(District Court, E. D. New York. May 8, 1900.)

BANKRUPTCY—EXAMINATION—INCRIMINATING EVIDENCE.

Though a bankrupt may, under Bankr. Act 1898, § 7, subd. 9, be required to submit to examination as to what property he has, what disposition he has made of any property which the court is entitled to administer, to what persons he has paid money or delivered property, and where they are, and though such section provides that no testimony given by him shall be offered against him in any criminal proceeding, he will not be required to develop the whereabouts of papers which might be used against him in a criminal proceeding.

See 101 Fed. 402.

Howse, Grossman & Vorhaus and Robert Ammon, for bankrupt.
Belfer & Flash, for petitioning creditors against Franklin Syndicate.
Myers, Goldsmith & Bronner, for petitioning creditors against bankrupt.

Wingate & Cullen, for trustee.

THOMAS, District Judge. The referee has certified that the bankrupt, William F. Miller, has refused to answer certain questions relating to his estate. When he was first summoned to testify, on a former occasion, his trial upon a serious charge, growing out of business connected with his estate, was pending in the court of the state. Whatever the power of this court to compel an answer to the questions propounded to him at that time, there was a certain impropriety in the exercise of such power. His trial was had subsequently, upon one of many indictments against him, a conviction secured, and he is now under sentence. The reasons that existed at the former trial for suspending the examination demanded by the bankruptcy act have measurably passed, and there are certain questions in the record now presented to the court which the bankrupt should answer, and which apparently he may answer without detriment to any proceedings pending against him. The following are the questions which, upon his attempted examination on May 4, 1900, before the referee, the bankrupt

refused to answer, upon the ground that such answers would have a tendency to degrade, disgrace, or to incriminate him:

(1) "Q. What business did you carry on prior to November 23, 1899?" (2) "Q. Is there any information which you desire to give to the trustee in this proceeding which will assist him in the collection of any of the property which belonged to you on the 23d day of November, 1899?" (3) "Q. Do you know of the location or whereabouts of any property which belonged to you on the 23d day of November, 1899, besides a deposit in the Knickerbocker Trust Company, standing to your credit, a deposit with F. A. Torrey, a banker in Nassau street, the balance of the cash on hand at the time you closed your office on the 23d or 24th day of November, the office furniture and office fittings, a balance of \$5.61 with Ferdinand B. Hesse, and the proceeds of any drafts, post office orders, express company orders, or checks which may have been received by you or for your benefit after November 23, 1899, which had not already been collected by you and reduced to cash?" (4) "Q. Have you in your custody or under your control, or in the custody or control of any of your agents, servants, attorneys, or persons in your employ, any property which belonged to you upon the 23d day of November, 1899, which was not on the 23d or 24th day of November, 1899, delivered by you to John L. Daly, your assignee?" (5) "Q. Have you in your possession or under your control, or in the possession or under the control of any of your agents, servants, attorneys, or persons in your employ, any property, of any manner, shape, or description, belonging to you on the 23d day of November, 1899, or which belonged to you at any time previous to the adjudication in bankruptcy in this proceeding?" (6) "Q. Mr. Miller, have you any papers, documents, letters, evidence of indebtedness, or memoranda of any kind in your possession or under your control which belonged to you or were in any way concerned for the carrying on of your business at 144 Floyd street, in the borough of Brooklyn?" (7) "Q. Do you know of any debts due to you?" (8) "Q. Have you a cause of action against anybody for an accounting for money had and received for your benefit?" (9) "Q. Does any one hold for your benefit an assignment of any property which you own, had possession or control of, after November 23, 1899?" (10) "Q. Where are the books of account kept by you in your business prior to November, 1899?" (11) "Q. Are those books now in your possession or under your control?" (12) "Q. Are there in existence any books showing your financial condition at any time during the months of November, December, or January of the years 1899 and 1900?" (13) "Q. Are you willing to assist the trustee in this case in any manner, shape, or form in the performance of his duties?"

It is considered that the court has power to compel an answer to certain of these questions, and that such power may be exercised without detriment to the defendant in any criminal proceeding which is now pending or may be instituted against him.

The refusal to answer the first question may be allowed to stand.

So as to the second and thirteenth questions.

The third question is objectionable, as it assumes certain facts, to which his assent is not necessary; but the question asked in the following form should be answered:

"Q. Do you know the location or whereabouts of any property which belonged to you on the 23d day of November, 1899? If so, state it all in detail."

The fourth question should be answered, excluding the assumed fact, that he had delivered certain property to John L. Daly, his assignee.

The fifth question seems unobjectionable in form and should be answered.

The sixth question should not be answered, as it calls upon the witness to testify as to papers, documents, letters, evidence of indebted-

ness, or memoranda in his possession, or under his control, which belonged to him or were in any way concerned in the carrying on of his business at 144 Floyd street, in the borough of Brooklyn. This evidence may be objectionable, as compelling the witness to develop the whereabouts of papers and documents which might be used against him in a criminal proceeding. Although the statute provides that his evidence given in proceedings in bankruptcy should not be used against him, this question calls for a discovery of documents which, when discovered, might be used against him. For that reason the question is not sustained.

There appears to be no reason for the refusal to answer the seventh question. So as to the eighth and ninth questions.

It also appears that the tenth, eleventh, and twelfth questions may well be answered without the objection above stated to the question relating to the discovery of papers, documents, letters, etc., provided the questions be limited to the usual books of account kept in the business, of which the court now has jurisdiction.

It is considered that the bankrupt should discover to this court what property he has, what disposition he has made of any property which the court is entitled to administer, to what persons he has paid money or delivered property, where such persons are, and questions of like nature. Subdivision 9 of section 7 of the bankruptcy act suggests the general nature of an examination to which the bankrupt may be subjected, and provides that no testimony given by him shall be offered in evidence against him in any criminal proceeding. The final clause of subdivision 9, section 7, is a complete protection to the witness, and no reason whatever exists, in view of such protection, for his refusal to answer suitable questions respecting his estate. While it is the purpose of the court to be entirely fair towards persons who are subject to criminal prosecution, the purposes of the bankruptcy act may not be defeated by the refusal to give evidence concerning his transactions, whereby property belonging to his estate may escape distribution to his creditors, and no refinement of argument will be permitted to save the bankrupt from giving evidence that shall tend to that result. It is considered that the examination of the bankrupt should be again taken up and conducted along the lines suggested, and, if there shall be persistent refusal to answer, proper proceedings should be instituted looking to the punishment of the bankrupt for contempt.

In re SHERA.

(District Court, S. D. New York. February 19, 1902.)

BANKRUPTCY—RIGHT OF BANKRUPT TO REFUSE TO ANSWER INCRIMINATING QUESTIONS.

A bankrupt, on his examination, cannot be compelled to answer questions, over his claim of privilege on the ground that the answers would tend to incriminate him, where the situation is such as seems to put him in hazard.

In Bankruptcy. On review of ruling of referee.

Hayes & Hershfield, for trustee.
 Myers, Goldsmith & Bronner, for creditor.
 McCurdy & Gard, for bankrupt.

ADAMS, District Judge. This matter came before me in January upon a petition to review the ruling of the referee sustaining the claim of the bankrupt of a right to refuse to answer certain questions. At the time of that examination, objections were interposed by counsel for the bankrupt, to the effect that the answers would tend to incriminate the witness. The objections were sustained. I then held that the refusal to answer questions on such ground was a privilege personal to the witness, who might wish to answer, and counsel could not be heard to object to the evidence. Abb. Tr. Ev. 783; 1 Greenl. Ev. § 469d. The matter was then remitted to the referee. Another examination has been had, and the witness therein declined to answer similar questions, upon the same ground, and the referee sustained his claim. The trustee has petitioned for a review of this ruling. The question involved has been answered in this district in favor of the bankrupt by Judge Brown in *Re Feldstein*, 4 Am. Bankr. R. 321, 103 Fed. 269. But my attention has been called to the cases of *In re Franklin Syndicate*, 4 Am. Bankr. R. 511, 114 Fed. 205, and *Mackel v. Rochester*, 4 Am. Bankr. R. 1, 42 C. C. A. 427, 102 Fed. 314, which apparently take a contrary view. In the former, however, I do not think that the decision of Judge Thomas is inconsistent with the view that the bankrupt can avail himself of the privilege when the situation is such as seems to put him in any hazard. I cannot follow *Mackel v. Rochester*, as it appears to me that it is not in accord with *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, which holds, in substance, that an immunity similar to that which the bankruptcy act purports to afford is not sufficient to protect the witness in his constitutional privilege.

The ruling of the referee is sustained.

THE RICHMOND.

(District Court, E. D. Virginia. February 19, 1902.)

1. COLLISION—STEAM AND SAILING VESSELS—PRESUMPTION OF FAULT.

Under the navigation rules requiring a steam vessel to keep out of the way of a sailing vessel when there is risk of collision, and requiring the latter to keep her course and speed, where it appears that she did so, a presumption arises that the fault for a collision was that of the steam vessel, and such presumption must be acted upon unless the accident is shown to have been inevitable, or that it was the result of neglect or omission on the part of those navigating the other vessel.

2. SAME—MAINTENANCE OF LIGHTS—EVIDENCE.

The failure of those in charge of one of two vessels to see or observe the lights of the other prior to collision does not disprove their existence; and cannot be accepted to outweigh the positive testimony of the officers and crew of the other vessel that the lights were properly set, and were seen to be burning up to within five minutes before the collision.

3. SAME—EX PARTE EXPERIMENTS.

Testimony in regard to experiments to determine the position of a vessel's lights, and whether they could have been seen by the officers

and crew as claimed, when the vessel was in a shattered condition from a collision, or after she had been rebuilt and materially changed, is not entitled to great weight, especially where the experiments were made by the adverse party without notice to the owners or crew, and when they were not present.

4. SAME.

Where it is shown that a vessel was equipped with lamps of an approved style, bought from a reputable dealer, the court will be slow to find that they were inefficient, or that those navigating the vessel failed to light and keep them burning on a dark and stormy night, when they were sailing in a locality where there was a probability of encountering other vessels.

5. SAME.

The claim of a steamer that a collision with a schooner was due to the failure of the latter to carry proper lights is materially weakened by the fact that such omission was not mentioned in the steamer's log, nor in the protest lodged against the schooner on the following day.

6. SAME—STEAMER AND SCHOONER CROSSING.

Evidence considered, and held to establish the claim that a collision between a steamer and a schooner in Chesapeake Bay on a stormy night was due solely to the fault of the steamer in failing to maintain an efficient lookout, or to reduce speed after lights were reported two or three miles off the port bow, until the location and course of the vessel carrying such lights could be ascertained, as well as because of improper maneuvers after the schooner was seen when 1,000 feet away, which were in themselves calculated to bring on a collision.

In Admiralty. Libel in rem to recover damages for collision.

This is a libel to recover damages caused by a collision between the steamship Richmond and the Georgie Clark, a three-masted schooner. The collision occurred on the night of January 31, 1890, about three miles E. S. E. of Thimble Light, in Chesapeake Bay, between 9:30 and 9:50 p. m. The steamship was on its outward trip to New York, having left Norfolk about 7 p. m. The schooner was also bound from Norfolk to New York, with a cargo of lumber; but after passing out of the capes had, on account of the threatening condition of the weather, to put about for harbor, and at the time of collision was bound into Hampton Roads for anchorage. The tide was flood. The night was dark and cloudy, with passing rain and snow squalls, but lights could be seen a considerable distance. The wind was about N. N. E., increasing, and the schooner had her three lower sails and three head sails set. She had a crew of seven men, consisting of the captain, mate, four sailors, and a steward. She passed in the capes about 7 p. m., bearing southward, some four miles distant from Cape Henry. Her course was about west, until, in the neighborhood of 9 o'clock, finding that she was getting too far to the southward, she made a short port tack to the N. E., continuing on this tack 15 or 20 minutes, when she was put back on her starboard tack, heading W. by N., and continued on that course until in collision. The schooner was making between five and six miles an hour, and the steamer, on a course E. S. E. from Thimble Light, some $9\frac{1}{2}$ miles an hour. The vessels came together by the bow of the schooner coming in contact with the after part of the midship house of the steamer on her port side, about 70 feet from her stern, doing some injury to the joiner work of the steering gear to the steamer. The forward portion of the schooner was wrecked, the bow burst open and carried away, and it left in a disabled condition. The charges of fault in the libel are that the steamer failed to keep out of the way of the schooner, slacken her speed, stop or reverse, or to take any other precautions necessary and prescribed to avoid a collision, and that the collision was caused entirely and exclusively by the fault and negligence of the steamer's navigators. The charges of negligence against the schooner are: Unskillfulness on the part of those in charge of her navigation; the failure to have and maintain lawful lights, properly set and burn-

ing; and that the schooner was proceeding at too rapid a rate of speed, and improperly changed her course.

Whitehurst & Hughes, for libellant.
Hughes & Little, for respondent.

WADDILL, District Judge (after stating the facts). The collision in this case being between a sailing vessel and a steamship, reference may be had to the rules of navigation properly applicable, with a view of ascertaining if they have been violated, and by whom. Article 20 of the rules of navigation is as follows: "When a steam vessel and a sail vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sail vessel." Article 21 is as follows: "Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed." Upon its appearing that the sailing vessel in collision kept its course, a presumption at once arises that the accident resulted from the failure of the steamship to keep out of its way, and this presumption should be acted upon, unless the accident is shown to have been inevitable, or that the same was the result of neglect or omission on the part of those navigating such vessel. The Carroll, 8 Wall. 302, 19 L. Ed. 392; The Fannie, 11 Wall. 238, 20 L. Ed. 114; The Scotia, 14 Wall. 170, 20 L. Ed. 822; Squires v. Parker, 42 C. C. A. 51, 101 Fed. 843; Spencer, Mar. Coll. 222, 223. There is no suggestion in this case of any inevitable accident, and the evidence, as viewed by the court, quite clearly establishes the fact that there was no change of course by the vessel at the time of collision, as it also does that the vessel was not proceeding at an undue rate of speed, or that its navigators failed properly to discharge their duty.

The only fault alleged against the schooner seriously contended for is that at the time of the collision its lights were not up and properly set and burning. As to this a great deal of evidence was taken, which, in part, it will be necessary to review. Four officers of the steamship were examined, viz., the master, the first officer, quartermaster, and lookout. Of this number, only two testified as to seeing the vessel and not observing the light, viz., the first officer and the master. The former observed the vessel when about a thousand feet away; the other, the master, did not see it until practically in collision, he having about that time come into the pilot house. Against this evidence we have the positive statement from four of the officers and crew of the vessel that the green light was burning. Clark, the mate, who made special examination, testified that twice within 40 minutes of the vessels' coming together he saw the lights in place, and properly burning, and that by the shock of the collision they were knocked out of their sockets and put out. Lund, the lookout, testified that he was in a position to see the lights, and actually observed them within five minutes of the collision. Watson, one of the mate's men, who was called out to assist in making the port tack, within 40 minutes of the accident, testified to seeing both the port and starboard lights burning; and Bartlett, the master, who was at the wheel, testified that he saw the glimmer of the green light on the jib when

the schooner was on the port tack. The steward, Peterson, testified that he trimmed and put them up in good order, and that Lund, the lookout, reported that they were burning 5 or 10 minutes before the collision.

This positive testimony by those on the schooner, in a position to see the lights, and know of their condition, will not be lightly rejected because other persons, whose duty it was to have seen them, either failed to observe, or happened not to see them. Negative evidence of this character cannot be accepted to outweigh positive evidence. The failure to observe a light cannot be said to disprove its existence. *Stitt v. Huidekopers*, 17 Wall. 384, 21 L. Ed. 644; *The Thingvalla*, 1 C. C. A. 87, 48 Fed. 764; *The Michigan*, 11 C. C. A. 187, 63 Fed. 280; *The Alice B. Phillips*, 26 C. C. A. 467, 81 Fed. 415; *Green v. Compagnia Generale*, 42 C. C. A. 580, 102 Fed. 650.

Effort was made to elucidate this important question, of whether or not the lights of the schooner were burning, and, if burning, were sufficient, and could have been seen from the positions from which the several witnesses on the vessel claim to have seen them,—the contention being that as these lights were fastened to an iron standard or stanchion extending from the rail of the vessel, and not in the rigging, they were improperly placed, and could not have been seen, and that the lamps were without proper ventilation and reflectors; and with this end in view, shortly after the collision, while the vessel was in the harbor at Norfolk, certain officers of the steamship company and others went at night upon and examined the vessel, and experimented with the same, from its forecandle deck, in its then shattered condition, and the conclusion was that the lights could not have been seen as testified to by the vessel's master and crew. Subsequently, hoping to refute the testimony as to this experimental examination, the libellant, after the vessel had been repaired, had examinations made of it in the city of Philadelphia, and made experiments also, as far as they could be then had; the vessel having been materially changed in rebuilding.

As to all of this testimony, it may be said, in passing, that it is hearsay in character, purely speculative, and entitled to but little weight; and especially is this true of that secured by the steamship's representative when the vessel was in dock after the collision. No notice was given of the proposed experiments to the other parties in interest or their counsel. They were denied any opportunity to know as to the exact condition of affairs when the experiment was made, and, indeed, what was done and seen. At least notice ought to have been given, and an opportunity afforded those to be affected to be present, before such testimony should be considered. *The R. R. Kirkland* (D. C.) 48 Fed. 760.

To the experiment made in Philadelphia by the libellant, possibly more weight should be given, if any, as opportunity was afforded the other party to be affected to be present if he desired. But, at best, all such evidence, by reason of the necessarily changed conditions and surroundings existing at the time of the particular occurrence, ought to be received with the greatest caution, if at all. The evidence taken by the libellant as to the character of the lights, and

their position upon the schooner, of persons not in the collision, who were familiar with the schooner prior to the time of the collision, and who testified that the arrangement of the lights on the stanchion instead of in the rigging was preferable, and that such lights could be seen on the schooner from the screen box on the stanchion, is entitled and ought to receive the weight due to evidence of any other persons who knew of the existence of particular facts and testified to them.

The court should be slow to hold that the officers and crew of a vessel were navigating the same without lights, as by so doing they were imperiling, not only the ship and its cargo, but their own lives (*The Gate City* [D. C.] 90 Fed. 314-317); and, for like reason, the lamps upon the vessel should not be quickly condemned, as it is not probable that the vessel owner would have used an inefficient appliance of this importance to the existence of his property, at least intentionally. The evidence taken in Philadelphia by the libelants is to the effect that the Flick light, used in the test there made, could be seen more than two miles distant on that night, which was more favorable for seeing than the night of the collision; and it is admitted that the light taken from the schooner was a Flick light, of satisfactory size, with corrugated glass of the proper dimensions, and bought from a ship chandler in Philadelphia who had been in the business 30 years. In the case of *The Olympia* (D. C.) 52 Fed. 991, it was held that one can rely upon an article as being reliable for its purpose when bought from a reputable ship chandler.

A most significant circumstance, bearing upon the vessel's lights, is the fact that, although the failure of the vessel in this regard is made the chief basis of the steamer's defense, the fact that such lights did not exist was not made record of at the time of the collision, either in the steamer's log or the protest made the next day. Both the log and the protest utterly fail to make any reference to such conditions, and it is hard to believe that so important an omission would have been made had the lights not been burning. Nothing could have been more material to the steamer,—nothing would so likely have accounted for the collision, and probably have vindicated the steamer. *The Utopia* (D. C.) 1 Fed. 892; *The Frostburg* (D. C.) 25 Fed. 451. The object of keeping the log was to have a record made at the time of the then existing facts. *The Newfoundland* (D. C.) 89 Fed. 510-515. Congress by act of the 14th of February, 1900, amending section 4290 of the Revised Statutes, has specifically required the facts of collision to be set forth in the log. This significant conduct on the part of the steamer, together with the other facts and circumstances in the case, convince me that the schooner's lights were properly set and burning at the time of the collision.

In two particulars, at least, is the negligence of the steamer established from the evidence, as viewed by the court:

First. The failure to have a proper lookout, or the neglect of the one employed properly to discharge his duty. The steamer's lookout testified that shortly after passing Thimble Light a red light was reported several miles distant on the port bow of the steamer, and, although the hull and spars of a vessel could be seen a half a mile

away, he neither saw the vessel in collision with his ship, nor its lights, until they were within 300 feet of each other, and then not until his attention was called by the screams of persons aboard of the schooner, when, without reporting the schooner, he immediately left his station. Had this lookout been competent, or in the proper discharge of his duty, the schooner could easily have been seen and reported, with or without lights, according to his own statement, in time to avoid the collision. *The Ariadne*, 13 Wall. 475, 478, 20 L. Ed. 542; *The Oregon*, 158 U. S. 186, 193, 15 Sup. Ct. 804, 39 L. Ed. 943; *The Manhasset* (D. C.) 34 Fed. 408; *The Samuel Dillaway*, 38 C. C. A. 675, 98 Fed. 138; *Steamship Co. v. Low* (C. C. A.) 112 Fed. 161, 172.

Second. The first officer of the steamer having observed the hull of the schooner in collision 1,000 feet off, and the schooner's masts 300 feet off the steamer's port bow, should have immediately ported his helm, and gone full speed ahead, or have hard ported and reversed. To have slowed down under one bell, and starboarded, was to do the two things most likely to bring about the collision, as, it seems quite demonstrable, it did in this case. To starboard with a green light off of the port bow, or the starboard side of a vessel without lights off of the port bow, was manifestly an improper maneuver, and could be only justified where the collision was so imminent that the coming together of the two vessels would be lightened, possibly, by so doing.

The *Richmond*, a propeller, would have responded much more readily to its port than its starboard helm, particularly with the then condition of the wind and tide; and had this course been pursued, as clearly contemplated by the rules of navigation (articles 21 and 22), this collision would, in all human probability, have been averted. *The Farnley* (C. C.) 8 Fed. 629; *The Excelsior* (D. C.) 102 Fed. 652.

Moreover, it may be said that the steamer, having had reported a red light on its port bow, a distance of two or three miles away, should, under the circumstances, have done more than itself port one point, and proceed at full speed. It was a bad night, and the vessel, while apparently not across its course, was still reported ahead, and the steamer should have slackened her speed until its exact location was ascertained. The fact that the vessels did collide quite disposes of the contention that there was no risk of the collision at that time, as does the circumstance of the steamer's porting strongly indicate that there was apprehension of this collision. A possibility of collision is all that is requisite to charge the steamer, unless it can establish that it was free from fault. *The Carroll*, 8 Wall. 302, 305, 19 L. Ed. 392; *Hoben v. The Westover* (D. C.) 2 Fed. 91; *Steamship Co. v. Low* (C. C. A.) 112 Fed. 161, 166, 171.

In the recent case of *The New York*, 175 U. S. 187, 207, 20 Sup. Ct. 67, 75, 44 L. Ed. 126, the supreme court said:

"The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn; but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect."

The disappearance of the light itself was a warning to the steamer, at least, sufficient to make it exercise extraordinary diligence, which it seems not to have done. Indeed, although the lookout could have seen the schooner's lights two miles away, and the vessel itself a half mile away, he admits that he saw neither until his attention was attracted by the screams of those on the vessel. This is equivalent to a confession of his own negligence.

A decree may be entered holding the steamer solely responsible for the collision.

THE ALABAMA.

THE CURTIN.

(District Court, E. D. Virginia. February 19, 1902.)

1. COLLISION—EVIDENCE—MAINTENANCE OF LIGHTS.

The positive testimony of credible witnesses, who were in a position to see, that the lights were set and burning on a vessel at the time of a collision, is entitled to greater weight than the negative testimony of other witnesses that they did not observe such lights.

2. SAME—STEAMER MEETING TUG WITH TOW—DUTY OF CARE.

The duty rests upon a steamer, having full control of its own movements, to keep out of the way of a tug with a tow, which occupies the position of an incumbered vessel.

3. SAME—STEAMER AND BARGE.

A steamer, which, on leaving her wharf in the night, saw the lights in the channel ahead, indicating the presence of a tug with other vessels in tow, was bound to proceed with caution, and at a speed which would enable her to keep out of the way and avoid collision, and must be held in fault for a collision, which occurred within four lengths of her pier, with a barge constituting a part of the tow, which had been cast off, and was moving by its own momentum, alone, toward the shore to an anchorage, and carrying proper lights.

4. SAME—NEGLIGENT NAVIGATION BY TUG.

A tug which was navigating a narrow and much frequented channel on a dark night with four barges in tow, and which elected to take the left-hand side of the channel, which placed it in the track of outgoing steamers, was bound to the exercise of extraordinary care to guard against collision between such steamers and the vessels of its tow, and it failed to exercise such care in sheering one of the barges under its own momentum across the space intervening between it and the shore, which was considerable, where it would be directly in the pathway of any steamer passing on that side, and without power to control its movements, and must be held in fault for a collision between such barge and a meeting steamer.

5. TUG AND TOW—ANCHORAGE OF TOW—CARE REQUIRED OF TUG.

The law imposes upon a tug the duty of exercising reasonable care and caution and maritime skill in everything relating to the safe anchorage of its tow, and it is liable to any one injured by its negligence in that respect.

In Admiralty. Libel in rem to recover damages for collision.

This is a libel by the owner of the C. C. McIlvalne to recover damages sustained in a collision with the Alabama on the evening of the 16th of January, 1900, in the harbor of Norfolk, Va. On the day in question the McIlvalne, along with three other barges,—the Emma and Bessie, the Schuykill, and the J. B. Blades,—in the order named, were in tow of the Curtin, an ocean-going tug, en route from the port of Philadelphia to the port of

Norfolk; and about 7:40 p. m., at a point opposite Nottingham & Wrenn's Pier, on the eastern side of the Elizabeth river, and a little below and across from Hospital Point, the barge McIlvaine, being the barge next to the tow, in sheering out from the tow to take anchor in the anchorage ground on the eastern side of the channel, came into collision with the Baltimore Steam Packet Company's steamship the Alabama, then leaving its pier en route on its outward trip to Baltimore, and sustained serious damage. The contest is a triangular one, and many faults are alleged by the parties respectively against each other. The charges of the libellant against the steamer are, briefly: The failure to keep out of the way, the maintenance of an improper and excessive rate of speed, the fact of going to starboard instead of port, the failure to stop and reverse, and the lack of a competent master and lookout. And against the Curtin are: That it should have taken the barge safely to anchorage, without placing it in a dangerous position, and, if so placed, should have promptly extricated it; that it should have given the Alabama two whistles in time to have advised her of the situation of the tug and tow and the danger of her going to starboard, and that it also should have sounded its danger signal. The tug Curtin, denying the several faults alleged against it by the libellant, insists that the collision was solely the fault of the Alabama, and specifically charges against the said steamer that she failed to keep a proper lookout; that she was proceeding too fast; that she did not slow down, and stop and reverse; that she should have proceeded, under the circumstances, to port, instead of attempting to pass to starboard, and have gone more to starboard if intending to pass on that side of the channel; and that she failed to keep away from the barge, which, at the time of the collision, was moving only by its own momentum. The steamer Alabama, protesting its own freedom from fault, insists that the collision was the result of the joint carelessness of the McIlvaine and the Curtin, and that the former negligently allowed the latter to cast her loose in the nighttime, in a crowded harbor, across the track of vessels; that, having the Alabama on her starboard bow, she should have kept out of the way; that she was proceeding at an improper speed, without lawful lights properly set and burning, and was not manned by a competent and skillful crew. And against the Curtin particularly for casting the barge adrift; failing to carry the barge to her anchorage ground and properly anchor the same; placing the barge in a dangerous position and doing nothing to relieve her; the failure to respond to the steamer's signals, but, on the contrary, giving a cross signal; the failure to give danger signals, or otherwise acquaint the steamer with the situation; having an incompetent master; and recklessly and negligently monopolizing and blocking the entire channel at the worst time it could have selected for the purpose.

Edward R. Baird, Jr., for libellant.
Hughes & Little, for the Alabama.
Heath & Heath, for the Curtin.

WADDILL, District Judge (after stating the facts as above). A great mass of evidence was taken, the witnesses being examined in open court, and in many important particulars the contest is sharply drawn, and the conflict between them apparently irreconcilable. Indeed, the condition in this respect frequently arising in collision cases exists in an unusual degree; yet in many particulars it can be accounted for by the peculiar character of the accident, the fact that it occurred in a narrow channel, on a dark night,—all of them matters as to which persons most frequently differ. The witnesses, in the main, from their frankness of statement and manner of testifying, appeared to be giving an accurate account of the occurrences as they saw them, and many of them were disinterested. The matter most in dispute, and upon which the case will largely turn, is the location of the tug and tow

prior to and at the time of the collision, their claim being that they were on the eastern side of the channel of the Elizabeth river, having come up from Lambert's Point on that side, with a view of making the anchorage ground for the McIlvaine; whereas the Alabama claims that they were well to the westward side of the channel, and that, as it sprang out from its pier, a distance of some 1,200 feet or more away, it observed the line of red lights well off of its port bow, and thereupon sounded the usual passing signal, and proceeded on its course down the eastern side of the channel; and that, upon the failure of the Curtin to answer its passing signal, it slowed down, stopped and reversed, and turned on its search light, when it discovered the barge McIlvaine a short distance off of its port bow, moving immediately across the channel; that it put its engines full speed astern, and did everything possible to avert the collision, but without avail, the barge coming into collision with it on its port beam, while it was moving backwards. These two contentions present the peculiar coincidence of the steamer's insisting that the tug and tow were just where they should ordinarily have been in the channel, and the tug and tow maintaining that they were not there, but on the opposite side of the channel, immediately across the pathway of outgoing steamers. After giving to this evidence much consideration, I am convinced that the tug and tow were not on the western side of the channel, but on the eastern side, though possibly not so far over to the east as claimed. The eastern side of the channel is where it should have been to have properly placed at anchor the McIlvaine; and the uncontradicted evidence is that other shipping, including an ocean-going steamship, passed it on the western side of the channel coming up from Lambert's Point. The presence of a three-masted schooner anchored well into the channel off Nottingham & Wrenn's pier doubtless accounts for the tug and tow being further out into the channel than they otherwise would have been. The fact that the Alabama found her course along the usual pathway on the eastern side of the channel blocked by this tug and tow, and that it, too, upon extricating itself from the collision, starboarded, and proceeded down the western side of the channel, further satisfies me of the location of the tug and tow. The position of the Alabama as to the tug and tow being well to the western side of the channel is not borne out by the facts in the case, and, in order for the collision to have happened upon that theory, involves the fact of a barge, of its own momentum, moving across the channel against the tide, and proceeding at such speed as to collide with a steamer moving backwards. The steamer's confusion as to seeing the red lights, thought to be on the western side of the channel, can, doubtless, be accounted for by its springing out from the front of its piers heading itself rather across the channel, to the east, at a greater momentum than it anticipated, and its failure to shape its course down the channel as quickly as it should have done.

Having determined the location of the tug and tow, the question of negligence against the barge, the steamer, and the tug will be taken up, in the order named.

First. The only assignment of negligence against the barge for which it should be held responsible as between itself and the tug, as to which

there is any evidence, is that of the failure to have its lights properly set and burning. Upon that question there is some conflict in the testimony, but it largely preponderates in favor of the barge, and establishes that its lights were properly set and burning. This is shown by positive evidence of persons who were in a position to have seen and did see the lights, and is entitled to greater weight than that of mere negative witnesses, who say they did not observe the lights. *The Thingvalla*, 1 C. C. A. 87, 48 Fed. 764; *The Michigan*, 11 C. C. A. 187, 63 Fed. 280; *Green v. Compagnia Generale, etc.*, 42 C. C. A. 580, 102 Fed. 650. Moreover, it should not be readily inferred that this barge, then in command of its owner, would have been guilty of the gross negligence of navigating without its lights, which would have been of such serious consequences to it. *The Gate City* (D. C.) 90 Fed. 314, 317.

Second. It will not be necessary to pass upon all the various faults alleged against the steamer by the tug and tow, respectively, but rather to deal generally with them. The tug and tow occupied the position of an incumbered vessel, and a duty was imposed upon the steamer, having full control of its own movements, to keep out of the way, and, if need be, to stop and reverse its engines; and this obligation was the more incumbent as the steamer itself, only a few minutes before the collision, was standing lashed to its own pier. The obligation upon it was a positive one, and no risks or hazards should have been taken as to its course; and for any error in this regard it is clearly liable. *The Syracuse*, 9 Wall. 672, 675, 19 L. Ed. 783; *The Mayumba* (D. C.) 21 Fed. 476; *The B. B. Saunders* (C. C.) 25 Fed. 727; *The Aller*, 20 C. C. A. 79, 73 Fed. 875; *The Lucy*, 20 C. C. A. 660, 74 Fed. 572; *The New York*, 175 U. S. 187, 207, 20 Sup. Ct. 67, 44 L. Ed. 126. The steamer's conduct, under the circumstances of this case, according to her own theory, could only be justified, if at all, by the exercise of extreme care on her own part, when it is remembered that she was mistaken in supposing that the pathway was clear down the eastern side of the channel, and that, on the contrary, before she had proceeded four lengths of the steamer from her pier, she became entangled with the tug and tow. By the exercise of proper care on her part, she could easily have seen the blocked condition of the channel just ahead of her before or at the time she left the pier; and upon having observed, as she admits she did, the lights ahead, indicating the presence of a tug and tow, and having signaled the same, she should not have approached it in such close proximity as not to have been able to avoid colliding with it. Her stopping and reversing her engines did not take place in time to avert the collision, as it manifestly would have done with a tug standing still and a barge moving only with its own momentum and against the tide. The cross signals given by the tug, and alleged as one of the faults against it by the steamer, do not appear to have affected the collision, so far as the steamer was concerned; for, while the libellant's evidence and that of the tug tends strongly to show that these signals were given in time to have enabled the steamer to avoid the collision by going to port and passing down the western side of the channel, still the steamer's contention is that the vessels were practically in collision when the signals were given. Upon the assumption

that these signals should have been given earlier, or that danger signals should have been sounded, in either event the steamer would not be excused for leaving its wharf, and moving out into a blocked channel, only a few hundred yards away from it, at such speed as to be unable to control its own movements.

Third. Coming to the faults assigned against the tug Curtin. Being in charge of a tow, it occupied, as before stated, the position of an incumbered vessel, and as to many matters would be relieved of liability. Still this did not relieve it from all responsibility, or from the exercise of that care and caution that a due regard of the rights of others required. It was navigating a narrow and a much frequented channel, on a dark night, at the time that it was known that the outgoing steamers usually passed; and having elected to take the eastern, instead of the western, side of the channel from Lambert's Point up to Norfolk, which placed it in the direct pathway of outgoing vessels, it should have exercised extraordinary care in bringing in a tow of the length and character of the one in question. *The Mary McWilliams* (D. C.) 47 Fed. 333; *The Plover* (D. C.) 100 Fed. 883. The law imposed upon the tug the duty to exercise reasonable care and caution and maritime skill in everything relating to the safe anchorage of the barge until the work in hand was accomplished, and for any negligence on its part in this regard it was liable to those sustaining injury thereby. *The Syracuse*, 12 Wall. 167, 20 L. Ed. 382; *The Margaret*, 94 U. S. 494, 24 L. Ed. 146; *The James Jackson* (D. C.) 9 Fed. 614; *The Annie Williams* (D. C.) 20 Fed. 867. Upon reaching Nottingham & Wrenn's wharf, and finding its pathway in part obstructed by an anchored vessel, which necessarily threw it further to mid-channel, the tug ought not to have attempted at that place, under such circumstances, to have still further obstructed the channel by sheering the barge of its tow in collision out to anchor as it did. This conduct on its part monopolized more of the fairway of the channel than was reasonable, and at least imposed upon it (assuming that room enough, at that particular time, was left for the outgoing shipping to pass to port, and down the western side of the channel, instead of to starboard) the obligation to take every possible precaution, and, if need be, to give danger signals, upon the steamer's approaching it, in order to avoid injury to others.

It follows from what has been said that the barge *McIlvaine* was free from fault, and that the collision was the result of the joint negligence of the steamship *Alabama* and the tug *Curtin*; and a decree may be accordingly so entered, dividing the damages between them, with costs against the tug and steamer.

In re DENNING.

(District Court, D. Massachusetts. March 22, 1902.)

No. 1,951.

1. BANKRUPTCY—PERSONS ENTITLED TO PROVE CLAIMS.

One partner sold out to his copartner, pending the insolvency of the firm, receiving notes in payment for his interest. Two months later the continuing partner filed a voluntary petition in bankruptcy. The assets in his hands were: (a) Proceeds of the sale of the business plant formerly owned by the firm; (b) proceeds of the collection of debts arising from the sale of goods sold to the firm; (c) proceeds of a contingent interest in real estate inherited by the bankrupt; (d) money received by the bankrupt for goods sold by him after the firm was dissolved. Certain joint creditors proved claims against the bankrupt. *Held*, that the retiring partner could not prove his notes, since to permit him to do so would permit him to compete with his own creditors.

2. SAME—PARTNERSHIP—RETIREMENT OF MEMBER—BANKRUPTCY OF CONTINUING PARTNER—DISPOSITION OF ASSETS.

In such case, the property belonging to the firm at the time of the dissolution should be applied by the trustee first to the payment of firm creditors, the separate estate of the bankrupt should be applied first to the payment of his separate debts, and any surplus in either fund should then be applied on the other, as provided in Bankr. Act, § 5f.

3. SAME.

Bankr. Act, § 5b, providing that, if one partner only is adjudged bankrupt, the partnership property shall not be administered in bankruptcy, except by consent of the other partners, has no application to such a case.

In Bankruptcy.

James H. Sisk, pro se.

Richard L. Sisk, for certain partnership creditors.

Sullivan & Dennis, for Brown.

LOWELL, District Judge. The bankrupt was formerly in partnership with one Brown, doing business under the firm name of Brown & Denning, up to August 22, 1899. On that date they were insolvent, and may be supposed to have known their financial condition. On that date Brown sold all his interest in the partnership to the bankrupt, and received from the bankrupt eight promissory notes, of \$100 each, without interest, payable, respectively, in two, three, four, five, six, seven, eight, and nine months. On October 25, 1899, the bankrupt filed his voluntary petition. At that time the firm was indebted to the amount of about \$1,100. The assets in the bankrupt's hands were: (a) Proceeds of the sale of the business plant formerly owned by the firm and transferred to the bankrupt as above set forth; (b) proceeds of the collection of debts arising from the sale of goods by the firm; (c) proceeds of a contingent interest in real estate inherited by the bankrupt; (d) money received for goods sold by the bankrupt after the partnership was dissolved. Brown proved the promissory notes above stated without objection. The trustee moved to expunge the claim, which motion the referee allowed, and the claim was expunged. Brown now seeks a review.

It is plain that the bankrupt's former partner cannot be allowed to prove in this case. To permit him to do so would permit him to compete with his own creditors. Under a separate commission like this, joint creditors may prove, and, at the least, they may share in the surplus of the separate estate after payment of the separate debts. There are joint creditors in this case who have proved, and, until the claims of the joint creditors are settled, Brown cannot share in the distribution of his former partner's estate. *Lowell, Bankr. § 133; Amsinck v. Bean*, 22 Wall. 395, 402, 22 L. Ed. 801. There is nothing in section 5g of the act to change this well-established rule.

Certain creditors of the firm seek to prove their claims against the bankrupt individually, and, together with the separate creditors, to share in the estate now in the hands of this court. If they are to be treated as joint creditors only, and if all the assets are to be treated as separate assets, they will be entitled only to come upon the surplus after payment of the separate debts. In *re Wilcox* (D. C.) 94 Fed. 84. In *Re Johnson*, Fed. Cas. No. 7,369, 2 *Lowell*, 129, it was decided that joint creditors could, even after bankruptcy, so assent to the bankrupt's undertaking to pay the firm debts as to make themselves separate creditors of the bankrupt, and thus to share alike with separate creditors in the separate estate. In the same case it was intimated that the conveyance of the firm assets to one partner was a fraudulent preference, which could be set aside in bankruptcy, and that thus the assets, which originally belonged to the firm, could be brought back into the estate. If both these propositions are true, there will be confusion in working them out together. Each joint creditor will have an election (1) to come with the separate creditors upon the separate estate, including that formerly joint, or (2) to have the assets marshaled, and come with the other joint creditors upon the former joint estate. It seems that a former joint creditor, who has elected to become a separate creditor of the bankrupt, assents to the conversion of the joint into separate assets, and is permitted to come upon the converted estate as a separate creditor. On the other hand, a creditor who procures the avoidance of the conversion and a marshaling of the assets comes as a joint creditor upon the property thus returned to the joint estate, and it is hard to see how accounts can be kept which treat the same property as joint property for the payment of some claims and as separate property for the payment of others. See *St. Mass. 1865*, c. 113; *Bucklin v. Bucklin*, 97 Mass. 256.

There are considerable difficulties in dealing with joint estate under a separate commission. See *In re Wilcox* (D. C.) 94 Fed. 84. As was there pointed out, courts of bankruptcy at one time permitted the creditors of the bankrupt, whether joint or separate, to come upon all the estate in the assignee's hands, both joint and separate, and share in it alike, unless application was made for a separation of accounts. This application had originally to be made, not to the court of bankruptcy, but to a court of equity. Some courts of bankruptcy in this country have held that the distribution of joint estate among joint creditors, and of separate estate among separate creditors, is confined to cases where the commission is joint. See 94 Fed. 105. The con-

trary was held by this court in *Re Wilcox*, and the principle was treated as of general application, at least under the provisions of this bankrupt act. The court has, therefore, to consider if the assets in the bankrupt's hands which came from the firm are to be treated as converted by the transaction of August 22d, or if the conversion was avoided by the adjudication October 25th.

It is somewhat difficult to construe the conversion as a preference within the terms of section 60 of the act. Under section 60 only that is a preference which enables a creditor to obtain a greater percentage of his debts than other creditors of the same class. If creditors are thus classified exclusively with regard to the priorities established by section 64, then the conversion of joint into separate estate is a preference; but it is at least doubtful if joint and separate creditors are "creditors of the same class." If they are not, then the conversion does not enable any creditor to obtain a greater percentage of his debt than any other creditor of the same class. The conversion enables creditors of the separate class to be paid in full, while depriving creditors of the joint class of any payment whatsoever. Even in England, however, the rule in *Ex parte Ruffin*, 6 Ves. 119, is subject to an exception where, as here, partnership and partners were insolvent at the time of the conversion. *Lindl. Partn.* (2d. Ed.) *338. As to the American rule, see *Lowell, Bankr.* § 139. Moreover, section 5g of the bankrupt act was intended, I believe, to clear up the whole matter, and to permit the court to deal with conversions of this kind so as not only to prevent preference in the technical meaning of that word, but also so as to "secure the equitable distribution of the property of the several estates." *Lowell, Bankr.* § 468; *In re Gillette* (D. C.) 104 Fed. 769; *In re Shapiro* (D. C.) 106 Fed. 495. That it is highly inequitable in this case to permit what was joint estate before the dissolution of the partnership to be treated as separate estate in the distribution of the bankrupt's effects is plain. To permit the joint creditors to come, alike with the separate creditors, upon the whole estate, even if admissible, seems to me to cut the knot, rather than to untie it. The trustee should be directed to keep separate accounts, the property belonging to the firm at the time of the dissolution of the partnership on August 22d should be applied first to the payment of the joint debts, and the separate estate of the bankrupt should be applied first to the payment of the separate debts. If there is any surplus in either fund, that is to be distributed as provided in section 5f. It is true that section 5h provides that, if one partner only is adjudged bankrupt, the partnership property shall not be administered in bankruptcy unless by consent of the other partners; but that provision has plainly no application to the case at bar.

The case is remanded to the referee, with instructions to proceed in accordance with this opinion.

In re WELLS.

(District Court, W. D. Missouri, C. D. February 24, 1902.)

1. BANKRUPTCY—JURISDICTION OF COURT OF BANKRUPTCY—PROPERTY CLAIMED BY THIRD PERSONS.

The filing of a petition in involuntary bankruptcy does not of itself vest the court of bankruptcy with jurisdiction over all property then in the possession of the bankrupt, whether owned by him or not, to the exclusion of the jurisdiction of a state court to try the title to such property.

2. SAME—ENJOINING SUIT IN STATE COURT—PRIORITY OF JURISDICTION.

On the day following the filing of a petition in involuntary bankruptcy against a debtor, and before any action had been taken by the court, a corporation commenced an action in replevin in a state court to recover property of which it claimed to be the owner, but which was in the possession of the bankrupt, and such property was taken under the writ of replevin. Subsequently the court of bankruptcy appointed a receiver, made an adjudication, and appointed a trustee. *Held*, that it did not acquire jurisdiction over the property which had been taken on the writ of replevin, and which was never in its possession, and was not authorized to enjoin the further prosecution of the action in the state court, and compel the plaintiff therein to submit its claims to its own jurisdiction.

In Bankruptcy. On bill by the trustee for an injunction to restrain further proceedings in an action in a state court.

Willard P. Hall, for trustees.

James S. Botsford and Sangree & Lamm, for McFarland Carriage Company.

McPHERSON, District Judge. The petition by creditors was filed in this court on the 8th day of November, 1900, against Charles B. Wells, in involuntary bankruptcy proceedings. An injunction, warrant, or process was not asked for. Wells was adjudicated a bankrupt on the 26th day of November, 1900, on the confession of his, filed November 8, 1900, that he had committed the act of bankruptcy charged. November 10, 1900, a receiver was appointed by the referee. On the same day (November 8, 1900) that the proceedings in bankruptcy were instituted, the McFarland Carriage Company prepared a petition in replevin against Wells to recover certain personal property in his possession, but which, as alleged, belonged to the carriage company. The petition in replevin was filed in the circuit court of Pettis county on the following day (November 9, 1900), and on that day the writ of replevin was issued, and on that day served, and on that day the property in question was reduced to the physical possession of the state court. To restate the case, after the petition in bankruptcy was filed, but before the receiver was appointed, and before the adjudication of bankruptcy, the state court took possession of the property now in controversy. The trustee, by direction of the referee, appeared in the state court, and asked leave (which was granted) to defend against the action in replevin. He filed his answer therein a year or more ago. The trustee now files in this court his bill in equity, asking that the carriage company, by writ of injunction, be enjoined from the further prosecution of the replevin action in the state court, and that the carriage company be commanded to deliver possession of the property

taken under the writ of replevin, over to the trustee, and, if the property cannot be delivered, that the carriage company be required to account to the trustee for the value thereof. The question, therefore, is, does the filing in this court of a petitioner in involuntary bankruptcy, of itself, and before any order is made by this court, give this court jurisdiction of all the property then in the possession of the bankrupt, whether by him owned or not? And if the bankrupt then has possession of the property, but not owned by him, or the question of ownership is disputed, must the claimant have the question of ownership adjudicated by this court, and to the exclusion of the state court, which has taken possession of the property for adjudication?

All agree that the court, state or federal, which first takes possession of the property, retains the possession and the jurisdiction. This is elementary, and cases need not be cited to emphasize the proposition. But the trustee, by counsel, argues that the "possession" does not mean physical possession. This court, by any of its officers, never has had physical possession of the property. And the decision of this question requires a construction of the bankrupt statute of 1898. Counsel for the trustee insists that the mere filing of the petition in involuntary bankruptcy is notice to the world, and no other court must interfere with any property then in the possession of the bankrupt, and that any subsequent interference by a state court is avoided and nullified by the subsequent adjudication of bankruptcy of the debtor. I decline to so hold, and for reasons which seem to me conclusive. Conflicts between courts over the same property should at all times be avoided, if possible, because at times such conflicts are unseemly. The mistake is constantly being repeated, and sometimes by lawyers, by asserting that the United States courts are greater and more commanding than the state courts. I cannot agree to this. The state courts are courts of general jurisdiction, while a federal court is one of limited jurisdiction. Of course, when a federal court once acquires jurisdiction, then such jurisdiction becomes complete. And it is true that on some questions the federal courts have exclusive jurisdiction,—such as in admiralty and other cases. Under some of the old bankruptcy statutes such has been the case. But it is not so under the act of 1898. But little is gained by reviewing the decisions of the different state supreme courts or of the federal trial courts. Such decisions are not binding on this court, and are in conflict, and cannot be reconciled. And no great headway is made by reviewing the dicta of the writers of opinions of the cases in the supreme court. But light has been given us by six cases decided by the supreme court: *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1,000, 44 L. Ed. 1175. That case was a thoroughly considered one. The object sought in that case was, in one respect, just the same as in the case at bar, viz., the trustee wanted to reduce to physical possession property which was not in his hands, but to which, as he alleged, he was entitled. And the supreme court held that the trustee must litigate the matter in a state court; which state court would have exclusive jurisdiction unless the adversary to the trustee would consent to come into the federal court. The language of the opinion in that case has been criticised, but the holding of the court in that case stands. *Mitchell v. McClure*, 178 U. S. 539, 20

Sup. Ct. 1000, 44 L. Ed. 1182; *Hicks v. Knost*, 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183. These two cases follow the *Bardes* decision. In *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, the supreme court held that property in the possession of the bankrupt when he was adjudicated a bankrupt, and subsequently seized by replevin proceedings in a state court, could be recovered by a proceeding in the federal court. *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, shows this state of facts: The debtor made an assignment for the benefit of creditors. Then proceedings in bankruptcy were brought. After the filing of the petition in bankruptcy, the assignee in the state insolvent law proceedings sold some of the debtor's property. Subsequently, the adjudication in bankruptcy. Still later, proceedings were instituted in the federal court to recover the property thus sold. And the purchaser appeared in the federal court, and asserted his claim to the property, and it was held that the property belonged to the estate in bankruptcy. It will be observed that the purchaser surrendered himself, without protest, to the jurisdiction of the federal court. That this is what gave the federal court jurisdiction is apparent from the case, and is specifically stated in a paragraph on page 197, 181 U. S., and page 560, 21 Sup. Ct., 25 L. Ed. 814. Of course, the federal court in such a case has jurisdiction, and would have in the case at bar if the carriage company would consent. But it protests. *Mueller v. Nugent*, 22 Sup. Ct. 269, 46 L. Ed. —, was a case where the agent of the bankrupt had the property. He sold the property as the agent of the bankrupt, and did not hold it adversely to the bankrupt. And what the supreme court held was that where property passed into the hands of a party as agent of the debtor, even before the petition in bankruptcy was filed, the federal district court could, by orders and contempt proceedings, coerce the surrender of such property to the trustee in bankruptcy. And this is emphasized by the record, wherein it is shown that after the case had been tried, and was about being decided, the claimant wanted to change his pleadings, and allege that, instead of holding the property as agent of the debtor, he held it adversely, and this was denied. And I have no doubt but that it was denied because, if he were an agent of the debtor, the court had jurisdiction, but if he held it adversely the court did not have jurisdiction, although this is my notion only. The foregoing is what has been held by the supreme court. And all of these holdings are consistent one with another, and inconsistent, in my judgment, with the contentions of the trustee in the case at bar.

But as an independent question, without these holdings of the supreme court, I would regard it my duty to deny the injunction herein. The act of 1867 carried with it many evils, real or supposed. One of such evils was its oppressive and expensive features. The estates were eaten up by a most vicious fee system. The litigation was all, or practically all, in the federal courts, generally sitting at a great distance from the debtor, the claimants, and the witnesses. It was the purpose of the present statute to correct this, and limit the fees and expenses, and have the greater part of the litigation where the parties resided. Under the former statute, the title to all property passed upon the mere filing of the petition. The judiciary committee of the house,

in reporting the bill which became the present statute, called attention to this evil, and said that it was corrected by passing the title as of the date of adjudication. And such is the language of the statute. And if this is not so, see what we have: A petition is filed. The debtor can, and often does, deny the commission of the alleged act of bankruptcy. He can demand a trial by jury, and perhaps never be adjudicated a bankrupt. This takes months. The petitioning creditors can obtain an injunction and keep the property intact. But in this case the creditors kept quiet and avoided such expense and liability. Now in the meantime can it be possible that nothing can be done by the debtor or by any other court?

The writ of injunction is denied.

MARVIN v. UNITED STATES.

(District Court, D. Connecticut. March 17, 1902.)

1. COSTS—FEE BILL—COURT RECORDS—EXPENSE OF CARTAGE.

Expenses paid for cartage of court dockets, files, and minute books cannot be allowed to the clerk, but the item should be presented to the attorney general by the marshal for allowance by him, under the head of "Miscellaneous Expenses," in the department of justice.

2. SAME—CHARGE FOR COPY OF INDICTMENT.

A charge for a copy of an indictment furnished by the clerk to accused at his request, but not shown to have been furnished to a United States marshal, or under order of the court, cannot be allowed.

3. SAME—DOCKET AND FINAL RECORD FEE.

Where an accused was indicted in a federal court in Texas, and was apprehended in Connecticut, and brought before the clerk as United States commissioner, but the question of his removal was referred to the district judge, who admitted accused to bail, and thereafter ordered his removal, the clerk was entitled to charge docket, final record, and transcript fees.

4. SAME—COPY FEES.

A clerk of a federal court is entitled to charge in his fee bill in a criminal case for copies of papers furnished to United States attorneys at their request, but he cannot charge for copies of an order excusing jurors, and for a copy of estimated costs furnished to a collector of internal revenue.

5. SAME—COPIES OF SUBPŒNAS—WARRANTS OF ARREST—COMPLAINTS.

Since proceedings in criminal cases before United States commissioners are required to conform to the state practice, and in Connecticut the clerk of the state court is entitled to charge for copies of subpœnas, warrants of arrest, and complaints, a United States commissioner is entitled to charge for such items in his fee bill.

6. SAME—CHARGE FOR FURNISHING LIST OF WITNESSES.

A charge for furnishing a list of witnesses cannot be allowed a United States commissioner, the requirement being fulfilled by sending a copy of the subpœna with the officer's return.

7. SAME—COPY OF MITTIMUS.

Where the record of the proceedings in a criminal case shows that a mittimus was issued, a copy was unnecessary, and the United States commissioner was not entitled to charge therefor.

8. SAME—COPIES OF RECOGNIZANCES.

Since Rev. St. § 1014, requires that the original recognizances in criminal cases be sent up, a commissioner is not entitled to charge in his fee bill for copies thereof.

9. **SAME—COPY OF MITTIMUS.**

A clerk of a federal court is entitled to charge for a certified copy of a mittimus left with a jailer.

10. **SAME—UNEXPLAINED CHARGES.**

Where items of a clerk's fee bill are suspended by the department "for explanation," the court will not interfere to enforce allowance thereof until final determination by the department.

11. **SAME—CERTIFICATES.**

Since the clerk is required to make duplicate copies of orders to pay jurors, which he is required to keep in his office for public inspection, and such duplicates should be authenticated by the clerk's certificate, the clerk is entitled to charge for such certificates in his fee bill.

12. **SAME—COPIES OF INTERROGATORIES.**

A clerk is not entitled to charge in his fee bill for making copies of interrogatories in depositions in a criminal case.

13. **SAME—FILING DEPOSITIONS AND EXHIBITS—CONTINUANCES.**

A clerk is entitled to charge for filing and marking depositions and exhibits in a criminal case and for continuances, and this though the date of each term at which such continuances were taken was not stated.

14. **SAME—ITEMIZED STATEMENT.**

The clerk is not required to furnish an itemized statement of charges for entering in his minute book a memorandum as to court business transacted, and the hour of adjournment of court, as a condition to his right to the allowance of his fees for such entries.

15. **SAME—STATUTES—PRESENTATION OF CLAIM BEFORE SUIT.**

Acts June 27 and July 1, 1898 (2 Supp. Rev. St. pp. 813, 880), providing that no suit can be maintained by any United States officer to recover fees unless an account therefor has been presented for allowance and acted on in the auditing department, having no retroactive force, a clerk was not precluded from recovering fees in a suit begun before the passage of the act by reason of the fact that through inadvertence, or by reason of a custom to postpone such charges until termination of the cause, some of the charges included in the action had not been presented.

E. E. Marvin, in pro. per.

F. H. Parker, U. S. Atty.

TOWNSEND, District Judge. The first item is for cash paid for cartage of dockets, files, and minute books to and from New Haven; amount, \$1.60. This charge was disallowed by the department on the ground that the marshal has the custody of court files, and should move them, if necessary. It seems clear that this is a proper expense, but I do not find any provision for its payment to a clerk. This item should have been presented to the attorney general by the marshal for allowance by him, under the head of "Miscellaneous Expenses," in the department of justice. The first item is disallowed. See Instructions to U. S. Marshals, Attorneys, Clerks, and Commissioners, 1899, p. 89 (instruction 562).

Item 6. The first charge is for a copy of indictment furnished by the plaintiff to an accused person at his request, and claimed to be payable under the rule that copies furnished to United States marshals in the scope of their duties, or under the order of the court, are chargeable. It does not appear from the statement that the copy was furnished to a United States marshal, or under an order of the court. The first charge is therefore disallowed. *U. S. v. Van Duzee*, 140 U. S. 169, 11 Sup. Ct. 758, 35 L. Ed. 399. The second charge

is \$1 for docket fee; final record, \$3.15; and transcript of proceedings before plaintiff as United States commissioner, \$3.45,—made in the case of *United States v. Teams*. This item does not seem to come within the cases cited. *Teams* came into this district, and while here was indicted in the United States district court at Paris, Tex., for murder. A copy of the warrant was brought here, and accused was brought before plaintiff and admitted his identity. He stated that he purposed to go to Texas and stand trial, but did not wish to be sent there long prior to the date of trial. The matter was brought before Judge Shipman, in this district, who refused to remove accused at that time, whereupon he was admitted to bail, and the hearing was adjourned from time to time until Judge Shipman issued a removal warrant, and admitted accused to bail on the removal warrant, himself, as judge of the district court. It is claimed the admission to bail, as the act of the judge of the court, required a docket and a record of the case to be made in the court. This charge is allowed. The third charge, \$10.60, includes copies of papers furnished to United States attorneys at their request in criminal cases, which copies, presumably, were necessary to enable them to prepare their cases for trial. These charges are allowed. The fourth charges, of 75 cents for certified copies of order excusing jurors, and 20 cents for copy of estimated costs furnished to a collector of internal revenue, are disallowed, as there appears to be no statutory authority therefor.

That part of item 7 which is contested by the government is for a total amount of \$34. This includes charges for copies of subpoenas, warrants, complaints, mittimuses, recognizances, and witnesses. The statutes and authorities hold that proceedings before a commissioner should conform to the state practice. *Gen. St. Conn. § 697*; *U. S. v. Barber*, 140 U. S. 164, 11 Sup. Ct. 749, 35 L. Ed. 396; *U. S. v. Ewing*, 140 U. S. 142, 11 Sup. Ct. 743, 35 L. Ed. 388; *Marvin v. U. S. (C. C.)* 44 Fed. 405, 410, 411; *U. S. v. Dundy*, 22 C. C. A. 219, 76 Fed. 355. In this state the charges for copies of subpoenas, warrants of arrest, and complaints are proper ones, and are therefore allowed. The charges for list of witnesses are disallowed, as the requirement is fulfilled by sending copy of subpoena with the officer's return. As to the mittimus, it appears from the record of proceedings that one was issued, and therefore a copy was unnecessary. As to recognizances of witnesses, *Rev. St. § 1014*, requires that the original recognizances should be sent up. The charges for copies of mittimus and recognizances are therefore disallowed. *U. S. v. Barber*, 140 U. S. 167, 11 Sup. Ct. 749, 35 L. Ed. 396.

Item 8. Charge for certified copy of mittimus left with jailer is allowed on the authority of *Van Duzee v. U. S. (D. C.)* 48 Fed. 643, 651 (item 16); *Erwin v. U. S. (D. C.)* 37 Fed. 470, 487, 2 L. R. A. 229 (item 15).

As to item 10, for \$2, the comptroller's report (152,913) states that this charge "is suspended" for further explanation. By the auditor's report (page 9, item 18), it appears that this item has never been explained. "If such claims are presented to the department for allowance, and this department, in the exercise of its discretion, suspends

action upon them until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken. So long as the claim is suspended and awaiting final determination in the department, the court should not be called on to interfere." *U. S. v. Fletcher*, 147 U. S. 664, 667, 13 Sup. Ct. 434, 37 L. Ed. 322.

Item 11 is a charge of \$9.45 for certificates of substance of orders to pay jurors. The statute requires such vouchers and accounts to be made in duplicate; that the clerk shall forward the originals to the proper accounting officers, and "retain in his office the duplicates, where they shall be open to public inspection at all times." If the department had not required a duplicate copy, or that such duplicate copy should be authenticated, the clerk would not be entitled to these fees. *U. S. v. Van Duzee*, 140 U. S. 169, 174, 11 Sup. Ct. 758, 35 L. Ed. 399; *Jones v. U. S. (D. C.)* 39 Fed. 410, 412. But as the copy required must be a duplicate, and must be one appropriate for public inspection, it should be authenticated at least by the certificate of the clerk. This item is allowed.

Item 13, for filing interrogatories and cross interrogatories attached to a commission to take testimony in *United States v. Salt*; making copies thereof for the use of the court in hearing on allowance of same, 60 cents; for filing and marking depositions and exhibits, \$1.50; total, \$2.10. The charges for copies of interrogatories, 60 cents, are disallowed on the ground that there is no provision therefor in the fee bill. The charges for depositions and exhibits, \$1.50, are allowed. *Goodrich v. U. S. (C. C.)* 35 Fed. 193; *U. S. v. Van Duzee*, 140 U. S. 169, 11 Sup. Ct. 758, 35 L. Ed. 399.

Item 16. Charges for continuances, 90 cents, are allowed. *Rev. St. § 828*; *U. S. v. Kurtz*, 164 U. S. 49, 17 Sup. Ct. 15, 41 L. Ed. 346. No necessity appears for stating the date of each term.

Item 17. Charges under this item amount to \$6, and are for entering in the minute book a memorandum as to court business transacted and the hour of adjournment. This charge was suspended for an itemized statement of same. It does not appear that any such itemized statement is required, and the charge is allowed. *Erwin v. U. S. (D. C.)* 37 Fed. 470, 2 L. R. A. 229.

The charges in items 18, 19, and 20 are for charges correct in amount, and such as are allowed in the ordinary quarterly accounts of clerks. Some of the charges were omitted from the plaintiff's accounts through inadvertence, and others because of his custom to postpone such charges until the termination of the cause. They have, however, been presented in a supplemental account, and approved by the court. For this reason these items have not been presented to or passed upon by the auditing department. In accordance with the provisions of acts of June 27 and July 1, 1898 (2 Supp. *Rev. St.* pp. 813, 880), no suit can be maintained by a United States officer to recover fees unless an account therefor has been presented for allowance and acted upon in the auditing department. This suit, however, was commenced prior to the passage of said statute. The statutes are not retroactive, and therefore do not affect plaintiff's right to recover. These charges are allowed.

In re DRAKE.

(District Court, D. South Carolina. March 24, 1902.)

INVOLUNTARY BANKRUPTCY—PERSONS ENGAGED CHIEFLY IN FARMING.

On an issue whether defendant was "engaged chiefly in farming," within Bankr. Act, § 4, excepting such persons from proceedings in involuntary bankruptcy, it was shown that the stationery used by him in ordering merchandise had the words "Merchant and Planter" at its top, and a traveling salesman testified that in outward appearance, etc., defendant's place of business did not differ from an ordinary country store. The bankrupt showed that he lived about 10 miles from town; that he had several large plantations under cultivation; that about one third of the land was worked by hired labor, another third on shares, and the remaining third let for a stipulated rental, defendant reserving the general control; that he bought all the fertilizers and provided the plantation supplies, and for that purpose kept what he called a "little commissary," selling a few goods to outside parties. It appeared that he and his brother had been engaged in a mercantile business on the same premises some time before, which ended in failure, etc. In explanation of the printed letter heads, defendant said he thought they "looked nice." A bank president testified that he loaned defendant about \$5,000 per year for his farming business and nothing for his mercantile business, and that he regarded him as engaged chiefly in farming. Merchants testified to selling him goods for family use. His neighbors testified that they regarded him as engaged chiefly in farming, etc. *Held*, that defendant was not subject to involuntary bankruptcy.

In Bankruptcy.

Willcox & Willcox, for petitioners.
Knox Livingston, for respondent.

BRAWLEY, District Judge. The only question in this case is whether J. N. Drake is a person "engaged chiefly in farming," which the answer sets up as a defense against the petition in involuntary bankruptcy, alleging the making of a general assignment that is not denied. On the part of petitioners requisite in number and amount of claims it is proved that the stationery used in ordering merchandise had the words, "J. N. Drake, Merchant and Planter," printed and stamped at the top of the page; and a traveling salesman for one of the largest creditors testifies that he visited the premises where the mercantile business was conducted, and that in all outward appearance and in the character of the goods therein it did not differ from what is ordinarily known as a country store; that the building was filled with counters and shelves and an iron safe, and therein differed from the class of buildings known in the country as "commissaries," wherein, according to the custom proved, the larger planters keep the supplies for their own plantations. On the part of the alleged bankrupt it is proved that he lived about 10 miles from Bennettsville, in the county of Marlboro; that in the year 1891 he had under cultivation Argyle plantation, containing 350 acres, the Covington place, containing 225 acres, and the Lane tract, containing 85 acres, the title to all of which was in his name, and a tract of 450 acres, the title to which was in his children; that his expectation that year was to raise 600 bales of cotton upon these lands, but, owing to the bad season, the lands produced only about 300 bales, and the testimony

makes it clear that a like disaster attended all the farming operations in that section of the state during that year. J. N. Drake testifies: That he and his brother conducted a mercantile business about 18 years ago upon the premises described, which ended in failure. That thereafter he, in partnership with a brother, was in a mercantile business at a point about two miles distant, which firm was dissolved in the year 1899; and that during the years 1900 and 1901 he was engaged chiefly in farming, and was not engaged in any mercantile business, except in connection with his farming operations, which were conducted substantially as follows: About one-third of the land was cultivated with hired labor, at stipulated wages. About one-third of it was farmed upon shares of the crop. In some cases he furnished all of the commercial fertilizers, and fed the stock, giving to the laborers one-third of the crop. In some cases, where the laborers were to furnish one-half of the fertilizers and the stock, they received one-half the crop. About one-third of the land was let for a stipulated rental; but by contract he had the general control, direction, and management of all the lands cultivated, as well of that for which he was to receive a stipulated rental as of that wherein he employed the laborers at fixed wages. He bought all of the fertilizers for all of the lands, and provided the plantation supplies for all of the laborers and tenants, and for this purpose kept what he calls a "little commissary"; these supplies being kept at the place and in the storehouse where he and his brothers, as already described, had formerly carried on a country store. He says that this was for the convenience and benefit of his farming interests, and for supplying his own hands and tenants, and that, although he sold a few goods to others for cash, whenever parties called for them, he did not advertise or otherwise solicit business; that all of the fertilizers bought were used upon his farm, except a small portion, which he let his brother have; and that the groceries and other goods were supplied to the laborers and hands employed upon his farms, it being the custom of the country, and necessary to the conduct of farming operations upon any large scale, for the landowner to keep on hand and supply the laborers with such groceries and other articles of merchandise as were required. In explanation of the printed letter heads, he said he thought it "looked nice." The president of the bank at Bennettsville with which Drake did business testifies that for several years he had loaned him about \$5,000 per annum for the conduct of his farming operations, taking liens on his crops; that he did not lend him any money for conducting any mercantile business; that he regarded him as chiefly engaged in farming, and the other business was an appendage to his farming, the store which he designated as a "commissary" being for the purpose of supplying the persons employed on his farms. Merchants at Bennettsville testify to selling him general merchandise for his family use. His neighbors all testify that they regarded him as chiefly engaged in farming, and that the store described was kept for the purpose of supplying his hands. All of the witnesses concur in saying that, by the custom of the country, a store or "commissary," as they call it, was kept by all farmers or planters for the purpose of furnishing supplies to their laborers whenever the farming

operations required the employment of any considerable amount of labor; that this practice had grown up out of the necessities of their situation, and enabled them the better to control the labor, and to prevent their men from going off to the neighboring towns to secure the supplies necessary to the plantation; the greater the distance from the towns, the greater being the necessity for such stores. The contention of the petitioners is that, as to so much of the land as was not cultivated by Drake personally, he could not be said to be engaged in farming; that his relation to it was simply that of landlord, and that his tenants were the farmers. The testimony of Drake, which has not been contradicted, is that he exercised supervision, control, and management of all the labor employed upon all of his lands.

The supreme court of this state, in *Carpenter v. Strickland*, 20 S. C. 1, held that a person employed to cultivate the land of another, and who received for his services one-half of the crop produced, was a laborer, and, under the statute, could not give a lien upon the crop. It is suggested, too, that there is a distinction between a "planter" such as Drake describes himself in his letter heads and a "farmer," and that the word "farming" in the statute should be given a restricted meaning, and applies only to those actually working on the land. The precise words of the act are (section 4): "Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, * * * may be adjudged an involuntary bankrupt," etc. 30 Stat. 547. There was a well-marked distinction in South Carolina anterior to the war between the states between a planter and a farmer, but the distinction has disappeared with the social and economic conditions which produced it, and for the purposes of this case it would be as idle to discuss it as the social conditions in Judea described by St. Matthew when those bidden to the marriage of the king's son "made light of it, and went their ways; one to his farm, another to his merchandise." Nor will it profit to trace historically the meaning of the word "farming." In its purely agricultural sense, its use is comparatively modern. Within the purview of this statute it is understood to mean the business of cultivating land, or employing it for the purposes of husbandry; and a farm is a tract devoted to cultivation under a single control, whether it be large or small, isolated, or made up of many parcels. For a long time after the words began to be used in an agricultural sense, they were applied to lands held on lease, and "demise, lease, and to farm let" are still the operative words of a lease, but they are, in modern use, applied without respect to nature of tenure. Robinson Crusoe says, "I farmed upon my own land," so it appears that the words have been used in their present sense for nearly 200 years. Under the proofs in this case the defendant had the direction and control of the farming operations upon all of the land described, and was "engaged in farming," and I am of opinion that these words cannot be given the restricted meaning which would take out of the protection of the statute only those engaged in actual labor upon the farm. "Wage-earners" are excepted, and, if it was intended to except only the agricultural laborer, the words "tiller of the soil," or some other

apt expression, would have been employed. When the bankrupt act excepts from its operation persons "engaged chiefly in farming or the tillage of the soil," due effect must be given to the words. The act defines "wage-earner" as an "individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year," and, if the intent was to limit the protection of persons engaged in agricultural pursuits to those only who were farming upon a small scale, it could easily have been done. It may be difficult to find a good reason why this defendant should be protected from the consequences of an act which, in every other class, would entail adjudication in bankruptcy; but it is not for the courts to vindicate the wisdom of laws which it is their duty to administer. If he is "engaged chiefly in farming," he cannot be adjudicated a bankrupt in an involuntary proceeding, and the test must be whether his chief occupation—the pursuit from which he expects to derive his support and profit—is farming or some other. The testimony leaves little room for question on that point. Although his purchases of merchandise were large, amounting to fifteen or twenty thousand dollars, a large part of this was for commercial fertilizers used upon the land. The remainder, he says, was sold to his laborers, etc., at a profit, which he says was small, owing to the competition of neighboring stores. His time was mainly devoted to the management and supervision of the farming operations, while the store was in charge of his nephew, a youth of 17 or 18 years. It might require a nice calculation to determine whether the profits from his farming were greater than the profits on the merchandise, but there is nothing in the testimony which would lead to any correct conclusion on that point. It appears that, owing to the disastrous season, there were no profits from any source, and that nearly \$5,000 of advances to persons engaged on the farms remains unpaid. That he regarded his mercantile business as an incident to his farming operations; that he made no attempt to extend it, and devoted his time and energies to his farms, and looked to them mainly for his profits,—seems to be clear. If so, it would follow that he is a "person engaged chiefly in farming," and the petition must, therefore, be dismissed.

Inasmuch as the petitioners were doubtless misled as to the nature of the defendant's business by the letter heads which he used, it is considered that he is not entitled to recover costs from them.

DICKINSON et al. v. CONSOLIDATED TRACTION CO. et al.

(Circuit Court, D. New Jersey. February 18, 1902.)

1. CORPORATIONS—SUIT BY STOCKHOLDER—ANNULMENT OF EXECUTED CONTRACTS.

Where the management of a number of street railroad lines was consolidated in a single company by means of leases executed by the several companies owning the same, with the approval of a majority of their stockholders, and the lessee has gone into possession and is operating such lines, and has issued and sold a large amount of stock and bonds for the purpose of carrying out its plans, a court will not annul one of the leases, and compel the restoration of the property to the

lessor, at suit of a single stockholder therein, unless a legal wrong and injury have clearly been done to him, or the corporation of which he is a stockholder.

2. SAME—JURISDICTION—PLEADING.

While a stockholder in a corporation may, under certain circumstances, maintain a suit in his own right against the directors to restrain them from doing an illegal or ultra vires act, yet where such act has been consummated, and by virtue thereof some third person has acquired rights, as against such person the rights of the stockholder are derivative, and not primary, and depend upon the failure and refusal of the corporation to enforce such rights in its own behalf; and he can only maintain a suit to annul the action taken in right of his corporation, and where the suit is in a federal court, by bringing himself within the requirement of equity rule 94, by showing in his bill that he has made proper efforts, without success, to secure such action as he desires on the part of the managing directors of the corporation, or, if necessary, by the stockholders, or by alleging such facts as will excuse a literal compliance with the rule, by making it appear that such efforts would have been futile.

3. SAME.

A suit in a federal court by a minority stockholder against his corporation and another to annul a lease of the property of the corporation to its codefendant, which has been executed by the directors with the approval of a majority of the stockholders, given at a meeting duly called for the purpose, is one in which the stockholder sues in the right of the corporation, whether the invalidity of the lease is asserted on the ground of fraud of the directors, or because it was ultra vires; and, to authorize the court to entertain such suit, the bill must contain the jurisdictional averments required by equity rule 94.

4. PLEADING—AMENDMENT—SUPPLYING JURISDICTIONAL AVERMENTS.

Jurisdiction must affirmatively appear at every stage of a case, and the court is without authority to permit amendments to supply essential jurisdictional averments in the bill.

5. CORPORATIONS—SUIT BY STOCKHOLDER.

The provision of equity rule 94, which requires a bill filed by a stockholder, founded on a right which may properly be asserted by the corporation, to "set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and if necessary of the shareholders, and the cause of his failure to obtain such action," merely prescribes a rule of pleading; but the efforts of plaintiff so required to be alleged are jurisdictional unless it is both alleged and proved that they would have been futile, and where the question comes up on final hearing the evidence must be resorted to for the purpose of ascertaining whether the allegations relied upon to excuse the failure of plaintiff to apply to the directors or stockholders to bring the suit are true in point of fact.

6. SAME.

Plaintiffs in a suit in a federal court alleged that they became the owners, as executors, of stock in one of two corporations which were made defendants; that while such owners the directors of such corporation leased all of its property to its codefendant; that such lease was the result of fraud and conspiracy of the directors, was ultra vires, and was highly detrimental to the interests of the stockholders generally; that plaintiffs had, in a friendly manner, applied to the defendant corporations and to the directors to desist from such acts, but without effect; and the bill prayed that the lease be annulled. There was no allegation that plaintiffs had applied to the directors or stockholders to bring the suit, but it was alleged that the directors who made the lease controlled the majority of the stock. The proofs showed that the latter allegation was untrue; that the lease was confirmed by a large majority of the stockholders at a meeting duly called for the purpose, and that during the 18 months which elapsed between the making of

the lease and the bringing of the suit there had been a number of stockholders' meetings, and a new board of directors had been elected, only 5 of whom, out of 15, were directors at the time the lease was made. *Held*, that the allegations of the bill were not sufficient to excuse the failure to allege the jurisdictional fact required by equity rule 94, that plaintiffs had made efforts to secure from the directors, or, failing in that, from the stockholders, the action they desired, and the cause of their failure, nor the proofs sufficient to entitle plaintiffs to maintain the suit had such allegations been made.

7. SAME—GROUNDS FOR ANNULING CONTRACT—FRAUD OF DIRECTORS.

The directors of a street railroad company, who owned about one-third of its stock, with the approval of a majority of the stockholders leased its property for a long term of years to another company, pursuant to a plan to unite the lines of the lessor and a competing company, together with those of the lessee, under a single management. In this plan a majority of the directors of the lessor company were interested, and after its consummation they became stockholders, and some of them directors, in the lessee company; paying for the stock, however, the same as other subscribers. The lessor company had a floating debt, besides its bonded debt, and no available funds, and had never paid a dividend. As a result of the lease, its debts were assumed by the lessee, and it was placed on a dividend-paying basis, which caused the market price of its stock to advance nearly 50 per cent. *Held*, that there was nothing in such facts to establish fraud and conspiracy on the part of the directors which would authorize a court of equity to annul the lease at suit of a minority stockholder, commenced 18 months after its execution, and after the lessee had been in control and operation of the consolidated lines, and had marketed its stock and bonds with reference to the same.

8. SAME—POWER TO LEASE PROPERTY—TRACTION COMPANIES UNDER NEW JERSEY STATUTE.

Act N. J. March 14, 1893 (Gen. Pub. Laws 1893, c. 172), authorizing the organization and providing for the regulation of traction companies, in section 16, authorizes any corporation created thereunder to lease the property and franchises of any other corporation owning or operating any street railway, subject to conditions therein prescribed. *Held*, that it also conferred power on one of two corporations organized thereunder to lease its property to the other.

9. SAME—MODE OF EXERCISING POWER.

Power given to a corporation by its charter, or by the general act under which it is incorporated, to lease its property and franchises, enters into the agreement between its stockholders; and, where no particular mode of exercising such power is prescribed, it may be exercised in the same manner as other general powers of the corporation,—by the vote of a majority of the stockholders, or by the board of directors.

10. SAME—RIGHTS OF MINORITY STOCKHOLDER.

Where a corporation is authorized by the law under which it is created to lease all of its property and franchises, the making of such a lease does not deprive a dissenting stockholder of his property without due process of law, since the exercise of such power by a majority was one of the implied conditions under which he became a stockholder.

11. SAME—NEW JERSEY STATUTE.

Act N. J. March 14, 1893 (Gen. Pub. Laws 1893, c. 172), after authorizing traction companies organized thereunder to lease the property and franchises of any other street railway company, provides, in section 17, that any stockholder in a company which shall so lease its property who objects to such action may institute a proceeding in court, in which his damages shall be appraised, and also the value of his stock, and that the lessor company shall either purchase his stock at the appraised value, or pay the damages assessed. *Held*, that such provision is not invalid as against a stockholder in a corporation organized under the act, who

took his stock subject to such condition, as authorizing a condemnation of his property under the power of eminent domain for private use, but that it is valid, as providing an additional remedy for his benefit, of which he may avail himself, or not, at his option.

In Equity. Suit by stockholders to annul a lease made by the corporation.

Joseph A. Duffy and Charles J. Roe, for complainants.
Coult & Howell and Spencer Weart, for defendants.

GRAY, Circuit Judge. The bill in this case was filed December 28, 1899, by the complainants, both citizens and residents of the state of Maryland, as executors of Samuel T. Dickinson, deceased, a citizen of New York, who died October 9, 1896, appointing the complainants his executors by his last will probated in the state of New York. The bill and answer, as summarized in complainants' brief, are as follows:

The defendants are corporations of New Jersey and citizens of the states of New Jersey, New York and Pennsylvania, all of whom have answered. The bill alleges that the complainants are the owners as executors of 100 shares of the capital stock of the Consolidated Traction Company, which came in their hands as assets of the estate of their testator. That the Consolidated Traction Company was incorporated on March 15, 1893, under an act of the legislature of New Jersey, particularly set forth in the said bill of complaint. That on September 25, 1893, the Consolidated Traction Company leased the property and franchises of the Jersey City and Bergen Railroad Company, a special corporation of New Jersey. (Schedule B.) That on January 2, 1894, the Consolidated Traction Company leased the New Jersey Traction Company, a corporation organized under the act concerning corporations. (Schedule C.) That they also became possessed of the capital stock of a ferry line. (Schedule A.) That they thereby became the owners of very valuable franchises, which were continually increasing in value and in financial returns. That on June 12, 1894, the North Jersey Street Railway Company was incorporated under the same act under which the Consolidated Traction Company was incorporated. That prior to the lease hereinafter mentioned, the North Jersey Street Railway Company was a small company, having but little property and few franchises. The bill further sets forth the directors of the Consolidated Traction Company and the North Jersey Street Railway Company on March 1, 1898, and also the directors of the Consolidated Traction Company on March 22, 1898, and the directors of the North Jersey Street Railway Company on June 26, 1898, and the directors of both companies on November 1, 1899, all of whom are made defendants. That in the month of March, 1898, the directors of the Consolidated Traction Company, to wit:—Edward F. C. Young, John D. Crimmins, P. A. B. Widener, A. J. Cassatt, Jeremiah O'Rourke, Thomas F. Ryan, A. Q. Garretson, William L. Elkins, Elisha B. Gaddis, Thomas Dolan, Almeric H. Paget, David Young, J. Roosevelt Shanley, C. A. Griscom, and George F. Perkins, controlling the majority of the capital stock of said company, knowing the value of its franchises and property and the increasing income of the same, for the purpose of benefiting themselves personally and di-

verting the same from the stockholders at large, combined with Bernard M. Shanley and the directors of the North Jersey Street Railway Company, to wit, James J. Corbiere, Wilber S. Johnson, Dudley Farland, Halsey Barrett, John J. Kehoe, John E. McArthur, William J. Davis, John W. Omberson, James E. Hulshizer, Jr., and Henry M. Doremus, who were agents of the directors of the Consolidated Traction Company, to transfer by means of lease, the Consolidated Traction Company to the North Jersey Street Railway Company. That in pursuance of such scheme, on May 25, 1898, the Consolidated Traction Company executed a lease of its property and franchises to the North Jersey Street Railway Company for 999 years; which lease is appended to and made part of the bill. That the complainants had no notice of this transaction. That the money by which this scheme was carried out was furnished by the proceeds of the sale of \$6,500,000 of bonds secured by a mortgage issued by the North Jersey Street Railway Company, the security for which was principally the property and franchises of the Consolidated Traction Company, and the money necessary to pay the interest and the redemption of such bonds arising from the earnings of the Consolidated Traction Company. That Bernard M. Shanley, through whom the transaction was brought about, was made president of the Consolidated Traction Company, and by the terms of the lease was given \$10,000 a year. The bill further alleges that the said lease is invalid, unconstitutional and void, and charges fraud and breach of trust on the part of the directors of the Consolidated Traction Company. That application was made to the defendants to redress the wrong, which was refused. And praying that the lease may be set aside and declared null and void, and the property of the Consolidated Traction Company be restored to its stockholders, and that the North Jersey Street Railway Company account for the profits derived from the operation of the franchises and property of the Consolidated Traction Company.

The answer filed by the defendants admits the leasing and the organization of the companies, and states the constituent formation of the Consolidated Traction Company. It denies that the directors had any interest in the North Jersey Street Railway Company, directly or indirectly. And says that the stock of the North Jersey Street Railway Company was lawfully issued for a valid consideration paid to the company, and denies the right of complainants to question the same. That the Consolidated Traction Company employed its entire stock of \$15,000,000 and had issued its entire bonds of \$15,000,000. That on March 28, 1898, it was further indebted to a list of persons in amounts there given, amounting to \$1,007,128.78. That it was in receipt of a large income from traffic, but that additional expenses necessary for extension and general development of the system had exhausted its funds, and the legal limit of its capacity to borrow money had been reached, and some immediate relief had to be had. That the Newark & South Orange Railway Company was a competitor with the Consolidated Traction Company in the railway business in the county of Essex, which company was operated independently and not controlled by the Consolidated Traction Company or individuals composing its board of directors. That the North Jersey Street Railway Company

was another competitor, and on March 28, 1898, had an authorized capital of \$5,000,000, of which only \$325,400 was subscribed. That in the month of April, 1898, its capital was increased to \$15,000,000, with authority to issue \$15,000,000 of bonds; setting forth its directors. That prior to March 28, 1898, a proposition was made by the North Jersey Street Railway Company, through its president, to lease the franchises and leaseholds of the Consolidated Traction Company for 999 years, naming the directors of the Consolidated Traction Company. That the proposition was submitted by and under a resolution of the board of directors of the Consolidated Traction Company, on March 28, 1898, to the stockholders; that notice was sent to Samuel T. Dickinson, the complainants' testator, at 239 Washington street, Jersey City, where in his lifetime and at the time of becoming owner of the 100 shares of said company's stock he had an office, and also the date of the meeting advertised in a Jersey City newspaper. That at the stockholders' meeting, 108,333 of shares in interest voted in favor of making the lease, and 26,132 shares in interest voted against the same. That the minority stockholders were led by John D. Crimmins, one of the directors of said corporation, who afterwards assented to said lease. That by virtue thereof the North Jersey Street Railway Company took possession on June 1, 1898, of the property and franchises of the Consolidated Traction Company, and have been operating the same since.

The answer denies fraud or conspiracy, or that any of the directors of the Consolidated Traction Company were interested in a single share of the stock of the North Jersey Street Railway Company, or that the board of directors were the largest stockholders of the Consolidated Traction Company. And says that early in 1898 the board of directors of the North Jersey Street Railway Company, by their agents, with the avowed purpose of placing the control of all of said railway systems under one head, began negotiations to purchase the capital stock of the Newark & South Orange Railway Company, and that such proceedings were had in relation thereto that eventually, as part of said plan, the North Jersey Street Railway Company became the owner of all the capital stock of the Newark & South Orange Railway Company, for which it paid the sum of \$1,500,000; that it took up the bond issue of \$1,525,000 of that road and paid off the floating debt, amounting to \$235,000, and paying upwards of \$3,250,000 in cash therefor from the money that was realized from the sale of the bonds and stock of the North Jersey Street Railway Company; and that the transaction was completed so that the North Jersey Street Railway Company took possession of the property and franchises of the Newark & South Orange Railway Company on May 25, 1898, six days prior to the time when the North Jersey Street Railway Company took possession of the property and franchises of the Consolidated Traction Company. And charges that the complainants had knowledge of the intention of the North Jersey Street Railway Company to purchase the stock of the Newark & South Orange Railway Company, and that they knew when the same had been purchased, and that the purchase was part of the general plan conceived by the North Jersey Street Railway

Company for placing the operation and control of all of said railway lines under one management; and that all the stockholders, except the complainants have acquiesced and tacitly consented. They admit that the complainants personally, or by attorney, came to the office of the Consolidated Traction Company in the beginning of the year 1899, and that the treasurer and counsel of the company explained to them fully the conditions of the lease, and exhibited to them fully the manner in which it had been authorized and executed, and stated to them briefly the reason why the lease had been entered into, and gave them full information as to their rights as stockholders, etc.; that the complainants expressed dissatisfaction and claimed that the legislature could not pass a law authorizing the lease. That they had been subject to expenses and disbursements by reason of the lease, and that the stock of the Consolidated Traction Company had risen in value. That the original intention on the part of the officers, directors and stockholders of the said three corporations in uniting their roads under one management, was to operate them in a more economical manner and with greater satisfaction to the large number of people who daily became passengers thereon. That it would be inequitable and unjust to set aside said lease and interfere with the business of the North Jersey Street Railway Company, and take from its stockholders and bondholders a large part of the consideration upon which the value of their stock and bonds depend.

An amendment was allowed by the court to be filed to the bill, covering certain alleged specifications of fraud that complainants claimed to have discovered in the taking of the testimony. Upon the issues thus framed, testimony was taken on both sides, and the contentions on the part of the complainants are: First. That such fraud has been shown on the part of the directors of the Consolidated Traction Company as vitiates the whole transaction of the lease. Second. That the lease of the Consolidated Traction Company was an illegal, as well as an ultra vires, act on the part of the defendants. Third. That the lease in question, in its effect, takes the private property of the complainants, against their assent, and is in violation of the rights of complainants, guaranteed to them by the constitution of the United States. Their bill, therefore, prays that the defendants, and each of them, may be restrained from carrying on the business of the Consolidated Traction Company, under the lease to the North Jersey Street Railway Company; and that the said executed indenture of lease may be set aside and declared null and void; and that the property of the Consolidated Traction Company may be restored to it and to the stockholders thereof; and that the North Jersey Street Railway Company may desist from operating the railways of the Consolidated Traction Company; and may account for the profits derived by it from the operation of the street railway lines, franchises and other property of the Consolidated Traction Company, of which it obtained possession by virtue of said indenture of lease; that the North Jersey Street Railway Company may desist from paying any sums of money to the Consolidated Traction Company in accordance with the terms set forth in said in-

denture of lease, and that the Consolidated Traction Company may desist and refrain from accepting the same, and that the Consolidated Traction Company, or its directors, and the North Jersey Street Railway Company, or its directors, may desist and refrain from making any other agreement, contract, lease or other arrangement to take from the Consolidated Traction Company its property, franchises and business. -

It thus appears that the end sought by these complainants, as holders, in their representative capacity as executors of their decedent's estate, of 100 shares of stock of the Consolidated Traction Company, is no less than the setting aside and nullification of an executed transaction of lease between the two corporations defendant, under and by means of which an important railway property has been bought and controlled by the lessee company, \$6,000,000 of its bonds marketed, \$15,000,000 of stock issued, and an extended railway system made possible, and operated for a period of more than 18 months prior to the filing of the bill in this case. Consequences that will involve the destruction of present conditions of comfort and convenience to a large community, and the demoralization of settled plans for the administration of large and valuable properties, with possible serious resulting loss to the stockholders of the defendant companies, ought not to be lightly incurred. That a wrong and injury has been done by the transactions complained of, to the estate of the single decedent stockholder, whose executors are complainants in this case, or to the corporation of which he was a member, should be made clearly manifest before the asked for interference of this court should be granted. But though it is true that no pecuniary loss or damage has been shown to have resulted to the holders of these 100 shares of stock, by reason of these transactions, we must nevertheless consider whether a legal or technical wrong has been done them by reason of some contravention of their legal rights as stockholders, or to the corporation itself, by reason of the illegal action or the fraudulent mismanagement of its interests, by those who for the time being controlled it.

In the present case, the alleged fraudulent acts of the directors of the Consolidated Traction Company, as well as the invalidity and ultra vires character of the lease complained of, were wrongs, not against the complainants as individual stockholders, but against the corporation, for which it would be entitled to be the complainant in a suit such as this, and it is only because of its failure to seek a remedy for these alleged wrongs, by suit, that a minority stockholder is permitted to carry the flag of the corporation, and under that flag fight the battle that the corporation ought to fight. Though the corporation is brought into court as a defendant, its real status is that of a plaintiff, and the relief sought must be such as will inure to its benefit. A stockholder who has grounds to believe that his directors are about to do an illegal act or thing, in order to restrain them therefrom, need not necessarily invoke the jurisdiction above referred to, because the thing complained of being in fieri, his individual interests in relation thereto may, under certain circumstances, be such, that he is not compelled to deal with the corporation itself,

but may proceed in his own name directly against the individual directors, to obtain relief for the wrong being perpetrated against him. But when the act complained of is not in fieri, but is consummated, and by virtue thereof some third person has acquired rights, then, as against that third person, the act of his corporation having been consummated, the stockholder's right to ask for a decree is derivative and not primary. A stockholder of a corporation cannot, by simply averring—"I am a stockholder of the corporation, and that corporation has made a contract which is illegal or improper, with another corporation"—ask that it shall be decreed against that other corporation, that the contract is illegal or improper, and that it shall surrender whatever it has taken under it. The case is one of corporation against corporation, and but for the equity principle above alluded to, and to be hereafter more fully referred to, there would be no relief whatever, because the third person (the other corporation) would say to the complaining stockholder, "You are not a party in any way to this case; you are only a stockholder; your corporation must sue me." But, although the stockholder as an individual can never go into a court of equity, and ask for relief against a third person, upon the ground that the corporation has made a bad bargain, whether by the fraudulent or the illegal action of its directorate, yet, if the corporation ought to bring a suit against such third person, and seek, as against him, to take back property, and if the corporation refuses so to do, the minority stockholder may, in equity, be permitted to assert the right which the corporation ought to assert, by alleging that the corporation so refuses to act, after he has made honest and bona fide efforts to induce them to do so, and by making his corporation a party by bringing it in as a defendant, though its real status is that of plaintiff, and seek to obtain for it the relief to which it would have been entitled, had it itself sued.

It has long been recognized as a principle in courts of equity, that a stockholder may enforce a right belonging to the corporation of which he is a member, or obtain relief for a wrong inflicted upon it, and for which the corporation itself might have maintained a suit, where he makes it appear to the satisfaction of the court that he has honestly endeavored to induce those in control of the corporation to bring such suit, and that he has failed in such endeavor, by setting forth the particulars of his efforts and the reasons for his failure. The inconveniences that would result from the interference of individual stockholders, where these preliminary efforts were not made, are so apparent, that the supreme court of the United States has guarded against them, by the peremptory requirements of a rule, that the bill in such cases must be under oath and contain allegations of the jurisdictional facts above stated. This is the well-known ninety-fourth rule in equity, which also embraces another requirement, which, owing to the peculiar jurisdiction of the circuit courts of the United States, had pressed itself upon the attention of these courts. This matter was the prevalence of collusive practices for the purpose of creating the conditions of federal jurisdiction, by diverse citizenship in the said courts. Accordingly, the ninety-fourth

was promulgated at the October term, 1891, and is as

ight by one or more stockholders in a corporation against
 ther parties founded on a right which may properly be
 ration, must be verified by oath, and must contain an
 tiff was a shareholder at the time of the transaction
 that his share devolved on him since by operation
 not a collusive one to confer on a court of the
 a case of which it would not otherwise have
 set forth with particularity the efforts of the
 action as he desires on the part of the managing
 and if necessary of the shareholders, and the cause of
 such action."

no allegations in the bill, as filed, complying with the
 ts of this rule. The complainants, however, contend that
 e within certain recognized exceptions to the rule. These
 ptional conditions which are said to excuse a literal compliance
 h the rule, are consistent with the reasons that support equitable
 jurisdiction in such cases. If it is apparent in a case like the pres-
 ent, that the directors, who are alleged to have offended, are still
 in control of the corporation, and so implicated in the alleged wrong-
 doing as to make it certain that a demand upon them to right such
 wrong or to bring suit for that purpose would be an idle ceremony,
 it would be unreasonable to require such demand to be made. Suits
 by one or more stockholders of a corporation, to assert a right be-
 longing to the corporation, or remedy a wrong committed against
 it, where the corporation itself is powerless to act by reason of the
 refusal of those having management and control of it, had been rec-
 ognized as cognizable in equity long before the promulgation of
 the rule referred to. The development of this equitable jurisdiction
 in England and America, is set forth in the judgment of the supreme
 court, in *Hawes v. City of Oakland*, 104 U. S. 450, 26 L. Ed. 827.
 Mr. Justice Miller, in delivering the opinion in that case, thus de-
 scribes and defines this jurisdiction:

"But, in addition to the existence of grievances which call for this kind of
 relief, it is equally important that before the shareholder is permitted in his
 own name to institute and conduct a litigation which usually belongs to the
 corporation, he should show to the satisfaction of the court that he has ex-
 hausted all the means within his reach to obtain, within the corporation
 itself, the redress of his grievances, or action in conformity to his wishes.
 He must make an earnest, not a simulated effort, with the managing body of
 the corporation, to induce remedial action on their part, and this must be
 made apparent to the court. If time permits or has permitted, he must show,
 if he fails with the directors, that he has made an honest effort to obtain
 action by the stockholders as a body, in the matter of which he complains.
 And he must show a case, if this is not done, where it could not be done, or
 was not reasonable to require it."

Such being the grounds of the jurisdiction, the court proceed to
 say that, like other jurisdictional facts, they should be alleged in
 the bill. In addition to this foundation of equitable jurisdiction,
 common to both English and American jurisprudence, the supreme
 court, owing to the exceptional and limited character of federal
 jurisdiction depending upon diverse citizenship, added in the rule an-
 other requirement, that in all such cases, the bill of complaint thus

sworn to, should contain an allegation negating collusion practiced for the purpose of creating the diverse citizenship necessary to jurisdiction in a federal court. At the same term at which this judgment was delivered, the ninety-fourth rule, as above quoted, was promulgated. This rule, of course, did not and could not create the jurisdiction, the exercise of which it thus properly undertakes to regulate. The essential jurisdictional facts are prescribed by the settled equitable doctrines above referred to, and by the constitutional requirement of a bona fide diverse citizenship. The manner in which the jurisdiction may be invoked in the federal courts, is prescribed by the said rule.

The defendants contend that the complainants have not complied with the ninety-fourth rule in any of its requirements. They say that the bill makes no allegations whatever in regard to these vital and important jurisdictional facts. It is not denied by complainants that there is no allegation in the bill, as filed, "that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance," and that in this respect, they have failed to comply with the rule. This rule is binding upon this court, and it is without authority to entertain a suit in equity, wherein the bill of complaint is lacking as to any of its requirements. Complainants, however, after the taking of testimony on both sides had been concluded, or was about to conclude, asked that they be allowed to amend their bill by inserting the allegation, that the suit was not a collusive one, in the respects and in the form prescribed by the rule. And they contend that this amendment should be allowed at any time, inasmuch as they allege that the defect in the bill, which it was designed to cure, was a technical and formal one. We think, however, that the defect is not merely technical or formal. It is jurisdictional. It was within the power of the supreme court to require by rule that essential jurisdictional facts should appear by averment in the bill of complaint, that the bill should be sworn to, and that the right of the circuit court to entertain the suit should be conditioned upon the presence of such averments. An allegation in the bill under oath, that there is no collusion, is a condition precedent to the jurisdiction of this court over the case. This court cannot permit a bill to be amended in a case, over which it has no jurisdiction. Jurisdiction must affirmatively appear at every stage of the case. It can be questioned in any mode and at any time, and does not require to be formally objected to by plea or demurrer. The court may, of its own motion, note the want of jurisdiction and dismiss the bill. In this case, however, objection to the jurisdiction on the ground stated was made in the answer of defendants as if on demurrer.

But passing over the question as to the right to amend, in the manner proposed, and assuming for the present that such an amendment could be allowed, we come to the objections by complainants, that this suit is not founded on rights which the corporation against whom the suit is brought, and of which complainants are stockholders, could properly assert, and therefore not within equity rule 94. We think, however, that by an examination of the allegations of

the bill, and the prayers for relief, it will abundantly appear that the jurisdiction in this case, must rest primarily upon the equitable doctrine, that permits a minority stockholder to assert a right or pursue a remedy, belonging to the corporation of which he is a member, and which it has declined to assert or pursue in its own behalf upon due demand from such stockholder, or where the circumstances are such as to make it clear that such demand would be idle. The thing complained of is a lease of its property and franchises, made by the corporation of which complainants are stockholders to another corporation through the action of its board of directors, confirmed by the stockholders as a body, at a regularly called annual meeting, with notice that the matter of such lease was to be considered. This lease, it is charged by complainants, was made by a board of directors, who controlled a majority of the capital stock of the said corporation, and who, for their own selfish purposes, are alleged to have entered into a conspiracy among themselves and with the directors of the North Jersey Street Railway Company, which company and its directors, as well as the directors of the lessor company, are made defendants in this suit. It is also charged that the lease so made by the directors, and sanctioned by the majority of the stockholders, was *ultra vires*, and therefore illegal and invalid. The fraud here charged against the directors was not in *fieri*, but a fact accomplished, and was clearly practiced against, and an injury to, the corporation and to the whole body of the stockholders as a corporate entity, and it belonged to such corporate entity, to assert the right to redress against such delinquent directors, and against the lessee corporation, if it had participated in the fraud. No right accrued to a single stockholder, or any number of stockholders, as individuals, primarily to sue in their own names, because whatever injury resulted to them as individuals, is indirect and derivative. This is true also as to the charge, that the lease in question was *ultra vires*. It belonged primarily to the corporation to assert the right to have it set aside. If, however, the corporation, through its directorate, or its stockholders as a body in lawful meeting assembled, refused to assert these corporate rights, due demand having been made that they should do so by one or more stockholders, or circumstances having been shown from which it clearly appears that such demand could not be made in time, or, if made, would have been certainly futile, then, out of these facts arises a distinct equity in such stockholder or stockholders to institute, in behalf of the corporation, the suit which said corporation ought to have instituted, and seek before a chancellor for the relief to which such corporation would be entitled, if it had brought suit in its own name. The relief sought must inure to the benefit of the corporation, which is made defendant for the purpose of bringing it into court, where, as we have said, it really stands in the attitude of a plaintiff. The equity which permits the bringing of such a suit by a stockholder, is as distinct and well defined as any other head of equity jurisdiction. It depends upon and arises from the facts above recited, and if these do not all appear as concurring, to the satisfaction of the chancellor, his jurisdiction fails for want of the equity to support it. The ninety-fourth

rule merely requires that these necessary jurisdictional facts must be alleged under oath, as a matter of pleading, as well as be shown to exist. If they fail to be so alleged under the requirements of the rule, there is no jurisdiction in the court to proceed, and the bill must be dismissed. Likewise, the requisite allegations being made, they must be supported by proof, and if they fail to be so supported, jurisdiction fails for want of the peculiar equity, as above defined, to sustain it, and for that reason, the bill must be dismissed.

Being of opinion that this suit is founded upon rights which the corporation, against whom the suit is brought, could and should properly assert, we are brought to the consideration of the important question, whether, first, this suit develops the fact that equity rule 94, in other respects than those requiring a denial of collusion, has been complied with, and second, whether, if the allegations required by the rule have been made, they have been supported by the evidence in the case. These allegations, it must be remembered, refer to essential jurisdictional facts, out of which alone the equity that will support this bill can arise. They must both be alleged and proved. Passing over again the question of the right of complainants to amend their bill at the time they offered to do so, in order to supply the admitted absence of any allegation therein respecting collusion, which has to do only with the conditions necessary to the peculiar jurisdiction of federal courts, and not with those necessary to their jurisdiction as courts of equity, we turn to the contention by complainants, that, in other respects, equity rule 94 has been complied with.

An inspection of the bill shows that it has been verified by affidavits of both the complainants; that it contains an allegation that the complainants were shareholders of the Consolidated Traction Company; that the shares devolved upon them as personal representatives of a decedent, who owned these shares at the time of his death, and that they were shareholders at the time of the grievances complained of. In these respects, the allegations complied with the requirements of the rule. The bill contains, however, no allegation which "sets forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, or, if necessary, of the shareholders, nor the cause of his failure to obtain such action." Manifestly, the allegation in the bill, that complainants had frequently and in a friendly manner applied to the said corporations defendant, and to all the other individual defendants, and had "endeavored to persuade them to desist in their unlawful and unjust conspiring against your orators and their violating law," etc., does not meet the requirements of the rule; that requirement being a setting forth in the bill of the efforts by complainants to induce the managing directors, or the body of stockholders, to bring the suit which they now seek to institute, and the reason of the failure of such efforts to induce the directors or body of stockholders so to do. As we have seen, it is on this important and essential fact, that the equity of an individual stockholder or stockholders, to maintain a suit in behalf of the corporation, is founded, and the jurisdiction of this court depends. But as, in considering whether such efforts have in fact

been made, their absence can be excused by showing exceptional circumstances which prevented their being made in time, or that the conditions were such as made it manifest that if such efforts had been made, they would have been futile, so, in considering the requirements of the rule, that there should be an allegation under oath that such efforts had been made, courts have, in a number of cases, said that, where the general allegations of the bill were such as to make it manifest that, if true, such application to the directors or stockholders would have been without avail, the necessity for such allegation would be dispensed with. No general rule can be laid down to guide us, as to when the general allegations of a bill make such a showing, as will dispense with this particular allegation as to efforts on the part of the complainants, to induce directors or the body of stockholders, to redress the wrong alleged to have been committed against the corporation. Each case must stand upon its own facts and circumstances. The rule is a peremptory one, that the fact that such application, if made, would be futile, must absolutely and clearly appear, and so, if the question comes up at final hearing, the evidence in the case must be resorted to, to show that the allegations of the bill relied upon for this purpose, are true in point of fact. And especially is this so, when we reflect that the fact of application to the directors, or circumstances excusing the want of such application, are jurisdictional facts, the failure of which to appear in the testimony, negatives the equity of the complainant stockholders for the relief prayed for.

An examination of the testimony in this case, discloses the fact that the board of directors of the Consolidated Traction Company, who negotiated and executed the lease, was not the board of directors of said company at the time the suit was brought, and had not been for many months previous thereto. Of 15 directors constituting the board at the time of the lease, only 5 were members at the time of the bringing of this suit. It is true, that some or all of the remainder were members of the board of directors of the North Jersey Railway Company, but they were engaged then in a transaction not alleged to be in itself illegal, and must have viewed the whole situation from the standpoint of their own company, the lessee. But, as directors of the lessor company, they were not committed in any way to make it unnatural or self-stultifying, if they should inquire whether the former board of directors of the lessor company had transcended their powers or committed a fraud. Nothing is shown which would have prevented an application to the new board of directors, asking them to take steps to redress these alleged wrongs to the corporation. That a refusal on their part was probable, ought not to excuse the lack of such an application. Some explanation of the situation might have been given, that would have been satisfactory to these complainants. But the rule further requires that, if necessary, application should be made to the shareholders for the same purpose. This was not done, and nothing in the evidence, or in the allegations of the bill, appears to excuse the want of such an application. The allegation that the directors controlled a majority of the capital stock of the Consolidated Traction Company, appears from the evidence to be untrue. The shareholders, as a body, are not accused of fraudulent or improper

conduct, in regard to this lease, and though the great majority voted for its confirmation, it does not lie in the mouths of these complainants, in considering the requirements of this rule, to say what might or might not have been the result of an application made to a regular and lawful meeting of the body of shareholders. Nothing appears in the allegations of the bill, or the evidence produced in the record, that would reasonably prevent the shareholders from being convinced, notwithstanding their previous vote for confirmation of the lease, that the same was a fraud upon the corporation of which they were members, and upon themselves as stockholders. On the contrary, it is presumable, that, if the allegations of the complainants, as to the ruin wrought by the lease, and to be hereafter wrought by a continuance thereof, are true, that fact could be made to appear to the fellow stockholders of the complainants, and in that case, the ordinary motives governing human conduct, would excite them to co-operation with the complainants.

The contention made by complainants that, those of the stockholders who subscribed to the bonds of the North Jersey Street Railway Company, were bribed by the reception of an allotment of shares of stock of that company, with each bond subscribed for, cannot be sustained. The subscription to their bonds was open, and on the same terms to all, whether stockholders of the Consolidated Traction Company, or not. These complainants had the same right and opportunity to subscribe and receive the bonus stock, as the other stockholders. It is not and cannot be truly alleged that such stockholders could not, with perfect propriety, subscribe to these bonds, just as others, not stockholders, could do. They owed no duty to the corporation of which they were members, or to their fellow stockholders, which would forbid their so doing; nor is there any evidence to connect the great body of stockholders, other than those in the direction, with the alleged conspiracy of the directors denounced in the bill.

During the more than 18 months that elapsed between the execution of the lease and the bringing of suit, more than one regular meeting of stockholders was held, at any of which it would have been possible for these complainants, to have stated their grievances, and asked for such action as was competent for the stockholders as a body to take. If complainants believed the allegation of their bill, that the lease complained of, was the result of the machinations of the directors of the Consolidated Traction Company, practiced for the selfish purpose of diverting an enormous income, that was about to come into the treasury of the said company for the benefit of the stockholders, and appropriate the same to themselves personally, and that, as is alleged in their brief, the making of said lease in the manner and upon the terms set forth, completely wrecked the said Consolidated Traction Company, and that the cancellation of said lease, and the undoing of the transactions connected therewith, would restore these enormous profits, and put them in a position in which they could reasonably expect them to be increased for the future, it is hard to imagine why they should not reasonably hope to so impress their fellow stockholders, by an appeal to their selfish interests, as to gain their co-operation in compelling the corporation to

assert the rights, which in this suit the complainants seek to assert in its behalf.

We think, therefore, that the allegations of the bill (relied upon by the complainants for that purpose) are not sufficient to dispense with the allegations of the jurisdictional fact as required by the ninety-fourth rule, that complainants had made efforts (setting forth with particularity what those efforts were) to secure from the managing directors, or, failing in that, from the shareholders, such action as they desired, and the cause of their failure to obtain such action. But if such allegations in the bill had been sufficient as allegations, they cannot, when at this stage of the case they have been shown from the testimony to be untrue in essential particulars, be relied upon for the purpose of dispensing with the requirements of the rule. And this brings us again to say, without regard to the question of whether the allegations of the bill conform to the requirements of the rule, that the essential facts required by said rule to be alleged under oath, are jurisdictional facts, and if they fail to be proved, whether alleged or not, the foundation for that peculiar equity which this suit is instituted to assert, fails, and this court is without jurisdiction to give the relief sought. To this conclusion we have come, because, as we have just said in another connection, there is nothing in the case as developed by the evidence, which will, as a matter of fact, justify the admitted neglect of the complainants to make any application to the new board of directors, to institute a suit on behalf of the corporation for such redress as is sought by these complainants in the present suit.

But if the facts necessary to support the equitable jurisdiction of this court had appeared, we are of opinion that complainants have failed to substantiate either of the grounds upon which they rely for relief. A careful examination of the testimony in this regard, fails to disclose the fraudulent and improper conduct on the part of the directors of the two defendant companies, charged in the bill. Bernard M. Shanley, who is made a defendant, and charged with being a leading co-conspirator with the other defendants, seems to have been, what in modern parlance is called, a promoter of large schemes for the combination of rival corporations under one management, so as to achieve for all concerned the benefits of more economical administration and increased facilities for earning profits. It appears, also, that the Newark & South Orange Railway Company was a company competing with the Consolidated Traction Company, in Newark, and also in a large stretch of suburban country. The desirability of the Consolidated Traction Company obtaining control of this competitor, had been manifest for a long time prior to the transactions here in question. But the Consolidated Traction Company had a large floating debt, and had exhausted its capacity for borrowing money. It seems to have occurred, probably first to Shanley, but possibly to the executive officers of the defendant the North Jersey Street Railway Company, as possibly also to the executive officers of the Consolidated Traction Company, that the former company might be so reorganized as to make it a valuable instrument for consolidating the railway interests of the Consolidated

Traction Company, the Newark & South Orange Railway Company, and those already controlled or capable of being controlled by the said North Jersey Street Railway Company. This latter company had been doing business in a small way, on a small capital, and needed a reorganization to make it capable of accomplishing this design. It had authority, or it was known that authority could be conferred upon it, to issue \$15,000,000 in par value of the stock, and \$15,000,000 of bonds. It was an independent corporation, although a small one, and none of its directors were directors in the Consolidated Traction Company. Shortly prior to the transactions here in controversy, Shanley became a subscriber to a syndicate formed to develop this North Jersey Street Railway Company, with a view to provide the money to pay off the floating debt of the Consolidated Traction Company, and purchase the Newark & South Orange Railway Company. With this end in view, he seems to have determined, with advances made by himself and others who might join with him, to provide the North Jersey Street Railway Company with sufficient cash to start the project proposed. John F. Dryden, a citizen of the state of New Jersey, of large means and high character and standing, was selected to receive subscriptions of cash for that purpose. \$354,000 was deposited in Mr. Dryden's hands, by 32 subscribers, for this purpose, of which \$117,000 was subscribed by 10 of the directors of the Consolidated Traction Company. These amounts were afterwards credited on account of subscriptions to the bonds and stock of the North Jersey Street Railway Company. A movement was then started by Shanley, and his associates, to provide money to pay off the floating debt of the Consolidated Traction Company, and purchase the Newark & South Orange Railway Company. In the carrying out of this plan, Shanley seems to have acquired, or obtained an option upon, all the securities of the Newark & South Orange Railway Company, and the Suburban Traction Company, which he placed in the custody of one L. D. Howard Gilmore, as his agent. Gilmore then, as the actual and legal custodian of these securities, made a proposition to sell the same and pay \$2,400,000 in cash, for \$6,500,000 of bonds, and \$14,659,400 par value of stock of the North Jersey Street Railway Company. The company accepted the proposition, and Mr. Shanley, in behalf of the North Jersey Street Railway Company, proceeded to obtain the money for the project, by selling its bonds, giving a \$1,000 4 per cent. bond, and \$2,000 of par value of stock of the North Jersey Street Railway Company, for \$1,000 in cash. With the money thus obtained, the floating debts of the Consolidated Traction Company and of the Newark & South Orange Railway Company were paid off, and being thus in control of these valuable competing properties, so long desired by those in control of the Consolidated Traction Company, a proposition was made to the latter company, that it should lease its property, franchises and privileges to the North Jersey Street Railway Company for a period of 999 years, the latter company assuming its liabilities and agreeing to pay to the lessor company the sum of \$1,000,000 upon the execution of the lease, and a rent thereafter to be paid annually, amounting to \$300,000 for the first two years, and increasing at intervals

until 1906, when and thereafter, the annual rent should be \$600,000. No dividend had ever been theretofore paid upon the stock of the Consolidated Traction Company. The proposition was accepted, and the lease executed, with the result that the stock of the Consolidated Traction Company rose in the market nearly 50 per cent. Before, however, the project was actually accepted by the directors of the Consolidated Traction Company, or the lease executed, the question of its advisability was submitted to a meeting of the stockholders of the company. The meeting was a regular annual meeting, but, in the call for the same, notice was given that the project of this lease would be brought before the meeting for consideration. After full explanation, it was confirmed, and approved by the stockholders, 108,000 shares out of 150,000 voting in favor thereof, and 23,000 against. These 23,000 afterwards, by written assent, were recorded in favor of the lease, and finally all but 400 shares, 100 being in the hands of the complainants in the present suit, had, in one way or another, assented to the transaction. The remainder of the \$15,000,000 of bonds had been marketed, and were widely distributed, as also the stock of the North Jersey Street Railway Company, and for 18 months prior to the suit, and for nearly 2 years since, the properties leased and controlled by the North Jersey Street Railway Company have been administered without complaint, so far as the record shows, on the part of any other stockholders than those representing the 400 shares mentioned. Much is made of the fact that Mr. Dryden was a secret trustee for the receiving of the cash subscriptions necessary to start the project, but there seems to have been no special injunction of secrecy, and what was done was known to a large number of interested persons. It was part of a plan that seems to have been well calculated to achieve an object that was conceived to be by both directors and stockholders of the Consolidated Traction Company a desirable one to achieve. It is altogether probable that this scheme was known to the directors of the Consolidated Traction Company. They were all of them large holders of the stock of that company, although they did not control the same, as alleged by the complainants in their bill; fully two-thirds of it being in other hands. But whatever the proportion of their holdings may have been, it was large enough to give these directors a personal interest in the successful management and prosperity of the corporation they were managing. Their subscription to the stock of the North Jersey Street Railway Company was consistent with this personal interest, and did not place them in the position of antagonism to the interests of their own corporation, a thing abhorred by equity, where trustees are personally benefited by the thing done by them as trustees, except in so far as they are benefited, in common with all other stockholders, by wise business management. Shanley was a director in neither company, but was a large holder of the stock of the Consolidated Traction Company, and certainly could have had no interest in wrecking that company. What his profits were as a promoter of the scheme, does not clearly appear. They were probably large, but the transaction was one requiring experience as a financier, skill and large pecuniary means. At all

events, there is nothing in the record to show that the directors shared in the profits accruing to Shanley as a promoter, or received any benefit from him, other than what came to all the stockholders from what was accomplished by his efforts. The lease, so far as the evidence before us goes, approved itself to the judgment of all the stockholders, except those interested in this suit, and it seems to have redounded to the well-being and prosperity of the enterprise in which their capital was embarked, by placing it upon a dividend-paying basis, where it had never before been. It likewise seems to have given to the public a better organized and more extended service. That the lessee company is controlled by many or most of the same men who, before the lease, controlled the Consolidated Traction Company, would seem to be to the advantage of the stockholders of that company, and not to their detriment. This state of things as disclosed by the record, is very far from sustaining the allegations of fraud against the individual defendants in this case, directors in the two companies, or any of them, and nothing but the clearest proof of such fraud would justify the interference asked of this court on that ground.

We now turn to what seems, from the argument of the complainants, the principal ground upon which they rest their case. This is the alleged ultra vires character, and the consequent invalidity, of the lease made by the Consolidated Traction Company to the other corporation defendant. It is, of course, necessarily true, that the activities of a corporation must be confined within the limits prescribed by the sovereign authority creating it; and especially is it true, that while a corporation has by implication all the ancillary powers necessary to the exercise of expressly granted powers, and to carry into effect the purposes of its creation, it can exercise no others that are not expressly granted. In this case, the power of these two corporations defendant, the one to be lessor and the other the lessee, of the property, rights, franchises and privileges which the lessor company had acquired by the legislative authority that granted it corporate existence, is not to be implied from any general power connected with the object of their creation. As the power to negotiate and execute the lease here in question has been challenged, those who would sustain it, must point to some express authority of the legislature of the state by which these corporations defendant were created. We find that both of them were formed under an act of the legislature of New Jersey, approved March 14, 1893, and constituting chapter 172 of the General Public Laws of 1893. The title of the act is, "An act to authorize the formation of traction companies for the construction and operation of street railways, or railroads operated as street railways, and to regulate the same." The act is a long one and prescribes, with much detail, the manner in which a corporation may be formed and organized under it. It carefully defines and limits the powers and franchises, which such corporations may exercise and enjoy. Its sixteenth section contains the following grant of power:

"Any corporation created under this act may lease the property and franchises of any other corporation owning or operating any street railway or other railroad operated as a street railway, or any turnpike or plank road,

or any motor power or traction company and such other corporation and corporations are hereby authorized to make such lease and after such lease the corporation created under this act may use and operate the franchises and property of such corporation or corporations so leased upon such compensation to be made to the lessee company as such respective lessor corporation may have been entitled to demand from persons using or traveling in or upon the property of such lessor corporation: provided, that all rights of creditors and all liens upon the property of the corporation lessor, and all privileges and immunities of such lessor corporation shall be preserved unimpaired to the same extent as if such lease had not been made; and all debts, liabilities and duties of such lessor corporation shall thenceforth attach to the lessee corporation, and be enforced against or be enjoyed by it to the same extent and in the same manner as they were enforceable against or enjoyed by the lessor corporation: and provided further, that no greater tolls or charges shall be made or demanded by any corporation created under this act than were or are authorized to be charged and collected for the same service by the corporation or corporations, lessor or lessors in said lease."

An act of the legislature, approved on the said 14th day of March, 1893, but said to have been passed and approved prior to the act above referred to, is entitled "An act to authorize street railway companies, or companies owning railroads operated as street railways, to lease their property and franchises to traction companies, and to prescribe a method therefor." It is printed in the volume of General Public Laws of 1893, just before the one quoted from, and is chapter 169, the act quoted from being chapter 172. The first section of this chapter 169 is as follows:

"That it shall and may be lawful for any company owning any street railway or railways or any company owning any railroad operated as a street railway, whether such lessor company or companies are incorporated under any general or special act of this state, to lease their property and franchises to any traction company created under the laws of this state for such term or terms, upon such condition or conditions as to the use and operation of the property of the corporation, the enjoyment of privileges or immunities of such lessor corporation and the amount of rent to be paid therefor, and the manner of making payment of said rent, and such other conditions, limitations and restrictions as said lessor and lessee corporations may agree upon."

Both this chapter and chapter 172 contain identical provisions for appraising and paying the value of the stock of dissentient stockholders. Section 17 of chapter 172 is almost a verbatim copy of section 2 of chapter 169, and is as follows:

"Any stockholder of any company whose property and franchises shall have been leased to a corporation created under this act who shall not assent to lease, or who shall resist or object to the making thereof, may at any time within thirty days after the making of such lease as in this act provided apply by petition to the circuit court of the county in which the chief office of the lessor corporation may be kept or to a judge of said court in vacation, if no such court sits within such period, on reasonable notice to said company, to appoint three disinterested persons to estimate the damage, if any, done to such stockholder by said proposed lease; and whose award, or that of a majority of them, when confirmed by the said court, shall be final and conclusive; and the persons so appointed shall also appraise said stock of such stockholder at the full market value thereof without regard to any depreciation or appreciation in consequence of the said lease; and the lessor company may at its election either pay to the said stockholder the amount of damages so found and awarded, if any, or the value of the stock so ascertained and determined, and upon the payment of the value of the stock as aforesaid the said stockholder shall transfer the stock so held by

him to said lessor company to be disposed of by the directors of said company or to be retained for the benefit of the remaining stockholders; and in case the value of said stock as aforesaid is not so paid within thirty days from the filing of the said award and confirmation by said court, and notice to said lessor company, the damages so found and confirmed shall be a judgment against said company, and collected as other judgments in said court are, by law, recoverable."

As both of the corporations lessor and lessee respectively, and defendants herein, were formed and organized under the provisions of chapter 172, it would seem that there could be no doubt, that plenary capacity to stand in the mutual relation towards each other, of lessor and lessee, was conferred upon said corporations by section 16 of said chapter. If it should be objected, however, that the words, "such other corporation and corporations are hereby authorized to make such lease," are insufficient, for any reason, to confer the requisite power on the lessor company, the prior act constituting chapter 169, is direct and ample for that purpose. But we are of opinion that section 16 of chapter 172 of the act under which both corporations were organized, confers the requisite authority upon both corporations.

The lease that has been executed, and here the subject of controversy, was made pursuant to the careful provisions of the said section 16. It complies with all its requirements as to protecting all rights of creditors and liens upon the property of the corporation lessor, and all privileges and immunities of such lessor corporation. It also provides for the assumption by the lessee company of all debts, liabilities and duties of the lessor corporation. As has been seen, section 17 of said act provides a mode by which any dissentient stockholder may be compensated, if he should fear the effects of such lease upon the value of his stock, or if for any other reason he desires to retire from the corporation without loss. This provision would seem to have been adopted out of cautious solicitude for the rights of possible dissentient stockholders. Even in a case where a lease or consolidation was authorized, by a legislative act subsequent to the act under which the corporation was organized, such a provision as that of section 17, above quoted, has been held a competent exercise of the power of eminent domain. It was construed to be a taking of private property for a public use, and the fact that it was for a public use has been held to be settled by the legislative act providing for the taking. *Black v. Canal Co.*, 24 N. J. Eq. 455. But in the case in hand, no such question, as to whether, or how far, dissenting stockholders would be bound by a subsequent legislative provision authorizing a lease, can arise. The act, under which both of these corporations were organized, and the legislation existing at the time, expressly conferred upon these corporations, from the beginning of their existence, the power to be either lessor or lessee. Every stockholder, including these complainants, in subscribing for his stock, took it subject to the conditions of the act, under the authority of which it was issued, and of the relevant provisions of law existing at the time, and were bound by their several requirements and conditions. Every stockholder knew, when he subscribed, or was bound to know, that the corporation had power to lease the property, and they also knew that if they did not assent, or did assent, what provision had been made, out of abun-

dant caution, for their benefit. These provisions entered into the contract of the stockholders, *inter sese*, and they took their stock upon the express condition that they would be bound thereby.

So far, it seems too plain for argument, that lawful authority to be parties to the lease in question, was conferred in express terms upon both of the defendant companies. It is not necessary to dwell long upon certain objections made by complainants, in their argument, to the sufficiency of the acts referred to, to authorize this lease. The objections seem to us hypercritical, and it would be an unnecessary consumption of time to discuss them further than to say that they are, in our opinion, without merit. One objection, however, should receive a passing notice, and that is, that the act constituting chapter 172 of the General Laws of 1893, in its sixteenth section, is unconstitutional, in so far as it attempts, after authorizing corporations created under it to lease the property of other corporations, to confer authority on all such other corporations to make such lease, the constitution of New Jersey providing that every law shall embrace but one object, and that object shall be expressed in its title. This objection would be good, were the lessor corporation created under another and different act. It would in that case, as in the case of *Camden & A. R. Co. v. May's Landing R. Co.*, 48 N. J. Law, 560, 7 Atl. 523, be an amendment to a charter subsisting under a different act. In the case before us, however, both companies derived their corporate powers from the same act, and if the power to lease the property of another corporation be sufficiently embraced in the general object expressed in the title, the power of such a corporation to make a lease, would also be so embraced.

The objection most seriously and strenuously urged, is, that although express power may be given to a corporation to lease, that power cannot, in the absence of express legislative authority to the contrary, be exercised without the assent of all the stockholders. It is argued, with some plausibility, that without express legislative authority, a corporation could not make a lease of its property and franchises, even with the assent of all its stockholders, and that express legislative authority to make a lease is only a conferring of a power not existent without such legislative grant, upon the whole body of stockholders. Many cases have been cited in the brief and in the argument, to support these propositions. The distinction, however, between these cases and the one at bar, is, that the former concern grants of legislative power to lease, to corporations already in existence, and whose stockholders have subscribed under the conditions of the original charter, by which no such power was given. The implied contract between the stockholders, *inter sese*, in such cases, is, as already stated, that no such additional power, so radical in its nature, though conferred by legislative authority, shall be capable of being exercised without the assent of all the stockholders. In the case before us, however, the power to lease was conferred by the act under which both corporations were formed. It was inherent in their organization and corporate existence, and was a condition upon which every stockholder received his stock. It was competent for the legislature to have imposed in its creative act, any conditions it

pleased, upon the stockholders of the corporation which it had called into existence. The power to lease having been so given, without prescribing any mode in which it was to be exercised, it must be classed with the general powers conferred by a charter, which are to be exercised by the majority of corporators or stockholders. This is the general rule, applicable to all corporate powers originally conferred by charter, and inherent in the corporate organization in its inception. It is unreasonable to suppose that a power conferred by the creative act, should, in the absence of any other mode prescribed for its exercise, be made to depend upon the unanimous consent of the stockholders. Corporate existence might be so imperiled, and corporate ends defeated. The view stated has the sanction of well-considered judgments in American and English cases, which have been summarized by Morawetz, in his work on Private Corporations (section 407), as follows:

"It is evidently the intention of all parties who join in creating a corporation, that all acts which are done by the company under its charter shall be done in the usual manner, and by the agencies through which a corporation usually acts. The majority in shareholders' meeting, and in some instances the board of directors, are impliedly invested with full powers to do on behalf of the corporation whatever they deem judicious in carrying out the company's chartered purposes. If the charter contains a provision purporting to authorize the corporation to do a certain act, this is not merely a grant of authority from the legislature to the corporation, but it enters into the agreement of the shareholders, and impliedly invests the majority, or the board of directors, with authority to do the act on behalf of the corporation. This is true, although a change in the company's constitution, or an alteration of the character of its main enterprise, be the result. The powers of the majority, or board of directors, under these circumstances, are derived strictly from the agreement of the shareholders."

See, also, sections 475 and 941. See, also, 3 Cook, Corp. § 895, and cases cited.

It should not pass without comment, that in the present case, the lease in question was assented to formally, by more than two-thirds of the stockholders, and informally in writing by every stockholder, save the holders of the 400 shares interested in this litigation, the complainants being the owners of only 100 shares. Courts of equity are reluctant to act in cases where their action would unsettle and disturb enormous interests, especially where most of them are attached to innocent third parties, and to which the interests of those invoking judicial action are overwhelmingly disproportioned. And still more is this the case, where the evidence discloses that those seeking such drastic judicial intervention, have not suffered, and are not likely to suffer pecuniary loss.

It is also contended by complainants, that there is jurisdiction in this court, independently of the grounds heretofore discussed, in that the lease in question, in its effect, takes the private property of the complainants, against their consent, and is in violation of the rights of the complainants, guaranteed to them by the constitution of the United States and of New Jersey. If this contention were valid, this proposition would not only be a ground of jurisdiction, but one justifying, in part at least, the relief sought by complainants. The gravamen of this charge is, that section 17 of the act under which the companies

defendant were formed, provides for the condemnation of the stock of any "stockholder of any company, whose property and franchises shall have been leased to a corporation created under this act, who shall not assent to the lease, or who shall resist or object to the making thereof," when no public use justifies the same, the contention being that this would be a taking of private property, without due process of law, in contravention of the constitutions of the United States and of the state of New Jersey. The fallacy of this contention consists in the ignoring of the fact that all stockholders of the lessor company are bound by the conditions imposed by the legislative act which created their corporation, and have impliedly assented to the exercise of the power to lease, when authorized by the lawfully constituted directors of the company, and by the holders of a majority of the stock therein. There has, consequently, been no taking of the property of the dissentient stockholders in the constitutional sense. The authority for appraising the stock of such minority holders, and paying them the value of it, need not in such a case have been provided for, nor are the proceedings authorized by section 17 of chapter 172, or by section 2 of chapter 169, strictly proceedings for condemnation of private property for public use. They only provide a way, in which minority stockholders may receive the present value of their stock, and retire from the corporation, when a lease, legally authorized, and to which they object, has been approved by a majority of the stockholders. It is, moreover, to be noted, that the argument of complainants seems to go also upon the assumption, that the provision for assessment and payment is obligatory upon the dissentient stockholders, whereas, it is entirely optional with such stockholders to avail themselves of this provision, or not. It is needless to further discuss the elaborate argument of complainants' counsel, under this head, except to say that the cases cited to support their contention, so far as we have examined them, are very different from the present; being cases where the legislature has sought to condemn holdings of minority stockholders in their corporation, by legislation enacted after the stockholders' rights under their charter had accrued.

For the reasons stated, we think the bill of complaint should be dismissed, with costs, and it is so ordered.

In re WATERBURY FURNITURE CO.

(District Court, D. Connecticut. February 25, 1902.)

No. 692.

BANKRUPTCY—PREFERENCES—PAYMENT ON NOTE HELD BY INDORSEER.

A payment made by an insolvent within four months prior to his bankruptcy to a bank, to apply on a note given by him to a solvent creditor, who had indorsed the same and sold it to the bank, constitutes a preference to such creditor, which must be surrendered, under Bankr. Act 1898, § 57g, before he can prove his claim against the bankrupt estate.

In Bankruptcy. On question certified by referee.

Josiah G. Beckwith, Jr., for petitioners.
Cooley & Bell, for Houghton & Fraser.
Bronson & Minor, for trustee.

TOWNSEND, District Judge. The certificate of the referee states the facts and question of law, with his ruling thereon, as follows:

"The petition of creditors in said case was filed in court on July 15, 1901, and the corporation was adjudicated bankrupt on August 2, 1901; having been insolvent for more than four months prior to the adjudication. On March 15, 1901, the bankrupt gave Houghton & Fraser a three-months note for \$421.28; being a part of the balance then due from the bankrupt to said Houghton & Fraser. Houghton & Fraser had this note discounted in bank, and when the note became due, on June 15, 1901, sent to the bankrupt their check for \$250, receiving a new note from the bankrupt therefor; and the bankrupt paid the note in bank on which Houghton & Fraser were indorsers. On May 1, 1901, Houghton & Fraser sold to the bankrupt goods to the amount of \$30, which were not paid for. The question arises whether the payment of \$171.28 (being the difference between the \$250 advanced by Houghton & Fraser on June 15, 1901, and the \$421.28 note in bank which had been discounted by Houghton & Fraser) should be considered as a preference, and charged against the dividend of Houghton & Fraser. The claim of Houghton & Fraser, as filed, was \$369.02. The referee holds that the \$171.28 should be returned, and, considering it as returned, allows the claim for dividend at \$540.30, and charges \$171.28 against the dividend, which sum will still leave a balance of dividend due Houghton & Fraser of about \$30, and, at the request of Houghton & Fraser, the question of the correctness of this ruling is certified to the judge of the court for his opinion thereon.

"In *Landry v. Andrews* (supreme court of Rhode Island; April 26, 1901) 6 Am. Bankr. R. 281, 48 Atl. 1036, a note was paid by an insolvent at the request of the indorsers, who had reasonable cause to believe that it was intended thereby to give them the preference over other creditors. It was held that this payment was a preference, under section 60b, and the trustee recovered back the amount from the indorser. If Houghton & Fraser had been aware that the Waterbury Furniture Company was insolvent, the trustee could recover back the \$171.28 from them. A distinction ought not to be made between the meaning of 'preference' under section 57g and section 60, unless absolutely necessary and in accordance with the general intent of the act. The note to Houghton & Fraser was given within four months of the commencement of the proceedings in bankruptcy. The payment made inured to the benefit of Houghton & Fraser as much as if it had been made directly to them. The objection is one of form, rather than of substance. To hold this payment not a preference, and at the same time hold direct payments to creditors as preferences, would be unjust to the other creditors. The ruling above is believed to be in accordance with the intent and spirit of the statute, and in the line of equity on which the decision in *Pirie v. Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, was justified by the supreme court. The bankruptcy statute should be construed so as to promote equality among creditors."

It is not disputed that the facts and questions at issue are correctly stated. Under section 57g of the bankrupt act, if the bank had continued to hold the note, and had not proved the claim, Houghton & Fraser could have proved it. The payment was wholly for their benefit, and, as their solvency is not questioned, the bank had no interest in the payment. The provisions of section 60 have been repeatedly cited to aid in construing the term "preferences" in section 57g. See, for example, *In re Soldosky*, 7 Am. Bankr. R. 126, 111 Fed. 511; *In re Dickson*, 7 Am. Bankr. R. 190, 111 Fed. 726.

The decision of the referee is affirmed.

MILLS et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 10, 1902.)

No. 43.

CUSTOMS DUTIES—FIGURED COTTON CLOTH.

Tariff Act 1897, par. 313, imposing an additional duty on "cotton cloth in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form a figure," includes cotton cloth in which there is a separate and extra thread, not introduced for the purpose of ordinary manufacture, but with the sole object of forming the figure, and which does not in any way enter into the structural part of the goods, but is for ornamental purposes, and without which the fabric would have been a completed fabric.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal from a decision of the United States circuit court for the Southern district of New York (109 Fed. 564), affirming a decision of the board of United States general appraisers, which sustained the action of the collector and overruled the protests of the appellants.

W. Wickham Smith, for appellants.

Chas. D. Baker, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. In May, 1890, the appellants, Mills & Gibb, imported into the United States at the city of New York a case of cotton woven goods of 25 different varieties, each containing figures of various kinds produced in weaving, and known as "fancy cottons." They were all assessed for duty as cotton cloth, under paragraphs 307 and 308, Schedule I, of the tariff act of July 24, 1897, and known as the "countable clauses." Upon 17 fabrics an additional duty was assessed under paragraph 313 of the same act, which is as follows:

"313. Cotton cloths in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form a figure, whether known as lappets or otherwise, and whether unbleached, bleached, dyed, colored, stained, painted or printed, shall pay in addition to the duty herein provided for other cotton cloth of the same description or condition, weight and count of threads to the square inch, one cent per square yard if valued at not more than seven cents per square yard; and two cents per square yard if valued at more than seven cents per square yard."

The importers protested against the exaction of this additional duty, but the protests were overruled by the board of general appraisers as to every fabric except one. The circuit court affirmed the decision of the board.

The substantial question in the case was whether, in these fabrics of cotton cloth, other than the ordinary warp and filling threads had been introduced in the process of weaving to produce a figure, and upon this question the witnesses for the importers and for the government differed. It was agreed that the figure effects in the goods in question were produced by attachments to the loom, such as Jacquard attachments, dobby attachments, drop boxes, or lino attachments; but the witnesses for the government conceded that this fact did not afford

a sufficient test for the purpose of determining the disputed question in regard to the use of ordinary warp and filling threads. For example, Mr. Henry F. Lippett, a witness of large manufacturing experience, testified as follows:

"Q. For what purpose are they [the Jacquard head or the dobby head] attached to and worked in conjunction with the loom proper? A. They are used for the purpose of making some of the very wide range of goods that is called 'fancy goods.' Q. And does that usually employ a separate and an independent thread in forming the fabrics? A. They may or may not. There are a great many dobby goods and a great many Jacquard goods in which the figure is produced by the ordinary threads of the fabric."

For some years before 1897 the importers and the appraising officers had differed in regard to the proper rate of duty to be imposed upon embroidered cotton fabrics, but it does not seem certain that paragraph 313 was inserted in the act of 1897 for the purpose of attempting to settle this question. There is reason to think that the introduction was due to a desire on the part of the domestic manufacturers that "lappet weaves," a new product, and produced by new and special machines in this country,—“a figure weave of the kind when the plain cloth has a woven pattern or design in its surface or embroidery,”—should be subject to additional specific duties. The lappet method of weaving is described as follows:

"It is a motion by which a thread is lapped onto the ordinary warp and filling of a piece of cotton goods. It consists of a number of needles, which by the proper mechanism it is possible to either raise or depress, and also to move either to the right or to the left. In that way the thread that these needles control can be put under or over the filling threads, or by moving to the right or to the left can be put under or over, as the case may be, the warp threads. In the ordinary Jacquard only one of these motions is possible."

It is probably true that a filling thread which can be used for the ordinary purpose of filling is sometimes used and introduced in the process of weaving by the skill of manufacturer for the sole purpose of forming a figure, and so has become an extraordinary thread; and this fact constitutes a part of the difficulty in defining with exactness the term which is used for the first time in paragraph 313. Our opinion is that the paragraph intends to describe and include cotton cloth in which there is a separate and an extra thread; that is, a thread not introduced for the purpose of the ordinary manufacture of plain cloth, but introduced in or during the process of weaving for the sole purpose of forming the figures, and which does not in any way enter into the structural part of the goods, but is for ornamental purposes, and without which the fabric would have been a completed fabric.

It follows that all the goods which are the subject of this appeal were properly dutiable under paragraph 313. The decision of the circuit court is affirmed.

H. B. CLAFLIN CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 10, 1902.)

No. 47.

CUSTOMS DUTIES—FIGURED COTTON CLOTH.

Tariff Act 1897, par. 313, imposing an additional duty on "cotton cloth in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form a figure," applies to cotton goods, known as "Madras" or "damask" goods, which are "ornamental, with spots or figures woven in by independent filling threads introduced for that purpose"; the threads not being an integral part of the fabric, and the portions not needed to make the figure being cut off after the weaving process is concluded.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal by the H. B. Claflin Company from a decision of the United States circuit court for the Southern district of New York (109 Fed. 562), affirming a decision of the board of United States general appraisers, which sustained the action of the collector and overruled the protests of the appellants.

Albert Comstock, for appellants.

Chas. D. Baker, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The question in this case is the same as that involved in the case of *Mills v. U. S.*, 114 Fed. 257, and is whether the additional duty imposed by paragraph 313 of the tariff act of July 24, 1897, upon a certain class of cotton woven fabrics, was properly assessed upon cotton goods, known as "Madras" or "damask" goods, which are "ornamental, with spots or figures woven in by independent filling threads introduced for that purpose, portions of which threads have been afterwards cut away." The circuit court further found that in the figured Madras goods "the figure is made by means of a shuttle carrying an independent thread, and thrown back and forth through the warp threads. These threads, however, are independent in the sense that they are not an integral part of the fabric, and the portions not needed to make the figure are cut off after the weaving process is concluded." The circuit judge, in discussing the meaning of the word "ordinary," as used in paragraph 313, said:

"I think that the word 'ordinary,' as applied to such [warp and filling] threads, means those threads which ordinarily enter into the construction of the ordinary plain fabric, and which cannot be removed without destroying its integrity, as distinguished from extraordinary threads, which are not an integral part of the fabric, but which, as in the case of lappets and dotted Swisses, are independent threads introduced to form a figure, and for no other purpose."

This is in harmony with the construction which was given by this court to paragraph 313 in the *Mills Case*. The result is that the assessment of duty upon Madras goods is sustained, and that the decision of the circuit court is affirmed.

CARBON SLATE CO. v. ENNIS.

BACON v. SAME.

(Circuit Court of Appeals, Third Circuit. February 24, 1902.)

Nos. 80, 81.

1. SHIPPING—BREACH OF CHARTER—DAMAGES.

The owner is entitled to recover from a charterer the amount necessarily expended by the master in trimming a cargo after loading, made necessary by the fact that the cargo was not in proper condition, or that the ship was loaded at a place where she could not "always lie afloat," as required by the charter.

2. SAME—DEAD FREIGHT.

Under a charter which required the ship to proceed to the port of loading, "or as near as she can safely go," and required the charterer to furnish a full and complete cargo of ore, it was the duty of the latter to deliver the cargo at a place from which the ship could get away after being loaded, and he is liable for dead freight where the ship could not load a full cargo at the berth he assigned her, because of a bar in the harbor which she could not cross, and the master was not requested to stop for further loading after crossing the bar.

3. SAME—CONSTRUCTION OF CHARTER—COMMENCEMENT OF LAY DAYS.

A provision in a charter, "Lay days not to commence to count until 12 o'clock noon after the steamer is entered at the custom house and in every respect ready to load," though negative in form, is positive in effect, and means that the lay days shall commence to count at that time; and where, by a further clause, the ship was required to load "when, where, and as directed" by the charterer, and she was ready on her part, and her master had given the required notice, the lay days commenced to count from the succeeding noon, and the responsibility for a further delay in commencing to load rests upon the charterer, although caused by a custom of the port which compelled her to await her turn to get to the berth assigned her.¹

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 110 Fed. 404.

H. L. Cheyney and John F. Lewis, for appellant.

Ira J. Williams, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. These cases were argued together, and may be disposed of in a single opinion. The question presented is whether the court below erred either in allowing the claims for trimming charges and for dead freight, respectively, or in disallowing those relating to dispatch money.

Respecting the two items first mentioned, we concur in the views expressed and in the conclusions reached by the learned judge of the district court. The respondents were charterers under a charter party which provided that the chartered vessel should proceed to Bilbao, Spain, "and there load when, where, and as directed, in the usual and customary manner, from the charterers' shippers, a full and complete cargo of ore, same to be delivered to her where she can always lie

¹ Demurrage, see note to *Randall v. Sprague*, 21 C. C. A. 337.

afloat," etc. Notwithstanding this provision, the ore was delivered to her where she could not always lie afloat. Consequently, and because it was in a wet condition, it was necessary to trim cargo; and as the expense incurred in doing this was not occasioned by any default of the master, but by the failure of the shippers to properly deliver, it was rightly held that that expense must be borne by the charterers.

The respondents contend that their obligation to furnish a full and complete cargo was fulfilled because they had a full cargo ready for shipment, and this position would be impregnable if certain other provisions of the charter party and the particular facts of the case were not to be regarded. But the contract was, in legal effect, that the vessel should proceed to Bilboa, or as near as she could safely get, and when loaded get away from, in order to proceed to the port of Philadelphia (Shields v. Wilkins, 5 Exch. 304); and the fact is that she was directed to load at a berth where a full cargo, if taken aboard, would have made it impossible for her, at any stage of water or at any time, to pass out over the harbor bar. The suggestion now made that the master should have detained the vessel outside the bar for reception of the balance of the ore is without force. He was not asked to do so, and it is quite evident that the shippers did not contemplate any delivery of cargo elsewhere than at the "tip." The district court was therefore right in deciding that nothing had been shown to excuse the nonperformance by the charterers of their express undertaking to furnish a full cargo, and in accordingly sustaining the libellant's demand for compensation by way of dead freight upon the difference between what would have been a complete cargo and the partial one which was actually put on board.

We are unable to adopt the construction which was put by the court below on that clause of the charter party which concerns lay days. In our opinion, the phrase, "lay days not to commence to count until twelve o'clock noon after the steamer is entered at custom house and in every respect ready to load," etc., though negative in form, is positive in effect. It means that they shall commence to count at that time, but not before. It does not mean that they shall not be counted before that time, but may not commence even then. When the steamer had been entered and was ready to load, and the stipulated notice had been given, all had been done which she was required to do. It then became the duty of the shippers to promptly load her, subject only to the provision by which they were allowed till 12 o'clock noon thereafter for the commencement of lay days. The ship's readiness to receive the cargo "from the charterers' shippers" was not dependent upon their readiness to assign her a berth. So long as this was not done, she was detained in waiting, not by any lack of readiness on her part, but by the unreadiness of the shippers, and therefore they, and not the master, were responsible for the consequent delay in loading her. It was not for him to obtain a berth, for the charter party expressly required him to load "when, where, and as directed." Upon reaching the harbor the arrival of the ship was complete, and, while it was the duty of the master to then make the vessel ready to receive cargo, the designation of a place for its reception was, as we read the contract, as clearly incumbent upon the shippers as was

preparedness to make delivery at some point within the port of Bilboa. *Gronstadt v. Witthoff* (D. C.) 15 Fed. 265. If, as is contended, the delay in question was caused by a custom of the port that each vessel should await its turn to obtain a wharf, that fact could not relieve the charterers from their positive engagement as to the time at which the lay days would commence to count. It is true that an incident not expressly mentioned may be by custom annexed to a contract, unless the annexing of such incident would be repugnant to, or inconsistent with, its terms, and this rule applies to a charter party as well as to other contracts; but it does not derogate from the right of the contracting parties to themselves agree by which of them any burden imposed by custom shall be borne. Therefore, as in this instance the contract, as we construe it, was that the lay days should commence at 12 o'clock noon, etc., it cannot, consistently with its terms, be held that the time for their commencement was not fixed, but was left open for future and contingent determination. *Davis v. Wallace*, 3 Cliff. 123, Fed. Cas. No. 3,657; *Sleeper v. Puig*, 17 Blatchf. 36, Fed. Cas. No. 12,941; *Keen v. Audenried*, 5 Ben. 535, Fed. Cas. No. 7,639; *Moody v. Five Hundred Thousand Laths* (D. C.) 2 Fed. 607; *Mott v. Frost* (D. C.) 47 Fed. 82. Nor is the clause directly under consideration at all qualified by the distinct provision that the ship was to load "in the usual and customary manner." These words do not apply to the time to be taken in loading, but only to the manner of loading. *Davis v. Wallace*, supra; *Dunlop v. Balfour* [1892] 1 Q. B. 520.

Solely upon the ground that its disallowance of the claims respecting dispatch money was erroneous, the decrees of the district court are reversed, and the causes designated at the head of this opinion will be remanded to that court for further proceedings to be there taken in pursuance of this determination.

F. L. SMIDTH & CO. v. BONNEVILLE CEMENT CO.

(Circuit Court of Appeals, Third Circuit. February 17, 1902.)

No. 32.

PATENTS—ANTICIPATION—TUBULAR BALL MILLS.

The Davidsen patent, No. 548,115, for improvements in tubular ball mills for pulverization of various materials, is void for anticipation by the British patent to Redfern.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Edwin H. Brown and Louis C. Raegener, for appellant.
Wm. A. Jenner, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. The suit in the court below was brought by F. L. Smidth & Co., for alleged infringement by the Bonneville Cement Company, of United States letters patent to Joseph Davidsen, No. 548,115, for improvements in tubular ball mills for pulverization

of various materials. The bill is in usual form, and sets forth the grant of the letters patent to Davidsen, its assignment to complainant, extensive manufacture thereunder by complainant, infringement by and profit therefrom by defendant, after notice, with the usual prayer for relief. The answer denies infringement, and alleges certain prior patents, notably the United States patents to Close and Robertson, and a British patent to Redfern, as anticipating Davidsen's invention, and invalidating the patent in suit. The record is a voluminous one, setting forth many prior patents referred to by defendant, and the protracted proceedings in the examiner's office as disclosed by the file wrapper, which shows that the complainant's application was seven times rejected on references to prior patents, and was finally granted on an amendment to the claim, with expressed reluctance.

We have carefully examined the record, and the elaborate statements therein made by expert witnesses, who testified for complainant and defendant respectively, and considered the argument of counsel thereupon, and are of opinion that the bill was properly dismissed by the court below. The opinion of the learned judge in that court, deals so clearly and satisfactorily with the questions involved in the case, that a separate opinion by this court would be an unnecessary paraphrase thereof. Referring to that opinion, as reported in (C. C.) 106 Fed. 930, we adopt its reasoning and conclusion.

The judgment of the court below is therefore affirmed.

CENTRAL R. & BANKING CO. OF GEORGIA v. FARMERS' LOAN & TRUST CO. et al. FARMERS' LOAN & TRUST CO. et al. v. CENTRAL R. & BANKING CO. OF GEORGIA et al. (CHARLESTON & W. O. RY. CO. et al., Interveners).

(Circuit Court of Appeals, Fifth Circuit. February 18, 1902.)

No. 1,087.

1. CORPORATION—POWER TO MAKE GUARANTY.

The Central Railroad & Banking Company of Georgia, which was given by its charter full banking powers, which it exercised, had power thereunder to guaranty the bonds of a railroad company of which it owned a majority of the stock, where such guaranty was made for its own purpose and advantage.

2. TRUSTS—REPUDIATION BY TRUSTEE—RECOVERY OF FUND.

A corporation which assumed the duties of a trustee of a sinking fund created by another corporation for the benefit of its bondholders, and received such fund, will not be permitted by a court of equity to withhold it from those to whom it belongs, or who have claims against it, on the ground that it had no power to act as trustee.

3. BONDS—RIGHTS OF TRANSFEREE.

The validity of negotiable bonds issued and sold to bona fide purchasers for value is not affected in the hands of a subsequent holder, because an intermediate owner could not have enforced the same.

Appeal from the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

This is an appeal prosecuted from a decree passed by the United States circuit court for the Southern district of Georgia (116 Fed. 700), on the inter-

vention of the Charleston & Western Carolina Railway Company and Robert S. Adams in the consolidated equity causes in said court entitled "The Central Railroad & Banking Company of Georgia against the Farmers' Loan & Trust Company et al.," and "The Farmers' Loan & Trust Company et al. against the Central Railroad & Banking Company of Georgia et al." The decree appealed from adjudges to said interveners the amounts which they claim to be due them upon certain second mortgage bonds of the Port Royal & Augusta Railway Company. The railway company just named executed on May 1, 1882, a second mortgage on its property to the Central Railroad & Banking Company of Georgia to secure an issue of second mortgage bonds. The Central Railroad & Banking Company of Georgia indorsed on each of said bonds its obligation to pay the principal and interest of said bonds in case of default by the Port Royal & Augusta Railway Company, and accepted the trusteeship of a sinking fund for the redemption of the bonds. This fund was to consist of annual payments to be made to the Central Railroad & Banking Company of Georgia by the Port Royal & Augusta Railway Company, and of interest thereon, which the former was to allow. The bonds are now past due. Before their maturity the Port Royal & Augusta Railway Company became insolvent, its property was sold under a decree of the United States circuit court for the district of South Carolina, and, as the proceeds of the sale were absorbed by prior incumbrances, nothing was realized on the bonds in question. The Central Railroad & Banking Company of Georgia owned a majority of the stock and a large number of the bonds of the Port Royal & Augusta Railway Company, and had guaranteed many bonds of other railroad companies in the same manner that it had guaranteed the bonds in question. All holders of the second mortgage bonds of the Port Royal & Augusta Railway Company were called upon, by orders of said United States circuit court for the district of South Carolina, to come in and prove their bonds. Seventy-nine of the bonds then proven were subsequently purchased by Samuel Thomas and Thomas F. Ryan at par and accrued interest. These were afterwards transferred by them at full cost to the Charleston & Western Carolina Railway, one of the present appellees; and Robert S. Adams, who is the other appellee herein, then proved two bonds, which then belonged, and still belong, to him. The Central Railroad & Banking Company of Georgia was placed in the hands of receivers by the United States circuit court for the Southern district of Georgia, and, in pursuance of a certain "plan of reorganization," all the assets and property of the Central Railroad & Banking Company of Georgia were transferred to the Central of Georgia Railway Company, as is stated more fully in the case of *Railway Co. v. Paul*, 35 C. C. A. 639, 93 Fed. 878. In the said receivership proceedings, by order of the court, certain properties of the Central Railroad & Banking Company of Georgia, which were free from mortgage, were sold, and the proceeds formed a fund, which is referred to as the "Overflow Fund." This fund was turned over to the new corporation. An order of court was passed calling on all persons having claims on said fund to come forward and prove their claims. The appellees filed their intervention, praying that their bonds, with interest, be paid out of the said overflow fund, and that in default of such payment out of said fund the Central of Georgia Railway Company be decreed to pay said bonds and interest. The master reported in their favor, and the court affirmed the report, decreeing that the interveners be paid as by them prayed. From this decree the Central of Georgia Railway Company and the Central Railroad & Banking Company of Georgia have appealed.

H. C. Cunningham and Alex. R. Lawton, for appellants.

A. P. Wright and A. T. Smythe, for appellees.

Before McCORMICK and SHELBY, Circuit Judges, and PARLANGE, District Judge.

PARLANGE, District Judge. The record in this cause is voluminous, but the issues are simple. The purpose of the interveners is to

recover on the guaranty of their bonds by the Central Railroad & Banking Company of Georgia, and also on the bonds themselves, as entitled to share in the sinking fund provided for these bonds and received by the Central Railroad & Banking Company of Georgia. The appellants urge that the Central Railroad & Banking Company of Georgia had no power to guaranty the bonds. Apart from the judicial admissions of liability made by the Central Railroad & Banking Company of Georgia on similar guaranties in the receivership proceedings, but in other pleadings than those in this particular cause, and apart from judicial action had in the proceedings in which those judicial admissions were made, we are clearly of opinion that the Central Railroad & Banking Company of Georgia had power under its charter to guaranty the bonds in question. It had full banking powers, which it used without any doubt or suspicion as to their validity. It seems that at one time it did the largest banking business in Georgia. The guaranty was made for its own purpose and advantage. It dominated and controlled the Port Royal & Augusta Railway Company, as it did several other railroad corporations. Under circumstances similar to those of the guaranty in this cause, it guaranteed other bonds of railroad corporations for an amount aggregating millions of dollars, and the bonds were put in circulation without any doubt of the validity of their guaranty.

It is immaterial whether there be force or not in appellants' contention that the Central Railroad & Banking Company of Georgia had no power to make itself the trustee of the sinking fund. It is evident that, that corporation having received the fund, a court of equity will not allow it to be withheld to the detriment of those to whom it belongs or who have claims upon it.

The appellants make an attack upon the doctrine announced by this court in the case of *Railway Co. v. Paul*, 35 C. C. A. 639, 93 Fed. 878. This court was, and still is, perfectly satisfied with the conclusion it reached in that cause. That conclusion has since been additionally fortified by the decision of the supreme court in the case of *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 174 U. S. 684, 19 Sup. Ct. 827, 43 L. Ed. 1130. The appellants contend that there can be no recovery in this cause by reason of fraud. They argue, as we understand them, that, if the reorganization of the Central Railroad & Banking Company of Georgia was a fraud, the bonds in question became stricken with nullity when they came into the hands of Thomas and Ryan, who were principal participants in the fraud, and that the Charleston & Western Carolina Railway Company, one of the present interveners, being a transferee from Thomas and Ryan, cannot recover on the bonds because Thomas and Ryan could not have recovered upon them. Substantially, what this court held in the *Paul Case* was that, because of the reorganization, the Central of Georgia Railway Company is liable for the claims of the unsecured creditors of the Central Railroad & Banking Company of Georgia. There was no connection between the bonds in question and the reorganization which could have affected them injuriously. The scope and effect of the decision in the *Paul Case* was to protect the rights of the class of creditors to which the interveners belong, and we do not see how it

was believed that a deduction could be drawn from the decision which would have defeated, instead of benefiting, the creditors in this cause. Upon this question of fraud the learned judge below said in his opinion:

"We have not been able to discover in this record any evidence of fraud on the part of Thomas and Ryan which, if they were the present holders, would deny them payment for these bonds."

He further said:

"We refrain from discussing the alleged fraud in the reorganization of the Central Railroad & Banking Company of Georgia, referred to by counsel. Counsel on either side had much to say about this supposititious fraud, and yet on both sides they protested that there was no fraud. This discussion seems superfluous, and, in view of the mutual protestations, not a little mystifying and vague. Certainly, nothing was said on this topic to affect the right of the interveners to have their bonds paid from the unpledged property set apart by the order of the circuit court for creditors of the class to which they belong."

On this point, it is sufficient to say that the bonds now held by the Charleston & Western Carolina Railway Company were originally issued to parties who acquired them years ago, for full value, and whose good faith has in no manner been questioned. Therefore, under a well-established doctrine, it is clear that the Charleston & Western Carolina Railway Company can claim and recover on the title of the persons who transferred the bonds to Thomas and Ryan. As for the intervener R. S. Adams, he was one of the original bona fide purchasers at the time of the issue, and has held his bonds ever since then.

There is no virtue in the contention that certain former debts or liabilities of the Central Railroad & Banking Company of Georgia, now paid or satisfied, should be allowed to prorate in the overflow fund. It may be well to notice in this connection that the main question in this cause is whether the appellants are liable to the interveners for their bonds, and, as we hold that they are, the means by which payment is to be made would seem to be of little practical importance in the end.

The answer to the complaint that the interveners, instead of resorting to the procedure of an intervention, should have filed a bill in equity, is that the interveners came in by the invitation and upon the call of the court, and that the appellants have had the opportunity, of which they have fully availed themselves, of presenting their defenses; and, besides, a stipulation in this cause, entered into between the counsel, estops the appellants from objecting to the interveners' form of procedure.

After a careful consideration of this cause, we find no error in the decree appealed from, and the same is therefore affirmed, with costs.

DUBOIS v. DECKER.

(Circuit Court of Appeals, Third Circuit. February 24, 1902.)

No. 44.

APPEAL—PROCEEDINGS NOT IN RECORD—NECESSITY OF BILL OF EXCEPTIONS.

Assignments of error based on the charge of the court or rulings on the admission of evidence present no question which can be considered by the appellate court, unless the charge and the evidence adduced have been brought into the record by bills of exception, duly certified and sealed by the trial judge.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

G. A. Jenks, for plaintiff in error.

A. L. Cole, for defendant in error.

Argued before DALLAS and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

GRAY, Circuit Judge. This case comes before us on a writ of error to the circuit court for the Western district of Pennsylvania. The suit was brought to recover for the price of goods sold and delivered by plaintiff below to defendant below. The principal defense was the alleged failure of plaintiff to deliver in the time stipulated for in the correspondence between the parties, the other defenses being the alleged inadequacy of the log loader (the subject matter of the sale) to do its work, etc. The record presents the docket entries in the suit:—the statement of claim and the affidavit of defense, the issues joined, the submission of the same to the jury, certain requests to the court to charge, by plaintiff and defendant respectively, the verdict of the jury, in favor of plaintiff, for \$4,438.18, motion by defendant in arrest of judgment, order of the court denying the same, and final judgment for the amount of the verdict. The petition for a writ of error, and its allowance by his honor, Judge Acheson, is also set forth, together with the supersedeas bond.

In this court, the plaintiff has filed six assignments of error. The first four allege error by the court in its conclusions of law, as stated in its charge to the jury. These assignments of error set forth as their basis, at great length, what purport to be extracts from the charge of the learned judge of the court below, and also what purport to be portions of the evidence, documentary and oral, to which the said extracts from the said charge relate. The fifth and sixth assignments allege error in the exclusion by the court of certain testimony, with what purports to be a statement of the offers of testimony, so alleged to have been refused.

These are the only assignments, and we look in vain to the record for any matter to which they refer. They deal exclusively with the charge and rulings of the court, and the evidence adduced at the trial before the jury. The charge of the court, its rulings during the trial, as to the exclusion or admission of testimony and the evidence adduced before the jury, are not of themselves part of the record. They can only be made such by bills of exception, duly presented and sealed by the trial judge. The law and practice in this regard is well es-

tablished, and requires no discussion. No bills of exception to either the charge or the rulings of the court are included in the record here, and none, in fact, are alleged to have been presented to, or sealed by the learned judge of the court below. The assignments of error are, therefore, in the air, as the charge and rulings of the court below, upon which they purport to be founded, are not before this court for review, as part of the record in the case.

The counsel for plaintiff in error, as if for the purpose of remedying this defect in the record, has added to his brief of argument, submitted to this court, an appendix, containing what purports to be a full stenographic report of all the testimony taken at the trial, including a copy of all the correspondence between the parties, and admitted in evidence. This, of course, can in no way supply the want of a properly certified and sealed bill of exceptions. We have, however, examined the same, and, in view of the zeal and ability of the counsel for the plaintiff in error, think it proper to state, that we are of opinion, that, if the portions of the charge criticised, and the evidence, especially that contained in the correspondence between the parties, to which they relate, are correctly set forth, there was no error in the conclusions of law reached by the learned judge of the court below.

For the reason that neither the charge of the court, as a whole, nor the parts to which the assignments of error refer, nor the evidence, in whole or in part, upon which the said alleged erroneous conclusions of law by the court below were founded, are before this court, as part of the record, the motion of counsel for the defendant in error, that the judgment below be affirmed pro forma, must be granted, and

It is so ordered.

MUTUAL LIFE INS. CO. OF NEW YORK v. KELLY.

(Circuit Court of Appeals, Eighth Circuit: February 17, 1902.)

No. 1,635.

1. APPEAL—REVIEW—ACTION TRIED TO COURT.

Where an action at law tried to the court without a jury is submitted on an agreed statement of facts, which is filed and made a part of the record, such statement is equivalent to a special verdict, and the court's conclusion of law based thereon is subject to review.

2. LIFE INSURANCE—CONTRACT—IOWA STATUTE.

In the provision of Code Iowa 1897, § 1782, that no life insurance company shall make any contract of insurance or agreement as to such contract other than as "plainly expressed in the policy issued thereon," the word "policy" must be construed to include the application, where that is in terms and by reference made a part of the policy, especially in view of section 1819, enacted in 1897, which requires a true copy of any application or representation of the assured which by the terms of a policy is made a part thereof to be attached to, or indorsed on, the policy.

3. SAME—VARIANCE BETWEEN APPLICATION AND POLICY—ESTOPPEL.

An application for life insurance requested that the policy be made payable to a third person, but as issued it was payable to the insured, his executors, administrators, or assigns. It recited that it was issued in consideration of such application, a copy of which was attached. It was accepted by the insured, and by him assigned to the beneficiary intended. *Held*, that both were estopped to repudiate the application as a part of the contract because of the variance.

4. SAME—EXECUTORY PROMISES BY INSURED—CONDITIONS BINDING ON BENEFICIARIES.

The beneficiary named in a life insurance policy, by accepting it and asserting a claim thereunder, ratifies the acts of the insured as agent in procuring it, and adopts the contract subject to the conditions and limitations therein expressed or implied, and cannot repudiate promises made to the insurer as a consideration for its undertaking, nor enlarge the obligation beyond that undertaking. Where the insured warranted and agreed in the application that he would not die by his own act within two years after issuance of the policy, and covenanted that such agreement should be a consideration for the contract, such agreement is a condition of the insurer's liability which is binding on the beneficiary.

5. SAME—DEPENDENT COVENANTS.

The effect of such a warranty and agreement in the application is to make the promise of the insurer to pay the amount of the policy dependent upon the death of the insured, exclusive of death by suicide within two years. The agreement of the insured, having been expressly made part of the consideration for the promise made by the insurer, cannot be treated as an independent covenant by which the rights of the beneficiary are not affected.

6. SAME—APPLICATION AS PART OF CONTRACT.

Where the representations and agreements in an application for life insurance are in terms "offered to the company as a consideration of the contract," and the policy expressly refers to the application and makes it a part of the contract, the agreements found in the application, as well as those in the policy, properly enter into and form a part of the contract.

7. SAME—CONSTRUCTION OF POLICY—COVENANT AGAINST SUICIDE.

An application for life insurance, the covenants and agreements in which were expressly offered as part of the consideration of the contract, and which was by reference in the policy issued thereon in terms made a part of the contract, contained agreements restricting the place of residence and occupation of the insured during the two years following the issuance of the policy, and also the following provision: "I also warrant and agree that I will not die by my own act, whether sane or insane, during the said period of two years." The policy contained a provision "that after two years from date hereof the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums. * * * and that the requirements of the company as to age and military or naval service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed." *Held*, that the effect of such mutual covenants, fairly and reasonably construed, was to make the agreement against suicide a condition to the company's liability for the period of two years, and to show that the death of the insured by suicide, sane or insane, within the two years, was a risk not assumed by the company.

8. SAME—ACTION ON POLICY—DEFENSES.

A life insurance company is not required to return the premiums paid on a policy as a prerequisite to its right to contest its liability thereon, on the ground that the insured committed suicide, which was a risk it did not assume, where it admits the validity of the policy.

9. SAME—COVENANT AGAINST SUICIDE WHILE INSANE—VALIDITY.

A covenant in a contract of life insurance that the insured will not die by his own act while insane is not void as one known by the parties to be impossible of performance, but is valid as creating an excepted risk.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

This was an action on two policies of insurance for \$2,500 and \$5,000, respectively, executed by the Mutual Life Insurance Company of New York,

the plaintiff in error, insuring the life of one Edward S. Kelly. Two separate applications in writing were made by Kelly for these policies, one dated April 19, 1893, wherein he made his wife, Josephine R. Kelly, defendant in error, the proposed beneficiary, and the other dated December 18, 1893, wherein he designated one Robert P. Mulock, his wife's father, as the proposed beneficiary. The first application was accepted by the insurance company, and the policy for \$2,500, bearing date May 24, 1893, was in due time executed, and, with a copy of the application attached thereto, delivered to Kelly. The second application resulted in the execution of the policy for \$5,000, bearing date December 23, 1893, which, with a copy of the application therefor duly attached, was delivered to Kelly; but instead of making Robert P. Mulock the beneficiary, as designated in the application, the same was made payable to the insured, Edward S. Kelly, his executors, administrators, or assigns. Each policy recites on its face as follows: That it was issued "in consideration of the application for this policy, which is hereby made a part of this contract." Each application contained the following statement, signed by Kelly: "I hereby warrant and agree not to reside or travel in any part of the torrid zone, and not to engage in any specially hazardous occupation or employment, during the next two years following the date of issue of the policy for which application is hereby made, and also not to engage in any military or naval service in time of war, during the continuance of the policy, without first obtaining permission from this company. I also warrant and agree that I will not die by my own act, whether sane or insane, during the said period of two years." The application, after enumerating the excluded hazardous occupations or employments, continues as follows: "I also agree that all the foregoing statements and answers * * * are by me warranted to be true, and are offered to the company as a consideration of the contract, which I hereby agree to accept as issued by the company in conformity with this application." After receiving the second policy of \$5,000, wherein Kelly or his estate was made beneficiary, he, on January 4, 1894, assigned the same to Robert P. Mulock, as beneficiary, as contemplated in the application. On February 21, 1895, after having paid the second annual payment on each policy, but before two years had elapsed from the date of either policy, Kelly while insane aimed a pistol at his own head and shot himself, and thereby inflicted upon himself a wound from which he thereafter, and on the same day, died. After his death, and on September 5, 1895, Mulock duly assigned all his right, title, and interest in the second policy to Josephine R. Kelly, the widow and defendant in error herein.

Both policies were, by explicit stipulations contained therein, made subject to the provisions stated on the back thereof. One of those provisions is as follows: "It is hereby further promised and agreed that after two years from the date hereof the only conditions that will be binding upon the holder of this policy are that he shall pay the premiums at the time and place and in the manner stipulated in said policy, and that the requirements of the company as to age and military and naval service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed."

Proofs of death were waived. Suit was instituted on the policies, and an agreed statement of facts, substantially as hereinbefore stated, was signed by the respective counsel of the parties and filed in the court below. Upon such agreed statement of facts, a jury having been duly waived, the cause was submitted to the trial court. Judgment was rendered in favor of defendant in error, hereinafter called "plaintiff," for the full face value of the two policies, with accumulated interest. The plaintiff in error, hereinafter called "defendant," now brings the case here by writ of error for review.

W. E. Odell and James L. Blair (Julien T. Davies and Edward Lyman Short, on the brief), for plaintiff in error.

Milton Remley (J. J. Ney and W. O. McElroy, on the brief), for defendant in error.

Before CALDWELL, and SANBORN, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

It is first contended by learned counsel for the plaintiff that there is nothing before us for review; that the so-called "Agreed Statement of Facts" is only a concession of certain independent and separate facts, which were offered in evidence as a basis for a general finding; and that, inasmuch as there was no objection made to the introduction of such facts in evidence or exceptions saved to the ruling of the court thereon, the doctrine announced in *Barnard v. Randle* (C. C. A.) 110 Fed. 906, and cases therein cited, is applicable. Undoubtedly it is true, as settled by a long line of authority, that where evidence is heard in an action at law, and a general finding made thereon, an exception to such finding alone presents nothing for review. But such is not the case now before us. The judgment entry and bill of exceptions both clearly disclose that the cause was submitted to the court upon an agreed statement of facts, signed by counsel for the respective parties, filed and made part of the record, and that no other evidence whatever was heard at the trial. It is of no significance that counsel at the trial formally offered in evidence the facts so agreed upon or any of them. Such practice, if adopted, did not change the essential character of the submission. It was a submission of facts agreed upon in writing for the judgment of the court as a conclusion of law thereon, and as such is the equivalent of a special verdict, presenting questions of law alone for the consideration of the court. Its conclusion thereon is subject to review by this court. *Supervisors v. Kennicott*, 103 U. S. 554, 26 L. Ed. 486; *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; *Cudahy Packing Co. v. Sioux Nat. Bank*, 16 C. C. A. 409, 69 Fed. 782. Guided by the foregoing authorities, our sole duty is to determine whether the trial court reached the correct conclusion of law from the facts so agreed upon.

It is next contended that we are foreclosed from any consideration of the force and effect of the suicide clause in question, because the policies in suit, being Iowa contracts, do not contain in their bodies the agreement exonerating the insurer from liability in case of suicide. Attention is called to the act of the general assembly of Iowa approved April 17, 1890, entitled "An act to prevent discrimination in life insurance." Laws 1890, p. 49. Section 1 of this act is as follows:

"No life insurance company doing business in Iowa shall make or permit any distinction or discrimination in favor of individuals between insureds of the same class and equal expectations of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contract it makes; nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance any rebate of premium payable on the policy, or

any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance."

It is contended by plaintiff's counsel that the clause relied upon by defendant to defeat recovery in this action, namely, "I also warrant and do agree that I will not die by my own act, whether sane or insane, during the said period of two years," being found only in the application made by Kelly for insurance, is not so "plainly expressed in the policy" as to be a valid and enforceable agreement, within the purview of that act.

The contention, as we understand it, is that the "policy," within the purview of the act, is that particular paper signed by the insurer which contains its promise, and nothing else, and particularly that it does not include any of the agreements found in the proposition for insurance usually denominated the "application," even though the same be attached to the other paper, and by express stipulation therein made part of the contract. This contention, in our opinion, is narrow and technical, and ignores the rule of construction of contracts, requiring a consideration of all its provisions, wherever found, to determine the intention of the parties. The stipulations of a paper, referred to in a contract as the consideration upon which it is made and by express terms made part of it, are as binding upon the contracting parties as if the same were bodily incorporated therein.

The act of Iowa, *supra*, in our opinion, creates no exception to the foregoing general rule governing the interpretation of contracts. That act was obviously intended for three purposes: (1) To prevent discriminations in favor of particular insureds; (2) to secure that certainty with respect to the rights and duties of the parties which is always best attained by written agreements; (3) to provide a ready and available method by which the insured or assured may at all times have before them the covenants and agreements which they are required to observe or perform. *Society v. Puryear's Adm'r* (Ky.) 59 S. W. 15. That the foregoing is the true interpretation of the act in question is, in our opinion, also conclusively shown by subsequent legislation in Iowa.

By section 1819 of the Code of Iowa, enacted by the 26th general assembly at its extra session, in 1897, it is enacted as follows:

"All life insurance companies or associations organized or doing business in this state under the provisions of the preceding chapters shall upon the issue of any policy, attach to such policy or indorse thereon a true copy of any application or representation of the assured, which by the terms of such policy are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy, or, upon reinstatement of a lapsed policy shall attach to the renewal receipt a true copy of all representations made by the assured upon which the renewal or reinstatement is made. The omission so to do shall not render the policy invalid, but if any company or association neglect to comply with the requirements of this section it shall forever be precluded from pleading, alleging or proving such application or representations, or any part thereof, or the falsity thereof, or any part thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."

The last-mentioned act was passed while the act of 1890 was on the statute book of Iowa, and both are found in the revision of 1897. They must therefore be construed together, and given full force and effect if possible. If the act of 1890 is to be construed as plaintiff's counsel contend, the act of 1897 is meaningless.

Its provision for attaching a true copy of the application was obviously intended to furnish the certainty of, and familiarity with, the terms of the whole contract which was generally contemplated by the act of 1890, and the special prohibition against reliance upon any of the terms and stipulations found in an application, unless a true copy of the same be attached to the policy, by necessary implication permit such reliance if a copy is so attached. In our opinion, it is perfectly clear that the legislature of Iowa by the latter act recognized an application for insurance when a copy of the same is attached to the policy at the time it is delivered, as a constituent part of the contract or policy of insurance itself. A legislative construction has therefore been given to the act of 1890 in full harmony with what seems to us to have been its obvious meaning. It follows that plaintiff's contention to the contrary cannot be sustained.

It is next contended that defendant cannot avail itself of the insured's agreement against suicide, as found in the application for the second policy of \$5,000, because of an alleged variance between the policy as issued and that applied for. The application was for insurance payable to Robert P. Mulock. The policy, as issued, made Kelly, his executors, administrators, or assigns, the beneficiary. No explanation is found in the record of this alleged variance, but in argument it was stated that as Mulock, by whom the policy was to be taken as collateral security for some obligation of Kelly, had apparently no insurable interest in his life, the change was made in order that the policy might be made an available collateral by assignment. However this may be, the fact appears that immediately after the receipt of the policy by Kelly he assigned the same to Mulock. In this way the purpose contemplated by the application was accomplished. Mulock got the policy exactly as applied for.

Not only so, but both Kelly and Mulock are clearly estopped from contending that the policy was not issued in conformity to the application. Kelly accepted the policy, which contained a statement that it was issued in consideration of the application, a copy of which was attached to it; in other words, that the policy was issued in consideration of the very application which is now sought to be repudiated. Whatever variance there was between the application and policy must be presumed to have been made with Kelly's full consent and approval. Neither he nor any one claiming under him can now be heard to repudiate the application so acted upon by the company and recognized by him. *Insurance Co. v. Myers* (decided at the present term of this court; C. C. A.) 112 Fed. 846.

The next contention requiring consideration by us is that the plaintiff acquired vested rights at least in the \$2,500 policy, in which she was originally named as sole beneficiary, immediately upon its issue, which could not have been affected by any subsequent conduct of the insured; that even though Kelly agreed as a part of the consideration

of the contract of insurance not to kill himself, sane or insane, within the period of two years, and even if he violated that agreement, such violation cannot be invoked against the claim of the plaintiff.

It cannot be disputed that plaintiff, who was Kelly's wife and beneficiary in the policy in question, had a certain vested interest in the policy immediately upon its issue; such an interest, in fact, that neither Kelly nor the insurer, nor both, could by appointment or agreement take from her without her consent. Her rights were created by the contract, and she, as one of the parties thereto, must, on familiar principles, consent to any deprivation, modification, or change of such rights before the same can be accomplished. *Bank v. Hume*, 128 U. S. 195, 206, 9 Sup. Ct. 41, 32 L. Ed. 370, and cases cited. But this well-recognized principle falls far short of sustaining plaintiff's contention in this case. The question still remains, with what rights was she vested? This obviously depends upon the terms and conditions of the contract creating them. The husband assumed to act as her agent in the negotiation of a contract intended to be beneficial to her. He gave a consideration therefor, consisting partly of certain executory promises. He secured the promise from the insurance company to pay money to the wife, in case of his death, by promising that such death should not, for two years at least, be the result of his own act, sane or insane. All this was so done as to disclose a clear intention on the part of both that no risk against such death should be assumed by the company.

The wife, by asserting a claim on the policy, ratifies and affirms the contract as made by her agent, and that, too, subject to all its terms and conditions. She cannot avail herself of the promise to pay her the amount of the policy, and simultaneously repudiate the promise made by her husband, which was given to the insurer as a consideration for its undertaking. Neither can she enlarge the obligation of the insurer beyond the scope of that undertaken by it. *Baker v. Insurance Co.*, 43 N. Y. 283; *Pitt v. Insurance Co.*, 100 Mass. 500.

These conclusions would seem to be the necessary result of well-recognized principles of agency and contract. But our attention is called to the case of *Seiler v. Association*, 105 Iowa, 87, 74 N. W. 941, 43 L. R. A. 537, to which special consideration was given by the learned trial judge. In that case the supreme court of Iowa held that where a policy of life insurance contains no stipulation against suicide, and is taken out in good faith, it is not avoided, as against a third party named as beneficiary in the policy, by the fact that the insured, while sane, purposely took his own life. In so holding it attempted to distinguish that case from *Ritter v. Insurance Co.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693, Id., 17 C. C. A. 537, 70 Fed. 954, 42 L. R. A. 583, which decided that the personal representative of an insured, who, when sane, deliberately killed himself with intent to secure to his estate the amount of insurance he had effected on his own life, could not recover on the policy though it contained no provision at all respecting suicide. The supreme court of Iowa held that even though the intentional suicide by an insured might constitute a defense to a suit brought on a policy payable to his estate, containing no provision against such suicide, it would be no defense in

such case if the policy was by its terms payable to a third party as beneficiary.

It is urged that in so far as the \$2,500 policy involved in the present case is concerned, wherein the wife is named as the beneficiary, the express agreement not to commit suicide is of no greater obligatory force than the implied one would have been if there had been no express one, and that, therefore, the Iowa case is directly in point. This may or may not be so, but, in any event, neither the case itself, nor the argument deduced therefrom, is fully persuasive to our minds. A view contrary to the Iowa doctrine is taken in *Hopkins v. Assurance Co.* (C. C.) 94 Fed. 729, and affirmed by the court of appeals of the Third circuit, 40 C. C. A. 1 (99 Fed. 199). See, also, the case of *Dean v. Insurance Co.*, 4 Allen, 96, 99.

Moreover, it seems to us that if there be an implied agreement on the part of every insured not to intentionally kill himself for the purpose of enforcing the liability under a policy,—and such, in our opinion, is the rule laid down in *Ritter v. Insurance Co.*, supra,—such agreement inheres in and forms a part of the contract, and is as much a condition to liability as if it were written out into an express agreement; and, that being so, for the reasons already pointed out a third party, claiming under such a policy of insurance made for her benefit, ratifies and adopts the implied as well as the express conditions and limitations of the contract. But we are not forced to any refinement of logic to support the conclusion reached in this case. There is here an express agreement, showing that the contracting parties had the subject fully in mind, and came to a definite understanding to the effect that the insurer did not undertake to assume the risk of suicide for at least two years, and this agreement must be enforced.

The case of *Fitch v. Insurance Co.*, 59 N. Y. 557, 17 Am. Rep. 372, relied on by the supreme court of Iowa in the *Seiler Case*, makes it clear that the court of appeals of New York considered that force and effect should be given to an express condition of a policy against suicide, even as against a third party, who might be the beneficiary. It there says:

"The policy contained no stipulation that it should be void in case of the death of the insured by suicide. It was not taken out for the benefit of *Fitch* [the insured], but of his wife and children. Although they were bound by his representations, and any fraud he may have committed in taking out the policy, the policy having been obtained through his agency, yet they were not bound by any acts or declarations done or made by him after the issue of the policy, unless such acts were in violation of some condition of the policy."

The case of *Kerr v. Association*, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631, is also relied upon by the supreme court of Iowa as sustaining its conclusion in the *Seiler Case*. A reference to that case shows that the provision of the policy made the basis of a defense was as follows:

"If the assured shall die in, or in consequence of, the violation of any criminal law of any country, state, or territory in which the assured may be, this certificate shall be null and void."

The defendant in that case offered to prove on the trial that *Kerr*, the insured, had committed the crime of forgery in Minnesota, and

fled to Canada to escape arrest, where he was ultimately discovered and apprehended by detectives, and, to avoid being brought back to Minnesota for trial, shot and killed himself. The supreme court held that that evidence was not admissible, saying:

"His death in Canada cannot be treated as the proximate result of his crime in Minnesota. * * * And the fact of his suicide is not in itself to be construed as occurring in or growing out of a violation of law, within the meaning of the policy."

The court then remarked as follows:

"In the law of insurance, suicide is not, as a rule, recognized as a ground of exemption from liability or for forfeiture of a policy issued for the benefit of a third person, unless it is expressly so provided in the policy."

The supreme court of Iowa also seems to think that a different result might follow if the contract of insurance contained an express provision exonerating the company in case of suicide. It says, after reviewing the cases to which reference has just been made, as follows:

"We wish now to add a few words on principle by way of emphasis of a thought already expressed. It is not the wrongdoer who makes claim here, nor any representative whose rights are to be measured by those of the wrongdoer, but persons who acquired an interest at the time the policy was taken out, and who are not in any way responsible for the loss under it. The defendant might well have guarded against this contingency in its contract. Not having done so, we think it is now in no position to complain."

How different is the case now under consideration by us!

As already pointed out, the plaintiff's right, even in the policy of \$2,500, was to be measured by those of the wrongdoer, and the insurer in the present case has in the contract specifically guarded against the very contingency which the supreme court of Iowa said might have been guarded against in the contract. We unhesitatingly reach the conclusion that, on principle as well as authority, no such vested rights were created by the \$2,500 policy in favor of the plaintiff in this case as to relieve her against the consequence of self-destruction by the insured.

The other policy for \$5,000, in which plaintiff acquired no rights until after the death of the insured, raises no such question as has just been discussed with reference to the \$2,500 policy. She, by accepting an assignment from the beneficiary, directly or indirectly, after the death of the insured, is confessedly made subject to all the infirmities inherent in the contract as originally made.

The learned trial judge in his opinion (C. C.; 109 Fed. 56) places great confidence in plaintiff's right to recover upon the principle that the covenant of the defendant to pay the amount of the policy in question is an independent covenant, and not at all dependent upon the covenant of the insured not to kill himself. We are unable to concur in this view. The covenant to pay is obviously dependent upon whether the death insured against occurs, and that death, as already seen, is one exclusive of suicide within two years. Not only is this so, but the promise not to kill himself within two years was by agreement made part of the consideration moving the insurer to make this promise.

As said by Mr. Justice Miller in announcing the opinion of the supreme court in *Construction Co. v. Seymour*, 91 U. S. 646, 650, 23 L. Ed. 341:

"Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent, if they are to be performed at the same time; and, if by the terms or nature of the contract one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done or tendered before that party can sustain a suit against the other."

In the case of *Loud v. Water Co.*, 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822, Mr. Justice Jackson, speaking for the supreme court, says:

"The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. * * * The question in each case is, which intent is disclosed by the language employed in the contract?"

Applying the test last stated, we have no difficulty in reaching the conclusion that the parties to the contract of insurance in question obviously and plainly intended that the covenants should be mutual and dependent, and not independent of each other.

It is next contended that the contracts of insurance sued on in this case are by their own terms embodied exclusively in the policy, and do not comprehend the applications made by the insured therefor. An argument to this effect is drawn from the fact that the policies state on their face that the payment was to depend upon the following condition: " * * * The annual premium * * * shall be paid in advance on the delivery of this policy, and thereafter, * * * on a certain day, every year during the continuation of this contract;" "and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made a part hereof." The maxim, "*Expressio unius exclusio alterius*," is invoked, and it is claimed that because the provisions of the application are not found on the back of the policy their stipulations and contents are not a part of the contract of insurance. We cannot agree to any such view. We have already considered this general question in disposing of the argument based on the Iowa statutes, but it may not be improper to observe further that the company said in each of the policies that it was issued in consideration of the application made for it, and that such application was made a part of the contract. It thus clearly appears that by the same token by which the provisions on the back of the policy were made part of the contract the application therefor was also made a part of it. Nothing can be clearer than this.

Kelly, by accepting a policy which by its terms incorporated the application as a part of the contract, necessarily admitted that such was a fact. He had already said the same thing in the application signed by him, namely, that it was offered to the company as a consideration of the contract, which he was to get. The entire application having been so made a part of the policy by agreement of the parties must be so treated by us, and the agreements, found in the application

as well as those found in the policy proper, must be considered in determining the true import and meaning of the contract. *Ritter v. Insurance Co.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693; *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; *First Nat. Bank v. Hartford Fire Ins. Co.*, 95 U. S. 673, 24 L. Ed. 563; *Insurance Co. v. Webb*, 45 C. C. A. 648, 106 Fed. 808; *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.*, 36 C. C. A. 671, 95 Fed. 111.

Accordingly, treating the application and all its terms and provisions as a part of each contract entered into between the insurance company and Kelly, what does it mean? In answering this question there does not seem to be any necessity for resort to technical distinctions between representations and warranties or affirmative and promissory warranties. The cardinal rule to be observed in construing all contracts is to determine, from a consideration of the four corners of the instrument or instruments creating it, what was the intention of the parties to the same. *Insurance Co. v. Gridley*, 100 U. S. 614, 615, 25 L. Ed. 746; *Long v. Timms*, 107 Mo. 512, 519, 17 S. W. 898. Subjecting the contracts in question to this test, it is very apparent, as we have already indicated in disposing of other branches of the case, that the death of Kelly by suicide at any time within two years after the date of the policy, whether sane or insane, was not a risk assumed by the insurer at all. The parties to the contract, when made, the insurer speaking for itself, and Kelly speaking for himself and as agent for the beneficiary, so agreed. This clearly enough appears from the following: The company agreed, in effect, that in consideration of the representations and agreements found in the applications for insurance, made by Kelly, it would upon the death of Kelly pay a certain sum of money to the beneficiaries named in the policies. Kelly agreed that such death should not occur by suicide within two years at least. The fair and reasonable import of these mutual agreements, in our opinion, is that the death insured against was such a death as might occur at any time in the future, excepting that, however, by suicide, sane or insane, if the same should occur within two years.

Kelly, in his proposition for insurance called "Application," said:

"I hereby warrant and agree not to reside or travel in any part of the torrid zone, and not to engage in any specially hazardous occupation or employment, during the next two years following the date of issue of the policy for which application is hereby made, and also not to engage in any military or naval service in time of war, during the continuance of the policy, without first obtaining permission from this company. I also warrant and agree that I will not die by my own act, whether sane or insane, during the said period of two years."

The company in its acceptance of the proposition, under the heading "Incontestability," found on the back of the policy, said:

"It is hereby further promised and agreed that after two years from date hereof the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums at the times and place and in the manner stipulated in the said policy, and that the requirements of the company as to age and military or naval service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed."

This last-mentioned covenant or agreement on the part of the company obviously has reference to the agreements of Kelly found in the proposition above quoted. It cannot escape observation that the parties treated the agreements referred to as conditions of continuing liability on the part of the company. They are referred to as "conditions," and it is agreed that the only ones which shall be binding after two years are those relating to engaging in military or naval service in time of war. In all other respects it was agreed that "if this policy matures after the expiration of the said two years the payment of the sum insured by this policy shall not be disputed." This carries the reasonable implication that, if the policy should mature by the death of the insured within two years, the policies might be disputed for breach of any of the "conditions" upon which liability depended.

The clear import and meaning of all this is that the policy was issued and the company's obligation of payment assumed on certain specified conditions, among them that Kelly should not reside or travel in any part of the torrid zone, or engage in any of the specially hazardous occupations recited in the application, or die by his own act, whether sane or insane, within the period of two years after the date of the policy. The wisdom of conditions of this kind is not for us to consider, but it is perfectly obvious that they were intended to prevent devising schemes to defraud an insurance company by securing insurance in contemplation of immediate exposure to probable death or immediate purpose to take one's own life. However this may be, the parties, by language admitting of no other rational meaning, agreed upon it, and that puts an end to our inquiry. The insured, acting for himself in one application, and as agent for the proposed beneficiary in the other, warranted and agreed, as a consideration for the execution of the policies, that he would not die by his own act, whether sane or insane, during the period of two years after the date of the policies. This, by reference to the incontestibility clause, already quoted, was by agreement made a condition to continuing liability.

But we do not wish to be understood as holding that it required any express agreement that the clause in question should be treated as a condition to liability. In our opinion, it, having been offered to and accepted by the company as a consideration of the assumption of the risk and for the continuance of liability for two years at least, is, in and of itself, a promissory warranty, requiring the insured to strictly conform thereto, in order to hold the company to a liability on the policies in favor of the beneficiaries. Failure to observe the stipulation of warranty, resulting, as in this case, in the death of the insured, undoubtedly absolves the insurance company from liability.

For the reasons already given, we cannot agree with counsel for plaintiff that it is necessary to find in the policy itself an express stipulation that in case of failure to observe the warranty the policy should be void. Such is the conclusive result of such failure determined and fixed by the law itself. While we have endeavored to answer the argument of counsel based upon the technical doctrines of condition and warranty, we prefer to place our determination of this

case upon the broad proposition that the contracts of insurance, when fairly and reasonably construed, show that death of the insured by suicide, sane or insane, was a risk not undertaken by the insurer at all. There is no merit in the contention that a return of the premiums paid by Kelly was a prerequisite to a defense by the insurance company. The company earned the premiums paid by Kelly for the risk which it agreed to assume, and which it did assume and carry until Kelly's death. This risk embraced death from practically all other causes but suicide. Cases where fraud may have been so practiced in the negotiations as to render the contract voidable at the instance of the company, or cases where no risk at all ever attached, are totally inapplicable to the facts disclosed in this case, and afford no warrant for plaintiff's contention.

It is next contended that the agreement of Kelly not to die by his own act while insane was impossible of performance, and known to be so by both parties to the contract, and therefore void. The argument is that self-destruction by an insane person is not his act, but rather the result of an irresistible impulse, over which he had no control, and therefore not within his power to prevent, and that an agreement to prevent it falls within that class of agreements which are void because of impossibility of performance. This argument is obviously founded on the doctrine taught by the case of *Insurance Co. v. Terry*, 15 Wall. 580, 21 L. Ed. 236. It is there held that where the condition is that, "if the insured shall die by his own hand" (without the qualifying words sane or insane), the policy shall be void, the defense must show affirmatively that the death was the result of an intentional act of a responsible being, and not the act of one driven by an insane impulse, over which he had no control.

The history of insurance litigation shows that the decision in the last-mentioned case brought about other and different stipulations in policies of life insurance, exonerating insurers from liability in case of suicide by the insured, whether he was sane or insane at the time of committing the act. Stipulations of the latter kind have been frequently before the courts, and been pronounced valid and enforceable on the distinct ground that they create an excepted risk; in other words, that a clause of that kind found in a policy of insurance evinces a clear intention on the part of both parties to the contract that self-inflicted death by the insured, whether sane or insane at the time, was not one of the risks assumed by the insurer.

In the case of *Bigelow v. Insurance Co.*, 93 U. S. 284, 23 L. Ed. 918, Mr. Justice Davis, in delivering the opinion of the court, says:

"There has been a great diversity of judicial opinion as to whether self-destruction by a man, in a fit of insanity, is within the condition of a life policy, where the words of exemption are that the insured 'shall commit suicide,' or 'shall die by his own hand.' But since the decision in *Insurance Co. v. Terry*, 15 Wall. 580, 21 L. Ed. 236, the question is no longer an open one in this court. In that case the words avoiding the policy were 'shall die by his own hand,' and we held that they referred to an act of criminal self-destruction, and did not apply to an insane person who took his own life. But the insurers in this case have gone further, and sought to avoid altogether this class of risks. If they have succeeded in doing so, it is our duty to give effect to the contract, as neither the policy of the

law nor sound morals forbid them to make it. If they are at liberty to stipulate against hazardous occupations, unhealthy climates, or death by the hands of the law, or in consequence of injuries received when intoxicated, surely it is competent for them to stipulate against intentional self-destruction, whether it be the voluntary act of an accountable moral agent or not. It is not perceived why they cannot limit their liability, if the assured is in proper language told of the extent of the limitation, and it is not against public policy. The words of this stipulation, 'shall die by suicide (sane or insane),' must receive a reasonable construction. If they be taken in a strictly literal sense, their meaning might admit of discussion, but it is obvious that they were not so used. 'Shall die by his own hand, sane or insane,' is doubtless a more accurate mode of expression, but it does not more clearly declare the intention of the parties. * * * Nothing can be clearer than that the words 'sane or insane' were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity."

In the case of Insurance Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308, the policy sued on contained a clause that "no claim shall be made under this policy when the death or injury may have been caused by * * * suicide (felonious or otherwise, sane or insane)." Mr. Justice Harlan, in delivering the opinion of the court in that case, said if the insured "commit suicide then the law was for the company, because the policy by its terms did not extend to or cover self-destruction, whether the insured was at the time sane or insane." See, to the same effect, the case of Scarth v. Society, 75 Iowa, 346, 39 N. W. 658. There are many other cases, both state and federal, to which attention might be called, which announce the same doctrine, but we do not deem it necessary to pursue this inquiry further.

Applying the rule governing the interpretation of contracts hereinbefore referred to, and seeking to give a reasonable interpretation to the clause now under consideration, consonant with the manifest intention of the parties as disclosed by all the provisions of the policies, we can only reach one conclusion: that the insured, Kelly, not only agreed that he would not die by his own act, whether sane or insane, within the period of two years, but, in effect, agreed, as already stated, that the risk actually assumed by the company excluded death by suicide within two years. The facts of the case therefore do not warrant the application of the rule rendering contracts void which are impossible of performance, and so known by both parties to it.

The ability and persistence with which learned counsel for plaintiff, both in oral argument and brief, pressed the points already considered upon the attention of the court, caused us to enter upon a discussion of questions more at length than their intrinsic difficulty, in the light of controlling authority, probably required.

The result reached, after a full consideration of all questions presented, is that as a conclusion of law, deducible from the agreed statement of facts on which the case was submitted, the plaintiff cannot recover. The judgment of the trial court must be reversed and remanded, with directions to render a judgment in favor of the defendant.

WESTERN UNION TEL. CO. v. TRACY.

(Circuit Court of Appeals, Third Circuit. February 20, 1902.)

1. MASTER AND SERVANT—INJURY TO SERVANT—DUTY OF INSPECTION.

In an action by a lineman against a telegraph company to recover for an injury sustained by plaintiff by reason of the breaking of a pole upon which he was working, which was decayed below the surface of the ground, it was not error of which defendant can complain to submit to the jury the question whether, by the custom and practice in that kind of work, the duty of inspecting the pole rested upon the foreman or the plaintiff, and to make defendant's liability dependent upon whether the duty was that of the foreman, where the evidence as to the custom was conflicting, but it was shown that a proper inspection would have disclosed the defect.

2. SAME—PLACE TO WORK—RESPONSIBILITY OF MASTER.

The duty of inspecting a telegraph pole before a lineman climbs it to work thereon, if not that of the lineman himself, is the positive duty of the master which is responsible for the failure to have such inspection made, notwithstanding it has engaged another, however competent, to perform the duty.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 110 Fed. 103.

Wm. D. Dalzell, for plaintiff in error.

John O. Petty, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

DALLAS, Circuit Judge. This writ of error has brought up for review the record of an action which was instituted by the defendant in error against the plaintiff in error to recover for personal hurt which the plaintiff had suffered while engaged at his work as a servant of the defendant, and which he alleged was caused by its negligence. The case as presented in the circuit court, and the general view of the learned judge of that court with respect to it, are so clearly and well set forth in the opinion which he filed in overruling the motion for a new trial as to render it unnecessary for us to preface the statement of our conclusions upon the questions of law which have been raised in this court otherwise than by extracting from that opinion the following:

"The plaintiff was a lineman in the employ of the defendant, the Western Union Telegraph Company. The duties of a lineman are to climb telegraph poles and to string wires on the cross arms, and remove wires therefrom and do other work thereon. The defendant had occasion to remove part of a line of its wires from four old poles, which had been standing for eleven or twelve years, to four new poles, which had just been set. Before the work of moving the wires began the defendant's foreman (Joseph Krotzer) visited the premises and made an inspection. He caused three of the old poles to be guyed, but did nothing with respect to the fourth pole. That pole appeared to the eye to be sound and firm, and the foreman applied no test to determine its condition. The plaintiff was one of a gang of linemen working immediately under another foreman of the defendant (Oscar Long), assigned to the work of removing the wires from these old poles to the new ones. In the course of his employment and in the discharge of his duty as lineman

the plaintiff climbed the fourth pole, just mentioned, to assist another lineman in removing the wires from the cross arms. While thus engaged the pole suddenly broke, and the plaintiff was thrown to the ground and very badly injured. The cause of the disaster proved to be the rotten condition of the lower end of the pole underneath the surface of the ground. The pole broke off three or four inches under the ground. There was evidence to show that a proper inspection of this pole by the usual test, by means of tools provided for the purpose, would have disclosed that the pole was in an unsafe condition for a lineman to ascend and do his work thereon. The defendant alleged and gave evidence tending to show that, according to the custom and practice in doing such work as this, it is the duty of the lineman to determine for himself the safety of the poles. This the plaintiff denied, and gave evidence tending to show the contrary, and that it is always the practice and business of the foreman to inspect the poles to determine their safety, and that the linemen rely on the foreman's inspection. The court left this disputed question of fact to the determination of the jury, and upon their verdict in favor of the plaintiff it must be accepted as established that the plaintiff was not under the alleged duty, and also that he was not guilty of any contributory negligence and was free from fault."

The only averments of error are that the court below erred in its disaffirmance of the four points which were presented for the defendant and in its answers to those points, in that it declined to give binding instructions in favor of the defendant, or to charge that there was not sufficient evidence to justify the jury in finding that any negligence of the defendant was the proximate cause of the plaintiff's injury, in that the learned judge submitted to the jury, for determination from all the evidence, the question whether or not the injuries to the plaintiff resulted from a latent defect which was one of the ordinary risks of his employment; and, finally, in that he refused to charge "that if the jury believed from the evidence that the defendant had a competent foreman in charge of the work, and that the foreman and the plaintiff were furnished with proper tools and appliances with which the pole could have been adequately tested, and, if any weakness was discoverable, secured, then the defendant was not guilty of any negligence which was the approximate cause of the plaintiff's injuries." None of these averments can be sustained. That the case was not one which the court would have been warranted in taking from the jury, unless upon the ground either that inspection of the pole was not a part of the foreman's duty, or (if it was) that the defendant was not responsible for the foreman's failure to discharge that duty, is too clear for argument, and that these subjects were dealt with in a manner as favorable to the defendant as was at all possible we are entirely satisfied. It is not necessary to decide whether, by reason of the company's legal obligation to exercise ordinary care to provide a reasonably safe place and appliances for its employes, it was not unconditionally bound to look to the safety of the pole upon which the plaintiff was required to work; for it was not ruled that the defendant's responsibility was conclusively fixed by this general rule of law, but that it depended upon whether, as matter of fact, the custom in doing such work was for the foreman to inspect the poles, or for the linemen themselves to inspect them. Upon this question the testimony was conflicting, and it was submitted to the jury with the statement that "if, according to the custom and practice in this kind of work, the duty of inspecting the poles is upon the lineman, and not upon the foreman, it would follow

that the company here would not be responsible for this disaster." In our opinion, the court, in thus holding that the company was but provisionally responsible, and in leaving it to the jury to find whether the practice was such as to make it absolutely so, went quite as far as could be justified in restriction of the defendant's liability.

Upon the remaining point the law is well settled. The duty of inspection, if not that of the linemen,—and the jury has found that it was not,—was the positive duty of the company itself, and it was responsible for its nonperformance, notwithstanding the fact that it had engaged another, however competent, to perform it. *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Railroad Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994.

The judgment of the circuit court is affirmed.

EVANS et al. v. DICKENSON et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,084.

1. ACKNOWLEDGMENT—POWER OF NOTARY TO TAKE—TERRITORIAL LIMIT.

Under the statute of Florida (McClell. Dig. p. 791, § 1), providing for the appointment of notaries public, who "shall use and exercise such office of notary public for such places and within such limits and precincts as the governor shall direct," one commissioned by the governor "to be notary public in and for" a certain county has no power to take an acknowledgment outside of such county.

2. HUSBAND AND WIFE—CONVEYANCE BY WIFE OF SEPARATE PROPERTY—REQUISITES.

Under the laws of Florida, a married woman can convey or incur her separate statutory property only by an instrument executed in strict conformity to the requirements of the statute, and such a conveyance is void where the notary public before whom it was acknowledged had no authority to act in the county where the acknowledgment was taken.

3. SAME—RATIFICATION OF VOID MORTGAGE.

A married woman gave a mortgage upon her separate statutory property, which was void for defective acknowledgment. She subsequently joined with her husband in a mortgage on other property, which recited the prior mortgage, and that the second was given to secure an extension of the indebtedness thereby secured. It further provided that, on default in payment of taxes, etc., both mortgages should be subject to foreclosure. The second mortgage was properly acknowledged, but it was stated in the acknowledgment of the wife that she executed the same for the purpose of releasing her dower, etc., in the property therein described. *Held*, that the execution by her of the second mortgage did not operate by ratification or estoppel to validate the first mortgage, there being nothing therein indicating such intention.

4. SAME—CURATIVE STATUTE—EFFECT ON PENDING LITIGATION.

Where a mortgage given by a married woman, and admittedly securing a valid debt, was held void solely on the ground that the acknowledgment was taken by a notary public of another county, not authorized to act outside of such county, and, pending an appeal from the decree, the legislature of the state passed an act legalizing all such notarial acts done by notaries of the state in good faith, the appellate court may, and should, in the interest of justice, give effect to such act as curing the irregularity in the execution of the instrument before it. *Per Pardee*, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

The following is the opinion of the circuit court, delivered by LOCKE, District Judge:

Not only must the findings of the master in this case be considered *prima facie* correct, but a careful consideration of the master's report, the exceptions thereto, the testimony upon which the same is based, and the arguments of counsel in this case, both orally and by brief, compels me to reach the same conclusion that he has reached. It is unquestionably the policy of the law to protect a woman's private property by requiring and demanding an exact compliance with the terms and conditions upon which she may convey the same. The property in question, although conveyed by the husband to the wife, was so conveyed at a time when, as it appears, there was no reason why a gift should not be legally justifiable, and convey the full title. See *Jones v. Clifton*, 101 U. S. 225, 25 L. Ed. 908. The deed had been on record for about 10 years, and the property was recognized and well known as the property of a married woman. In order to convey such property, it was required by the law that she make an acknowledgment of her intentions in regard to such conveyance before a party duly authorized to receive such acknowledgments. The law of Florida is that a notary public is appointed only for such places and within such precincts as the governor shall direct. The party taking this acknowledgment had only been appointed and commissioned for the county of Alachua, and the acknowledgment was taken and certified in Marion county. If his power to take acknowledgments, which is one of the most important powers of a notary, is not limited to that county, what limitations could there be to any of his acts or doings, and of what force would be the terms of the statute? It is true that some courts have held that the power of a notary in taking acknowledgments, under the statutes of certain states, is not limited to the county of his appointment, but it is considered that the weight of authority, where the language of the statute is as clear and distinct as it appears to be in this state, is to the contrary.

The supreme court of this state has not passed upon the question positively, but in *Stewart v. Stewart*, 19 Fla. 848, where the question was raised, it says: "It appears by the certificate of acknowledgment and proof, and by the testimony of the case, that the justice of the peace certifying the same was an officer of Alachua county, and that he took the acknowledgment and certified the same within the county of Marion. This act of the justice beyond his territorial jurisdiction may be void, but yet is good *inter partes*,"—appearing to intimate that, if the question had turned entirely upon the extraterritorial act of the justice, it might be considered void.

Although there is found in the certificate of acknowledgment a declaration that the notary who took the same was a notary of Marion county, yet the seal affixed thereto showed that he was a notary for Alachua county only, and this was sufficient to put the mortgagee on notice that the acknowledgment had not been taken before a person duly authorized.

As to the ratification by the second mortgage, upon other property, it is considered that the terms of the acknowledgment, taken separate and apart from her said husband, declared and determined the intention of the married woman in joining in that document. Her declaration upon that examination, as appears by the certificate, was that she joined therein for the purposes of "releasing, relinquishing, renouncing, and mortgaging her right of dower, dower, separate estate, and property of every nature and character whatsoever in and to the said property and every part thereof." There had been in this second mortgage no property mentioned or described except that conveyed therein; and to presume that at that time she had the intention of ratifying the first mortgage, and in effect consenting to a transfer of the property described in it, or that such declaration was made upon her separate examination at that time, appears to me to be an unnatural and forced construction.

Unquestionably, the complainants suffer pecuniary loss, but there appears to be not only a noncompliance with the letter of the law required to transfer

the property of a married woman, but a notice thereof contained in the very seal of the document. The exceptions to the master's report will therefore be overruled, and a decree follow in accordance therewith.

Robert L. Anderson (William Hocker, on the brief), for appellants.
Wm. Wade Hampton, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of this court are of opinion that there is no reversible error in the record, and they approve the conclusions of the judge presiding in the circuit court, as shown by his opinion in the record.

Affirmed.

PARDEE, Circuit Judge (dissenting). The bill in this cause was filed to foreclose two mortgages executed by appellees. One of these bears date August 24, 1887; the other, February 23, 1893. The latter was executed upon an agreement for extension of time for payment of the original debt secured by the former. Both were designed to create a lien upon lands in Marion county, Fla.

The answer "admits the giving of" both these mortgages by the appellees, but defense is made as to the original one, of August 24, 1887, based exclusively upon the alleged facts that the property therein described was held by M. Julia Dickenson as her separate statutory property, she being at the time and ever since a married woman; that this mortgage was never executed and acknowledged as required by the state laws relating to the conveyances of such property; that the acknowledgment was "illegal, null, and void," because taken in Marion county, Fla., by a notary public of the adjoining county of Alachua, this notary having been appointed for the latter county only. This is the only ground upon which the mortgage was assailed or the suit resisted, and is the only ground upon which the court below refused to decree appellants the substantial relief demanded.

January 1, 1901, the learned special master, in his report against the right of the appellants to recover in this case, concluded as follows:

"In the case presented here we find a lady signing the mortgage with her husband in the presence of witnesses, making a declaration in writing under her own hand declaring that the officer who took her acknowledgment was an officer of the county in which she lived, and permitting complainants to go for years under the apprehension that this declaration was true, when the fact is when the lien is undertaken to be enforced she then discloses that this same officer was not the officer that she had previously declared that he was, and that he was an officer of another county, and it is to be presumed that he had simply gone across the border line of the two adjoining counties to her home for her convenience and accommodation, and took this acknowledgment. The authorities seem to sustain, however, just such transactions as this.

W. S. Bullock, Special Master in Chancery.

"January 1, 1901."

In his opinion confirming the master's report, filed February 23, 1901, the learned judge of the circuit court admits the hardships of the case. The legislature of the state seems also to have been advised of the injustice in this and perhaps other cases; for on the 22d of May, 1901, following, it enacted a law, which was approved and went into

effect the same day, entitled "An act to legalize the acts of all notaries public of the state of Florida up to April 1, 1901," which act provides "that any and all notarial acts that were done in good faith by any notary public in the state of Florida, or who was a notary public in the state of Florida and whose term of office expired before the 1st day of April, A. D. 1901, are hereby declared valid." Acts 1901, p. 113.

As in the instant case, there is no dispute that the only irregularity in the whole transaction was and is that a duly qualified notary for Alachua county only took the acknowledgment of Mrs. M. Julia Dickenson in Marion county; and as it is admitted that this was done in good faith, and as the act is broad and full enough to cover the present case, I am of opinion that the legislative act aforesaid fully ratified and legalized such acknowledgment; and as the irregularity of this acknowledgment is the only ground upon which this court relieves Mrs. M. Julia Dickenson from the obligations of an honest contract, honestly entered into by all the parties, I enter my dissent.

There can be no doubt that the legislature by ratification may make valid any act which it had authority to previously authorize. I can see no reason why a ratifying act may not be available in the interest of justice, on appeal or writ of error, and there are respectable authorities to that effect. *Underwood v. Lilly*, 10 Serg. & R. 97; *King v. Course*, 25 Ind. 202. I have no doubt the authorities can be multiplied on research.

And there is another feature of this case which justifies some mention. The second mortgage, by and between the same parties, dated February 23, 1893, recites the first, and the indebtedness thereunder, acknowledging its full effect, and the said second mortgage was given to procure an extension of time for the payment of the indebtedness. This mortgage was regularly acknowledged according to the strictest requirements of the state law, and, among other things, it contains this provision:

"It is further agreed that a failure to pay the taxes aforesaid or any part thereof, or of failure to pay the said debt or any part thereof, or of any interest due thereon, shall render the foreclosure of this mortgage and the said former mortgage liable to a foreclosure for the whole of the said debt, or for such part thereof, at the election of the mortgagors or their assigns."

Except for the peculiar favor which it is claimed should be extended to married women, the second mortgage in this case would be held to estop Mrs. M. Julia Dickenson from setting up any irregularity in the acknowledgment of the first mortgage in any and all courts where decrees are rendered in accordance with equity and good conscience.

SOUTHERN BUILDING & LOAN ASS'N v. CAREY et al.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 1,013.

MORTGAGES — FORECLOSURE — RECEIVERS — DEFICIENCY — APPLICATION OF RENTALS.

A bill to foreclose a trust deed averred that the taxes were unpaid, and a receiver was appointed, with authority to rent the premises. Afterwards the mortgaged property was sold for a sum not sufficient to satisfy the debt. The receiver's report showed a balance in his hands after the payment of the taxes and certain other expenses. There was no proof that the mortgagors were insolvent, and no steps had been taken to reach the rents and profits on that ground. *Held*, that the balance in the receiver's hands should be paid to the mortgagors, and could not be applied on the unpaid balance due the mortgagee.

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

The bill in this case was filed in the circuit court by the Southern Building & Loan Association against Joseph P. Carey and Emma A. Carey, his wife, seeking the foreclosure of two trust deeds executed by said Carey and wife in favor of the appellant, one for \$1,700, and the other for \$1,000, secured on certain premises belonging to Emma A. Carey. Among other allegations of the bill there was an averment that the taxes were unpaid, and upon an application to the court a receiver was appointed, with authority to rent the premises. Issues were made, and upon trial a decree was rendered in favor of the building and loan association upon both trust deeds, and the property was put up for sale, and did not sell for enough to pay both incumbrances by the sum of \$1,132.22. The report of the receiver, being duly filed, showed a balance in his hands after the payment of taxes and certain other expenses. Upon hearing, the circuit court ordered the balance in the hands of the receiver to be paid over to Emma A. Carey. Error was assigned to the action of the court in thus applying this balance of rentals, and in failing to apply the same upon the unpaid balance of the decree.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

DAY, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

This case presents the single question as to whether the court committed error in ordering the balance of rentals in the receiver's hands to be paid to Emma A. Carey, instead of making application thereof upon the unpaid balance of the plaintiff's decree. It is the claim of the appellant that a court of equity may, upon a showing of the insufficiency of the security for the payment of the mortgaged indebtedness, appoint a receiver for the purpose of reaching, not only the body of the premises mortgaged, but the rentals thereof as well. This is undoubtedly the practice of courts of equity where a sufficient showing is made that the mortgaged premises will not be sufficient to pay the debt, and that the mortgagor, or other person primarily liable for the indebtedness, is insolvent and unable to make good the deficiency in the security. The rule is thus stated in High, Rec. § 666:

"Stated in general terms, the well-established rule, deducible from the clear weight of authority, is that, in all cases where the rents of the prop-

erty are not specifically pledged for the security of the debt, to entitle a mortgagee to a receiver of the mortgaged premises, and of the rents and profits, he must show—First, that the property itself is an inadequate security for the debt, with interest and costs of suit; and, second, that the mortgagor or other person who is personally liable for the payment is insolvent, or beyond the jurisdiction of the court, or of such doubtful responsibility that an execution against him for the deficiency would prove unavailing. And this being shown, the courts will generally interpose and appoint a receiver. And it has been held that the aid of a receiver should be granted or withheld, according as it may or may not be an essential means to pay the indebtedness secured by the mortgage, and there can be no necessity for the relief, if the mortgagor is solvent and able to pay any deficiency."

We fail to find facts in the record in this case sufficient to bring it within the rule. The receiver was appointed upon the ground that the taxes were unpaid upon the mortgaged premises. This is a well-recognized ground of equity jurisdiction. High, Rec. § 672.

The order appointing the receiver in this case expressly provided that he should not take possession of the property until the expiration of 10 days from the date of the order, and that if in the meantime the defendants should pay the taxes and the costs and the charges for the collection thereof the order might be vacated. There is not apparent in the record any attempt to sequester the rentals on the ground that the principal in the obligation secured by the mortgage was insolvent, and the premises inadequate security for the payment of the mortgage loan. It is true that it is alleged in the bill that Carey and his wife are insolvent, and that the security of the mortgaged premises was insufficient, but no proof, so far as we have been able to discover, was offered in support of these allegations, and no attempt, for this reason, was made to secure the appropriation of the rentals by means of a receiver.

A receiver had been appointed, who, by the terms of the order, was not to take possession of the mortgaged premises except for the purpose of subjecting the rentals for the payment of taxes. He was appointed upon the allegations in the bill seeking the appointment of a receiver for the purpose of appropriating the rentals to the payment of taxes. In this state of the record, the court could do only the thing which was done, namely, order the balance to be turned over to Mrs. Carey as the owner of the fee of the mortgaged premises. This view of the case requires an affirmance of the judgment below, and renders it unnecessary to consider whether, in the absence of a conveyance of the rents and issues of the premises mortgaged, a court of equity could apply the same upon the mortgage debt as against a married woman, and one who, at least as to one of the trust deeds, had mortgaged her separate property as security for a debt of her husband in which she had no separate interest. Upon the state of the record disclosed, no proper steps having been taken to secure the rentals except for the single purpose which had been satisfied, the court did not err in ordering the balance in the receiver's hands to be paid to Mrs. Carey, the original owner of the fee.

Judgment affirmed.

114 F.—19

CONTINENTAL NAT. BANK OF MEMPHIS, TENN., v. BUFORD.

(Circuit Court of Appeals, Eighth Circuit. March 12, 1902.)

No. 1,621.

CORPORATE OFFICERS—LIABILITY FOR CORPORATE DEBTS—LIMITATIONS—ACCRUAL OF CAUSE OF ACTION.

Under Sand. & H. Dig. Ark. § 1347, providing, if the president of a corporation neglect to make an annual certificate showing certain facts, as provided by section 1337, he shall be liable to an action founded on the statute for debts of the corporation contracted during the period of such neglect, the cause of action against the president accrues not later than maturity of the note given by the corporation for the debt, and the statute runs from then, though the note is renewed.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

The Bank of Mammoth Springs was an Arkansas corporation, located at Mammoth Springs, in that state. On the 9th day of June, 1891, G. C. Buford, the defendant in error and defendant below, was elected president of the bank, and continued to be such until the 9th day of June, 1896. A statute of Arkansas under which the bank was organized, and which was in force during the period mentioned, contains the following provisions:

"Sec. 1337. The president and secretary of every corporation organized under the provisions of this act, shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of making such certificate, in the following particulars, viz.: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the names and number of shares of each stockholder; which certificate shall be deposited on or before the 15th day of February or of August with the county court clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"Sec. 1346. The certificates required by sections 1334, 1337, 1343 and 1344, except certificates of transfers of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts, he shall be deemed guilty of perjury, and be punished accordingly."

"Sec. 1347. If the president and secretary of any such corporation shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of such neglect or refusal."

Sand. & H. Dig. Ark.

This action was commenced July 21, 1900. The complaint alleges that during the whole time the defendant was president of the bank he neglected to comply with the requirements of the foregoing provisions of the statute by making, swearing to, and depositing the certificate required thereby. It further alleges: "That on September 6, 1894, said Bank of Mammoth Springs became indebted to plaintiff in the sum of \$2,500 by note for that amount due November 8, 1894. That on said date said note was renewed, and upon maturity of said renewal it was likewise renewed. These renewals continued from time to time, with occasional payments at some of the times of renewal, until May 20, 1897, when said Bank of Mammoth Springs, being then indebted to plaintiff in the sum of \$1,150 as balance due on said original indebtedness, executed to the plaintiff its note for that amount due and payable three months after date. That on May 3, 1894, said Bank of Mammoth Springs was also indebted to the plaintiff in the sum of \$5,000 by note, which, by the

same process of renewals and part payments as above stated in regard to the first note, was reduced on May 2, 1897, to \$3,500, for which said Bank of Mammoth Springs executed to plaintiff its note for said amount, due ninety days after date." The defendant demurred to the complaint on the ground that it appeared on the face of the complaint that the cause of action was barred by the statute of limitations. The circuit court sustained the demurrer, and, the plaintiff declining to plead further, final judgment was rendered for the defendant, and the plaintiff sued out this writ of error. The opinion of the circuit court is reported in 107 Fed. 188.

Rhea P. Cary, for plaintiff in error.

Robert Neill (Davidson & Meeks, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is settled by the decision of the supreme court of Arkansas in the case of *Bank v. Walsh*, 68 Ark. 21, 59 S. W. 952, that the statute on which this action is founded is a remedial statute, and imposes "a statutory liability, and not a penalty," and that the three-years statute of limitations applies to actions founded thereon. The single question left for our consideration is, when did the plaintiff's cause of action against the defendant accrue? The contention of the plaintiff in error is that it did not accrue until the maturity of the last renewal notes; the contention of the defendant is that it accrued when the debts sued for were contracted, or, at the furthest, on the maturity of the notes given at the time the indebtedness was created. The complaint does not disclose when the debts sued for were contracted, but they must have been contracted on or before May 3, 1894, and September 6, 1894, the respective dates at which the first notes mentioned in the complaint were executed. As the action is barred whether the statute of limitations commenced to run from the creation of the debt or from the maturity of the notes given at its creation, it is not essential to the decision of the case to determine whether, when the plaintiff made a loan to the Bank of Mammoth Springs or otherwise became its creditor for a present consideration on an agreed term of credit and took a note accordingly, the plaintiff could the next day have brought suit for the amount of the debt against the defendant on his statutory liability to pay it as a debt of the bank "contracted during the period" of his neglect and refusal to file the required certificate. Under the statute the defendant did not sustain to the debtor bank the relation of a joint principal, surety, or guarantor. His liability was primary, and not secondary. It was created by statute, and was not contingent upon the failure or inability of the bank to pay, but was absolute and unconditional. It resulted from his dereliction of official duty, and, if he had been compelled to pay the debt, he would have had no right of reclamation or indemnity from the bank. The statute imposed upon him the obligation of a principal debtor for his refusal and neglect to perform a duty enjoined upon him by law for the protection of the public. His legal liability for the debt was fixed and perfect the moment it was contracted, without regard to the solvency or insolvency of the bank, or to any proceedings against it to enforce pay-

ment. At the time when the first renewal notes were taken, the debt and the original notes given therefor had then become due and payable. The renewal of the notes operated as an extension of time for the payment of the debts by the bank, but did not release the defendant either from his statutory liability to pay the debts or from immediate action therefor. As soon as the original notes became due and payable, if not before, the defendant was liable. The defendant was unquestionably then liable to an action, and so was the bank. These two rights of action in the plaintiff were not dependent. They were concurrent and independent. The plaintiff could assert either or both. The assertion of one would not preclude the assertion of the other. Suspending the assertion of the one would not preclude the assertion of the other. Nothing but satisfaction of the plaintiff's debt by the pursuit of one would take away its right to follow the other. If, therefore, the right of action against the defendant on his statutory liability did not accrue on the creation of the debt, it unquestionably did on its maturity, and the statute, having once commenced to run, could not thereafter be suspended so far forth as concerned the defendant, by any action of the plaintiff and the bank which might have that effect as between them. Without pursuing the subject further, we may say that we concur in the opinion of Judge Folger in *Jones v. Barlow*, 62 N. Y. 202, 213, and have, in substance, adopted its reasoning. It seems to have been followed in later cases in that state (*Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354; *Parrott v. Colby*, 6 Hun, 55, affirmed on appeal in 71 N. Y. 597; *Iron Co. v. Walker*, 76 N. Y. 521) and elsewhere (*Mining Co. v. Woodbury*, 14 Cal. 265; *Davidson v. Ranken*, 34 Cal. 503; *Hyman v. Coleman*, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; *Young v. Rosenbaum*, 39 Cal. 646).

The complaint counts on an open account also, touching which it is only necessary to say that that portion of the account contracted while the defendant was president is clearly barred, and for that portion of the account contracted after he ceased to be president he never was liable.

The judgment of the circuit court is affirmed.

CITY OF FT. MADISON v. FT. MADISON WATER CO.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1902.)

No. 1,570.

CITIES—CONTRACTING FOR WATER—EXCEEDING SPECIAL TAX.

Under McClain's Code Iowa, § 641, empowering cities to contract with a water company for water, and to pay therefor such sum as may be agreed on, and section 643, providing, if a city contract for water, it shall annually levy a special tax sufficient to pay the agreed water rents, provided said tax shall not exceed five mills, the city may contract debt for water in excess of five mills, and be subject to action thereon.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

For opinion below, see 110 Fed. 901.

E. C. Weber, for plaintiff in error.

James C. Davis, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The Ft. Madison Water Company brought this action against the city of Ft. Madison to recover \$4,440 alleged to be due for rent of hydrants. The contract for the hydrants was made by ordinance of the city, and contained this provision: "Said hydrant rental to be paid quarterly out of the special tax fund, to be levied and collected as other taxes of the city are for this purpose." The statutes relating to the powers of cities to contract for a supply of water in force at the time the contract was entered into read as follows:

"* * * and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties." Section 641, McClain's Code. "* * * If the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water for any purpose, such city or town shall levy each year, and cause to be collected, a special tax as provided for above sufficient to pay off such water rents so agreed to be paid to said individual or company constructing said works, provided, however, that said tax shall not exceed the sum of five mills on the dollar for any one year." Id. § 643.

The defense to the action set up in the city's answer is that the city has levied, collected, and paid a special tax of five mills on the dollar on the taxable property of the city to pay the hydrant rentals due under the contract, but that since September, 1896, that levy has not furnished sufficient revenue for that purpose, and that the city has no power or authority to pay the deficit out of any other fund, and "therefore," says the answer, "said city is not indebted to the plaintiff in said sums or any other sum." The only question in the case is this: Is the city under obligation to pay that portion of the contract price for the hydrant rentals that is in excess of the revenue the five-mill levy will produce, and will an action lie against it therefore? Under the statutes quoted there is no limitation on the amount of indebtedness a city may contract to procure water for its corporate purposes. It is authorized "to pay therefor such sum or sums as may be agreed upon." The "special tax" authorized to be levied to pay the water rents is limited to five mills, but this is not a restriction on the power of the city to contract debts for that purpose. The power of the city to levy the special tax to pay for water is not the measure of its power to contract debts for water. There is no necessary connection between the power to contract debts and the power to levy taxes to pay them. *Board v. King*, 14 C. C. A. 421, 67 Fed. 202. The power of a municipality to contract a debt does not imply that it possesses the power to levy a special tax, or any tax, to pay it; and the grant of a power to levy a special tax for some purpose does not imply a prohibition of the power to contract a debt for that pur-

pose in excess of what the special tax will discharge. It frequently happens that a municipality may lawfully contract debts which it has no power to levy a tax to pay. *Board v. King*, *supra*; *U. S. v. Miller Co.*, 4 Dill. 233, Fed. Cas. No. 15,776; *Stryker v. Board*, 23 C. C. A. 286, 77 Fed. 567; *King v. Same*, 23 C. C. A. 348, 77 Fed. 583.

It is clear, both upon principle and authority, that under the statutes quoted the defendant city is liable on its contract for the amount due for water in excess of what the five-mill levy will pay. *U. S. v. Clark Co. Ct.*, 96 U. S. 215, 24 L. Ed. 628; *U. S. v. Macon Co. Ct.*, 99 U. S. 582, 25 L. Ed. 331; *Knox Co. Ct. v. U. S.*, 109 U. S. 229, 3 Sup. Ct. 131, 27 L. Ed. 915; *Grand Junction Water Co. v. City of Grand Junction (Colo. App.)* 60 Pac. 196; *Creston Waterworks Co. v. City of Creston*, 101 Iowa, 694, 70 N. W. 739. And the water company is entitled to have the amount due it under the contract judicially ascertained and judgment against the city for the same.

Whether the water company can by mandamus compel the city to levy either a general or special tax to pay such judgment is a question not raised by this record. The right to a judgment against the city for the debt, and the right to a mandamus to compel the city to levy a tax to pay the judgment, are separate and distinct questions, the latter of which is not now before us, and concerning which it will be distinctly understood we express no opinion.

The judgment of the circuit court is affirmed.

HINGSTON et al. v. L. P. & J. A. SMITH CO.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 992.

1. CONTRACTS—FRAUDULENT REPRESENTATIONS—RIGHT OF RELIANCE.

A party making a contract to dredge a harbor, and being some distance from the harbor at the time, is entitled to rely on the representations of the other party, who has done a portion of the work and had access to the chart showing soundings, as to the thickness of the rock to be removed, and is not required to investigate the facts himself, and, such representations being relied upon and being false and known to the party making them to be so, is not bound by the contract.

2. SAME—MATTERS OF OPINION.

Representations made after soundings had been taken in the harbor for the purpose of ascertaining the character of the work, and a chart thereof made with which the party making the representations was familiar and the other party not, were not mere expressions of opinion, but were matters of fact, which could be relied on, though not accompanied with specific statements as to actual measurements having been made.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

W. M. Duncan, for plaintiffs in error.

George B. Marty, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This action was brought to recover damages alleged to have been sustained by the plaintiff, the L. P. & J. A. Smith

Company, for an alleged breach of contract made with the defendants, Hingston et al., for certain dredging in the harbor of Ashtabula. The defendants alleged that the contract upon which a recovery was sought was obtained by certain fraudulent misrepresentations, among others that the rock which it was necessary to remove under the terms of the contract would average a foot in thickness, which representation was false and untrue, and known to be such when the representation was made, and that the falsity thereof was unknown to the defendants, who made said contract believing said statements to be true and in reliance thereon. Other allegations were made in the answer, unnecessary to notice in the disposition we shall make of this case.

The court charged the jury among other things, as follows:

"If you find that Smith, the agent of the plaintiff, and Hingston, one of the defendants, had equal opportunities of obtaining information as to the character, location, and amount of the work to be done, then, as a matter of law, Hingston had no right to rely upon representations made by Smith, but it was his duty to inform himself as to these matters."

To understand the relevancy of this charge, it is necessary to know something of the facts which the testimony tended to develop. The dredging which Hingston & Co. undertook to do for Smith & Co. was in the completion of a contract to remove certain materials from the harbor at Ashtabula, in order to deepen and improve the same for the purposes of navigation. Smith & Co. had already done a considerable portion of the work. The harbor was to be excavated to the depth of 20 feet, the rock and dirt removed where the channel was not of that depth, so as to give 20 feet of clear water. For the purpose of knowing the character of the work to be done, soundings had been taken and a map or chart prepared showing the excavation to be made in carrying out the work. This chart was accessible to the Smiths, and, doubtless, known to them. The character of the work was so far developed that the jury might find it to have been known to the Smith Company's representative when he made the contract with Hingston which has given rise to this suit. The contract was made at Buffalo, a very considerable distance from Ashtabula. Hingston gave testimony tending to show that he did not know the nature and character of the work necessary to be done in carrying out the contract, and relied upon the representation made to him by Smith as to the thickness of the rock excavation to be made. The testimony shows that the thickness of the rock to be removed was a very material circumstance in view of the fact that the work was paid for by the cubic yard, and thick rock could be more profitably handled than thin layers of rock could be. In this situation of affairs is it sound law to say that Hingston might not rely upon the representations of Smith as to the thickness of the material to be excavated? In a sense it is true that Hingston had equal opportunities with Smith to know the character of the work to be done, and by going to Ashtabula he might have inspected the work and examined the chart. But was he bound to do so? Undoubtedly a party may not shut his eyes to facts which are apparent at the time of making a contract in blind reliance upon the assurance of another that things are not what his senses, if used, would show him they, in fact, are. The rule is well stated in

Slaughter's Adm'r v. Gerson, 13 Wall. 379-383, 20 L. Ed. 627, cited to sustain the charge of the court below, wherein Mr. Justice Field says:

"Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another."

The important condition that the means of information be at hand is not to be overlooked. The matters directly before the party which may be observed he must be presumed to see. But does the reason or the justice of the rule apply where the subject-matter is not present, but distant from the contracting parties? In such case, where the party making the representation has had means and opportunities to know the facts concerning the subject-matter of the contract which the other party has not had, and cannot have without going to the expense and delay of an investigation of matters at a distance, we see no reason why he may not rely upon such representations of fact. In our opinion, the party making such representations cannot be heard to say, "Their falsity might have been known by an investigation of the facts, and had the other party not been so credulous as to rely upon my representations he would not have been deceived." The rule is thus stated in *Bigelow*, *Frauds*, 67:

"Every contracting party, not in actual fault, has a right, however, to rely upon the express statement of an existing fact, the truth of which is known to the contracting party who made it, and unknown to the party to whom it is made, when such statement is the basis of a mutual engagement. He is under no obligation to investigate and verify the statement, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith."

This statement is taken almost verbatim from the opinion in *Mead v. Bunn*, 32 N. Y. 275-280, and is amply sustained by the authorities. *McClellan v. Scott*, 24 Wis. 81-87; *Hale v. Philbrick*, 42 Iowa, 81; *Faribault v. Sater*, 13 Minn. 228 (Gil. 210); *David v. Park*, 103 Mass. 501; *Savage v. Stevens*, 126 Mass. 207; *Erickson v. Fisher*, 51 Minn. 300, 53 N. W. 638; *Henderson v. Henshall*, 4 C. C. A. 357, 54 Fed. 320.

In view of the superior knowledge which the testimony tended to show was possessed by Smith as to the nature and character of the work to be done in the execution of the contract entered into, we think it was error to instruct the jury that Hingston had no right to rely upon these material representations, which, if untrue, were misleading and prejudicial.

In this connection the jury were further instructed:

"Statements of what condition of things exist beneath the water, made between people whose business it is to deal with things below the water, must be regarded as conjectures, as statements of opinion merely, unless there goes with such statements the assertion of a fact with respect to actual measurements having been made, of which report is sought to be given."

We think this statement, in view of the facts shown, is too broad and liable to mislead. The thickness of the rock to be excavated after the soundings were made was not mere matter of opinion. It was a matter of fact which Smith, there was testimony tending to show, assumed to know and state. Expressions of opinion as to things in their nature not capable of being known, as the prospects of an unopened mine and the like, may not be relied upon, but matters of fact capable of positive knowledge may be the subject of representations for which one may be held liable. In the present case the statement as to the average thickness of the rock to be excavated, under the charge given, could not be relied upon unless statements of actual measurement were made in the same connection which were false. But if the testimony disclosed that the facts as to the thickness of the rock to be excavated might be within the knowledge of Smith resulting from measurements or other means with which he was familiar, and which were unknown to Hingston, such representations may become material, although unaccompanied with specific statements as to measurements. The charge in this respect should be modified in a retrial of the case.

For error in the respects pointed out the judgment will be reversed, and a new trial awarded.

BROOKS v. CITY OF WICHITA et al.

(Circuit Court of Appeals, Eighth Circuit. March 8, 1902.)

No. 1,636.

1. DAMAGES—BREACH OF CONTRACT WITH CITY—PROVISION FOR LIQUIDATED DAMAGES.

By reason of the fact that a city in its corporate capacity does not suffer any loss or damage from the breach of a contract by which a private corporation has agreed to furnish a public utility for the benefit of the inhabitants, and that the inconvenience and loss to the public from such breach are too remote and speculative to furnish a basis for the recovery of damages, it is competent for the parties to fix the measure of damages in the contract itself, and provisions of a contract to furnish electric lights that, if they are not furnished by the time agreed, a sum deposited with the city shall be forfeited as liquidated damages, "for the reason that the actual damages * * * cannot be definitely or accurately ascertained," and that it shall not be considered as a penalty, show that the parties had knowledge of such rules of law, and clearly intended what their language expressed; and such provision will be enforced, where the lights were never furnished.

2. SAME—CONTRACT FOR LIQUIDATED DAMAGES—POWER OF EQUITY TO RELIEVE AGAINST.

A court of equity cannot, more than a court of law, relieve a party from his obligation to pay liquidated damages, where it has been determined that the damages are liquidated, and that the provision is not for a penalty.

Appeal from the Circuit Court of the United States for the District of Kansas.

On the 23d day of September, 1898, the Wichita Railway, Light & Power Company entered into a contract with the city of Wichita by which it agreed to furnish the city with 150 arc lights of the standard of 2,000 candle power, and to have the same "in operation by April 1st, 1899." The contract contained the following provisions: "And it is further agreed that in the even-

that the said first party shall fail to furnish and put in operation for the use of the said city the one hundred and fifty (150) arc lights before referred to by the first day of April, 1899, then it is agreed that the said first party is to forfeit and pay to said second party, as liquidated damages, and not as a penalty, the sum of ten thousand (10,000) dollars now on deposit with the city treasurer of the city of Wichita. It is further agreed that the ten thousand dollars (\$10,000) is to be treated as liquidated damages in case of a breach of this contract, for the reason that the actual damages sustained by the said city in case of a breach of this contract cannot be definitely or accurately estimated or computed. And it is further agreed and understood that, as a part of the consideration of this contract, the sum of ten thousand dollars (\$10,000) has been deposited with the city treasurer of the city of Wichita, as a guaranty that the said first party shall begin to furnish lights herein contracted for by the first day of April, 1899; the said sum of ten thousand dollars (\$10,000) to be treated, as hereinbefore set forth, as liquidated damages, and not as a penalty; and further conditioned to pay the second party all damages, penalties, and forfeitures that may arise under this contract in case of the first party's failure to perform its part of the same by April 1st, 1899." The \$10,000 was deposited with the city treasurer as recited in the contract. The company never furnished and put in operation the 150 arc lights, or any of them. The appellant, Francis A. Brooks brought this bill in equity against the city and the Wichita Railway, Light & Power Company to recover the \$10,000 deposited in the treasury of the city under the contract, alleging he had furnished the company the money to make the deposit, and was the equitable owner thereof; admitted the company did not put the arc lights in operation, but denied that the money was thereby forfeited to the city under the contract; and prayed "that the said city of Wichita may be ordered and decreed to account with him for so much of the money deposited with it by him in September, 1898, as is not required to meet and satisfy the damages, loss, or injury caused to or sustained by said city, if any there was, by reason of the failure of said railway, light, and power company to keep and perform the contract made by it as aforesaid." A demurrer to the bill was sustained, and the bill dismissed "without prejudice to an action at law," and the plaintiff appealed to this court.

Kos Harris, for appellant.

A. E. Helm (David Smyth and C. V. Ferguson, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Waiving any consideration of the question of equitable jurisdiction, concerning which there may be some doubt, owing to the equitable character of the plaintiff's alleged claim to the fund, we will proceed to dispose of the case on its merits.

By the express terms of the contract, if the 150 arc lights were not put up and in operation within the time limited, the company was to forfeit and pay to the city, "as liquidated damages, and not as a penalty, the sum of ten thousand dollars now on deposit with the city treasurer of the city of Wichita." Cases of penal bonds between private persons, where the damages resulting from a breach are readily ascertainable, have no application to this case. A city is a public corporation designed for local government. It is an agency of the state to assist in the civil government of the territory and people of the state embraced within its limits. It has no private interests. It is a public agency, and acts for the public; and when it contracts for the

establishment and maintenance by a private corporation of waterworks, gas or electric lights, street railroads, and other like public utilities, it does so in the performance of its public functions, and for the purpose of promoting the convenience and preserving the health of its citizens, and protecting them in their persons and property. And when a private corporation which has engaged with the city to construct and maintain one of these public utilities—as in the case at bar, to light the public streets of the city—fails to comply with its contract in that regard, the city, in its corporate capacity, does not suffer any loss or damage capable of judicial ascertainment. Nor is the inconvenience and loss suffered by the public, on whose behalf and for whose benefit and protection the contract was made, capable of ascertainment. The loss and damage sustained by the public, however great it may be, in the loss of health or life or the destruction of property, is too remote, conjectural, and speculative to be made the basis of recovery in such cases. *Clark v. Barnard*, 108 U. S. 436, 459, 460, 2 Sup. Ct. 878, 27 L. Ed. 780. For this reason it is common for municipal corporations, in making contracts of this character, to stipulate for the payment of a fixed sum as liquidated damages in case the public utility is not constructed and put in operation within the time limited by the contract. *Nilson v. Town of Jonesboro*, 57 Ark. 168, 20 S. W. 1093. This is the only method by which the city can obtain anything like an adequate compensation for the loss and damage sustained by the public by the breach of such a contract. The sum forfeited as liquidated damages goes into the treasury, and inures to the benefit of the public. The contract in this case does not stop with declaring that the sum of \$10,000 has been agreed upon between the parties as liquidated damages in case of its breach, but it contains the further and somewhat unusual provision that they have agreed upon this sum “for the reason that the actual damages sustained by the said city in case of a breach of this contract cannot be definitely or accurately ascertained or computed.” This clause of the contract evinces a knowledge on the part of the contracting parties of the rules of law to which we have adverted, and which preclude a city from recovering substantial damages in this class of cases unless they are liquidated by the agreement of the parties. It was the knowledge of this fact that led the parties to this contract to agree on the damages for its breach, and this is conclusive evidence that they intended what they expressed in their contract, namely, that the sum agreed upon was “liquidated damages, and not a penalty.” If this provision of the contract does not mean what it says, then it does not mean anything; and, when the company failed to put up and operate the arc lights within the time limited by the contract, all that remained to be done was for the city to cancel the contract, and hand back to the company the \$10,000 it had been at such pains to exact. Such an interpretation of the contract violates the clearly expressed and actual intention of the parties, is in the teeth of its plain provisions, and makes the deposit of the \$10,000 a vain and useless act.

The law on the subject of liquidated damages and penalties has recently received great consideration at the hands of the supreme court, in the case of *Association v. Moore* (Oct. term, 1901) 22 Sup. Ct. 240,

46 L. Ed. —. After a very extended review of the authorities on the subject, the court declares:

"The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not, bona fide, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed; it being the duty of the court, always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract."

And the court quotes approvingly from the case of *Bagley v. Peddie*, 16 N. Y. 469, 471, 69 Am. Dec. 713, these two rules:

"Sixth. If, independently of the stipulated damages, the damages would be wholly uncertain, and incapable of being ascertained except by conjecture, in such case the damages will be considered liquidated if they are so denominated in the instrument. Seventh. If the language of the parties evinces a clear and undoubted intention to fix the sum mentioned as liquidated damages in case of default of performance of some act agreed to be done, then the court will enforce the contract, if legal in other respects."

The case at bar falls directly within the doctrine of the supreme court in this case, and is, moreover, in principle, on all fours with the case of *Clark v. Barnard*, supra.

It is needless to say that a court of equity, no more than a court of law, can relieve a party from his obligation to pay liquidated damages. When it is once settled that the damages are liquidated, it is then settled that they are not a penalty. A court of equity can no more relieve from the obligation to pay liquidated damages than it can relieve from the obligation to pay a promissory note executed upon sufficient consideration.

The decree in the case should be that the plaintiff's bill be dismissed for want of equity, and, as thus modified, the decree of the circuit court is affirmed.

BUTLER v. MCGORRISK et al.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1902.)

No. 1,633.

MINES AND MINING—CONVEYANCE OF COAL—CONSTRUCTION OF DEED.

A deed conveyed "all the coal and the right to mine and remove the same" under lands described, and further provided that the grantee "is to mine and remove said coal by May 1, 1891, and no coal is to be mined after that date. By accepting this conveyance, the grantee agrees to mine and remove said coal by May 1, 1891." *Held*, that the legal effect of said deed, construing its provisions together, was to convey all the coal in the land which the grantee should mine and remove by the time limited, and no more.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

On the 2d day of July, 1887, Redhead and wife made a deed to E. K. Butler, the plaintiff in error and plaintiff below, which reads as follows: "Know

all men by these presents: That Wesley Redhead and Annie S. Redhead, his wife, of Polk county and state of Iowa, in consideration of the sum of thirty-five hundred dollars (\$3,500) in hand paid by E. K. Butler, of Cook county and state of Illinois, do hereby sell and convey unto the said E. K. Butler, all the coal and the right to mine and remove the same under the following described premises, situated in the county of Polk and state of Iowa, to wit: The north half ($\frac{1}{2}$) of lot twenty (20), lot twelve (12), and all that part of lot ten (10) lying south of the extension of the south line of lot two (2), all said real estate lying in the official plat of section sixteen (16), township seventy-eight (78) north, range twenty-four (24) west of the 5th P. M., Iowa. The grantor warrants that no coal has been taken from under lot twelve (12) or from under the north half of lot twenty (20), and said Butler is to mine and remove said coal by May 1, 1891, and no coal is to be mined after that date. By accepting this conveyance, the grantee agrees to mine and remove said coal by May 1, 1891. And I hereby covenant with the said E. K. Butler that I hold the coal under said premises by good and perfect title, that I have good right and lawful authority to sell and convey the said coal, that the coal thereunder is free and clear of all liens and incumbrances whatsoever. And I covenant to warrant and defend the coal so conveyed under said premises against the lawful claims of all persons whomsoever." On the same day Redhead and wife, for the consideration of \$20,000, conveyed to the Clifton Heights Land Company certain lands, among which were the lands described in the deed to Butler. This deed, after describing the lands conveyed, contains this exception: "Except all the coal being and lying under the following described land, to wit: The north half of lot twenty (20), lot twelve (12), and all of that part of lot ten (10) lying south of the extension of the south line of lot two (2), all of said real estate being and lying in the official plat of section sixteen (16), township seventy-eight (78) north, of range twenty-four (24) west of the 5th P. M., Iowa, with the privilege to remove said coal until the first day of May, 1891, per deed made to E. K. Butler, July 2, 1887." Subsequent to the 1st day of May, 1891, the defendant, the Clifton Heights Land Company, or the defendants who were its grantees, mined and removed coal underlying the lands described in the deed from Redhead and wife to Butler, and thereupon Butler brought this action to recover the value of the coal so mined and removed, claiming to be the owner of the same under the deed of Redhead and wife to himself. The defendants, in their answer, admitted they had mined and removed the coal, but that they did so subsequent to the 1st day of May, 1891, and set out the deed from Redhead and wife to Butler, and alleged that by the terms thereof the plaintiff had no right, title, or interest in the coal after that date. The plaintiff interposed a demurrer to this answer, which was overruled, and the plaintiff electing to stand on his demurrer, final judgment was rendered for the defendants, and the plaintiff sued out this writ of error.

N. T. Guernsey, for plaintiff in error.

C. C. Nourse, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The single question in this case is: Did the plaintiff, under the provisions of the deed from Redhead and wife to himself, have any right to the coal under the land after the 1st day of May, 1891? The deed conveys "all the coal and the right to mine and remove the same" under the lands described, and declares that "said Butler is to mine and remove said coal by May 1, 1891, and no coal is to be mined after that date. By accepting this conveyance, the grantee agrees to mine and remove said coal by May 1, 1891."

The language of the deed is clear and unambiguous. It can have but one meaning, either to the lay or professional mind, and that meaning is that Butler's right to mine the coal in the land, as well as the right to the coal not mined on the 1st day of May, 1891, terminated on that day. The explicit language of the deed is, "No coal is to be mined after that date." It is unreasonable to suppose that Butler bought coal which he agreed never to mine. He was guilty of no such absurdity. No court would place such a construction on the deed unless its language compelled it. The plain language of the deed refutes such a construction. The coal that he bought was, not all the coal under the land, but the coal that he should mine up to the day his right to mine the coal in the land was terminated by the terms of the deed. The right to the coal and the right to mine it are, by the terms of the deed, indissolubly linked together, and expired together. The legal effect of the deed, when its several clauses are taken and construed together, as they must be, was to convey to Butler all the coal in the land which he saw proper to mine and remove up to the 1st day of May, 1891, and no more. The right to mine and remove the coal is the very substance of this contract. A limitation upon that right is necessarily a limitation upon the coal conveyed, for the coal conveyed is of no use or utility to the purchaser without the right to mine and remove, and there can be no implied right to mine and remove the coal where the right is express and the limitation is expressly put upon the right. *Barring. & A. Mines*, p. 26; *Baker v. Hart*, 123 N. Y. 470, 25 N. E. 948, 12 L. R. A. 60; *Austin v. Mining Co.*, 72 Mo. 541, 37 Am. Rep. 446; *Knight v. Iron Co.*, 47 Ind. 105, 17 Am. Rep. 692; *Perkins v. Stockwell*, 131 Mass. 529; *Pease v. Gibson*, 6 Greenl. 81; *White v. Foster*, 102 Mass. 375. This construction gives effect to the obvious intention of the parties to the deed. No technical rule of law or construction can be admitted to subvert this fundamental and paramount rule.

The judgment of the circuit court is affirmed.

WHITWORTH v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1902.)

No. 1,631

1. CRIMINAL LAW—JURISDICTION OF CIRCUIT COURT OF APPEALS—DISCRETIONARY ORDER AFTER JUDGMENT.

A circuit court of appeals has no jurisdiction to review or reverse the order of a district court in a criminal case denying a motion to set aside a judgment and to permit a defendant to withdraw his plea of guilty, where this motion presents no question of the jurisdiction or right of the district court to grant the motion, because such an order is not a final decision, and because such a motion does not present a question of law, but, like a motion for a new trial, is addressed to the discretion of the trial court.

2. SAME—JUDGMENTS FOR EXCESSIVE PENALTIES.

In the national courts a judgment in a criminal case must conform strictly to the act of congress which authorizes it. Any departure

from the statute in the extent or character of the punishment adjudged is a fatal error.

2. SAME—JUDGMENTS FOR COSTS.

Section 974 of the Revised Statutes empowers a federal court to award that the defendant shall pay the costs of the prosecution when he is convicted of an offense not capital.

3. SAME—POWER OF COURTS OF APPEALS.

Where error is discovered in the proceedings in a criminal case properly presented to a circuit court of appeals for review, it is empowered to enter such judgment and to impose such sentence as the law prescribes, or to reverse the judgment, and direct the court below to take such further proceedings as the justice of the case may require.

(Syllabus by the Court.)

In Error to the District Court of the United States for the Eastern District of Missouri.

This writ of error challenges the judgment and sentence of the plaintiff in error upon an indictment found in the district court for the Eastern district of Missouri on November 9, 1900. The indictment contained two counts. The first charged the embezzlement of \$236.06 of the money-order funds of the United States, under section 4046 of the Revised Statutes, and the second charged the embezzlement of \$16.96, under Act March 3, 1875 (18 Stat. 479, c. 144). The defendant, Whitworth, pleaded not guilty, and upon a trial the jury disagreed. Afterwards, and on May 10, 1901, he withdrew his plea of not guilty, and entered a plea of guilty, and thereupon the court sentenced him upon the first count to pay a fine of \$236.06 and the costs of the prosecution of the cause, to stand committed until the fine and costs were paid, and to be confined in the penitentiary for three years, and on the second count of the indictment to be confined in the penitentiary at hard labor for one year and one day. On May 22, 1901, Whitworth made a motion to set aside this judgment against him, to withdraw his plea of guilty, and for a new trial, because he was induced to withdraw his plea of not guilty and to enter that of guilty by the promise of a post-office inspector, who was preparing the evidence for the prosecution, that, if he would do so, his sentence would not be more severe than a fine of \$50. This motion was denied, and the judgment still stands.

Charles H. Brock (Simon S. Bass, on the brief), for plaintiff in error.

Edward A. Rozier, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The motion to set aside the judgment and to permit the defendant to withdraw his plea of guilty because he had been induced to enter it by the promise of the inspector that he should not suffer a severe sentence was supported and opposed by affidavits. It was properly presented to the district court at the same term at which the judgment was rendered. It was in the nature of the old writ of error coram nobis to correct a mistake of fact, and the trial court had jurisdiction to hear and determine it. But its decision of this motion is not reviewable in this court for two reasons. In the first place, it is only the final judgments or decisions of the district courts in criminal cases that the act of congress empowers the circuit courts of appeals to review (Act March 3, 1891; 26 Stat.

828, c. 517, § 6), and the only final decision or judgment in this case was the judgment which imposed the sentence upon the defendant. The order denying his subsequent motion was not a final decision or judgment. He may renew it at any time. In the second place, the authority of the courts of appeals to review the acts of the district courts in criminal cases is limited to the power to reverse or modify their judgments for errors of law. In criminal cases a circuit court of appeals is a court for the correction of errors of law exclusively, and the denial of the motion to set aside the judgment was not an error of law, whether it was right or wrong. The motion was addressed to the judicial discretion of the court below. There was no question of its jurisdiction, no question of its right to grant or refuse the motion, raised or involved in the hearing or decision of the motion. The only question presented was whether or not, in the exercise of a wise discretion, the motion ought to be granted. A perusal of the affidavits used upon the hearing shows that the district court committed no abuse of this discretion in denying the motion, and the result is that this court has no authority to review or reverse its order. A circuit court of appeals has no jurisdiction to review or reverse the order of a district court in a criminal case denying a motion to set aside a judgment and to permit a defendant to withdraw his plea of guilty, which presents no question of the jurisdiction or right of that court to grant the motion, because such an order is not a final decision, and because such a motion does not present a question of law, but is, like a motion for a new trial, addressed to the discretion of the trial court. *Walden v. Craig*, 9 Wheat. 576, 6 L. Ed. 164; *Pickett's Heirs v. Legerwood*, 7 Pet. 142, 149, 8 L. Ed. 638.

The penalty prescribed by section 4046, Rev. St., for the commission of the crime charged in the first count of the indictment was that the culprit should "be imprisoned for not less than six months nor more than ten years, and be fined in a sum equal to the amount embezzled." The judgment against the defendant for this offense was that he should be imprisoned for three years; that he should pay a fine equal to the amount embezzled, and also the cost of the prosecution of this cause; and that he should stand committed until the fine and costs were paid. This judgment was erroneous. The statutes gave to the court below no power to add to the fine prescribed by the act of congress the cost of the prosecution of the case. In many instances, where, as in the case at bar, the amount embezzled was small, the costs would far exceed the amount of the fine fixed by the law. In the national courts a judgment in a criminal case must conform strictly to the act of congress which authorizes it. Any departure from the statute in the extent or character of the punishment adjudged constitutes an error which is fatal to the judgment. In *re Graham*, 138 U. S. 461, 463, 11 Sup. Ct. 363, 34 L. Ed. 1051; In *re Bonner*, 151 U. S. 242, 257, 14 Sup. Ct. 323, 38 L. Ed. 149; *Harman v. U. S. (C. C.)* 50 Fed. 921, 922; In *re Johnson (C. C.)* 46 Fed. 477, 481; In *re Pidgeon (C. C.)* 57 Fed. 200, 201; In *re Christian (C. C.)* 82 Fed.

199, 201. The result is that, while there was no error in the receipt and acceptance of the defendant's plea of guilty, the judgment rendered thereon was not warranted by the law.

A single question remains, and it is whether the judgment shall be modified by this court and affirmed, or reversed and the case remanded to the court below, with instructions to impose a sentence in accordance with the provisions of the statute. Where error is discovered in the proceedings in a criminal case properly presented to a circuit court of appeals for review, it is empowered to enter such judgment and to impose such sentence as the law prescribes, or to reverse the judgment, and direct the court below to take such further proceedings as the justice of the case may require. Act Sept. 24, 1789 (1 Stat. 73, 85, c. 20, §§ 24, 25); Act June 1, 1872 (17 Stat. 196, c. 255, § 2); Act March 3, 1879 (20 Stat. 354, c. 176, § 3); Act Feb. 6, 1889 (25 Stat. 655, c. 113, § 6); Act March 3, 1891 (26 Stat. 826, c. 517, § 11); Rev. St. § 701; *Ballew v. U. S.*, 160 U. S. 187, 201, 202, 16 Sup. Ct. 263, 40 L. Ed. 388; *Haynes v. U. S.*, 42 C. C. A. 34, 37, 101 Fed. 817, 820; *Gardes v. U. S.*, 30 C. C. A. 596, 87 Fed. 172; *Murphy v. Com.*, 177 U. S. 155, 20 Sup. Ct. 639, 44 L. Ed. 711; *Beale v. Com.*, 25 Pa. 11. This case was once tried in the court below before a jury, which disagreed. The judge who conducted that trial necessarily has a knowledge of the circumstances surrounding and the nature of the offenses of which the defendant is guilty, which this court, in the absence of the evidence there produced and of an acquaintance with the demeanor and character of the defendant, cannot acquire. Counsel for the defendant insist that the sentence below, which was imposed by another judge in the absence of the district judge who presided at the trial, was severe; and in view of the disagreement of the jury and of the small amount of money appropriated we are by no means confident that they are mistaken here. In view of these facts, the wiser course seems to be to remand the case to the court below, with directions to that court to impose a just sentence.

The judgment below will accordingly be reversed, and the case will be remanded to the district court forthwith, with directions to enter such a judgment and impose such a sentence upon the plea of guilty already interposed as, under all the circumstances, the justice of the case requires, and the acts of congress authorize; and it is so ordered.

Since the above opinion was announced, the attention of the court has been called for the first time to section 974 of the Revised Statutes, which provides:

"When judgment is rendered against a defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offense not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution."

This statute undoubtedly empowered the court below to adjudge that the defendant, Whitworth, should pay the costs of the prose-

cution, and, if this provision of the acts of congress had been called to our attention, the judgment below would not have been reversed on account of the imposition of the costs. Meanwhile the case has been remitted to the court below, and the defendant has probably been re-sentenced pursuant to our direction. No motion for a rehearing has been made, and no injustice has resulted from our decision, because the conviction was not disturbed. The former sentence was very severe, and the presumption is that a just sentence has been imposed since our mandate issued. For these reasons the judgment will be allowed to stand, notwithstanding the fact that section 974 undoubtedly empowers the trial judge to award that the defendant shall pay the costs of the prosecution when he is convicted of any offense not capital.

THAYER, Circuit Judge. I concur in the foregoing.

GARDNER v. LAKE.

(Circuit Court of Appeals, Eighth Circuit. March 2, 1902.)

No. 1,623.

APPEAL—REVIEW—ACTION TRIED TO COURT.

Where an action at law is tried by stipulation to the court, which makes only a general finding for plaintiff, where no exceptions were taken to any ruling, there is no bill of exceptions, and the complaint states a cause of action, there is nothing which can be reviewed on a writ of error.

In Error to the Circuit Court of the United States for the District of South Dakota.

Frawley & Laffey, for plaintiff in error.

Edwin Van Cise and James W. Fowler, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. By agreement of the parties in writing filed with the clerk, this action was tried by the court. The court's finding was general in favor of the plaintiff, and judgment was rendered accordingly. No exceptions were taken during the trial to the admission or rejection of evidence or to any other ruling of the court, the record does not contain the evidence, there is no bill of exceptions, and the complaint states a good cause of action. On this state of the record, we cannot consider the errors assigned. The presumption is that the judgment of the circuit court was right, and it is accordingly affirmed.

THE ELIZA LINES.

(Circuit Court of Appeals, First Circuit. February 12, 1902.)

Nos. 363-371.

1. SHIPPING—CONTRACT OF AFFREIGHTMENT—TERMINATION BY ABANDONMENT OF SHIP.

The involuntary abandonment of a vessel by her master and crew under stress of weather, without any actual intention to renounce the contract of affreightment between the ship and cargo owners, does not terminate such contract, but on the bringing of the ship into port by salvors in a condition to resume her voyage without unreasonable delay the master is entitled within a reasonable time to reclaim the vessel and cargo, and on indemnity to the salvors to take the cargo to the stipulated port of destination.

2. SAME—INTERRUPTION OF VOYAGE BY CARGO OWNER—DAMAGES RECOVERABLE.

Where a vessel, abandoned at sea under circumstances which rendered such abandonment excusable, so that it did not operate to terminate the contract of affreightment, is brought into port by salvors, but by the action of the cargo owners the resumption of the voyage is prevented, the shipowner is entitled to be compensated for his loss of freight on principles of equity; but under such principles his damages cannot go beyond compensation, and he is not entitled to recover the gross freight he would have earned under the contract, but only the estimated net freight, and from that should be deducted the net amount the ship earned, or should reasonably have earned, during the time it would have taken her to complete the voyage.

3. ADMIRALTY—OBJECTIONS TO COMPUTATION BY COMMISSIONER—WAIVER.

Practice on a hearing before a commissioner in admiralty is analogous to that before a master in chancery, and objections to computations made by the commissioner should be taken by exception to his report, and, if not so taken, or at least urged on the hearing before the court on such report, they will be treated as waived, and will not be considered when raised for the first time by assignments of error in the appellate court.

4. SAME—PRACTICE—CONSOLIDATION OF CAUSES.

Where several proceedings have been instituted in a district and a circuit court, growing out of a disaster at sea, against the ship and cargo, to recover for salvage services, by the cargo owner to obtain possession of the cargo, and also by the master to subject the cargo to the payment of freight and general average, it is within the power of the circuit court thus having acquired jurisdiction of the subject-matter and the parties to consolidate the several suits, and determine and adjust the rights of all parties.

5. SHIPPING—ADJUSTMENT BETWEEN VESSEL AND CARGO—VALUATION OF CARGO.

Where the cargo of a vessel has been sold by order of the court in a port to which it was brought by salvors, in proceedings regularly instituted by the owners to recover possession, the proceeds of the sale may properly be taken as its value for the purpose of making adjustment between the several parties in interest, although the proceeding by the cargo owners was unwarranted, and the cargo was sold for less than its actual value.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Lewis S. Dabney and Frederic Cunningham, for Henry P. Booth and Bradford Darrach and others.

Edward S. Dodge, for Catharine T. Black and Banque de Genes.

James A. Lowell (John Lowell, on the brief), for Hans Andreassen.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

ALDRICH, District Judge. We have taken time to carefully examine the cases consolidated under the title of "The Eliza Lines, Her Cargo and Freight," and our conclusion is that the circuit court, after a thorough and exhaustive examination of the details involved in the situation, and a comprehensive consideration of the general principles of law which should govern the disposition of the several cases, disposed of them without substantial error.

A full narrative of the facts, and a sufficiently comprehensive history of the various proceedings grouped under the title of "The Eliza Lines," will be found in the two opinions of the circuit court, and by referring thereto it becomes unnecessary for us to reiterate. The *Eliza Lines*, 61 Fed. 308; *Id.*, 102 Fed. 184.

We do not feel called upon to discuss, and we do not feel that justice requires that we should discuss, seriatim, the 80 or more assignments of error. The substantive rights of the various parties are principally involved in the question whether the involuntary abandonment of the vessel at sea, under the circumstances pointed out, operated to terminate the contract of affreightment, or whether, under principles governing in the admiralty law, the master of the vessel was entitled, within a reasonable time after the vessel was brought into port, to reclaim the cargo, after discharging the liens and claims incident to its recovery. The solution of this question either way would render it unnecessary to examine many of the assignments of error set out in the record.

When these cases were brought to the circuit court, the cargo had been sold, and that court was confronted with the duty of dealing with the situation as presented,—of making ascertainment, adjusting the interests and liabilities of the various parties, and distributing the proceeds according to equity, under the guidance of such general principles of admiralty law as were applicable to the situation as it then existed; and after finding the facts relative to the disaster at sea, and the efforts of the master to reclaim the vessel and her cargo after arrival in port, and before the sale of the cargo, the learned judge proceeded to an examination of the substantial question in the case, and the one upon which the rights of the parties largely depended, and, as a result, concluded that the involuntary abandonment at sea, under the circumstances, did not terminate the contract of affreightment, and that the master should have been treated as entitled to proceed with the cargo upon proper stipulation. This result was reached after a most careful and painstaking examination of the English and American cases, and upon a line of reasoning which makes it clear that any other rule than the one adopted would be an unjust rule as applied to a situation like the one presented. The *Eliza Lines* (C. C.) 61 Fed. 308; *Id.*, 102 Fed. 184. It is not altogether clear that the English authorities establish the proposition that the owners of a cargo may, under an involuntary abandonment at sea, like the one in question, and in the absence of an actual

intention on the part of the shipowner to abandon the vessel, treat the contract of affreightment as absolutely at an end, and proceed to a sale of the cargo, regardless of the prompt and reasonable efforts of the master to regain possession, regardless of the strong equity created by an actual earning of a large part of the freight covered by the contract, and regardless of the question whether the cargo is perishable or otherwise. If such a rule is deducible from the English authorities, it is abundantly demonstrated by the reasoning of Judge Putnam in the circuit court to be contrary to a natural sense of justice, and therefore one which we should not feel bound to follow in the absence of a supreme court decision to that effect; and none such is suggested.

It is apparent that the abandonment of the vessel was not voluntary, and that there was no actual renunciation of the contract by the shipowners; neither was there, in that respect, any actual intention, one way or the other, involved in the abandonment. It is probably true that when, under stress of weather and circumstances, the master and crew were taken from her deck, they acted upon the idea that she was lost; but there was no wrongful intention, and probably no actual thought one way or the other upon either the question of the recovery of the vessel or the abandonment of property rights. Under such circumstances the vessel was picked up by others, and, without any substantial change in her condition or that of her cargo, was brought into the port of Boston, and the master made prompt and reasonable effort to regain possession of the property, which temporarily, but without his fault, had been put out of his control. The shipowner, in no sense, from the beginning of the voyage from Pensacola to the time he asserted the right of repossession at Boston, had renounced the contract between himself and the cargo owners. He had not agreed that the contract should be treated as off. No act of the cargo owners contributed to the force which brought the vessel under control and into the port of Boston, and it is only a rule of plain and simple justice that, upon indemnity to the salvors and a proper stipulation, the master, under such circumstances, should be permitted to take charge of his vessel, and to carry its unperishable cargo to the stipulated port of destination.

The *Arno*, 8 Asp. 5, and other English cases, make the question turn largely upon the question of intention; and in *The Arno*, as well as in the American case *The Elizabeth and Jane*, 15 Fed. Cas. 478 (No. 8,321), the shipowner had made no effort nor shown any intention to reclaim the property at the time the cargo owners interposed. We are not dealing here with a situation where the carrier does not choose to stipulate, or where no intention is shown, nor reasonable effort made, to reclaim the property; and it is therefore unnecessary to examine into such a situation, or state any rule with respect to the rights and obligations of the parties under such circumstances. After the vessel and cargo in question were brought into port, the shipowner speedily got possession of his vessel, and made prompt and reasonable effort to regain possession of the cargo, and to discharge the obligations to the salvors, and go on with his voyage.

The just doctrine enunciated by Judge Putnam in *The Eliza Lines* has found its place in *Carv. Car. Sea* (3d Ed.) §§ 308, 373b, 445, 554, 561, 651. The rigid rule of *The Kathleen*, L. R. 4 Adm. & Ecc. 269, though the cargo was perishable, was strenuously assailed by counsel in the later case of *The Cito*, 7 Prob. Div. 5, and, while some features of the *Kathleen* were sustained, the appellate court said (page 9):

"We do not decide what would have been the result if, after the ship had been brought in, as it was, by the salvors, and before the cargo owners had come and exercised their right to the cargo, the shipowner had given bail for the ship and the cargo, and had carried the cargo on."

That at least amounts to a query as to the application of the doctrine of *The Kathleen* to a case like the one at bar. In *The Leptir*, 5 Asp. 411, the doctrine of *The Cito* was questioned by the court, for it is there said, at page 412, "I do not intend to carry *The Cito* a step farther than it has gone;" and, under the circumstances of that case, the owner of the cargo was held liable for the freight. In referring to the rule of *The Kathleen* and *The Cito*, it is observed in *Abb. Merch. Ships* (13th Ed.) 456, that "the reasonableness of this decision is not clear," and in *Wendt*, *Mar. Leg.* (3d Ed.) 627, 629, the rule is assailed with vigor by the author, who, upon forcible reasoning, —which involves the idea that the rule gives the cargo owner full option to take advantage of common misfortune for the purpose of evading a contract entered into by him, which, according to the law of every civilized country, holds good until both parties to it, of their own free will, agree that it shall not be carried on, and that an involuntary abandonment, or the action of the crew in leaving a vessel to save their lives, is not an expression of an agreement on the part of the owners of the vessel to cancel or abandon the contract,—proceeds to declare the rule as one "opposed to every principle of law and justice; * * * a doctrine utterly opposed to common sense."

We must confess our inability to contend against the idea expressed by this author that a rule which enables the cargo owner to take advantage of such misfortune of the shipowner is in violation of plain principles of law, and contrary to justice; and we assume that the necessity for this harsh rule in respect to derelict property on the ocean has ceased to exist. The spirit of modern law and present conditions of civilization will justify a closer approximation to a rule of justice than the rule which, on the forced theory of renunciation, though in fact the abandonment was involuntary, deprived the carrier of compensation for the carrying benefit bestowed upon property put out of his possession without his fault, even though, upon recovery, the carrier made prompt and reasonable effort to discharge salvage claims and regain possession of the ship and cargo.

We think it is unnecessary to deal further with this question, and prefer to leave this branch of the case upon the critical analysis and the careful reasoning of the circuit court.

Now, what was the effect of the sale of the cargo under order of

court upon the rights of the various parties? It is sufficient for the purposes of this case to say that under the circumstances disclosed by the record the proceedings in the district court and the sale of the cargo by order of that court did not determine and establish the ultimate rights of the parties consequent upon the alleged abandonment of the ship and cargo at sea.

The circuit court, having determined these two questions according to views which we sustain, proceeded, under the general principles of the admiralty law, which, in a sense, adjusts itself to the necessities and contingencies of maritime affairs, to ascertain the rights and interests of the various parties, and to give directions for determining general average and net freight under the peculiar circumstances of these particular cases.

In view of this we are confronted by the claim that, as the master was without fault, and had made prompt and reasonable effort to regain possession of the vessel and cargo when the vessel was brought to the port of Boston, and was entitled, upon proper stipulation, to take possession of the vessel and cargo, and proceed to the port of destination, which right was denied him, he should be accorded gross freight, rather than the net freight awarded by the circuit court.

It must be borne in mind in this connection that the circuit court was not dealing with the question whether the shipowner should then be permitted to complete the voyage. The cargo had been sold by order of the district court, and, although the breaking up of the voyage by the cargo owners was not justifiable under the circumstances, the only thing the circuit court could do was to determine what the shipowner should receive in damages by way of indemnity for being kept out of his rights. Should he, therefore, be accorded gross freight, or should there be deducted from the gross freight what it would cost to complete the voyage, and what the vessel ought to earn in the time which would necessarily be occupied in carrying the voyage forward to the port of destination? The latter view would seem to be fair, because it gives full indemnity. Gross freight would seem to be unfair, because it would give more than indemnity. It would give the shipowner the contract price, without regard to the fact that it would have cost him something to reload the cargo, after making the necessary repairs, and continue the voyage. Considerations of equity which relieve the shipowner who, without fault, has been forced from the deck of his vessel by the perils of the sea, from the rigid rule of absolutism which denies him the freight actually earned, would deny the shipowner a rule of absolutism which would give him a larger measure of freight than the vessel was equitably entitled to receive. The spirit of equity which relieves a party upon the ground of misfortune from the hardship of a rigid rule consequent upon abandonment at sea would be offended by a rule which would accord to the party relieved a measure of damages beyond that which he has sustained or what is equitable. The voyage was temporarily interrupted by the perils of the sea, and permanently prevented by the fault of the cargo owners, and the shipowner was accorded freight in the nature of damages, not by virtue of the strict

terms of the unexecuted contract, but upon grounds of equity because nonperformance was excusable, and notwithstanding the fact that the contract was unexecuted. The right to reclaim the ship and cargo after abandonment by discharging salvage claims, acting promptly and with reasonable diligence, though further performance of the contract is prevented by the cargo owners, does not necessarily restore the shipowner to a position where he may insist upon recovery according to the strict terms of the contract, but to a position where he may receive what he is equitably entitled to for freight already earned, and what equity would accord to the vessel for the remainder of the voyage. It is because of equitable considerations that he is restored to any right of recovery after his property has remained derelict upon the open sea, and therefore his measure of damages should be an equitable measure. This manifestly would not be gross freight, for, as said, the voyage could not be taken up and continued without the burden of incidental and necessary expense, and, if this burden is not sustained, full freight should not become the measure of recoverable damages; and the further suggestion is susceptible of proof in a given case that a ship might and should earn something in the time which would necessarily be occupied in carrying freight forward to the port of destination. As observed by the circuit court, if such beneficial results to the shipowner were not taken into consideration, he would be more than indemnified; and an award of damages based upon full affreightment would operate to impose a penalty upon the cargo owners. Such would not be an equitable rule.

When the shipowner, with his crew, was on the way to Halifax, and the disabled vessel, with her cargo, was adrift in midocean, control was lost, not through renunciation, but through disaster. Control had been wrested by the supreme powers of the ocean, yet the right of property remained. The owner did not renounce his right of property though the right of possession was temporarily gone (*The Bee*, 1 Ware, 332, 339, Fed. Cas. No. 1,219); and if the unexpected should happen, and the lost property should be brought into a harbor of refuge, upon identification and discharge of such obligations as should be created in favor of strangers who found and saved it the right of possession by the shipowner would be re-established. It is in this sense that the right of the shipowner remains, and it is upon this ground that he is restored to possession upon indemnity to the independent, though unexpected, force which finds and brings under control the lost property.

Wrongful abandonment of a ship and cargo at sea, or actual renunciation of the right of possession; of course, amounts to a permanent breach of the contract of affreightment, and the right of the shipowner to be repossessed of property abandoned under force of circumstances, and which remained at large upon the open sea until brought under control and into a port of refuge by the act of strangers, results, under the elastic principles of the admiralty law, because it is repugnant to equity and justice that the right under such circumstances should be wholly and permanently lost. The right of possession being thus restored upon grounds of equity, it logically

and philosophically follows, we think, that the rule of damages should be an equitable rule, rather than an arbitrary one, through a rule of law making the strict terms of the contract as to freight the measure of recovery. Therefore the rule adopted by the circuit court in respect to the unearned part of the voyage was sufficiently favorable to the shipowner, and that court was right in holding that no damages should be recovered in excess of the net injury suffered, and in proceeding to estimate this injury by deducting from the gross freight such charges as were saved to the vessel and such amount as she was able to earn by the termination of the contract prior to the time contemplated. *Watts v. Camors*, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406; *The Gazelle*, 128 U. S. 474, 487, 9 Sup. Ct. 139, 32 L. Ed. 496.

It would seem that, under somewhat analogous conditions at law, the rule of damage is indemnity, or what the party has lost. *Bank of U. S. v. Bank of Washington*, 6 Pet. 8, 19, 8 L. Ed. 299; *Fuel Co. v. Brock*, 139 U. S. 216, 220, 11 Sup. Ct. 523, 35 L. Ed. 151.

While Ward & Co. have succeeded in pointing out certain minor errors in respect to details and to the method of computation, errors of that character may—rightfully enough, we think—be treated as harmless upon the findings of the circuit court that they were more than compensated by errors of computation in their favor. On the whole, in our opinion, the judgment is rather too favorable to Ward & Co. than otherwise; and, had one question now urged been based upon proper exceptions by the other appellants, it is probable that we should have been called upon to enhance, rather than to diminish, the judgment against Ward & Co. upon the whole case. The position taken by the interests adverse to Ward & Co. that the liability of Ward & Co. should not have been diminished by any deduction of freight's contribution to general average at least presents a serious question. It is by no means clear, however, that the preliminary opinion of the circuit court justified the commissioner's mode of computation in his first report, or that the alternative report is so clearly correct that we can now adopt it; and on the whole we think that we cannot fairly go to the merits of this question, presented here in the appellate court for the first time. The report of a commissioner stands, and should stand, in respect to exceptions, like exceptions at a jury trial, where they should be taken at a time and under circumstances where error can be easily corrected if urged, and, if not urged, should be treated as waived. But, aside from the analogy of the practice as to exceptions upon a jury trial under the eighty-third rule of practice in equity, parties have a given time in which to file exceptions to the report of a master, and, if none are presented within that time, the report stands confirmed, or, in other words, exceptions are waived. Admiralty rule 44 contemplates that proceedings before commissioners shall be under the rules which govern masters in chancery in equity proceedings; but, without regard to rule 44, it would be assumed that practice in respect to a report of a commissioner in an admiralty proceeding would be in accordance with practice in equity, unless otherwise expressly regulated by the rules of admiralty. If the parties had intended to rely

upon objections to computations by the commissioner, the objections and exceptions should have been distinctly stated upon the coming in of the report, or at least upon the hearing before the circuit court, upon the question as to its acceptance, to the end that, if errors in computation were either apparent or could be discovered, the report should be recommitted for correction. This was not done, nor was any objection or exception in this regard taken to the regulations promulgated by the circuit court under which the master was to work out his results; and, so far as the record shows, no exceptions were taken by these parties to the computation upon the hearing before the circuit court. It is true a letter was appended to the commissioner's report in which the question is suggested; but, as the point was not taken by the parties, the circuit court was warranted in viewing it as one which the parties did not desire to press. So far as we can see, this question was first raised upon the record by the assignment of errors, and such assignment in no way presented the question for the circuit court, but raised it here for the first time. We think, in all fairness to the parties, that this question should be treated as waived, because, as already said, if it had been taken upon the report of the commissioner, if found to be tenable, it could have been easily corrected by recommitment. While other parties filed various specific objections to the report, the parties now presenting this question did not file any exceptions to the report on the ground now urged, and, as a result, the cases have proceeded upon other lines for several years; and we think it would assuredly be unfair to the various interests, and to the court as well, to disturb the findings, the calculations, and the decrees by allowing this question to be raised as an original question in this court at this late day. The error is not so manifestly apparent, and injustice on the whole case is not so clear, as to require our interference with the computations in this case in respect to a question raised as this question is.

The manifold assignments of error by the different parties under the various appeals are largely constructed upon the particular theory of each party as to the rights and obligations resulting from the abandonment at sea and the subsequent salvage of vessel and cargo. Many of the alleged errors relate to matters of discretion, others to just and reasonable expedients necessitated by the peculiar and exceptional situation of these cases, others are peculiarly inconsequential, while others are frivolous. Of these minor assignments of error, many of which may be said to be subsidiary to the particular view of the different parties in respect to the substantive right involved in the main contention relative to the effect of the abandonment of the vessel at sea, and their rights and interests thereunder, we only feel called upon to say that we are not satisfied that any of the details of the course adopted by the circuit court involved error which would justify this court in reversing its action; but, on the contrary, we are satisfied that the cases were disposed of, on the whole, with substantial justice to all interests.

It only remains, therefore, to deal with the questions relating to the consolidation of the various proceedings, and to the power and duty

of the court in respect to the attitude which Darrach and Ward & Co. sustained thereto.

The rights and interests of the various parties by reason of their diverse claims in respect to the disaster at sea and in respect to the various proceedings relating thereto which were pending in the district and circuit courts were involved in the intricacies of an inextricable legal tangle, and we have no doubt of the power of the circuit court to consolidate the proceedings in question, or of the wisdom of such action. Indeed, it is difficult to see that the controversy could have otherwise been adjusted without subjecting the parties and their interests to unwarrantable expense and interminable delay. There seems to be no limit upon the power of the court, in the exercise of a sound discretion, to consolidate different cases pending in the same court and relating to the same subject-matter where justice can be administered more speedily and less expensively through such consolidation, and the duty of the court to order such consolidation would seem to be plain when no individual interests will be prejudiced, and when all interests will be beneficially subserved by thus speeding an ultimate ascertainment and establishment of the several rights.

The court having jurisdiction of the subject-matter in controversy, Ward & Co., through Bradford Darrach and others, submitted themselves to its jurisdiction, and, having thus interposed for the purpose of having their rights relative to the subject-matter ascertained and established, and having for that purpose thus voluntarily attached themselves to and interrupted the course of the proceedings between other parties, they were in for all purposes, and the court unquestionably had power not only to deal with the particular rights which Ward & Co. asserted in their own behalf, but, upon proper incidental and auxiliary proceedings, to deal with all the rights and all the consequences which sprung from or naturally and reasonably followed their interruption of the further prosecution of the voyage and from their interposition in respect to the adjustment of the various rights. Ward v. Todd, 103 U. S. 327, 26 L. Ed. 339; Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829.

It is of no consequence whether they were or were not strictly interveners or cross libelants. They were in with their libel against the cargo in rem for possession, and with their claim in the salvage suit for a delivery of the cargo upon stipulation; while Andreassen, the master, also had his libel against the cargo and the owners of it for the payment of freight and general average. The subject-matter and the parties all being thus before the court, either upon personal notice or upon notice to their proctors of record, there is no known reason why the rights should not all be ascertained and established. Such course avoids circuity of action and multiplicity of process, and the modern rule of practice not only permits it, but convenience and justice require that it should be so.

Several of the parties—perhaps all—suffered by reason of the forced sale of the cargo in a disadvantageous port, and those other than the cargo owners who have suffered by such sale urge that the award against the cargo owners should be for the true value of the cargo,

rather than the net proceeds of the sale thereof. There are strong reasons why the cargo owners should be held for the value of the property. Their interference, even under the regular forms of maritime procedure, was unwarrantable and inexcusable under the circumstances. Such interference operated to interrupt a voyage which should and would otherwise have been completed. But the claim of the cargo owners of their right to take possession of the cargo at the port of refuge and terminate the voyage was asserted through regular process, which, under the rules and practice of admiralty, threw the property into the custody of the district court; and, the sale being a public sale upon order and in an open court, we have difficulty in finding grounds upon which to hold the cargo owners for or on account of the cargo in a sum greater than the net proceeds of the sale, which was the basis adopted by the circuit court.

The rights of the parties were in litigation, and the sale of the cargo was under the forms of law and upon the ascertained necessity of protecting the property, not because it was perishable, not because it was deteriorating in value, but in the sense of saving the absorbing expense incident to custody, and in the supposed interest of whatever party should establish the right to realize from it. And, though the order of sale did not settle the ultimate and substantive rights of the parties, and though it worked an injustice, we do not see our way clear, under the circumstances, to hold the parties whose proceeding precipitated the sale liable in respect to the cargo beyond the proceeds realized from the public sale under the forms of law and upon the order of the district court, in whose custody the property then was.

On the whole, our conclusion is that the decree of the circuit court should be affirmed.

The decree of the circuit court is affirmed, without costs in this court to either of the parties.

AMBS v. ATCHISON, T. & S. F. RY. CO.

(Circuit Court, E. D. Missouri, E. D. April 8, 1899.)

No. 4,178.

1. **MALICIOUS PROSECUTION—PROBABLE CAUSE—MALICE—BURDEN OF PROOF.**
In an action for malicious prosecution, plaintiff has the burden of showing both that defendant did not have probable cause and that it acted with malice.
2. **SAME—"PROBABLE CAUSE"—DEFINITION.**
"Probable cause" means reasonable cause to believe that plaintiff was guilty, based on facts and circumstances sufficient in themselves to induce such belief in an ordinary person.
3. **SAME—EFFECT OF MALICE ALONE.**
If defendant had probable cause, it would make no difference that it acted with malice.
4. **SAME—PRESUMPTION OF MALICE.**
Malice may be inferred from the absence of probable cause.
5. **SAME—COMMITMENT OF PLAINTIFF BEFORE MAGISTRATE—EFFECT.**
A judgment of a magistrate, finding that there was probable cause for believing plaintiff guilty, and binding him over to await the action of the grand jury, constitutes prima facie evidence of probable cause.
6. **SAME—IGNORING OF BILL OF GRAND JURY—EFFECT.**
The ignoring by the grand jury of the bill against plaintiff constitutes prima facie evidence of want of probable cause.
7. **SAME—QUESTION FOR JURY.**
The question as to which of the two prima facie cases has the greater weight is for the jury.
8. **SAME—ADVICE OF PROSECUTING ATTORNEY—EFFECT.**
If defendant's agents and attorney before making the complaint against plaintiff made a full and fair disclosure of all the facts in their possession, and which they could reasonably obtain, to the prosecuting attorney, and were advised by him that a crime had been committed, and that there was probable cause to believe defendant guilty, and if the prosecuting attorney himself drew the complaint, plaintiff would have probable cause, and would not be liable for malicious prosecution.
9. **SAME—PROSECUTION UNDER INAPPLICABLE STATUTE.**
The fact that the statute under which plaintiff was presented did not afford an authority for his punishment would not alone render defendant liable for malicious prosecution.
10. **SAME—MEASURE OF DAMAGES.**
In estimating the damages caused by a malicious prosecution, the jury may consider loss of time and expenditure of money by accused in his defense, and any injury to his reputation, character, standing, or feelings directly occasioned by the other party's wrong.

Chester H. Krum and A. G. Hirsch, for plaintiff.

Gardiner Lathrop, Adiel Sherwood, and S. W. Moore, for defendant.

ADAMS, District Judge (charging jury). You have been brought here, as an important and valuable auxiliary of this court, to aid it in the administration of justice, and you, as well as the judge of this court, have taken an oath, to administer justice with an even hand, to the rich and to the poor, to the high and to the low, alike.

Now, in entering upon the consideration of your verdict in this case, you must at the outset recall your duty as well as the oath you have taken, and at once compose yourself to treat this case, so far as the right of recovery is concerned, as you would if the case were between

two individuals, irrespective altogether of the amount of wealth of one or the poverty of the other. So much by way of preface.

And now I will give you, as clearly and distinctly as I am able, the legal principles, as well as the issues of fact, which are involved in this trial. This is a suit, as you are already advised, instituted by the plaintiff to recover damages for an alleged malicious prosecution of himself by the defendant. The undisputed facts, as shown by the proof in the case, show that in January, 1898, the defendant railway company, after having discovered that a considerable number of its railroad coupon tickets had been so altered from what they were reported to the company as having been sold as to entitle the holder to transportation over a much greater distance than that for which payment had been made to the company, and suspecting this state of facts, and having been so informed thereof, the defendant caused complaint to be lodged before an examining magistrate at St. Joseph, Mo., charging the plaintiff in this case with having so altered said tickets and sold the same, and thereby with having violated the provisions of section 3573 of the Revised Statutes of the state of Missouri. This section reads as follows:

"If any person in the employ of any railroad company, whether such company be incorporated by this or any other state or the United States, shall fraudulently neglect to cancel or return to the proper officer, agent or company any coupon or other railroad ticket with intent to permit the same to be used in fraud or to the injury of any such company, or if any person shall embezzle any such coupon or other railroad ticket, or shall fraudulently sell or put in circulation any such ticket, the person so offending shall upon conviction thereof, be punished by imprisonment in the penitentiary not exceeding five years, or by a fine of not more than one hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

The complaint, as made against the plaintiff in this case, is a charge of having sold and put in circulation a certain railroad ticket, exactly in the language of this section 3573, and I call attention to this at the present time, on account of the argument just made with respect to the meaning of this particular action of the defendant company. It is stated by counsel that the charge was the altering of a railroad ticket only. The charge as made by the agent of the defendant company was not that. The charge found in the affidavit filed before the magistrate is simply this: that the defendant feloniously and fraudulently did sell and put in circulation a certain railroad ticket. It makes no difference, for the purposes of this case, what the justice of the peace afterward added in issuing the warrant. The charge made by the agent was in the language of the statute. Whatever may have been the subsequent action of the magistrate is immaterial for your present inquiry. You are now considering what the defendant did and what its responsibility is therefor. It appears, further, gentlemen, from the proof, that the plaintiff was arrested upon a *capias* issued upon the complaint so made by one of the defendant's agents before this magistrate; and after some intermediate proceedings in St. Louis, where the arrest was first made, the plaintiff was brought before the magistrate for examination, with a view and for the purpose of ascertaining whether an offense had been committed, and whether there was such

reasonable ground to believe that the plaintiff had committed the offense as warranted holding the plaintiff to await the action of the next coming grand jury. It further appears that a full hearing was had before this magistrate, at which the plaintiff, as well as the state, was represented by counsel, and that as a result of this examination it was adjudged by the magistrate that an offense had in fact been committed, and that there was reasonable ground to believe that the plaintiff was guilty of the offense as charged, and, as a necessary result of such finding by the magistrate, the plaintiff was bound over to await the action of the next grand jury. It further appears that at the next session of the grand jury of Buchanan county the case was brought to the attention of that body, but that body ignored the bill, and the plaintiff was discharged. The prosecution was thereby ended. This suit is now instituted by the plaintiff to recover damages from the defendant, alleged to have been sustained by him by reason of this proceeding.

To entitle the plaintiff to recover in this action, the burden of proof rests upon him to satisfy you by a preponderance of the evidence of two facts: First, that the defendant company, at the time of lodging the complaint against him, did not have reasonable or probable ground to believe that the plaintiff in this case was guilty; second, that the defendant instituted the charge against him with malice.

If you find from the evidence, by the measure of proof which I have already indicated,—that is, by a preponderance of the proof,—that the defendant so instituted the prosecution without reasonable or probable cause and maliciously, then the plaintiff is entitled to a verdict in this case. If, on the other hand, you find that the defendant had reasonable or probable cause to believe that the plaintiff was guilty or that the defendant did not institute the proceedings maliciously, your verdict must be for the defendant.

In determining these issues there are certain well-recognized rules of law which, when understood by you, will be of considerable aid to you, and which in reaching your conclusion it is incumbent upon you to observe: First. "Probable cause," as here used, means simply this: A reasonable ground to believe that the plaintiff was guilty, based upon facts and circumstances sufficiently strong in themselves to induce such belief in the mind of an ordinarily prudent person. Second. If you find that the defendant had such probable cause for believing the plaintiff guilty, no malice, however distinctly proved, will render the defendant liable; that is, if the defendant had probable cause for believing him guilty, it does not make any difference with how much malice it may have acted. Third. If you believe that there was no such probable cause for believing the plaintiff guilty of the offense charged, you are at liberty therefrom—that is, from the absence of reasonable or probable cause—to infer malice. In other words, "malice," as employed in the instructions which the court is now giving you, does not necessarily mean ill will, hatred, or any active expression of such emotions, but only a wrongful act done intentionally, without legal justification or excuse. Therefore it is that the intentional commencement of a criminal prosecution against one without probable cause entitles a jury to infer the requisite malice to maintain the action for malicious prosecution. Inasmuch as the hearing before the magis-

trate (now having reference to the hearing which was had before the magistrate at St. Joseph) was for the express purpose of inquiring into the existence of probable cause, and inasmuch as in this case such inquiry was made, which resulted after a full hearing on the merits, in the conclusion and judgment of the magistrate that there was such probable cause, this judgment of the magistrate constitutes in law *prima facie* evidence of such fact, namely, probable cause to believe that the plaintiff was guilty, for all purposes of this case which you are now trying. By "*prima facie* evidence," gentlemen of the jury, is meant that degree of proof which, in the absence of satisfactory rebutting proof, will justify you in concluding that the defendant had probable cause to believe the plaintiff guilty.

Again, the ignoring the bill by the grand jury of Buchanan county affords, when taken by itself, *prima facie* evidence of want of probable cause. Thus, you will observe, is created for your consideration in this case an apparent conflict in two presumptions, or what the lawyers recognize as *prima facie* cases, and the court has concluded to leave these two presumptions or *prima facie* cases to you for such consideration and weight as, under all the evidence, you in your better judgment see fit to give them, with the remark, however,—and I do not refrain from making such remark,—that it seems to the mind of the court that the conclusion reached by the magistrate, considering the legal character, scope, and significance of the proceedings before the two bodies in question, is entitled to greater consideration than the discharge by the grand jury; and this for the following reasons: The hearing before the magistrate is essentially a proceeding to determine the very issue now presented, namely, the existence or nonexistence of probable cause. It permits evidence on both sides, the appearance of counsel for the accused, the examination and cross-examination of the witnesses, and the full and unrestrained opportunity for ascertaining the truth; while, on the other hand, the proceeding before a grand jury is secret in its character,—affords no opportunity for public inspection or criticism of its work or conclusion reached. It hears evidence only on the part of the state, and has it in its power to determine whether, irrespective of the proof of probable cause, it is for the best interests of the public to present the accused for trial to a trial court. It seems to me that, on thus comparing the two proceedings, a finding of probable cause by the magistrate, with the accused and his counsel having a full opportunity to be heard in his defense, is more persuasive on the question of probable cause than the action of the grand jury, as already stated. But, whatever may be my personal views of the relative weight and significance of these two presumptions, I leave the whole determination thereof to you, as the sole judges of the facts of the case.

Again, whatever may be your conclusion as to the relative force of these presumptions taken by themselves, you may and should consider all the other facts, evidence, and circumstances surrounding the case, and any and all reasonable inferences deducible therefrom, and from them all determine whether the defendant did have reasonable ground to believe the plaintiff guilty at the time of the filing of the complaint against him before the magistrate at St. Joseph. It will be your duty

in considering this other phase of the case to take all such facts and circumstances as appear in evidence, together with any and all reasonable inferences and deductions therefrom, together with the presumptions to which I have alluded, and give to them all such weight and consideration as your better judgment dictates, and to determine from them all the primary issue, and the most important issue involved in this case, which is, as I have already stated, the issue of probable cause.

Now, gentlemen, independent of any and all presumptions arising from the action of the examining magistrate or of the grand jury, what do you think the facts of the case, as disclosed by the evidence, signify? Are they or are they not sufficient, in your mind, to have warranted a reasonably prudent person to believe the plaintiff guilty? Counsel have critically analyzed all such facts, and have called your attention to every possible phase of them, and I do not deem it necessary to comment further on them myself. If, in your opinion, they are of such character and force as to have justified a reasonably prudent and cautious person in believing the plaintiff guilty of the offense charged against him, then, entirely independent of any and all other considerations, you must conclude that the defendant had probable cause to believe the plaintiff guilty, and there can be no recovery in this case.

In addition to this, there is an entirely different phase of the case. It of course centers upon the primary issue, probable cause or want of probable cause, but it is entirely different from that which I have been considering. Inasmuch as the issue you are now trying is not whether the plaintiff was in fact guilty or not guilty of the offense with which he was charged, but is simply the question whether the defendant when instituting the prosecution against the plaintiff acted with the honest belief (that is all) that he was guilty, and upon facts and circumstances which afforded to the defendant a reasonable ground for such belief, it becomes necessary for you to consider the evidence relating to the submission of this matter to counsel, and the advice of counsel with respect to the defendant's duty in the premises.

The laws of the land, gentlemen, should never be so construed or administered by the courts as to discourage or deter our citizens, through fear of civil actions against them, from bringing offenders against the law to the bar of the courts for trial. Accordingly, the law has wisely declared that if any person or persons, having reason to suspect any one to be guilty of a violation of the law, communicates all the facts known to him, or which in the exercise of reasonable care he could have ascertained, to the duly constituted public official, charged with the duty of prosecuting offenders, and if such official, possessed of such knowledge, advise that an offense has been committed, and that there is reasonable ground for belief that the person suspected has committed the offense, such person or persons may, with perfect impunity, put the machinery of the law in motion to secure that one's trial before an impartial tribunal, and not only may they do it with impunity, but as good citizens, solicitous for the public welfare, it becomes, in the opinion of the court, their bounden duty to do so. The court, therefore, charges you that, if you believe from the evidence in this case that before the making of the complaint against the

plaintiff by the defendant's agent Burdge, he and other agents of the defendant, including the defendant's local attorneys, made a full and fair disclosure of the facts in their possession, or which they might by the exercise of reasonable diligence have had in possession, relating to the alleged fraudulent disposition of its railroad tickets and plaintiff's connection therewith, to W. B. Norris, prosecuting attorney of Buchanan county, and that thereupon said Norris advised that a crime had been committed, and that there was probable cause to believe the plaintiff guilty thereof, and that said prosecuting attorney then himself drew the complaint sworn to by the defendant's agent Burdge, upon which the warrant was issued under which the plaintiff was arrested, the jury are instructed that such facts constitute probable cause for the defendant's action in making such complaint, and the verdict must be for the defendant.

So much has been said, gentlemen of the jury, by counsel with respect to the true meaning of section 3573 of the Revised Statutes of Missouri, which I have already read to you, that the court deems it proper to call your attention to its true relation and bearing on this case. It probably is true, and the court so declares, that this section of the law to which I have referred did not afford an authority for the punishment of the plaintiff in this case for the offense with which he was charged; and if the defendant's agents knew, or in the exercise of reasonable caution should have known, of such infirmity, and notwithstanding such knowledge proceeded to make the complaint in question and inaugurated the proceedings against the plaintiff, you would be justified in finding that they so acted without probable cause; but if, on the other hand, they did not know of the inapplicability of the law, or if by reasonable inquiry they could not have known of its inapplicability, it has no bearing on this case whatsoever. It seems to the court that the defendant's agents, not being lawyers or learned in the law, could not be reasonably required to do more than to fairly and fully submit the facts of the case to counsel of the state, and, if no such infirmity was suggested to them prior to making the affidavit in question, the defendant cannot be constructively held to any of the consequences arising from the inapplicability of the statute in question. It is oftentimes, gentlemen, as you have doubtless observed in your experience here and elsewhere, either as jurors or possibly litigants, a matter of grave difficulty and uncertainty on the part of learned counsel, and often on the part of the courts, to interpret accurately the statutes and laws of the land. Much greater is this difficulty and uncertainty when the task is undertaken by laymen or the ordinary business man, who rely upon their attorneys and upon the courts for the true interpretation of statutes. Considering what has been said in argument by counsel, it seems to me proper to caution you with respect to the legitimate scope and bearing of the act and conduct of defendant's agents in St. Louis, connected with the arrest of the plaintiff in this city. Whether their conduct was harsh or inconsiderate toward the plaintiff—as to which it is unnecessary to make observation—cannot, in and of itself, have any bearing on the issue of probable cause for instituting criminal proceedings in St. Joseph, by filing a complaint before the magistrate there. The issue of probable

cause, gentlemen, must be determined by the facts and circumstances as they existed then,—that is to say, at the time when this affidavit was made in St. Joseph, for it was then, and only then, that the defendant in this case put the machinery of the law in motion which resulted in plaintiff's prosecution; these facts and circumstances, I say, as they existed at that time, aided by the presumption arising from the action of the examining magistrate and the grand jury, which have already been considered by you in determining the issue of probable cause.

You are the sole judges, gentlemen, of the facts of this case, and whatever may be the suggestions of the court concerning them, or any of them, or of the inferences which may arise from them, you are to take such suggestions for what, in your judgment, they are worth, and give them such consideration as to you they seem entitled, but whatever directions are now given you concerning the law of this case you are to receive as conclusive directions controlling your judgment. If, on the whole case, you should conclude to find a verdict for the plaintiff, you should assess his damages in such sum as will reasonably compensate him for the loss, injury, and damage sustained by him. In arriving at this conclusion, you should consider any loss of time and expenditure of money in the defense of himself; any injury to his reputation, character, standing, or feelings directly brought about by the wrong of the defendant,—not exceeding, however, the amount claimed in the petition.

There will be two forms of verdict prepared for you,—one for the plaintiff and one for the defendant,—and they are already prepared. You can take them, and I will hear counsel on the question of exceptions.

In re TOPLIFF et al.

(District Court, D. Massachusetts. April 7, 1902.)

No. 5,346.

BANKRUPTS—PREFERENCES—SURRENDER—NET INCREASE OF INDEBTEDNESS.

Bankrupt stockbrokers four months before adjudication owed a customer \$1,550. Thereafter they were employed by him to purchase and carry stocks on a margin, receiving from him considerable sums of money, and paying to him considerable, but lesser, sums as profits on his operations. At the date of the adjudication they owed him \$6,500. *Held* that, though the relation between the broker and the customer was anomalous, no injustice was done by treating them in the case at bar as debtor and creditor, and the effect of the transactions having been to increase the net indebtedness to the customer, and presumably to increase the bankrupt's estate, the customer did not have to surrender the payments made to him within the four months to entitle him to prove his claim.

In Bankruptcy.

Walter N. Buffum, for creditor.

Edward C. Bradlee, trustee, pro se.

LOWELL, District Judge. The bankrupts were stockbrokers. The creditor who seeks to prove was their customer. Four months

before adjudication, viz., on July 2, 1901, the bankrupts owed the creditor \$1,550. Thereafter they were employed by him to purchase and carry stocks on a margin. At times he paid them considerable sums of money, and at other times they paid considerable but smaller sums to him as profits on his operations. The last of their payments to him was subsequent to the last of his payments to them. At the date of the adjudication, November 2, 1901, they owed him about \$6,500. The trustee disputes the creditor's right to prove this debt without the surrender of the alleged preferential payments. It was admitted that the bankrupts were insolvent on and after July 2d. There was no proof that the creditor knew this.

It appears to me that the case at bar is governed by *Dickson v. Wyman*, 49 C. C. A. 574, 111 Fed. 726. There the court said:

"It is beyond all reason to hold because a creditor has, in the ordinary course of business, during the four months preceding bankruptcy, received payments which, under some circumstances, might operate as a preference in some views of the law, that that fact can be held to bar the proof of his claim, when, looking at all the transactions together, they demonstrate, not only that they were without any intention to acquire any unjust preference, but also that they have increased the net indebtedness to the creditor, and correspondingly increased the bankrupt's estate. In order to avoid so unreasonable a result, we might say that all the transactions covered by the account current should be regarded as one, so that it could not be held that the effect of the payments was to enable the creditors at bar to obtain a greater percentage of their debt than any other creditor of the same class, within the meaning of paragraph a of section 60." 49 C. C. A. 577, 111 Fed. 728.

In the case at bar the transactions between June 2d and November 2d increased the net indebtedness to the creditor, and so presumably increased the bankrupt's estate. If the transactions "be regarded as one," they did not enable the creditor to obtain a greater percentage of his debt than other creditors of the same class. This is true, whether (1) the account be taken as stated in the trustee's brief, including purchases and sales of stocks, or (2) only the cash payments on the one side and on the other of the account are considered. The trustee seeks to avoid the effect of *Dickson v. Wyman* by arguing that that decision does not apply to transactions like these, but only to merchandise accounts like those there in controversy. But no material difference is pointed out between the two cases, and the language and the reasoning of the court of appeals are broad enough to cover both. The relation of stockbroker and customer is anomalous, as was pointed out by the supreme court of Massachusetts in *Chase v. City of Boston*, 62 N. E. 1059, and *Rice v. Winslow*, Id. 1057 (not yet officially reported), and by this court in *Re Swift*, 105 Fed. 493; but no injustice is here done the creditor by treating that relationship as one of debtor and creditor. If the bankrupts actually bought and sold the stocks mentioned in the account which they rendered to the creditor, then their estate was actually increased by the net result of the four months' transactions. If these purchases and sales be treated as fictitious, and if the fluctuations of the stock market be taken to fix day by day the amount due one party from the other, without regard to any actual purchase or sale of stock, then

the bankrupt's estate was increased by the excess of cash payments made by the creditor over those received by him.

The trustee further contended that only subsequent credits can be taken to balance prior preferences, and that the last payment, if made by the bankrupt, must be surrendered before the creditor's claim can be proved. Whatever may be the rule regarding "set-offs," strictly so called, as regulated by section 60c, there is no sufficient reason for this limitation upon the principle laid down in *Dickson v. Wyman*. That case was decided without regard to section 60c.

This court is well aware of the different decisions and opinions rendered by different courts regarding sections 57g and 60 of the bankrupt act. Some of these are so different as to be irreconcilable. The decision in *Pirie v. Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, authoritatively settled one question, but left others open. *Dickson v. Wyman*, which is also binding upon this court, may be in more or less disagreement with some cases decided by other federal courts. See *Mills v. Lewis*, 49 C. C. A. 131, 110 Fed. 512; *In re Teslow* (D. C.) 104 Fed. 229. In several other cases, where the facts are not stated fully in the report, the decisions may be actually in conflict with *Dickson v. Wyman*. See *In re Ft. Wayne Electric Corp.*, 39 C. C. A. 582, 99 Fed. 400; *In re Arndt* (D. C.) 104 Fed. 234; *In re Conhaim* (D. C.) 97 Fed. 923; *In re Bashline* (D. C.) 109 Fed. 965. On the other hand, *McKey v. Lee*, 45 C. C. A. 127, 105 Fed. 923, and *Peterson v. Nash* (C. C. A.) 112 Fed. 311, reach a decision like that reached in *Dickson v. Wyman*, but by different reasoning, viz., by treating section 60c as applicable to section 57g as well as to section 60b. *In re Abraham Steers Lumber Co.* (C. C. A.) 112 Fed. 406, it was held that the payment need not be surrendered, if made on a distinct and independent debt. In the argument made in the case at bar, counsel for the trustee attempted to distinguish between some of the cases just cited and *Dickson v. Wyman*, and to reconcile them accordingly; but I do not conceive it to be the duty of this court, in the interpretation of the confessedly ambiguous provisions of a recent enactment, to seek to establish a fictitious agreement between several courts by drawing fanciful distinctions between the decisions they have made. A better result will be reached by recognizing the existing disagreement, and by trying to follow loyally the course of reasoning and the fair intent of *Dickson v. Wyman*, a fully considered case decided by an appellate court which this court is bound to obey. In due time the difference of opinion between the several courts of appeals will be settled by the supreme court.

The creditor further contended that, under the provisions of section 60c, he was entitled to offset the payments made by him to the bankrupts. It has been held in several cases that the set-off given by section 60c is not applicable to section 57g. See *In re Oliver* (D. C.) 109 Fed. 784; *In re Steers Lumber Co.* (C. C. A.) 112 Fed. 406; *In re Christensen* (D. C.) 101 Fed. 802; *In re Arndt* (D. C.) 104 Fed. 234; *In re Keller* (D. C.) 109 Fed. 118; *Pirie v. Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171; *Dickson v. Wyman*, 49 C. C. A. 574, 112 Fed. 726. Other courts have held that the set-off given by section 60c is applicable to section 57g; *McKey v. Lee*,

45 C. C. A. 127, 105 Fed. 923; Peterson v. Nash (C. C. A.) 112 Fed. 311; In re Seckler (D. C.) 106 Fed. 484. Moreover, McKey v. Lee decided that, in order to be set off, the further credit given to the debtor need not be subsequent to the preference. It does not seem to have been observed that, if section 60c be inapplicable to section 57g, and be limited to section 60b, it will have scant application. Section 60b is confined to cases where the creditor has reasonable cause to believe a preference was intended. Clause "c" is confined to cases in which the debtor has acted "in good faith." How a creditor who has knowingly received a preference can afterwards give credit to the debtor in "good faith" is hard to imagine. It is not necessary to express an opinion on this point, as the decision of this case is left to rest upon Dickson v. Wyman.

Judgment of the referee reversed, and proof of claim allowed.

In re LYON.

(District Court, S. D. New York. February 7, 1902.)

BANKRUPTCY—PREFERENCES—SURRENDER.

A bankrupt on January 2d gave a check to a creditor on the A. Bank, dated January 20th, and became insolvent on the latter date. On that day the creditor deposited the check with the N. Bank, which on the following day received the money through the clearing house, and the amount was charged by the A. Bank against the bankrupt's account. *Held*, that the creditor had received a preference, though the payment was made to him through the medium of the N. Bank, and not directly, and that it would have to be surrendered before he could prove other claims.

In Bankruptcy. On appeal from order of referee expunging claim. The following is the opinion of WISE, Referee:

The verified schedules of the bankrupt disclose the fact that the indebtedness of the company amounts to \$10,239.82, and the assets of the company, according to said schedules, amount to \$4,174.27. The claims proved before the referee amount to \$14,895.81. It is also conceded that the sale of the bulk of the assets, consisting of the stock in trade of the bankrupt company, was had on January 20, 1900. In the opinion of the honorable district judge, made January 4, 1901, he found as a fact as follows: "By its sale to the Lyon Umbrella Company, the Amasa Lyon Company transferred all its tangible property and ended its business. All it did thereafter was to collect in some outstanding accounts, and make payment to various creditors. It was insolvent." The finding of fact of the insolvency of the bankrupt corporation is an adjudication of fact in this case, which has not been reversed, and therefore stands as binding upon all parties. It certainly binds with particular force the creditors George Batten & Co., who took part in and secured the adjudication of the bankrupt by the establishment of this very fact. When the bankrupt divested itself of what the learned district judge found was all its tangible property, it did not remain possessed of property which, at a fair valuation, was sufficient in amount to pay its debts; and as this took place on January 20, 1900, it is very evident that the insolvency of the bankrupt must be established as of that date. It may possibly be that the company was really insolvent prior to January 20, 1900, but the burden of proving this fact was upon the trustee, and as no satisfactory value of assets transferred on January 20, 1900, by the company, was established, it would not be just or right to assume as a fact that which was not properly established by sufficient evidence; hence from the evidence, as well as from

the previous finding of the honorable district judge, January 20, 1900, must be fixed as the date whereon the bankrupt became insolvent.

The fact that on January 2d the bankrupt delivered to the firm of George Batten & Co. a number of postdated checks, the last one bearing date January 20, 1900, for \$210.15, did not, under the authorities, operate as a payment on January 2, 1900. A postdated check becomes, in effect, a note, and in many of the states would be entitled to days of grace, the same as a note (1 Edw. Bills & N. [3d Ed.] 396); and therefore the decision in *Re Abraham Steers Lumber Co.*, 6 Am. Bankr. R. 315, 110 Fed. 738, and affirmed by the circuit court of appeals (7 Am. Bankr. R. 332, 112 Fed. 406), to the effect that the giving of a note does not constitute a payment at the time it was delivered, negatives the proposition that such payment was made on January 2, 1900, at the time the said postdated check was delivered to the creditor. Had the check never been paid, no preference would have been received by the creditor. A creditor receives a preference when there is actually transferred to him, either in money or in other value, part of the debtor's property. The transfer herein to the creditor took place either on January 20, 1900, or thereafter; and as such transfer took place on or after the day the bankrupt became insolvent, and as the law does not consider fractions of a day, the result naturally follows that, under the authorities, the said firm of George Batten & Co. did, on January 20, 1900, while the bankrupt was insolvent, receive a preference to the extent of \$210.15, and which preference must be surrendered before the said creditors can participate in a distribution of the estate of the bankrupt. The evidence and record show that the postdated check payable on January 20, 1900, amounting to \$210.15, was part of a running account for advertising furnished by the said creditors to the bankrupt company, and the proof of debt filed herein by the creditors in the sum of \$546.62 is for advertising furnished subsequently; so that we have before us all the elements of a continuous business transaction and a running account, and no alternative is therefore left, under the decision of the United States supreme court in *Pirie v. Trust Co.*, 21 Sup. Ct. 906, 45 L. Ed. 1171, but to require a surrender of the said sum of \$210.15 as a prerequisite to allow the creditor's claim to stand against the bankrupt estate.

The order of the referee expunging the claims was affirmed February 26, 1902.

Kneeland, LaFetra & Glaze, for petitioner.

Perry D. Trafford, for the trustee.

ADAMS, District Judge. It appears that the bankrupt became insolvent January 20, 1900. On the 2d of January, 1900, it delivered to the petitioner a check on the Astor Place Bank, dated January 20, 1900, for \$215. On that day the petitioner deposited the check with the National Shoe & Leather Bank. On the following day the latter received the money in the ordinary course of business through the clearing house, and the amount was charged by the Astor Place Bank against the account of the bankrupt.

The claim is that when the deposit was made the Shoe & Leather Bank became the absolute owner of the check, and the preference was to it, and not to the petitioner. I am unable to coincide with such view. The effect of the delivery of the check to the petitioner was to diminish the assets of the bankrupt, when insolvent, to the detriment of its other creditors. The money was within the control of the bankrupt up to the 21st of January, 1900, and if it had been drawn from the bank before the check was presented there would have been no payment, and the petitioner would have occupied the same position as other unpreferred creditors. There was therefore a payment when

insolvent, and it was a payment directly for the benefit of the petitioner, through the medium of its bank. I do not see any merit in the other suggestions.

The order of the referee expunging the claim is affirmed.

In re DE GOTTARDI et al.

(District Court, S. D. California. February 20, 1902.)

No. 1,547.

1. **BANKRUPTCY—JURISDICTION OF COURT—COMPELLING PRODUCTION OF ASSETS.**
A court of bankruptcy has jurisdiction, on issues properly joined, to determine whether or not a bankrupt has in his possession or under his control money or other property belonging to his estate in bankruptcy, and, if the issues be found against him, to make an order requiring him to pay or deliver such money or property to his trustee and to force obedience to such an order by commitment as for contempt.
2. **SAME—COMMITMENT FOR CONTEMPT—PROCEDURE.**
In proceedings for the enforcement of such an order two rules are to be observed: First, that the answer of respondent to the rule to show cause is not conclusive, but traversable; and, second, that the power of commitment should be cautiously exercised, and only when its propriety is beyond reasonable doubt.
3. **SAME—HEARINGS BEFORE REFEREE—EVIDENCE.**
Upon an issue before a referee as to the truth or falsity of a claim made by bankrupts that their store was entered by burglars on a certain night, shortly before their bankruptcy, and a large amount of money was taken from their safe, it was not error to admit the testimony of witnesses that they saw no strangers or suspicious characters in the small town where the store was situated on the day preceding the alleged burglary, although such testimony is entitled to little weight.
4. **SAME.**
Various rulings of a referee upon the hearing of a petition by a trustee to compel bankrupts to turn over money alleged to be in their possession or under their control considered, and held erroneous, as admitting testimony which was incompetent as hearsay or as the opinions or conclusions of the witnesses.
5. **SAME—PRACTICE ON HEARING BEFORE REFEREE—REVIEW.**
A hearing before a referee, under Bankr. Act 1898, is in the nature of a hearing in equity, and is governed by the rules of equity practice of the federal courts, both as to the hearing itself and as to the review by the judge. Orders in bankruptcy No. 22, providing that "the examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law," is substantially copied from equity rule 67, and it does not have the effect, in connection with Rev. St. § 721, of rendering such hearings and proceedings for review subject to the laws of the state governing trials and appellate procedure in actions at law, but, on the contrary, indicates the practice as that prescribed by the rules in equity. Applying such rules, it is the duty of a referee, although he must pass on objections to testimony, to cause all testimony excluded to be taken down and made a part of the record, with the ruling and exceptions noted; and upon a review the judge is not required to reverse the decision because of the erroneous admission or exclusion of evidence, but it is his duty to determine the issues de novo upon the competent evidence in the record, or he may recommit the case for further hearing as the circumstances may require.

6. SAME—TESTIMONY OF BANKRUPT—CONSIDERATIONS AFFECTING CREDIBILITY.

Where bankrupt partners, on their examination, by pre-arrangement with their counsel, refused to answer a large number of competent and material questions with reference to their property and business, such as the capital they had when they established the business, whether they took inventories, etc., in effect refusing to give any information respecting their affairs, on the ground that their answers might tend to incriminate them, reading their refusal and the grounds from a slip of paper given them by their counsel, such action showed a disposition not to be fair and candid with their creditors, and a purpose to conceal their transactions, which may properly be taken into consideration in determining the weight to be given to their testimony in subsequent proceedings to compel them to turn over money and property which they are alleged to have concealed.

7. SAME—FAILURE OF BANKRUPT TO ACCOUNT FOR PROPERTY—BURDEN OF PROOF.

Where a bankrupt admits having had money or property a short time before his bankruptcy, which is not shown by his schedules, it is incumbent upon him to clearly account for the same to the satisfaction of the court; otherwise, he must be held to still have it in his possession, and to be able to turn it over to his trustee.

8. SAME—EVIDENCE CONSIDERED.

The assets of a bankrupt partnership were shown to have decreased several thousand dollars within three months prior to the bankruptcy, without any apparent business reason therefor. On the examination of the partners they refused to answer questions with reference thereto, but in a proceeding by the trustee against them to compel them to turn over to him certain sums of money, aggregating about \$14,000, alleged to be in their possession or under their control, they testified that a short time before the bankruptcy burglars had entered their store and taken \$7,500 in cash from the safe. One of the partners, who was shown to have drawn \$6,500 out of the business, accounted for the same by testifying that he had paid \$6,000 of it to a woman with whom he got into a "scrape," and \$425 to a doctor in connection with the same; but he refused to give the name of either the woman or the doctor. There was no evidence to corroborate such testimony; but, on the contrary, circumstances tended to discredit it, and to show a purpose on their part to defraud their creditors. At the time of the alleged burglary their accounts in the banks with which they did business were, and had been for some time, largely overdrawn, and they had been asked to make the deficit good; also, a few days later, when threatened with attachments by the banks, they turned over to an attorney drafts amounting to over \$2,700,—a part in alleged payment for past services which could not be explained, and \$2,000 of it as a retainer for services to be rendered in connection with the capture and conviction of the burglars. *Held*, that the testimony of the bankrupts was an admission that they had the sums of money at the times stated, but was wholly insufficient to account for the same satisfactorily, in view of the discredit cast upon it by the circumstances and by their past conduct, and that a finding by the referee that the alleged burglary and the payment to the woman were fictitious, and his order requiring the bankrupts to turn over the money to their trustee was fully justified, and such order would be enforced.

9. SAME—SCOPE OF HEARING—COLLATERAL QUESTIONS AFFECTING CREDIBILITY OF BANKRUPTS.

In a proceeding by a trustee against bankrupts to compel them to turn over to him certain sums of money alleged to be in their possession, where the principal issues are whether an alleged burglary and payment of money, by which the bankrupts attempted to account for such sums, were real or fictitious, and parts of a scheme to defraud creditors, the question of the good faith of a transaction occurring about the same time, by which they transferred a large sum to their attorney, is per-

tinent to said issues, and one which the court of bankruptcy has power to investigate, notwithstanding a prior consent order made by a referee requiring the attorney to turn over the money so received to the trustee, but reciting that it was not based upon any finding of fraud, and the compliance of the attorney with such order.

In Bankruptcy. On review of order of referee requiring the bankrupts to turn over to the trustee certain sums of money found to be in their possession or under their control, and on a rule to show cause why they should not be adjudged in contempt for failure to obey such order.

Rothschild & Ach, for creditors.
Hunsaker & Britt, for bankrupts.

WELLBORN, District Judge. The creditors' petition in this matter, asking that the respondents be adjudged bankrupts, was filed May 18, and the adjudication had June 21, 1901. On September 3d next following, the trustee in bankruptcy and one of the creditors filed with the referee a petition alleging, in substance, that the bankrupts were wrongfully withholding from the trustee a large amount of assets not reported in their schedules, and charging specifically upon both the concealment of \$7,500, and upon De Gottardi the concealment of \$6,500, and asking an order requiring them to pay such assets to said trustee. The bankrupts made answer to said petition, denying, in the main, its allegations; and thereupon evidence was taken, and the findings and order now under review were made by the referee. Thus it will be seen that the proceeding before the referee was not an examination of the bankrupts and other witnesses for the purpose of acquiring information generally as to the bankrupts' estate, but was a hearing on specific issues duly raised by appropriate pleadings. To account for the two amounts of money which they were specifically charged with concealing, the bankrupts claimed that, within a few weeks prior to their bankruptcy, De Gottardi became involved in an intrigue with a woman, in consequence of which he paid to the woman \$6,000, and to a doctor, for services in connection with the same matter, \$425. They further claimed that on the night of the 30th of April, 1901, their store at Cayucos, Cal., was burglariously entered, and a large amount of money (\$7,500 or \$8,500) abstracted from their safe by the burglars. Both of these claims the trustee contested.

The findings and order of the referee were as follows:

"That from December, 1900, the bankrupts had been engaged in buying produce on commission for Loeb, Fleishman & Co., of Los Angeles, and others, and that until about April 24, 1901, it had been their practice to receive payments from Loeb, Fleishman & Co. through the mail, by checks of that firm, drawn on the Farmers' & Merchants' Bank of Los Angeles, which checks, until the last-named date, they had regularly deposited with their bankers in San Luis Obispo. On said April 24th they had overdrawn their accounts at two banks in San Luis Obispo, and on the same day they requested Loeb, Fleishman & Co. to send them \$5,000 in coin by express, which that firm declined to do. Loeb, Fleishman & Co., in answer to the request of the bankrupts for coin by express, said they would send them checks for all they owed, but would not send coin, and that if they wanted coin they must come and get it. Within 25 days before that time (April 24th) the bankrupt De Gottardi had drawn out of the firm \$6,500. Three days afterwards (April

27th) De Gottardi, one of the bankrupts, left Cayucos, taking with him a check of Loeb, Fleishman & Co., payable to the order of De Gottardi & Righetti, for \$3,375.10. He arrived that night at San Luis Obispo, stopping at the French Hotel, and early next morning (April 28th) left for Los Angeles. He remained in Los Angeles Sunday, and on Monday forenoon, the 29th of April, obtained the coin on the Loeb, Fleishman & Co.'s check, and also the cash on another check, dated April 29, 1901, for \$2,628.91, making in all \$6,004. This money he claims to have put in his satchel or dress suit valise, and with it left Los Angeles for Cayucos on the afternoon of the same day. He arrived at San Luis Obispo that night, and took a room at the Commercial Hotel, where he slept. He left San Luis Obispo early in the morning of the 30th of April for Cayucos, without calling on his bankers, loitered on the road, and arrived at Cayucos about 2 or 3 o'clock p. m. of the same day. He also claims to have taken the six thousand and odd dollars to his home at that place. No one saw the money after he obtained it, so far as the evidence discloses, except his wife. He also claims to have taken this money, and an additional \$1,500 which he asserted he had had at his home since the latter part of March, to the store of the firm at Cayucos, and placed the whole amount in the safe, and left it there; that on the night of April 30th some person or persons effected a violent entry into the store and robbed them of the money. In fact, the evidence shows that the amount alleged to have been stolen was eighty-five or eighty-six hundred dollars. It also appears that the bankrupt De Gottardi drew out from the funds of the firm of De Gottardi & Righetti, in cash, the following sums: On March 21st, \$3,000; on April 11th, \$2,000; and on April 16th, \$1,500; making the \$6,500 hereinbefore mentioned. De Gottardi says that \$6,000 of this money he paid to a woman with whom he got into a scrape, and \$425 to a doctor for services rendered said woman in connection with said scrape, but he does not account for the remaining \$75 of the \$6,500 already mentioned. It will be seen that the said bankrupts have attempted to account for the money brought from Los Angeles, and the \$1,500 that De Gottardi had at home, by the alleged burglary of the store on the night of April 30th, and for the \$6,500 drawn by De Gottardi from the store by the alleged payment of the same to a woman and a doctor in settlement of De Gottardi's 'scrape.' These explanations, in the light of the evidence, are, to say the least, unsatisfactory. The firm of De Gottardi & Righetti were overdrawn at the Commercial Bank of San Luis Obispo on April 29th to the extent of about \$3,000, and at the Andrews Banking Company, of San Luis Obispo, in the sum of nearly \$1,500. They had been requested to at once settle these overdrafts, and it was then, in my judgment, they concocted the scheme of obtaining possession of large sums of money and defrauding their creditors. Shortly after these requests were made it appears that the firm must have had in its possession the following checks: Loeb, Fleishman & Co., on Farmers' & Merchants' Bank of Los Angeles, dated April 17, 1901, \$3,375.10; Loeb, Fleishman & Co., on same bank, dated April 24, 1901, \$2,058.18; and one of Hillmer & Bredhof, dated April 27, 1901, for \$685.76. Neither of these checks was applied towards the payment of the overdrafts, yet on May 1st, the day after the alleged robbery, the last two named checks, aggregating \$2,743.94, were given to Mr. F. A. Dorn in payment for alleged past services, \$800, and the balance as a retainer in the matter of the alleged burglary. It appears further that no person other than the bankrupts were aware that the money brought from Los Angeles had been collected or placed in the safe. There are also a number of other suspicious circumstances tending to show that no burglary in fact was committed, which I deem unnecessary to detail.

"The bankrupt De Gottardi declined to answer certain questions propounded to him with the object of ascertaining the names of the woman and doctor to whom he claims he paid money, as well as the place of their respective residences. While De Gottardi's refusal to disclose the name of the woman might be commended in a social sense, as an act of gallantry, it cannot in law be excused. This denial being based on the ground that his answers might tend to incriminate him, it must be taken as a mere subterfuge, for the reason that, whether his meretricious relations with the

woman constituted a public crime or not, it could make no difference; for, if they did not, then this privilege of immunity from punishment would be useless and unnecessary, while, if the said relations made it a crime, the crime itself being admitted, the admission must be taken as a waiver of the constitutional privilege, and, the names and residences of the parties neither magnifying nor lessening the offense, this privilege would not avail, and therefore he could not shield himself from disclosing the facts sought by the questions asked. I am fully persuaded and satisfied, and therefore find, that no burglary was perpetrated, and that De Gottardi did not pay the moneys he asserts that he paid to the woman and doctor. I do further find that said bankrupts have now in their possession or under their control the sum of \$7,500 in money and property of their estate, and that they have been and are concealing the same from their creditors and the said trustee in bankruptcy. And it is ordered that said bankrupts, Natele De Gottardi and David E. Righetti, do pay over and deliver to Edward Vollmer, the duly elected, qualified, and acting trustee of the estate of said bankrupts, within twenty-four hours after service hereof, the sum of \$7,500 in money. I do further find that the sum of \$6,500 drawn out as aforesaid by the said Natele De Gottardi from the funds of the firm of said De Gottardi & Righetti is now in his possession or under his control, and that the same is now being concealed by him from the creditors and the trustee aforesaid, less the sum of \$1,500 claimed by De Gottardi to have been returned on April 30, 1901. Therefore it is ordered that said Natele De Gottardi do pay over and deliver to Edward Vollmer, the trustee aforesaid, within twenty-four hours after service hereof, the sum of \$5,000 in money; the same being the property of the estate of said bankrupts.

"As to the other specifications set forth in the petition, I find that they have been satisfactorily explained. * * *

The bankrupts failed to comply with said order, and thereupon, at the instance of the trustee, were cited to show cause why they should not be adjudged guilty of contempt. They have filed exceptions to said order, and, in response to said citation, have appeared and answered that said order was erroneously made, and is now under review, and, further, that they are wholly without means to pay over the amounts of money, or any part thereof, named in said order. Both of these matters—the review of the order and the rule to show cause—have been heard together, and, as they are closely connected, can be conveniently and without confusion considered in this opinion.

That a bankruptcy court has jurisdiction, on issues properly joined, to determine whether or not a bankrupt has in his possession or under his control money or other property belonging to his estate in bankruptcy, and, if the issues be found against the bankrupt, to make an order requiring him to pay or deliver to the trustee in bankruptcy the money or other property so found to be in his possession or under his control, and to enforce obedience to such an order by commitment as for contempt, are well-settled propositions. In *re Rosser*, 1 Nat. Bankr. N. 469, 96 Fed. 308; *Id.*, on review in court of appeals, 41 C. C. A. 497, 101 Fed. 562; In *re Purvine*, 1 Nat. Bankr. N. 326, 37 C. C. A. 446, 96 Fed. 192; In *re Salkey*, 21 Fed. Cas. 235 (No. 12,253); In *re Tudor*, 1 Nat. Bankr. N. 476, 96 Fed. 942; In *re Mayer*, 98 Fed. 839; In *re Tudor*, 2 Nat. Bankr. N. 168, 100 Fed. 796; In *re McCormick*, 2 Nat. Bankr. N. 104, 99 Fed. 566; *Knitting Works v. Schreiber*, 2 Nat. Bankr. N. 899, 101 Fed. 810, affirmed on review in 104 Fed. 1006; In *re Deuell*, 2 Nat. Bankr. N. 597, 100 Fed. 633; In *re Schlesinger*, 2 Nat. Bankr. N. 169, 97 Fed. 930; *Id.*, on review, 3 Nat. Bankr. N. 177, 42 C. C. A. 207, 102 Fed. 117;

In re Miller, 3 Nat. Bankr. N. 329, 105 Fed. 57; In re Levin, 3 Nat. Bankr. N. 1011, 113 Fed. 498; Branden. Bankr. 332, 458. In the exercise of the jurisdiction above outlined, two rules—one relating to a matter of pleading, and the other to a matter of evidence—are to be observed: First. The answer of the respondents to a rule to show cause is not conclusive, but traversable. *Knitting Works v. Schreiber* (D. C.) 101 Fed. 810; In re Salkey, *supra*; In re Rosser, *supra*; In re Purvine, *supra*; In re Schlesinger, *supra*; In re McCormick, *supra*. Second. The power of commitment should be cautiously exercised, and only when its propriety is beyond reasonable doubt. In re Salkey, *supra*; In re Purvine, *supra*; In re McCormick, *supra*; *Knitting Works v. Schreiber*, *supra*.

The jurisdiction of the court being thus established, the matters next to be considered are the alleged errors and misconduct on account of which the bankrupts attack the referee's order. The only error specified in the petition for review is insufficiency of the evidence to justify the findings and order of the referee. Attorneys for the bankrupts, however, now contend in argument that errors were committed by the referee in the admission and exclusion of testimony; also that there was misconduct on the part of attorneys for the trustee, and that said errors and misconduct were gross, and require the setting aside of the referee's order, although, upon an inspection of the whole record, the judge should be satisfied that it contains enough competent evidence to justify the order.

General order in bankruptcy No. 27 is as follows:

"XXVII. Review by Judge. When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

Ordinarily, I take it a review by the judge of an order made by the referee will be confined to the error pointed out in the petition for review. On account, however, of the peculiar nature of this pending proceeding, I have concluded to examine the grounds of error and misconduct—at least the salient ones—complained of in argument, as well as the one set out in the petition for review. To avoid repetition, I will state generally that objections and exceptions to all of the rulings complained of were duly made and taken, and, in order that the objections to testimony may be readily comprehended, will repeat what has already been made to appear, namely, that one of the main issues before the referee was whether the claim made by the bankrupts, in accounting for their assets, that on the night of the 30th of April, 1901, their store at Cayucos was entered by burglars and large sums of money abstracted therefrom, was true or false.

The ruling first complained of was the admission of the testimony of several witnesses to the effect that they saw no strangers or suspicious characters on the 30th of April, 1901, in the little town of Cayucos. While such testimony is entitled to but little consideration, I am not prepared to hold that it was incompetent.

The next ruling complained of was the admission of the testimony of William Hermann to the effect that Louis Padraita told him that on the 1st day of May, 1901, at the shop of Louis Padraita, in Cayucos, between the hours of 7 and 9 a. m., he met David E. Righetti in front of his (Righetti's) store; that he asked him why he did not go into the store; and that Righetti replied that he could not do so; that he didn't have any key, and was waiting for his clerk, Mr. Brockseib, to open the store. Previous to the admission of this testimony the trustee had introduced Louis Padraita as a witness, who testified, in substance, that he had no recollection of such conversation, but anything that he may have stated to Hermann was true. The testimony of Hermann, detailing statements made to him by Padraita, being hearsay, ought to have been rejected. It was incompetent for the purpose of impeachment, because, while Padraita probably did not testify as the trustee expected him to testify, still he had not, up to that time, given any damaging testimony against the trustee, and hence there was no reason for the trustee to attack his credibility. *People v. Jacobs*, 49 Cal. 384; *Hickory v. U. S.*, 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170. Nor was the testimony of Hermann admissible because of the previous testimony of Padraita that anything he may have said to Hermann was true. Hermann's testimony was still hearsay, its effect being to get before the referee the naked declarations of Padraita as independent evidence. *People v. Jacobs*, supra. Nor was the testimony of Hermann admissible on the ground as further contended by counsel for the trustee, that the declaration of a conspirator is competent against a co-conspirator, for the reason that, up to the time Hermann testified, whatever may have been proven afterwards, there was no evidence that Padraita had conspired with the bankrupts to defraud the creditors of the latter.

The ruling next complained of relates to the testimony of John Tonini, who kept a saloon and lunch house on the road from San Luis Obispo to Cayucos, at which place De Gottardi stopped for about half an hour on the 30th of April, 1901. Tonini had testified that De Gottardi did not bring into the house with him a satchel, or anything of that sort; that he tied his team to the fence at a point where it could not be seen from the saloon. This evidence was in line with other evidence offered by the trustee of certain actions of De Gottardi on his return trip from Los Angeles,—leaving his grip in one car, and going into another for dinner, and into another to play cards, loitering the next day along the road to Cayucos, stopping at different places, where the grip was out of his sight or immediate control; the inference sought to be drawn from all of these actions being that he did not have a large amount of money in his grip. The witness was permitted to answer the following question: "He didn't impress you as being very anxious about what was going on out on the road, did he?" This question called for the opinion and conclusion of the witness, and was manifestly incompetent.

The next ruling complained of is the admission of certain testimony of E. C. Ivins, who was the sheriff of San Luis Obispo county, and on the 2d day of May went to Cayucos with writs of attach-

ment against De Gottardi & Righetti. This witness, sometimes in response to leading questions, was permitted to testify that the impression he gained from his conversations with De Gottardi was that the alleged robbery did not weigh heavily on the latter's mind, and that he did not want to talk about it, and, further, that he (Ivins) could find nothing to indicate that there had been a robbery, and that he reached the conclusion that De Gottardi and Righetti knew more about the alleged crime than they told him. The language of the referee in passing upon the objection was as follows: "The Court: He was the sheriff, and had conversations with Mr. De Gottardi, and viewed the premises. Objection overruled." This testimony was peculiarly objectionable. The issue being tried was whether the alleged robbery was a reality or a mere simulation,—a trick to account for assets which the bankrupts were concealing. The witness Ivins was then, and for two years prior thereto had been, sheriff of San Luis Obispo county,—presumably a man of high character, whose utterances commanded respect; and he was permitted to testify, substantially, that after conversations with the bankrupts, and an examination of the premises, his conclusion was that a robbery had not been committed, and that the bankrupts knew more about the alleged crime than they told him. How attorneys of experience and learning could urge or offer, as legal evidence, matters of pure opinion, so obviously and absolutely incompetent, I am at a loss to understand.

The next ruling of the referee complained of is of the same character as the one last mentioned, and relates to the testimony of Mr. A. M. Hardie, postmaster at Cayucos, with whom the bankrupts had often consulted on matters of business, and with whom they advised touching the alleged robbery and what they should do. Mr. Hardie testified to the conversation he had with the bankrupts. They were both together, and one or the other of them (he thinks, Mr. De Gottardi) first called his attention to the condition of the door and the confusion about the safe (that is, the papers and things scattered around in front of the safe), and asked him what he thought of it. He replied that it was a raw piece of work. He then asked them what they had called him over for. They said they wanted to talk to him,—were in a bad fix, left without anything, didn't know what to do, and wanted to advise with him. They said they were left with nothing, and they thought it was too bad at this time, and did not propose to be left with big families on their hands without anything, and asked him if he would be left that way if he could help it. They then asked him how it would do for him to put in his safe and keep for them some papers and things. He said he guessed that would be all right; that he thought the best thing would be to put the papers and things in a package, addressing it to some friends,—naming Silvia Righetti as a good man; and that he (Hardie) would see that it was delivered to him when he called for it. They asked other questions of the witness, and he told them that the questions were beyond him; that he was not a lawyer, and thought the best thing they could do was to send for their lawyer as quick as they could,—suggesting Mr. Dorn as a

good lawyer. Something was said also by the bankrupts about their creditors being after them. The examination then proceeded as follows:

"Q. Mr. Hardie, from the conversation you had with them, and what they said to you, was it papers and things that they wanted to hide from their creditors? Mr. Dorn: Object to it as irrelevant, incompetent, and immaterial, outside of the issues, and calling for the opinion and conclusion of the witness, without a foundation. The Court: Overruled. Mr. Dorn: Exception. A. I looked upon the thing just simply this way, at a glance,—that there was going to be a grand complication of affairs, and I didn't wish to have my foot in it. That is the reason that I refused to have anything to do with those papers. Q. Well, did you say anything to them to this effect: That you were not lawyer enough to tell them how to evade the law and still have the law protect them? A. Yes, sir, I did; something just to that effect. Q. From what they said, were they trying to evade the law? Mr. Dorn: Object to it as irrelevant, incompetent, and immaterial, outside of the issues, and calling for the opinion and conclusion of the witness, without a foundation. The Court: Overruled. Mr. Dorn: Exception. A. I took it for granted, from the conversation, that there was certain things that they had in their possession that they didn't wish to be attached, and that they simply wished to make my safe a depository. Mr. Dorn: I move to strike out the answer as not responsive, being the opinion and conclusion of the witness. The Court: Denied. Mr. Dorn: Exception."

The questions objected to were certainly intended to elicit and did elicit from the witness his own conclusion, drawn from his conversation with the bankrupts, that they intended to conceal from their creditors certain papers, and wished to deposit the same in his safe. This conclusion, it may be, is fairly deducible from the facts previously testified to by the witness; still it was a conclusion to be drawn by the court, not by the witness.

Another error complained of was the admission of the evidence of P. Tognazini to the effect that he had made investigations in the neighborhood of Cayucos to ascertain whether or not there were dairymen trading with De Gottardi & Righetti who had demanded cash from them instead of checks, and that he had found one. Tognazini previously testified that he had lived in that community for 30 years, and was a director of the Commercial Bank at San Luis Obispo. In order that the bankrupts' objections to this testimony may be understood, it should be stated that the bankrupts claimed that they had accumulated at the store the large amount of money of which they said they were robbed because some of their customers had demanded payment in cash, rather than checks, and if they were not able to comply with such demands the customers, to whom they might give checks would go over to Cass & Co.'s (a competing store) for the purpose of cashing the checks there, and would then transact other business with Cass & Co. To meet this claim of the bankrupts the above-mentioned testimony of Tognazini was offered. The testimony was clearly incompetent, being mere opinions and conclusions of the witness, and, what is worse, opinions and conclusions drawn necessarily not from facts within the knowledge of the witness, but from hearsay statements made to him by other parties.

Another ruling complained of is the striking out of the testimony of Righetti as to what De Gottardi told him about putting \$1,500 into

the safe on the 30th of April. Righetti had just testified that he saw De Gottardi put money in the safe; that he did not count it, but that De Gottardi told him he had \$1,500, and put it in the safe. The referee, on motion of the trustee's attorney, struck out what De Gottardi said, as incompetent, irrelevant, and immaterial. This ruling was erroneous. Whether or not De Gottardi had placed \$1,500 in the safe was one of the matters in dispute, and his statements at the time were competent as a part of that transaction.

The misconduct charged against attorneys for the trustee consists mainly in asking incompetent and improper questions, insisting upon answers where the referee had sustained objections to the questions, and a transaction, which I will notice later on, with the witness Mary Malvate, a girl 17 years of age, who at the time of the alleged robbery was a domestic in the home of Mr. Righetti. That incompetent testimony, prejudicial to the bankrupts, was offered and admitted, appears from what I have already said. Besides the instances thus enumerated, an examination of Mrs. Tognina Righetti, wife of one of the bankrupts, is complained of as having been unfair to the witness and highly improper. Mrs. Righetti was born in Italy, and came to California when she was about 12 or 13 years old. Before marriage she lived with Mr. Padraita, her brother-in-law, at Cayucos, and went to school about one month at that place. She can write English a little, but not well. She is able to read printing to some extent, and plain writing. In the latter part of 1900 the witness declared a homestead on certain property in Cayucos, and it was to this matter that the objectionable questions related. Some of the questions and answers were as follows:

"Q. Well, you remember putting the homestead on this property, don't you? A. Yes, sir. Q. You remember signing the paper? Mr. Dorn: Object to that as irrelevant, incompetent, and immaterial, and outside the issues. The Court: Overruled. Mr. Dorn: Take an exception. A. Yes, sir. * * * Q. And you knew what was in the paper that you signed? Mr. Dorn: Same objection. The Court: Same ruling. Mr. Dorn: Exception. A. Well, I read it. Q. What was in it? A. Oh, I don't remember,—it been so long. Q. Did it say anything about a horse? A. I don't remember if it said anything about a horse. Q. Did it say something about farming implements and chickens? Mr. Dorn: Object to it as irrelevant, incompetent, and immaterial, not the best evidence, and calling for the contents of a written instrument. The Court: Objection sustained. Mr. Ach: Answer the question. A. I don't remember,—it has been so long since. Q. Well, don't you know that it spoke about furniture and beds and carpets and clothes and so forth, in that paper? Mr. Dorn: Object to it as irrelevant, incompetent, and immaterial, not the best evidence of the contents of a written instrument, and an improper mode of interrogating a witness,—unfair to the witness. The Court: Objection sustained. A. I suppose it did, but it been such a long time that I can't remember."

Counsel for bankrupts insist that the fact that the last two questions were held by the referee to be objectionable in no way mitigates their impropriety, that counsel for the trustee was interrogating an illiterate woman, and that by adroitly insinuating, through his questions, as true, matters which he knew to be untrue, he finally succeeded in getting the witness to affirm the false matters. This method of examination, which counsel for the bankrupts sharply criticise, I cannot myself look upon otherwise than with disapproval.

Another charge of misconduct against attorneys of the trustee is that they persistently repeated questions and insisted upon answers where the referee had sustained objections to the questions. This charge is without foundation. The correct practice, as I shall show later on, is to take down the answers to questions, without regard to the referee's rulings. The incident relating to Mary Malvate, complained of by the bankrupts, was brought out on the cross-examination of that witness by Mr. Dorn, as follows (the Mr. Gregg mentioned by the witness was associate counsel with Mr. Ach):

"Q. Since you were here before, have you talked with anyone besides Mr. Gregg about your testimony? A. Since I was here before? Q. Yes? A. No, sir; I guess I did with Glubbini. Q. I mean since you were here as a witness the last time you were here,—a week or so ago,—as a witness? Since that time have you talked with any one besides Mr. Gregg? A. No. Q. You haven't received any present or anything of that kind, have you? A. Yes, sir. Q. Well, who from? A. Mr. Ach. Q. Mr. Ach? A. Yes, sir. Q. What did you get? A. A box of candy. Q. Who delivered the present to you? A. This fellow over here. (Pointing.) Q. Mr. Gregg? A. Yes, sir. Q. So, since you were here as a witness before Mr. Gregg delivered for Mr. Ach to you a box of candy as a present? A. Yes, sir. Mr. Ach: That is objected to as assuming that Mr. Gregg delivered it for Mr. Ach. Mr. Dorn: Q. So, since you were here before, then, Mr. Ach has made you a present of a box of candy, and Mr. Gregg delivered the present to you? A. Yes, sir. Q. And was that the time that you talked with Mr. Gregg at Cayucos? A. Yes, sir. Q. Is that the only present you got? A. Yes, sir."

On re-direct examination by Mr. Ach the witness testified as follows:

"Q. Now, you say that you got a box of candy? A. Yes, sir. Q. Was it good candy? A. Fine. Q. You say Mr. Gregg brought it over to you? A. Yes, sir. Q. Well, did you tell Mr. Gregg anything more about the case than you told me on the witness stand before? A. He was asking me something, but I told him I didn't know any more. Q. Was that before or after he gave you the candy? A. I don't remember. Q. He told you it came from Mr. Ach, did he? A. Yes, sir. Q. Just Mr. Gregg gave you candy, and said Mr. Ach sent it to you? A. Yes, sir. Q. You thought Mr. Ach was a real nice fellow, didn't you? A. Yes, sir."

This gift of candy, counsel for bankrupts, in argument, while disavowing any purpose to charge bribery, characterized with marked severity as indiscreet and violative of the duties of an attorney. In a written opinion heretofore, on the 7th day of January, 1902, read in open court, I fully indorsed said criticism. After said opinion had been read, Mr. Ach, counsel for the trustee, at his own request, and without objection, was sworn as a witness, and thus disclaimed any connection with or knowledge of the transaction until after its occurrence. The following order was then made:

"Thereupon it is ordered that the opinion just heretofore rendered, in so far as this matter is concerned, be held in abeyance for further consideration, and that the same be not filed of record until the further order of the court."

Mr. Ach's testimony shows satisfactorily that he was in no way connected with said gift of candy, and relieves him of any responsibility therefor. On January 25, 1902, Mr. Ach submitted in open court (counsel for bankrupts being present and offering no objection thereto) the affidavit of Mr. Gregg, stating, in substance, that on the 7th day of September, 1901, he drove to the town of Cayucos

to attend and direct the sale of a stock of goods belonging to the estate of the bankrupts, and for no other purpose, and that Mary Malvate was then, and for some time prior and subsequent thereto had been, a waitress at the Exchange Hotel, in said town; that on said day affiant, while visiting at said hotel, did, in the presence of several persons, whose names are unknown to him, give to her a small box of candy, which was then passed around among and eaten by the persons present; that he was not in the presence or hearing of said Mary Malvate for a longer time than 10 minutes, nor at any time away from the presence of others and that he did not see, nor attempt to see, her again until she again appeared as a witness in this proceeding; that the only reference made at the time to the testimony of said Mary Malvate was that affiant asked her if she knew anything more about the facts in said matter than appeared in her testimony, and she replied that she did not; that said question and answer arose out of a general conversation among those present as to the probability of an investigation being made by the federal grand jury, and that affiant did not then know or expect that she would be called again as a witness in said bankruptcy proceedings; that the candy was not given for the purpose of affecting her testimony or attitude towards any of the parties interested, or of inducing her to testify against said bankrupts, and was not given at the request or under the direction of Henry Ach or any other person; and that said gift was intended by this affiant solely as a personal courtesy. The object of the visit which Mr. Gregg says, in his affidavit, he made to the Exchange Hotel, was testified to by Miss Malvate, in that part of her testimony immediately preceding the questions and answers above quoted, as follows:

"Q. Since you were here as a witness before, did you ever talk with Mr. Gregg about this matter? A. I guess I did. Q. How many times? A. Once. Q. Where was that? A. I don't know when was it. That time he came up to Cayucos. Q. Well, where were you when you talked with Mr. Gregg about it? A. The Exchange. Q. The Exchange Hotel? A. Yes, sir. Q. I suppose he had lunch there? A. No, sir. Q. Called there to see you? A. He came to pay my expenses. Q. You mean your witness fees? A. Yes, sir. Q. Did you have any talk with him about what you knew about this case? A. I don't remember. I guess I did."

With Mr. Gregg's affidavit in the record, the following facts remain undisputed: That Mary Malvate was called as a witness twice by the trustee,—the first time several days before, and the second time a few days after, the gift of the candy; that Mr. Gregg went to said hotel to pay the girl her witness fees, and on that occasion gave her the candy, representing it as a gift from Mr. Ach, the leading counsel for the trustee, and asked her if she knew anything more about the facts in said matter than appeared in her testimony, and she replied she did not. That the transaction, as first shown in evidence, called for severe rebuke, will not admit of controversy, and, even in the light of Mr. Gregg's affidavit, it was a blamable indiscretion.

The foregoing rulings and matters, adverted to by me with disapproval, unquestionably disclose prejudicial errors by the referee, and misconduct on the part of the attorneys for the trustee, some

of which may, without exaggeration, be denominated gross, and present for settlement the proposition of law strenuously insisted upon by counsel for bankrupts, that for errors and misconduct such as above indicated a referee's order ought to be set aside, regardless of what the competent evidence in the record may establish. In support of said proposition it is argued, among other things, that a referee under the present bankruptcy law differs from a register under the bankruptcy act of 1867 in this: that the former is clothed with important judicial powers, which the latter did not possess, and that among these powers is that of passing upon the competency, materiality, and relevancy of testimony; that No. 22 of the general orders in bankruptcy and section 721 of the Revised Statutes of the United States, together and in effect, establish as the procedure to be observed by a referee where witnesses are examined, and by the judge on review of an order made as the result of such examination, that which obtains in the courts of law of the state wherein the bankruptcy court is located; and that under the laws of the state of California the appropriate remedy for errors in the admission and exclusion of testimony and misconduct on the part of attorneys is a new trial. The order in bankruptcy and the section of the Revised Statutes above mentioned are respectively as follows:

"XXII. Taking of Testimony. The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just."

"Sec. 721. The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The first proposition stated in the bankrupts' argument, that a referee is clothed with important powers,—among them, that of determining objections to testimony,—has been approvingly adopted by text writers (Coll. Bankr. [3d Ed.] 503; Loveland, Bankr. 502), and is unquestionably sound. Jurisdiction to hear and determine issues of fact necessarily implies power to pass upon the admissibility of testimony. The last proposition of said argument, namely, that, under the state practice of California, for errors and misconduct such as appear in this record a new trial is the appropriate remedy, also seems to be well sustained by authority, and the rule is applied in civil as well as criminal cases. *Smith v. Westerfield*, 88 Cal. 383, 26 Pac. 206; *People v. Wells*, 100 Cal. 460, 34 Pac. 1078; *People v. Jacobs*, 49 Cal. 384; *In re James' Estate*, 124 Cal. 653, 57 Pac. 578, 1008. The intermediate proposition of said argument, that No. 22 of the general orders in bankruptcy and section 721 of the Revised Statutes of the United States establish as the procedure before a referee, where witnesses are examined, that of courts of law of the

state wherein the referee is sitting, is vulnerable. Its infirmity consists in this: that it unduly enlarges the scope of general order No. 22. I am inclined to think that the provision of said order requiring the examination and cross-examination to conform to the mode adopted in courts of law simply means that the witness, after being duly sworn, shall be first examined by the party introducing him, and then cross-examined by the adverse party, and that such examination and cross-examination shall be oral, and not upon written interrogatories. Whatever may be the precise limits, however, of that general order, it is sufficient to say here that it does not affect the practice on a review by the judge of an order made by the referee, nor the record which the referee should cause to be made up for the purpose of such review. Section 38a of the bankruptcy act of 1898 provides that "referees respectively are hereby invested, subject always to a review by the judge, * * * with jurisdiction," etc. The unlimited power of review here conferred upon the judge includes matters of fact as well as questions of law. There is nothing in the act prescribing the manner in which this review shall be had, nor is there any general order relating in terms to the subject, except No. 27, already quoted; and that simply requires the person desiring a review to file his petition therefor, setting out the error complained of, and the referee to forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee. The supreme court of the United States, however, has said:

"Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words 'at law,' in the opening sentence conferring on the courts of bankruptcy 'such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings,' may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law, and not in equity." *Bardes v. Bank*, 178 U. S. 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175.

General order in bankruptcy No. 37 is as follows:

"In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the supreme court of the United States shall be followed as nearly as may be. * * *

A proceeding before a referee, such as the present one, is essentially of an equitable nature. Issues of fact are to be determined by him without the intervention of a jury, and his order, if affirmed on review, is enforceable, not after the manner of courts of law, but by the process of commitment. General order No. 22 affects the equitable nature of this proceeding only to the extent of prescribing a common-law mode of taking testimony, which had previously been introduced by rule into equity practice. The pregnant fact here suggested, that said order is imitative, has, it seems, escaped the attention of counsel for bankrupts; and consequently they have overlooked authoritative interpretations, directly pertinent, which the supreme court has placed upon the archetype. I find, upon careful research, that general order No. 22 is taken largely, if not in its entirety, from No. 67 of the rules of practice for United States courts

of equity, and this fact of itself is a recognition by the supreme court of the equitable nature of the proceeding. That part of general order No. 22 on which counsel for bankrupts mainly rely, namely, "The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law," has its corresponding provision in that part of said equity rule No. 67 relating to the examination of witnesses before an examiner, as follows:

"Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in the common law courts." 144 U. S. 689, 12 Sup. Ct. 311, 36 L. Ed. 1143.

Now, what is the practice at the hearing and on appeal in equity? There, as is well known, at the examination of witnesses, questions, objections, rulings, exceptions, and answers are all taken down, so that the appellate court, rejecting incompetent testimony, even though it may have been considered below, and considering competent testimony, even though it may have been rejected below, may render such final decree as the equities of the case require. *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521; *Ruckman v. Cory*, 129 U. S. 387, 9 Sup. Ct. 316, 32 L. Ed. 728; *Mining Co. v. Doe*, 27 C. C. A. 50, 82 Fed. 51; *Ridings v. Johnson*, 128 U. S. 212, 9 Sup. Ct. 72, 32 L. Ed. 403; *Johnson v. Harmon*, 94 U. S. 371, 24 L. Ed. 271; *Beach*, Mod. Eq. Prac. §§ 978, 980.

In *Blease v. Garlington*, supra, the court, speaking through Chief Justice Waite, says:

"Since the amendment of rule 67, in 1861, there could never have been any difficulty in bringing a case here upon appeal, so as to save all exceptions as to the form or substance of the testimony, and still leave us in a condition to proceed to a final determination of the cause, whatever might be our rulings upon the exceptions. The examiner before whom the witnesses are orally examined is required to note exceptions, but he cannot decide upon their validity. He must take down all the examination in writing, and send it to the court, with the objections noted. So, too, when depositions are taken according to the acts of congress or otherwise, under the rules, exceptions to the testimony may be noted by the officer taking the deposition, but he is not permitted to decide upon them; and when the testimony, as reduced to writing by the examiner, or the deposition, is filed in court, further exceptions may be there taken. Thus both the exceptions and the testimony objected to are all before the court below, and come here upon appeal as part of the record and proceedings there. If we reverse the ruling of that court upon the exceptions, we may still proceed to the hearing, because we have in our possession and can consider the rejected testimony. But under the practice adopted in this case, if the exceptions sustained below are overruled here, we must remand the cause in order that proof may be taken. That was done in *Conn v. Penn*, 5 Wheat. 424, 5 L. Ed. 125, which was decided before the promulgation of the rules. One of the objects of the rule, in its present form, was to prevent the necessity for any such practice. While, therefore, we do not say that, even since the Revised Statutes, the circuit courts may not, in their discretion, under the operation of the rules, permit the examination of witnesses orally in open court upon the hearing of cases in equity, we do say that now they are not by law required to do so, and that, if such practice is adopted in any case, the testimony presented

in that form must be taken down or its substance stated in writing and made part of the record, or it will be entirely disregarded here on an appeal. So, too, if testimony is objected to and ruled out, it must still be sent here with the record, subject to the objection, or the ruling will not be considered by us. A case will not be sent back to have the rejected testimony taken, even though we might, on examination, be of the opinion that the objection to it ought not to have been sustained."

The fourth paragraph of the syllabus in *Ruckman v. Cory*, supra, also a decision by the supreme court of the United States, is as follows:

"Although incompetent evidence be received in an equity case, yet, if the decree can be sustained by such evidence in the record as is competent and relevant, this court will not disturb the decree."

In the body of the opinion, the court says:

"(3) Reference is made to the depositions of several witnesses, including the plaintiff, who testified in his own behalf, in which are detailed statements made by Ruckman at different times after 1862 in reference to the title to these lands. This evidence, it is contended, and properly so, was incompetent, under the well-established rule that 'a grantee in a deed is not affected with the declarations of the grantor made after the execution and delivery of the deed, unless, with full knowledge of such declarations, he acquiesces in or sanctions them.' * * * But the question remains whether the decree cannot be sustained by such evidence in the record as is competent and relevant. We think it can. At any rate, after a careful sifting of the proof, and giving due weight to all the facts and circumstances that may properly be considered, we do not see our way clear to disturb the decree."

In *Mining Co. v. Doe*, supra, the circuit court of appeals of this circuit held (quoting from the syllabus):

"3. Appeals in Equity—Findings of Fact. On an appeal in equity, findings of fact made by the court below are entitled to some weight, but are not binding on the appellate court. The whole case is before the latter court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits."

It is true that an examiner in equity does not pass upon objections to evidence, while a referee in bankruptcy must do so. This, however, furnishes no reason why the record made up by the latter should be less complete than that made up by the former. The necessity for a full transcript is the same in each case,—in the one case, that the decree of the appellate court, and in the other that the order of the judge on review, may finally determine all matters at issue. Moreover, where the examination of witnesses is had orally in open court, as may be done under the amendment to equity rule No. 67, promulgated by the supreme court May 15, 1893 (149 U. S. 793, 13 Sup. Ct. iii., 37 L. Ed. 1235), the judge does pass upon the admissibility of testimony; and in that case a hearing in equity and a proceeding (such as the present one) before a referee in bankruptcy are substantially alike. The judge and referee, it is true, do not occupy towards each other the relation of an appellate to an inferior court, but are both officers of the bankruptcy court. This circumstance, however, does not weaken, but, rather, confirms, the conclusion which I have reached as to the power and duty of the judge on review of an order of the referee. If, in equity, an appel-

late court, regardless of errors and irregularities at the hearing, exercises complete supervision over the decree of the lower court,—the two being distinct tribunals,—and confirms, reverses, or modifies the decree so as to administer final relief upon the competent evidence in the record, for a much stronger reason ought the judge, in a bankruptcy proceeding, to exercise equally as full control over the order of the referee, where both judge and referee are not only of the same court, but each for the time being constitutes the court, and where, therefore, a review by the judge of the referee's order is theoretically a review by the court of its own decision.

In *re Nugent*, 44 C. C. A. 620, 105 Fed. 181, and *Smith v. Belford*, 45 C. C. A. 526, 106 Fed. 658, cited by the bankrupts, do not, I think, support their contention. In each of those cases it was expressly held by the court of appeals that the district court was without jurisdiction to make the orders complained of, and, of course, there was nothing the appellate court could do but set aside the orders. In *re Keller* (D. C.) 109 Fed. 118, also cited by the bankrupts, is, according to my view of the case, favorable to the procedure which I have outlined, rather than to that contended for by the bankrupts. There the trustee in bankruptcy contested the right of a creditor to prove up his claim on the ground that, within four months next preceding the filing of the petition in bankruptcy, bankrupt had made payments to the creditor, and that at the times of such payments the bankrupts were insolvent. Thus it will be seen that one of the issues before the referee was the alleged insolvency of the bankrupts, and the referee found that the bankrupts were insolvent, as alleged by the trustee. With reference to the finding of the referee on this issue, Judge Shiras says:

"As I understand the certificate of the referee, this conclusion was reached upon consideration of the facts appearing of record in the bankruptcy proceedings, and of the testimony given upon the examination of the bankrupt and other parties before the referee in connection with other proceedings had in the case; and upon part of the present claimant it is excepted that this evidence was introduced when the claimant was not present and was not represented."

This exception was held to be good, and, since there was no other evidence to support the finding, the judge referred that particular issue back to the referee for further testimony; affirming, however, the report of the referee in other respects. If the practice were as contended for by bankrupts' counsel,—that error in the admission of testimony wholly vitiates the order made by the referee,—then the referee's entire order in the case last cited would have been reversed, and the whole matter referred back to him, whereas only one issue was sent back to the referee, and the balance of the order affirmed.

Marks v. Fox (C. C.) 18 Fed. 713,—another citation of bankrupts' counsel,—seems, on casual reading, to hold that on the coming in of a master's report in an equity cause, showing the admission of incompetent testimony and the exclusion of competent testimony, the matter should be referred back to the master to take additional testimony, reconsider the proofs, and report conclusions. A more careful reading of that case, however, indicates that the excluded

testimony was not in the record before the judge. The following paragraph occurs in the opinion of the court :

"The master erroneously sustained the objections to Interrogatories 20, 28, 34, 38, 47, 49, 50, 51, and 52, propounded to the witness Henry King, and to interrogatories 17, 21, 44, 46, 65, 72, 73, 76, and 81, propounded to Aaron Grant. While some of these interrogatories do not seem to have been of much importance, others were, and the general result of the master's rulings has been to deprive the defendants of testimony which was clearly competent and material. It is for the master to determine what weight should be given to this testimony when it is in the case. It may be that his conclusions will not be affected by it, but upon this review of his findings it cannot be determined that they were not influenced by the absence of the evidence which the defendants sought to introduce."

If the interrogatories which the master held to be incompetent were not answered, then, of course, there was nothing else the judge could do, except send the matter back to the master to take the testimony which had been erroneously excluded.

Equitable procedure before the referee, and by the judge on a review of the referee's order, such as I have outlined, is approvingly epitomized by a well-known text writer on bankruptcy as follows:

"It would therefore seem that referees have power to pass upon the competency, relevancy, or materiality of any question in the course of an examination, subject to have the question reviewed by the judge upon certificate. The more convenient practice would seem to be for the referee to make his rulings, and thereupon require the question to be answered. If his ruling be against the question, and the court should reverse his finding, it would not be necessary to have a re-examination of the witness. If the court should affirm such ruling, the answer may properly be disregarded. The examination should continue, and the question be certified after the deposition is completed, to prevent delay." Loveland, Bankr. 502.

My conclusions on this branch of the case are: First, that in a proceeding before a referee, such as the present one, a record should be made of all that transpires on the examination of witnesses,—questions, objections, rulings, exceptions, and answers should all be taken down; second, that, on a review of the order made by the referee, the judge should look through the whole record, and, considering only competent and material evidence, affirm, modify, or reverse, with suitable directions, the referee's order, accordingly as the circumstances of the case require. If, as in the present case, the order be one whose enforcement may call into exercise the power of commitment, and the judge is not satisfied beyond a reasonable doubt of the sufficiency of the evidence to justify the order, he should set it aside, and either put an end to the proceeding, or refer the matter back to the referee, with appropriate instructions. If, however, there is in the record enough of competent and relevant evidence to justify the order, either wholly or in part, it should be accordingly affirmed or modified, notwithstanding there were errors and misconduct such as shown in the present case on the hearing before the referee.

The jurisdiction of the court being established, and the rules of procedure for its exercise determined upon, I now come to a consideration of the facts. The evidence is voluminous, covering more than a thousand pages, and its review now is impracticable. A few only of the salient points can be mentioned. The recitals of facts

made in the referee's findings are fully sustained by the evidence. In addition to those recitals, a few other matters will be stated.

The bankrupts began business as merchants and partners, under the firm name of De Gottardi & Righetti, in the year 1896, at Cayucos, in this state,—a village of two or three hundred inhabitants,—and continued the business until May 2, 1901, when the store was attached. On the 23d of January, 1901, the bankrupts, as appears from the books of the firm, took an inventory of their property and indebtedness, from which it appeared that the former was \$19,018.18, and the latter \$2,050.06. The schedules of the bankrupts, filed herein on the 1st day of July, 1901, but which exhibit the condition of the estate at the time of the attachment, May 2, 1901, represent their assets at \$28,964.37 and their debts at \$22,824.70. The deficiency of assets shown by the schedules in bankruptcy (\$6,039.67), added to the surplus of assets shown by the inventory of January 23, 1901, makes a total loss between January 23, 1901, and the 2d day of May, 1901 (a period of a little more than three months), of \$23,007.82. The startling change thus exhibited led to judicial inquiry; and an examination of the bankrupts and other witnesses, for the purpose of acquiring information generally concerning the bankrupts' estate, was begun, at the instance of the creditors, before the referee, August 11, 1901. At this examination, which was prior to the present proceeding, one of the bankrupts (Natele De Gottardi) declined to answer competent and material questions touching the business and property of the bankrupts, on the ground that his answers might incriminate him. As showing the disposition of the bankrupt at that time, I quote from his examination the following questions and answers:

"Q. When you started into business with David E. Righetti, did you have any money? A. I decline to answer that question on the ground that my answer might tend to criminate me, and might be made the foundation of a criminal action against me, and might have a tendency to subject me to punishment for a crime."

This answer witness read from a piece of paper previously prepared and handed to him by his attorney, Mr. Dorn.

"Q. Did you make an inventory of the assets of your business (the business of De Gottardi & Righetti) in January, 1901? A. I decline to answer to that on the same ground I did before. Q. What ground is that, Mr. De Gottardi? A. I decline to answer that question on the ground that my answer might tend to criminate me, and might be made the foundation of a criminal action against me, and might have a tendency to subject me to punishment for a crime. * * * Q. Mr. De Gottardi, on the 27th day of April, 1901,—the day being Saturday,—did you not, for your firm of De Gottardi & Righetti, receive some money at Cayucos? A. I decline to answer on the same ground. Q. Did you not on that date receive \$300 in money from Peter or Paul Maddona? A. I decline on the same ground. Q. Did you not upon that date receive from Peter Maddona the sum in addition, of \$600, or about that amount of money, in a check or draft? A. I decline to answer on the same grounds. Q. Did you not take that money, and appropriate it to your own use, and withhold it from your creditors, and conceal the money? A. I decline to answer on the same grounds. Q. On the 27th day of April, 1901, did you not have in your possession at your store in Cayucos a sum of money in coin in excess of one thousand dollars? A. I decline to answer on the same ground. Q. Mr. De Gottardi, did you not have in your possession at your house in the city or town or place called 'Cayucos,' in the

county of San Luis Obispo, on the 30th day of April and the 1st day of May, 1901, the sum of fifteen hundred dollars in money? A. I decline to answer on the same ground. Q. Did you not prior to the 27th day of April, 1901, to wit, about the 25th day,—the 26th day of April, 1901,—receive communications from various of your creditors, and particularly the Commercial Bank of San Luis Obispo and the Andrews Banking Company of San Luis Obispo, calling attention to the fact that the account of De Gottardi & Righetti was overdrawn, and requesting you to remit? A. I decline to answer on the same ground. Q. Did you not on the 27th day of April, in the afternoon or evening of that day, leave Cayucos,—1901? A. I decline to answer on the same ground. Q. Did you not on the 27th day of April, 1901, when you left Cayucos, have in your possession drafts and coin belonging to the firm of De Gottardi & Righetti in excess of \$4,000? A. I decline to answer on the same ground. Q. Did you not while in the city of Los Angeles receive from the firm of Loeb, Fleischman & Co. in excess of six thousand dollars belonging to the firm of De Gottardi & Righetti? A. I decline to answer on the same ground. Mr. Ach: Haven't you that money now? A. I decline to answer on the same ground. Q. Haven't you that money in hiding and in your possession at this time? A. I decline on the same ground, sir, to answer. Q. What did you do with that money? * * * A. I refuse to answer that question on the same ground. Q. Mr. De Gottardi, did you not have in your possession on Wednesday, the 1st day of May, 1901, and in the possession of the firm of De Gottardi & Righetti, checks payable to De Gottardi & Righetti, or a check payable to De Gottardi & Righetti, in excess of two thousand dollars? A. I refuse to answer that question on the same ground. Q. Did you not have such check, and did you not give it to Mr. Dorn, the gentleman who appears here for you as counsel? A. I refuse to answer that question on the same ground. Q. Did you not on the morning of the 1st day of May, 1901, telephone to Mr. Dorn, in the town of San Luis Obispo, to come over to Cayucos? A. I decline to answer on the same ground, sir. Q. You mean all the time, when you say the same ground, the same ground that you read from that piece of paper that you carry with you? A. Yes, sir. Q. Did you not ask the advice, before the arrival of Mr. Dorn, of some person in the city or town of Cayucos, as to what you should do with the collaterals and the moneys that you had? A. Decline to answer on the same ground. Q. Do you now know that David Righetti has in his possession at this time moneys belonging to the firm of De Gottardi & Righetti? A. I decline to answer that question on the same ground. Q. Do you now know that at this time the attorney, Mr. F. A. Dorn, has in his possession moneys or property belonging to the copartnership—the firm—of De Gottardi & Righetti? A. I decline to answer that question on the same ground."

Without quoting further from said examination, it is sufficient to say that whole pages of questions, competent and material, were propounded to the witness, which he persistently refused to answer on the grounds stated. The refusals of De Gottardi were certified to the judge, who ruled that the questions must be answered. Before said ruling was announced an examination of David E. Righetti, one of the bankrupts, was had; and he also refused, on the same ground, to answer a great many competent and material questions concerning the bankrupts' estate. He also declined, on the same ground (that is, on the ground that it might tend to criminate him), to answer questions as to his whereabouts during the night of the alleged robbery, April 30, 1901, as follows:

"Mr. Ach: Q. Mr. Righetti, were you in Cayucos on the 30th of April, 1901? A. I decline to answer that question. Q. Why? A. On the same ground stated before. * * * Mr. Ach: Q. Mr. Righetti, did you not go into your store on the night of the 30th of April, 1901, after the store was closed, and open the safe? A. I decline to answer that question on the same ground, sir. * * * Mr. Ach: Q. What time did you go to bed on the

night of the 30th of April, 1901? A. I decline to answer that question on the same grounds. * * * Mr. Ach: Q. After you left the store on the night of the 30th of April, 1901, did you have a meeting with Mr. De Gottardi anywhere in Cayucos? A. I decline to answer that question on the same ground, sir. * * * Mr. Ach: Q. Don't you know what became of the money that Mr. De Gottardi brought up from Los Angeles? A. I decline to answer that question on the same ground. * * * Mr. Ach: Q. Did anybody tell you to decline to answer these questions? A. Yes, sir. Q. Who? A. My lawyer. Q. What is his name? A. Mr. Dorn."

Subsequently, in the pending proceeding, the bankrupts appeared before the referee and expressed their willingness to answer the questions which they had previously declined to answer, but counsel for the trustee did not see fit to call them as witnesses. They took the stand, however, in their own behalf, and explained their previous refusals by saying, in substance, that they thought, from the actions of some of the creditors and their attorneys, that the examination was not a fair one, and that the creditors and their attorneys were simply seeking grounds to charge them with a crime, and were trying to confuse them, and would take advantage of any mistake they might make. The apprehensions thus avowed by the bankrupts are not usually attendant upon a course of fair dealing, and their refusals to answer proper questions, so unsatisfactorily explained, together with the facts that such refusals were the result of an agreement between the bankrupts and their attorney, made before the examination begun, ill comport with an honest failure in business, or truthful accounting for assets. De Gottardi's claim that he gave \$6,000 to a woman and \$425 to a doctor involves the admission that he did have that amount of money in his possession, belonging to the estate of the bankrupts. This fact, however, is also testified to by Righetti, as well as evidenced by the books of the firm. The only question, therefore, to be determined on this branch of the case, is whether or not De Gottardi's statement of his disposition of the money is to be believed. It has been said by high authority:

"The bankrupt, when on examination, after admitting the possession of property, must clearly account for the same to the satisfaction of the court; otherwise he must be held to still have it in his possession, and be able to hand it over to his assignee, and, on falling or refusing to account in a reasonable manner for the disposition of assets which have been traced to him, must be held to be acting in contempt of the jurisdiction of the court." In re Salkey, 21 Fed. Cas. 238 (No. 12,253).

Can it be claimed that De Gottardi has accounted in a reasonable manner for the \$6,500 which he admits to have been in his possession but a short time before the petition in bankruptcy was filed, by asserting that he gave \$6,000 to a woman and \$425 to a doctor, when he refuses, on cross-examination, where there is no immunity from self-criminatory evidence, to name the woman or the doctor to whom he says the money was given? Such a claim would be preposterous. If his testimony in this regard had been true, its corroboration would have been within his power. In the absence of such corroboration, under all the circumstances of this case, the issue cannot be otherwise found than against him.

The claim of the bankrupts that they were robbed of \$7,500 is likewise an admission of the fact that they did have in their possessi...

that amount of money belonging to their estate. Here, again, the question to be determined is whether or not the testimony of the bankrupts in regard to the alleged robbery is to be accepted as true, or rejected as false. It has been said:

"A bankrupt should have the disposition to comply with the law,—candidly to account for his property. The law requires it. He is entitled to fair consideration from the court and its officers. The case is very different where the bankrupt is contumacious, as this man was in the first instance, and as he probably has been in some degree all along. In that case, where the bankrupt fails to testify fully and fairly and truthfully, the court or the referee is at liberty to accept his testimony as it may seem to be supported by other witnesses. If at any point it is found that his testimony is unworthy of credit, it may be rejected altogether." *In re Tudor* (D. C.) 100 Fed. 796.

On this issue of the alleged robbery, as on the one already disposed of, the referee's finding is fully justified by the evidence. There is no room for controversy but that the bankrupts accumulated the large amount of money, of which they claim they were robbed, for the purpose of in some way concealing it from their creditors. This and the other facts enumerated by the referee are sufficient to determine said issue against the bankrupts. Furthermore, the immediate circumstances of the alleged robbery confirm its improbability. Forcible means were not employed in opening the safe. Neither drill nor explosive was used. The safe was opened by some one familiar with the combination, or else the combination was not turned on the night of the robbery. There was no indication of a forcible entry into the house, other than an auger hole through the back door, designed, apparently, to reach a bolt which fastened the door; and this hole was so located with reference to the bolt and a defective and unused lock as to show that the hole was bored by one who knew of the situation and use of the bolt, as well as the disuse of the lock. To my mind, the boring of this hole was a mere artifice on the part of the bankrupts to divert suspicion from themselves.

Upon the competent evidence in the record, there can be no reasonable doubt but that there was on the part of the bankrupts a deliberate scheme to defraud their creditors, and that the alleged payments to a woman and doctor and the alleged robbery were fictitious, and parts of said scheme. These conclusions are fully warranted by the facts which the referee enumerates in his findings, and strengthened by the further facts that the bankrupts have at other times made or attempted dispositions or arrangements of different pieces of property, which, if successful, will place those pieces of property beyond the reach of their creditors. To some of these dispositions and arrangements I will make hurried reference:

De Gottardi claims to have sold his half interest in the store March 15, 1901, to his brother-in-law, Giorgi, for \$1,500 cash, a part of which he says he gave to the woman, and the other part was abstracted from the safe. Righetti in the latter part of the year 1900 drew out of the partnership money, with which he bought a residence in Cayucos, upon which his wife afterwards declared a homestead. Righetti also claims that in October or November, 1900, he gave his wife a note for \$2,025, which she still holds. The evidence relat-

ing to these transactions reveals such badges of fraud as to throw serious doubt upon the integrity of each.

The last and most remarkable of the various dispositions of property by the bankrupts charged to have been in fraud of creditors was the transfer on May 1, 1901, to their attorney, F. A. Dorn, of two checks,—one for \$2,058.18, and the other for \$685.76,—upon an alleged agreement that \$2,000 was a retainer for services to be rendered in searching for the burglars, and their prosecution, if found, to final conviction, and the balance to be applied on a past indebtedness of \$800. Mr. Dorn, in one part of his examination before the referee, testified to this agreement as follows:

"Q. What did they give you this \$2,800 for, Mr. Dorn? A. Well, they gave it to me because they owed me considerable money, and because I demanded it,—I was weary of working on jawbone,—and because I wanted a retainer for my work I expected to do with reference to the robbery. In fact, I was employed to investigate this robbery, trace it out, and discover the robber or burglar, if possible, and prosecute him to a finish if he was found. The whole matter was placed in my hands, and this money was given as a retainer, and on account of what they owed me prior to that time. Two thousand dollars was a retainer, and the balance was applied on an indebtedness which existed in my favor against them at that time."

In another part of his testimony Mr. Dorn stated the agreement thus:

"The understanding was that \$2,000 was a retainer in the burglary matter, and anything that might arise out of it, and the balance would be applied on the indebtedness that existed prior to that time. Of course, the two thousand dollars retainer was to cover any services that might be rendered in the robbery or burglary case, whichever you might call it, and any other litigation that might arise out of it."

From other evidence in the case it appears that, early on the morning of the day the two checks were transferred to Mr. Dorn, the bankrupts consulted with Mr. A. M. Hardie, the postmaster at Cayucos, with whom they had frequently advised before in confidential matters. They told Mr. Hardie, in substance, among other things, that they did not propose to be left without anything. The fair inference from Hardie's testimony about his interview with the bankrupts is that they sought him for the purpose of placing in his hands certain papers and other things, so as to get them beyond the reach of their creditors and secure the same to themselves. He told them, in substance, that it was difficult to keep within the protection of the law and yet evade its provisions, and that they had better consult with their lawyer. They immediately telephoned to Mr. Dorn, who for a number of years had been their attorney in different matters, and requested him to come out to Cayucos, which he did. The bankrupts and Mr. Dorn testified concerning this matter. Neither of them was able to specify a single employment or service to make up the alleged past indebtedness which Mr. Dorn told them was \$800, and on which they claim nearly that amount was paid. Three cases begun in justices' courts were mentioned by Mr. Dorn, but in one case the testimony expressly showed that he had received his fee, while the inference is a fair one, from all the evidence, that the fees had also been paid in the other cases. Mr. Dorn testified: That

prior to his partnership with Mr. Green, November 15, 1900, he did not keep books of account, and that he had no books showing any services rendered to, or charges made against, De Gottardi & Righetti, prior to that date, and could not remember that he had any business transactions with them from the 15th day of November, 1900, to the 25th day of April, 1901, "unless it was consultations of some sort;" and, when asked if he remembered any consultations, he replied: "No; I don't recall definitely any consultations. In all likelihood, they did consult the firm,—one or the other of the members,—but I have no recollection of any particular transaction." That he never made any demand upon De Gottardi & Righetti for the \$800, or any part of it, before the time said checks were turned over to him, nor was any bill ever rendered for the same, or any part of it, and that he had never called on De Gottardi & Righetti for money without getting it. He was asked if the bankrupts made any objection to his claim of \$800, and answered:

"Yes, sir; they kicked about it a little bit. They thought it was too much. Something to that effect. I know I learned, from either the expressions on their faces or from what they said, that they thought it was a pretty steep charge. I didn't think they liked it very well."

The cross-examination of Mr. Dorn was as follows:

"Mr. Ach: These are statements in cross-examination by Mr. Dorn without objection by Mr. Ach. The Witness: Referring to the check for \$2,058.18, concerning which the witness had testified, and the check or draft for \$685.76, marked 'Exhibit H3,' concerning which the witness had been interrogated after the proceedings before the present referee had been commenced, the following order was made by the referee and served on me, after the title of the court and cause: 'The parties hereto being this day in open court; trustee appearing by Henry Ach and Paul M. Gregg, as attorneys; F. A. Dorn in proper person; said parties having stipulated in open court that all testimony taken and produced in the matter of the bankrupts above named, and on the examination of the bankrupts, stand as testimony in this matter, neither of said parties hereto desire to submit any further testimony, and said parties in open court waiving the making and filing of findings of facts herein, and the matter stand submitted upon said testimony. It is hereby ordered that the said F. A. Dorn has in his possession, belonging to the estate of the bankrupts, the sum of \$2,743.94; and it is ordered that the said F. A. Dorn pay said money, and all thereof, to Edward Vollmer, trustee in bankruptcy, within five (5) days from and after the date hereof. This order is not made, however, upon the ground or theory that said F. A. Dorn has been guilty of any fraud. That said firm of De Gottardi & Righetti at the time the money above mentioned was received by said Dorn was insolvent, but said Dorn had no knowledge thereof. This order is made without prejudice to the attorneys of the bankrupts making any application for an order allowing them attorney's fee in the matter of said bankrupts' estate. Dated this 8d day of September, 1901, Louis Lamy, Referee in Bankruptcy.' That order was served on me, or, rather, a copy of it; and I turned over to one of the attorneys for the trustee, Mr. Vollmer, the amount specified in the order, to wit, \$2,743.94,—being the amount of the two drafts concerning which the witness has testified."

The foregoing is a brief summary of the evidence appearing of record when my opinion was read in open court on the 7th of last month, as hereinbefore stated. Said opinion then contained strictures upon Mr. Dorn different in some particulars from those herein expressed; and, at the conclusion of its reading, Mr. Britt, counsel for bankrupts, requested that said strictures be held in abeyance "un-

til said Dorn may appear before this court, if he may so choose, and exculpate himself from any complicity in an intention to defraud the creditors in this case." Whereupon it was ordered that said opinion, so far as concerns said matter, be held in abeyance for further consideration, and that said opinion be not filed until the further order of the court. On January 25, 1902, Mr. Britt, pursuant to said request and order, submitted in open court (Mr. Ach, counsel for the trustee, being present and making no objection thereto) an affidavit of Mr. Dorn as follows:

"On May 1, 1901, I received from De Gottardi & Righetti, at Cayucos, a telephone message requesting me to go at once to Cayucos. I complied with the request, and reached Cayucos about 12 m. the same day. I did not know of the alleged burglary until I met some parties on the road about ten miles from the city of San Luis Obispo, who informed me that the safe of De Gottardi & Righetti had been robbed the night previous. On reaching Cayucos I was informed by De Gottardi that their safe had been robbed, and that some of their creditors were already threatening attachment. They also made statements to me to the effect that they were entirely solvent, and that pressure from their creditors would only result in loss to the firm and their temporary embarrassment. I believed them to be entirely solvent, even after the loss of the sum alleged to have been stolen, and continued in that belief until some time thereafter, as hereinafter stated. They desired to employ me to trace out the burglary, recover the money, if possible, hire detectives, if necessary, and prosecute to the end the guilty party. Also to represent them in dealing with their creditors, preventing suits, if possible, and appearing for them until payment could be made in case suits were brought. I appreciated the fact that an employment of this kind might involve a great deal of labor and expense. The burglar must first be detected; the evidence found to convict; the trial; the probable appeal to the supreme court; the possibility of a new trial being granted, and a new trial or trials being had. Also that, in their first excitement, creditors might attach and that meetings of creditors would have to be attended. They told me that they had but a small sum of cash in their immediate possession, but that they had several thousand dollars due them from Loeb, Fleishman & Co., of Los Angeles, and they had in their possession the two drafts or checks aggregating \$2,743.94, which are in evidence. I asked them to transfer to me the two drafts. They did so, and I accepted the employment. I did not know, and had never heard of the 'Giorgi transaction,' the note transaction with Mrs. Righetti, or the 'Maddona transaction,' at that time. I employed Mr. C. R. Soberanes to work on the case as a detective, and paid him for his services and expenses the sum of \$350. I went with Mr. De Gottardi to see the officers of the Commercial Bank, one of their main creditors, who had attached, endeavored to arrange with them for a release of the attachment, and offered to allow any one the creditors might select to take charge of the property for their protection until all creditors were paid. Arranged and attended, by my partner, Mr. Green, at our own expense, a meeting of the San Francisco creditors; and the reception there accorded, by whom, and the manner of accusation, is disclosed by the record. The report of that meeting was my first information of the payment by Mr. De Gottardi to a woman or doctor of any sum of money. I appeared in five different suits brought by creditors, and advanced the necessary costs, aggregating \$10. After the adjudication in bankruptcy, a proceeding was instituted before Referee Lamy to set aside the transfer to me of the two checks or drafts in question. I fully appreciated the fact that neither the referee nor the courts in bankruptcy had jurisdiction of this matter, but I appeared, denied any improper motives or intent on my part in the transaction, and tacitly consented to the order being made as disclosed by the record. The order was made, and I paid to the trustee the entire sum received by me, to wit, \$2,743.94. I was convinced at that time that De Gottardi & Righetti were bankrupt when they paid me the money, and that it was an unauthorized preference, though I am

still convinced that enough could have been realized from their assets, by judicious management, to have paid their creditors in full. I felt that my honor was involved in this proceeding, and though I was entitled to retain a reasonable fee for services rendered and to be rendered in the bankruptcy matter, and possibly all sums expended, I made no effort to do so; and the order was made, as hereinbefore stated, to pay over the entire sum. That order exonerated me from any blame or wrongful participation in the transaction, though it required me to give up money which I was entitled to retain. No request was made by any of the interested parties that said order, or any part thereof, be certified to this honorable court for review.

"Former Indebtedness. The firm of De Gottardi & Righetti was indebted to me when I made the trip to Caycos. The amount, extent, or particulars of that indebtedness are not fully disclosed by the record before this court. There was no effort made to collect that fee from this money, and I deemed it not necessary or proper to go into that matter fully before the referee, when it was not at issue. (There is a mass of testimony on this subject taken on the original examination of the bankrupts, though even then no effort was made to present my side of the question.) A claim will probably be presented in this matter on that indebtedness, and, if it is contested, all of the facts in relation thereto will be at issue, and may come before this court for review.

"Reasonableness of Fee. I have been actively engaged in practicing my profession before the state courts for over fifteen years, and am familiar with fees charged and paid for legal services in San Luis Obispo county. The employment might have resulted in appearing and even trying a great number of civil cases; attending an indefinite number of creditors' meetings at different places, so that the business might be carried on to their satisfaction; the possible recovery from the burglar of a large sum of money; the detection of the burglar; finding evidence to convict him; his trial before a jury, which would ordinarily take ten days or more; one or more appeals to the supreme court; and the possibility of one or more new trials. Had these services been rendered, and the whole sum received been paid for the same, the fee would not, in my opinion, have been extravagant or unreasonable.

"Secret Trust. There never was an understanding or intimation that this money, or any part thereof, should be held for the bankrupts, or either of them, or that any of it should at any time be returned to them, or either of them, or held in trust for them in any manner.

"Notice of Decision and Opportunity to be Heard. Had I anticipated that my connection with this matter was under consideration by the court, I would have been present and endeavored to make matters plain to the court. It may be said that I am charged with knowledge of that which the record contains; but I am not a party to this proceeding; my acts have been adjudicated by the referee; his judgment has been complied with, and has not been certified here for review. Under these circumstances, I assumed that the referee's decision was final; that, so far as an adjudication against me was concerned, that the referee's decision stood until certified to this court; that the question of past indebtedness was one which could only arise when a claim was presented; that the amount of a reasonable fee or retainer could only arise on a claim being presented therefor. For these reasons, among others, I have not heretofore explained my connection with this matter to the court."

After a careful review of all the evidence in the case, I am forced to the conclusion that the bankrupts were not indebted in any amount whatever to Mr. Dorn at the time the checks in question were turned over to him. A retainer of \$2,000 as a reasonable professional employment to investigate the alleged robbery, and prosecute the thief if found, is too preposterous for serious comment, and even its bona fides might well be questioned. It is true that Mr. Dorn, in his affidavit, states the scope of his retainer much more broadly than he stated it on the witness stand before the referee. Whether or not his

last version, however, if accepted as the correct one, would better the situation it was designed to improve, is doubtful. The bankrupts would not, under the circumstances which surrounded them, have used a large amount of their assets—practically all the cash they had on hand—in the employment of attorneys to negotiate with and obstruct the legal remedies of their creditors, but would have promptly applied the money thus wrongfully used to their just debts, where it equitably belonged, if their purposes had been honest and their dealings upright. One or the other of two things is true,—either the bankrupts transferred said checks to Mr. Dorn with an understanding that he should return to them the money collected thereon, between \$2,700 and \$2,800, or a part of it, or else the bankrupts were so perturbed and alarmed at their situation that they weakly submitted to an unrighteous exaction. Said transfer would be, under the former alternative, in direct line with, and, under the latter, a natural outgrowth from, the scheme, otherwise shown, to defraud creditors, and is therefore, in either event, corroborative evidence of the falsity of the bankrupts' stories of a robbery and an intrigue with a woman. Mr. Dorn's connection with said transfer cannot be passed over in silence. Although not admitted to the bar of this court, he is a practicing attorney at law, and represented the bankrupts before the referee in the proceedings now under review. If, however, he sustained no professional relation whatever to said proceedings, his participation in a disposition of property by the bankrupts, which the trustee has challenged as fraudulent, would be inseparable from the case; and it is temperate animadversion to say that, giving him the benefit of the least prejudicial of the two alternatives above mentioned, his agency in said transaction cannot be otherwise than grossly offensive to a court of justice.

While I shall not review all the contents of Mr. Dorn's affidavit, there are some things stated therein, which require notice. He says that, when he received the checks in question from De Gottardi & Righetti, he believed they were entirely solvent. How he could have entertained that belief, without closing his eyes to circumstances then apparent, it is difficult for me to understand; and, furthermore, how, in face of the facts that De Gottardi & Righetti were sorely distressed for money to satisfy their creditors, and for many years had been his regular clients, always faithful in the payment of fees, he could, at the most critical emergency of their business career, have exacted from them, partly on past accounts, but mainly as a retainer for future services, over \$2,700,—practically all the money they had on hand,—if he believed them to be entirely solvent, is a question to which I can find no satisfactory answer. That part of Mr. Dorn's affidavit devoted to the matter of past indebtedness only confirms the conclusion I first announced on that question, and which was precisely the same as herein stated, namely, "that the bankrupts were not indebted in any amount whatever to Mr. Dorn at the time the checks in question were turned over to him." The statement of his affidavit presumably responsive to this finding is that:

"The firm of De Gottardi & Righetti was indebted to me when I made the trip to Cayucos. The amount, extent, or particulars of that indebtedness are

not fully disclosed by the record before the court. There was no effort made to collect that fee from this money, and I deemed it not necessary or proper to go into that matter fully before the referee, when it was not at issue."

It will be observed that, while he says the firm of De Gottardi & Righetti was indebted to him, he does not name or intimate any amount whatever, and an indebtedness of only \$1 would fulfill literally every requirement of his statement. The explanation, of course, is clearly evasive, and a virtual admission of the correctness of the finding. But he says further:

"A claim will probably be presented in this matter on that indebtedness, and, if it is contested, all of the facts in relation thereto will be at issue, and may come before this court for review."

Why does he use the word "probably"? If the claim is just, why should there be any doubt or hesitancy as to its presentation? Moreover, at the time of filing his affidavit, January 25, 1902, nearly five months had elapsed from the date of the referee's order directing him to pay over to the trustee the money (\$2,743.94) he received from the bankrupts. This long failure to present the claim, unexplained, and in view of the other evidence relating thereto, ill comports with the idea of its justness. Mr. Dorn's suggestions of lack of notice and opportunity to be heard are without force. On the 22d day of June, 1901, a general reference of this case was made to Wm. D. Stephens, since deceased, but then referee for Los Angeles county, on affidavits alleging, among other things, that said Dorn was attorney for the bankrupts, and charged by the creditors of said De Gottardi & Righetti with having assets in his hands belonging to said firm, and that Louis Lamy, referee for San Luis Obispo county, was so prejudiced in favor of said Dorn that an impartial hearing of the matters to be investigated could not be had before said Lamy. Thereafter, on the 5th day of July, 1901, a notice of motion to vacate said order was filed at the instance of said Lamy, and to this notice, with the names of other attorneys for said Lamy, appears that of said Dorn. In opposition to said motion an affidavit by numerous creditors was filed July 11, 1901, to the effect: That, in the opinion of affiants, the matter of De Gottardi & Righetti, bankrupts, was replete with fraud committed by the bankrupts, and that affiants were informed and believed that Mr. Dorn had been a party to said fraud. That on an examination before some of his creditors at San Francisco, immediately prior to the institution of said proceedings in bankruptcy, De Gottardi declared that he gave about \$2,700 to Mr. Dorn on the 1st day of May, 1901; that Dorn claimed \$800 for services rendered before that date; "and that he had told Dorn about the robbery, and that he gave Dorn two thousand dollars retainer, to employ detectives, if necessary, and for his advice as to what to do." That said Dorn would be charged with fraud in obtaining said money, and otherwise, and that, owing to the intimate relations between him and said Lamy, the latter could not impartially inquire into and determine said matters. Thus it will be seen that Mr. Dorn, in the earliest stages of these bankruptcy proceedings, was fully advised that searching inquiries were to be prosecuted by the creditors into his dealings with

the bankrupts, and particularly concerning the two checks they transferred to him. Furthermore, the subsequent examination of Mr. Dorn as a witness by the trustee's attorney, in furtherance of said inquiries, was protracted and thorough, and invited from and gave to him every opportunity for full explanations. Mr. Dorn's assumption that the questions of past indebtedness and reasonableness of retainer were not legitimately before the court on this review, but could arise only when claims are made, respectively, therefor, was unwarranted. The chief issues on this review are whether the alleged payments by De Gottardi to a woman and a doctor, and the alleged burglary on the bankrupts' store, were real, or only parts of a scheme to defraud creditors. Manifestly, any fraudulent disposition of property by the bankrupts is pertinent to said issues. When, therefore, the trustee introduced in evidence the transfer of checks to Mr. Dorn, claiming the same to have been a fraud, and the bankrupts sought to justify said transfer on the grounds of past indebtedness to him and a retainer for his future services, these matters became not only proper, but necessary, subjects of inquiry. Mr. Dorn's further assumption that the decision of the referee, ordering him to pay to the trustee, within five days, \$2,743.94, money adjudged to be in his possession and belonging to the estate of the bankrupts, and stating that said order was not made upon the ground or theory of fraud, and that at the time Mr. Dorn received the money from the bankrupts he had no knowledge of their insolvency, because unreviewed and final, would be, in the pending proceeding, conclusive of the character of his relations to said money, was unwarranted. The trustee by said decision obtained all the relief he sought, and certainly could not have asked a review on the ground, that, while the order itself was good, the reasons given therefor were unsatisfactory. Besides, the decision expressly recites that findings of fact were waived by the parties, but without that recital the referee's remarks negatory of the ground or theory of fraud could have no greater or other effect than would have been given to an affirmative statement by him, had it been made, of his reasons for the order. Such a statement might be persuasive, but could hardly work an estoppel. Giving to said remarks of the referee, however, the force of an adjudication, they are inoperative here, further than above indicated, for the reason that a judgment in one action cannot be conclusive in another unless the parties to both are the same.

Orders conformably to the views herein announced, affirming the referee's decision, and committing the bankrupts to jail until they comply with the same, or until otherwise ordered by this court, having been already made, the clerk will now enter only an order for the filing of this opinion.

THE FALLS OF KELTIE

(District Court, D. Washington, N. D. February 18, 1902.)

1. ADMIRALTY JURISDICTION—SUIT BY CITIZEN AGAINST FOREIGN SHIP—RULE OF COMITY.

An admiralty court of the United States has no right to refuse its process when demanded by a citizen of the United States against a foreign ship for the purpose of having the rights of the parties determined under a maritime contract, such as shipping articles, and to remit the controversy to the determination of the consular representative of the country to which the ship belongs. The right to invoke such jurisdiction is one which belongs to every citizen, and of which he cannot be deprived even by treaty or legislation.

2. SAME.

While a court of admiralty of the United States will not entertain a suit by foreign seamen against a British ship to determine their rights under shipping articles, yet where one of the libelants is an American citizen, and the court is obliged to take jurisdiction to determine his rights, it will incidentally hear and decide the case as to his co-libelants.¹

3. SEAMEN—CONSTRUCTION OF SHIPPING ARTICLES—TERMINATION OF TERM OF SERVICE.

Shipping articles described the voyage for which the seamen became bound as from New York to Shanghai; "thence, if required, to any ports and places within the limits of seventy-five degrees north and sixty-five degrees south latitude, trading to and fro for a period not to exceed three years; voyage to end at a port in the United States, the United Kingdom, or the continent of Europe." *Held*, that the contract was for a voyage, and not for a term of three years, and that such voyage terminated, and the seamen were entitled to discharge, on the return of the ship to a port of the United States.

4. ADMIRALTY—PLEADING—SUFFICIENCY OF LIBEL.

A libel in rem should state the nationality of the vessel proceeded against, but such allegation is not indispensable when jurisdiction is invoked by a libelant who alleges that he is a citizen of the United States.

5. SAME—MISJOINDER.

A claim by seamen for damages on account of alleged assaults by the master cannot be litigated in a suit in rem, but, where the libel contains other allegations stating a cause of action in rem, those relating to such claim may be disregarded, as surplusage, and the misjoinder will not be fatal.

In Admiralty. Suit in rem against a British ship by seamen to recover wages. On exceptions to libel.

J. L. Waller, for libelants.

Hastings & Stedman, for claimant.

HANFORD, District Judge. This is a suit by four seamen, one of whom alleges that he is a citizen of the United States, against the British steamship Falls of Keltie, to recover wages earned on a voyage from New York to Shanghai, and thence to Seattle. The shipping articles containing the contract under which they served were signed at the city of New York, before the British consul, and describe the voyage for which the libelants became bound as follows:

From New York to Shanghai, "thence, if required, to any ports and places within the limits of seventy-five degrees north and sixty-five degrees south

¹Admiralty jurisdiction of suits between foreigners, see note to *Fairgrieve v. Insurance Co.*, 37 O. C. A. 193.

latitude, trading to and fro for a period not to exceed three years; voyage to end at a port in the United States, the United Kingdom, or the Continent of Europe, with liberty to call for orders if required."

The libelants claim that, by the plain words of their contract, it was fully performed on their part when the ship arrived at Seattle. The British vice consul at Seattle has decided that they are bound by their contract to continue in the service of the ship for a term of three years, and has refused to discharge them, or to order payment of their wages. Notwithstanding his determination, this court granted leave to the libelants to file their libel, and to have process in rem against the ship for the purpose of adjudicating the controversy, in case the proof establishes the claim that one of the libelants is a citizen of the United States. The case has been argued and submitted upon exceptions to the libel, whereby the claimant contests the jurisdiction of this court, and the sufficiency of the allegations of the libel to justify the suit.

The rule of comity which should be observed in dealing with controversies between alien seamen and masters of foreign ships was stated in the decision of this court in the case of *The New City* (D. C.) 47 Fed. 328; but that rule is not applicable where a party to the controversy is a citizen of the United States. In the treaty between the United States and Great Britain providing for the apprehension and surrender of deserters from the ships of either country while in the ports of the other, an exception was made, exempting from its provisions "citizens or subjects of the country where the desertion shall take place" (27 Stat. 961), so that the local authorities cannot be required to arrest and deliver up a citizen who may desert from a British ship in an American port. The same consideration for the rights of citizens must control when courts are urged to leave a dispute as to the true construction of a shipping contract, and a claim for wages between a citizen and the master of a foreign ship, to be determined by the consular representative of the country to which the ship belongs. I do not think that the courts of any nation will refuse to hear the complaints and enforce the rights of its own citizens or subjects against foreign ships. Certainly this court has no right to refuse its process when demanded by any citizen of the United States. By the constitution of the United States, the people have ordained that judicial power shall be vested in the supreme court, and in inferior courts to be established by law, and that the judicial power shall extend to all cases of admiralty and maritime jurisdiction. The manifest purpose of these provisions is to insure to citizens of the United States means for the redress of wrongs and the enforcement of legal rights. In some branches of jurisprudence the jurisdiction of the federal courts is concurrent with that of the local courts created by and existing under state laws, but the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and cognizance thereof is given to the national courts exclusively. *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; *The Glide*, 167 U. S. 606-624, 17 Sup. Ct. 930, 42 L. Ed. 296. The executive and legislative branches of the government have no power to remit cases of admiralty and mari-

time jurisdiction for adjudication to any tribunal other than a court established and organized pursuant to the constitution. Jurisdiction of this class of cases cannot be conferred upon state courts by any law enacted by any state, nor by congress; and, a fortiori, no citizen of this country, having a cause cognizable in a court of admiralty, can be required by any law or treaty to seek an adjudication thereof in any foreign country, nor be denied the right to invoke the jurisdiction of the courts specially established pursuant to the constitution for the purpose of rendering justice in such cases. I consider that this court is bound to take cognizance of this case for the purpose of deciding the disputed question whether the libelant Swanson is or is not a citizen of the United States, and, if the court shall find in his favor on that issue, then it must proceed to a final adjudication of all questions which are properly alleged in the libel. The libelants who are not citizens of the United States would not be permitted to sue in this court independently; but, if the court has to entertain the case for the determination of the controversy as to the rights claimed by Swanson, it will incidentally hear and decide the contentions of his co-libelants.

It is my opinion that the contract must be construed as a contract for a voyage, and not for a term of three years. The agreement certainly binds the libelants to continue in the service of the ship, if required, after her arrival at Shanghai, and while trading to and fro within the limits mentioned, for a period not to exceed three years. This period is in addition to the time required for making the run from New York to Shanghai and return to a port in the United States, United Kingdom, or continent of Europe; but the phraseology of the contract excludes the idea that the libelants became bound for a term of three years, unless required to serve while the vessel should be engaged in trading to and fro between Shanghai and ports other than any port of the United States, United Kingdom, or continent of Europe. The contract is explicit that the voyage is to end at a port in the United States, United Kingdom, or continent of Europe; and, as there are many ports in the countries named, and no one in particular is designated as the port at which the voyage should end, the master or owner could choose any port in either of those countries, but could only choose one port; and upon arrival of the ship at a port in the United States the voyage specified was terminated, and the contract was fully performed on the part of the libelants, so that they became entitled to claim their discharge and payment of their wages.

A libel in rem ought to state the nationality of the vessel proceeded against. I consider the libel in this case to be not as perfect a specimen of good pleading as it would be if the nationality of the Falls of Keltie were alleged therein, but the allegation is not indispensable when jurisdiction is invoked by a libelant who alleges that he is a citizen of the United States.

In addition to the wages sued for, damages are claimed for assaults alleged to have been committed by the master. This claim cannot be litigated in a suit in rem, but it is not necessary to file a new or

amended libel on account of this misjoinder. The court will ignore the claim for damages, as surplusage.

The exceptions are sustained as to the claim for damages, and overruled in all other particulars.

In re STORCK LUMBER CO.

(District Court, D. Maryland. March 6, 1902.)

BANKRUPTCY—CORPORATIONS—DISSOLUTION BY STATE COURT—EFFECT.

The sole stockholder of a Maryland corporation filed a bill in a state court alleging its insolvency, and praying the court, under Code Md. art. 23, and amendments, to declare the dissolution of the corporation and appoint receivers. The corporation answered, admitting the allegations of the bill, and the court on the same day entered its decree granting the relief prayed. Thereafter creditors filed a petition asking to have the corporation adjudged bankrupt. *Held*, that a motion to quash the petition in bankruptcy on the ground that the state court had full jurisdiction when it entered its decree dissolving the corporation, and that, therefore, the corporation had no existence when the petition was filed, should be denied, the action in the state court being in the nature of an insolvency proceeding, and the bankrupt act superseding state insolvency laws.

In Bankruptcy.

John E. Semmes, Stephens & Lincoln, and Charles M. Leslie, for petitioning creditors.

William S. Bryan, Jr., for respondent Storck Lumber Co.

MORRIS, District Judge. The Storck Lumber Company, of Baltimore city, is a Maryland corporation, and is one of a large number of trading corporations which Charles E. Corkran caused to be incorporated for the purpose of helping him to carry on his business plans. He held and owned all of its capital stock, and on August 19, 1901, he filed a bill of complaint in equity in the circuit court No. 2 of Baltimore city on behalf of himself and its creditors, alleging that it was unable to pay its debts as they matured in the ordinary course of business, and was insolvent. He prayed that court to exercise the powers given to it by the Maryland Code, art. 23, and the amendments thereto, to declare the dissolution of the corporation, and to appoint receivers of its estate and effects, who should be trustees for the benefit of the creditors and stockholders, and who should act under the direction of the court. The corporation filed its answer at once, admitting the truth of the allegations in the bill of complaint, and consenting to the appointment of the receivers; and on the same day the court entered its decree appointing receivers, adjudging that the corporation was dissolved, and that it be deemed to have surrendered its corporate rights, privileges, and franchises. The receivers were given power to take possession of all its assets, collect the outstanding debts due to it, and to convert all its property into money, and bring the same into court for distribution among the creditors and stockholders according to their legal rights and priorities, and to wind up the affairs of the corporation in conformity to the

provisions of the Maryland law applicable to the winding up of insolvent corporations. The receivers qualified, and were proceeding with their duties, when, on November 18, 1901, certain petitioners, claiming to be creditors of the corporation, filed their petition in this court alleging certain acts of bankruptcy, and asking to have the corporation adjudged bankrupt under the provisions of the national bankrupt law of 1898. The receivers appointed by the state court have appeared in answer to the petition, and have moved to have it quashed upon the ground that the state court had full and complete jurisdiction on August 19, 1901, when it entered its decree dissolving the corporation, and adjudging that it had surrendered its corporate rights, privileges, and franchises, and appointing receivers, and that on November 18, 1901, when the petition in bankruptcy was filed, the defendant corporation was no longer in existence, and all its property was vested in the petitioners.

The question raised by this motion to quash is not clear of difficulty, but it seems that it must be solved by applying the broad principle that the national bankrupt law is to govern the administration of the estate of all insolvent debtors who are within its provisions, and supersedes all the state laws having the like object, when its provisions are invoked by the requisite creditors, and acts of bankruptcy are proven. The Maryland statute for winding up insolvent corporations is in the nature of a proceeding in insolvency. Chapter 263, art. 23, § 264, Act 1894, provides that the bill for the dissolution of an insolvent corporation may be filed by any stockholder, shareholder, or creditor, or by the attorney general of Maryland, or by the state's attorney of the city or county. Chapter 349, § 264a, Act 1896, provides that, when any corporation has been declared insolvent under section 264, all payments, conveyances, and assignments, and all preferences which, if made by a natural person, would have been void or fraudulent under the state insolvency laws, shall, to the like extent, be void or fraudulent, and all its property and assets distributed to creditors as the property and assets of an insolvent debtor are distributed under the provisions of the state insolvent laws; and that the date of the filing of the bill against the corporation shall be taken for the purpose of determining the validity of preferences and for all other purposes as the date of the filing of the petition in insolvency by or against a natural person. The national bankrupt act of 1898 superseded the state insolvent laws, and now, when commercial and manufacturing corporations are so numerous, and are sometimes used, as in this case, more as a cover from individual liability than for more legitimate uses, it can scarcely be supposed, as the bankrupt act especially provides for proceedings against commercial corporations, that it was intended that such a corporation could commit acts of bankruptcy, and escape the provisions of the bankrupt act by applying to be wound up under the state statute, and thus defeat the operation of the bankrupt law. In re Independent Insurance Co., Holmes, 103, Fed. Cas. No. 7,017; Platt v. Archer, 9 Blatchf. 559-569, Fed. Cas. No. 11,213; State v. Superior Court of Kings Co., 2 Am. Bankr. R. 92, 56 Pac. 35; Boese v. King, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760; In re Lengert Wagon Co., 6 Am. Bankr. R. 535, 110

Fed. 927; Scheuer v. Stationery Co. (C. C. A.) 112 Fed. 407; Coll. Bankr. p. 431.

Upon the best consideration I have been able to give the question, I think the motion to quash the proceedings must be overruled.

BEVIN BROS. MFG. CO. v. STARR BROS. BELL CO. et al

(Circuit Court, D. Connecticut. February 22, 1902.)

1. PATENTS—DESIGNS—INVENTION.

The fundamental question in determining the validity of a design patent is whether the inventive faculty has been exercised to produce something which is original and pleasing to the eye.

2. SAME—IDENTITY OF DESIGNS.

In design patents, the test of identity on questions of anticipation and infringement is the eye of the ordinary observer; and in determining such question the court may avail itself of such common knowledge as is possessed by the general public.

3. SAME—NOVELTY—DESIGN FOR BELL.

The Scranton design patent, No. 33,142, for a design for a bell, is void for lack of patentable novelty. Also held not infringed.

In Equity. Suit for infringement of letters patent No. 33,142, granted to Frederick A. Scranton August 28, 1900, for a design for a bell. On final hearing.

Chas. L. Burdett, for complainant.

Simonds & Hart, for defendants.

TOWNSEND, District Judge. At final hearing on bill and answer, defendants deny the validity and their infringement of complainant's patent, No. 33,142, granted to Frederick A. Scranton August 28, 1900, for a design for a bell. The specification says:

"As shown in the drawings, the leading or material feature of my design consists of a body part, a, in the form of an oblate spheroid, and having at one end a circular base, b, joined with the body portion, a, by a smaller neck portion, c, which flares out from the point of union with the body part to its point of connection with the base, b. The body portion of the bell, in the form of an oblate spheroid, has its end approaching a form nearly flat, as shown in the drawings."

The drawings show such an oblate spheroid and neck, and the claim covers "a bell as herein shown and described."

The complainant and defendants are located at East Hampton, Conn., and are rival manufacturers of bells. Up to February, 1901, complainant had sold over 1,700 embodiments of its patent. The bells in question are intended for use on automobiles. The patented design is unlike any other form of automobile bell previously produced.

In support of their denial of patentable novelty, defendants claim to have shown prior designs for door knobs and bells and other devices which so closely resemble the form shown in the patent as to deprive it of all claim to novelty. The answers to defendants' contention as to patentable novelty are as follows: (1) The uncertain and questionable character of the testimony as to the prior existence of the alleged an-

ticipating exhibits; (2) differences of ratio between neck and base in the alleged anticipations and in the patented design, and other differences in configuration; (3) differences in construction and character of use. The objections are well founded in fact as to several, but not all, of the exhibits. Among others, defendants have an old tea bell, which is substantially the same as that of the patent, except that the drawing of the patent shows a central bead on the oblate spheroid. The defense is well taken that the patentee has not only carefully avoided all mention of or reference either to said bead in his specification or claim, or to the fact that the spheroid is in two parts, but, as if out of abundant caution, has specified that "the leading or material feature" is the body portion, "in the form of an oblate spheroid," and the neck.

But irrespective of prior patents and other sufficiently proven exhibits, the defense of lack of patentable novelty stands on a broader foundation than the proof produced in court. In design patents the eye of identity, on questions of anticipation and infringement, is the eye of the ordinary observer. And in determining this question the court may avail itself of such common knowledge as is possessed by the general public. The fundamental question is whether the inventive faculty has been exercised to produce anything which is original and pleasing to the eye. *Gorham Co. v. White*, 14 Wall. 511, 20 L. Ed. 731; *Manufacturing Co. v. Odell* (D. C.) 18 Fed. 321; *Wooster v. Crane*, 2 Fish. Pat. Cas. 583, Fed. Cas. No. 18,036; *Dukes v. Bauerle* (C. C.) 41 Fed. 778; *Cahoone-Barnett Mfg. Co. v. Rubber & Celluloid Harness Co.* (C. C.) 45 Fed. 582. The eyes of the court cannot be closed to the fact that in the court room itself are electric light fixtures, placed there long before the date of the patent, which show a sphere with a neck and rim so nearly identical with those of the patent that the difference is a mere matter of immaterial proportions. Nor can the andirons of our grandfathers, the door knobs from time immemorial, the old chime bell of the sleigh, the conventional cuspidor, be overlooked. The court must take judicial notice of the oblate spheroid and neck common to the whole field of everyday arts, and must hold that this design is merely a double use,—is, at most, the adaptation of an old form to a new purpose. The defense of want of patentable novelty is sustained.

On the question of noninfringement, as well as patentable novelty, defendants refer to the door knob,—Exhibit No. 5. It is objected that this exhibit is not sufficiently proved, but I think pages 249 and 256a of the Russell & Erwin catalogue have not been successfully discredited. Complainant's oblate spheroid is substantially the same as this door knob; the only material difference in shape being that between the neck portions, for which reason plaintiff's patent should be limited to a design having the neck portion which flares substantially like that shown in the patent. The shape of defendants' bell differs from plaintiff's more widely than plaintiff's differs from the door knob, and therefore defendants' construction does not infringe the patent.

Let the bill be dismissed.

ATLANTA MACH. WORKS v. UNITED STATES.

(Circuit Court, N. D. Georgia. February 10, 1902.)

No. 1,541.

SALE—ACTION FOR PRICE—FAILURE TO MAINTAIN DEFENSE—WITHDRAWAL OF COUNTERCLAIM—EFFECT.

In an action against the United States to recover the contract price of lighthouse lanterns constructed for it by plaintiff, defendant set up in defense an amount claimed to have been paid to third persons, who had a contract to build one of the lighthouses, for damages caused to them by plaintiff's delay in furnishing the lanterns for that particular lighthouse, and introduced in evidence a voucher for the amount paid, but no proof to show the justness of the claim, or how and in what manner the third persons were damaged. The court thereupon suggested that the evidence so offered would be insufficient to prove the defense, and counsel for the government withdrew its counterclaim and pleas setting up the same. *Held*, that plaintiff was entitled to judgment for the amount claimed.

John L. Hopkins & Sons, for plaintiff.

E. A. Angier, U. S. Dist. Atty., and Geo. L. Bell and W. L. Massey, Asst. U. S. Dist. Attys.

NEWMAN, District Judge. This is a suit to recover \$3,369, alleged to be the contract price of three lighthouse lanterns constructed by the plaintiff for the United States under a contract with the lighthouse board, represented by Col. D. P. Heap, engineer of the Third lighthouse district. The lanterns appear to have been constructed according to contract, were examined and approved by an inspector duly appointed, were shipped and delivered at the proper destination, and were put in place and used by the United States. It appears that there was some delay in the construction of the lanterns, and while they were, according to the contract, to have been completed by the 15th of October, 1899, they were not, in fact, shipped until November 10, 1899. The failure to deliver the lanterns according to the contract was set up by the United States as a defense to this suit. The only damage claimed on behalf of defendant, however, was an amount alleged to have been paid by the government to Toomey Bros. & Co., who had a contract to build one of the lighthouses in which the lanterns constructed by the plaintiff were to be placed, by reason of damage to them caused by the delay of the Atlanta Machine Works in constructing the lanterns to be placed in that particular lighthouse. The only evidence offered by the government to prove that such damage resulted was a voucher for the amount of \$1,728.99 paid by the lighthouse board to Toomey Bros. & Co. apparently on this account. This voucher being offered without any evidence whatever to show the justice of the claim made by Toomey Bros. & Co., or how and in what manner they were damaged, and counsel for the United States stating that he had nothing whatever to support it, the court suggested that the evidence so offered would be insufficient to support the defense, whereupon counsel for the government withdrew its counterclaim, and, by leave of the court, the pleas setting same up were withdrawn. The voucher referred to was paid on April 1, 1901,—more

than seven months after this suit was instituted by the Atlanta Machine Works against the United States. The materiality of this fact, however, it is unnecessary to discuss, in view of what has been stated above. Counsel for the plaintiff have contended in this case that there was really no delay on the part of the plaintiff which cannot be justified under a proper view of the facts. They say the plaintiff had no notice until September 28, 1899, that there was any urgent need for the lantern to be placed in the lighthouse at New Haven, and that there was delay on the part of the government in appointing an inspector, and some few days lost by the inspector in getting the opinion of the officers of the lighthouse board in Washington. Some other interesting questions are raised by the evidence, but it is unnecessary to consider any of them, for the reason that the case is controlled by the entire failure of the government to maintain its defense, as hereinbefore stated, and by its withdrawal of its pleas, as has also been mentioned. It is agreed by the parties that there should be a credit of \$25 on the amount sued for, because of that amount having been paid by the government for freight, which was properly chargeable to the plaintiff.

Conclusions of Law.

The conclusion, therefore, necessarily is that the United States are indebted to the plaintiff in the amount of the contract price of these lanterns, less the amount of the freight item referred to, which would entitle it to a judgment for \$3,344 principal, with legal interest thereon from December 2, 1899; and judgment is consequently rendered in favor of the plaintiff, the Atlanta Machine Works, against the defendant, the United States of America, for said sum of \$3,344 principal, with legal interest from December 2, 1899, with costs of suit.

It is ordered that a transcript of the testimony and a certified copy of the proceedings be transmitted to the attorney general, as required by law.

In re YATES.

(District Court, N. D. California. February 24, 1902.)

No. 3,774.

BANKRUPTCY—WHO MAY BECOME VOLUNTARY BANKRUPTS—DEBTS.

The word "debts," as used in Bankr. Act 1898, § 4, providing that "any person who owes debts, except a corporation, shall be entitled to the benefit of this act as a voluntary bankrupt," must be construed in accordance with the definition given in section 1, subd. 11, as limited to a "debt, demand, or claim provable in bankruptcy," and an unliquidated claim for damages for a personal tort is not such a debt. Where the only debt scheduled by a voluntary bankrupt was a judgment rendered against him by a state court, and it is shown that such judgment was for a personal tort, and that an appeal therefrom had been taken and was pending at the time of the filing of the petition, the effect of which, under the laws of the state, was to supersede the judgment, the adjudication will be set aside and the proceedings dismissed.¹

¹ What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank of Mattoon, Ill.*, 42 C. C. A. 4.

In Bankruptcy. On motion by creditor to vacate adjudication.

T. B. Hutchinson, for creditor.

Edw. S. Bell, for bankrupt.

DE HAVEN, District Judge. This is a motion by one S. H. Risdon to vacate the decree of this court made January 2, 1902, by which Enoch Yates was upon his voluntary petition adjudicated a bankrupt, and for the dismissal of the petition in bankruptcy. The only debt mentioned in the schedule filed with the petition for adjudication is described as a judgment in favor of said Risdon for the sum of \$894, rendered by the superior court of the state of California in and for the county of Napa, on August 31, 1901. The ground of the motion is that Yates is not a bankrupt, within the meaning of the bankruptcy act. It appeared upon the hearing of the motion that the judgment referred to was obtained in an action for a willful and malicious injury to the person of Risdon, the plaintiff therein; that after its rendition, and before the decree of adjudication in bankruptcy, an appeal was taken from that judgment to the supreme court of the state, and such appeal is now pending.

1. It was said by the supreme court of California, in the case of *Harris v. Barnhart*, 97 Cal. 550, 32 Pac. 589:

"It has been repeatedly held by this court that the operation of a final judgment is suspended by an appeal therefrom, and that pending such appeal the judgment is not admissible in another case as evidence, even between the same parties."

And section 1049 of the Code of Civil Procedure of this state provides:

"An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

The appeal, therefore, from the judgment in the action of Risdon v. Yates suspended its operation, and may result in its reversal; and from this it follows that at the date of the adjudication in bankruptcy there was not, nor is there now, any certainty that the plaintiff in the action referred to will succeed in the recovery of any judgment against Yates. Such being the status of the claim for damages involved in that action, it is clear that Yates was not at the date of the filing of his voluntary petition a bankrupt, within the meaning of the law. Section 4 of the bankruptcy act provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." In subdivision 11 of section 1 of that act the word "debt" is defined as "any debt, demand, or claim provable in bankruptcy"; and subdivision "a" of section 63 of the bankruptcy act enumerates five different classes of debts which may be proved against the estate of the bankrupt, in one of which is included "a claim for a fixed liability as evidenced by a judgment or instrument in writing, absolutely owing by the bankrupt at the time of the filing of the petition against him"; but a cause of action against him for unliquidated damages for a personal tort, such as is involved in the

action of *Risdon v. Yates*, before referred to, is not within either of the classes named. Subdivision "b" of the same section provides:

"Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

This subdivision is not to be construed as authorizing the proof of claims not declared in subdivision "a" to be provable. Its object is simply to provide that unliquidated claims which fall within the scope of subdivision "a" are to be liquidated in such manner as the court shall direct. *Lowell, Bankr. p. 487*; and see, also, the well-considered opinion of Judge Marshall in the case of *In re Hirschman*, 4 Am. Bankr. R. 716, 104 Fed. 69. In the case of *In re Maples*, 5 Am. Bankr. R. 426, 105 Fed. 919, it was held that the bankruptcy proceeding should be dismissed, where the only debt scheduled was a judgment for willful and malicious injury to the person,—a debt which, although provable under the provisions of the bankruptcy act, would not be affected by a discharge. With much stronger reason should the decree adjudging *Yates* a bankrupt be vacated, and the proceeding instituted by him be dismissed, because at the date of the filing of his voluntary petition there was no existing provable debt against his estate under the bankruptcy act. It will be time enough for him to apply for relief under the bankruptcy act, and to ask the court to pass upon the many questions which may arise in such a proceeding, when it shall be ascertained that he is indebted to some person upon a claim provable under the bankrupt act.

The order of adjudication is vacated, and the petition in bankruptcy dismissed.

THE SLEEPY HOLLOW.

(District Court, D. Connecticut. March 19, 1902.)

Nos. 1324, 1325.

ADMIRALTY—PRIORITY OF LIENS.

An admiralty lien for towage is inferior to a statutory lien for repairs, the towage having been performed more than six months before, without effort to collect therefor till after, the repairs.

In Admiralty. On exceptions to commissioner's report.

Samuel Park, for Palmer & Son Co.

Wing, Putnam & Burlingham, for L'Hommedieu and others.

TOWNSEND, District Judge. In this case two libels were filed against the house boat *Sleepy Hollow*. One was for \$1,849.84, for services rendered and materials furnished said boat at the shipyard of the libelant, Robert Palmer & Son Company, at Groton, between November 27, 1900, and January 5, 1901,—a certificate of lien for said services being duly filed in the town clerk's office at Groton, as required by the Connecticut statute. The other libel was for \$80 for towage service rendered by the libelants, L'Hommedieu et al., on June 25 and 26, 1900. The vessel was sold for \$850.

The commissioner finds that the service of towage constitutes a good and valid lien against the vessel; but as the service was rendered nearly six months prior to the time the repairs were made, and as there is nothing in the evidence to show any cause for the delay in collecting the amount due for towage, the claim of the libellant, Robert Palmer & Son Company, for repairs, should take precedence of the claim for towage, and, as the avails of the sale are insufficient to pay both claims, the whole sum should be paid to libellant, Robert Palmer & Son Company.

Libellants, L'Hommedieu et al., except to the report of the commissioner on the following grounds:

"(1) Because the commissioner finds that the libellants' claim is not entitled to payment from the proceeds of the Sleepy Hollow. (2) Because the commissioner finds that the libellants' claim must be postponed in favor of the claim of the Robert Palmer & Son Ship Building & Marine Railway Company, and that the whole of the proceeds must be paid to said company. (3) Because the commissioner finds that the payment of a maritime lien must be postponed in favor of a claim of a lien not maritime, but acquired by virtue of a statute of the state of Connecticut. (4) Because the commissioner did not find that the libellants' claim was entitled to be paid in full, with interest and costs, prior to all other claims."

In the earlier decisions it was held that an admiralty lien took precedence of a statutory maritime lien, but it is now settled that they are of equal rank. *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654; *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; *The Guiding Star* (D. C.) 9 Fed. 521; *Id.* (C. C.) 18 Fed. 264; *The Wyoming* (D. C.) 35 Fed. 548. Claims for materials and supplies and for towage are usually considered, in the absence of special equities, of equal rank. *Saylor v. Taylor*, 23 C. C. A. 343, 77 Fed. 476; *Hughes*, Adm. p. 339. In these circumstances, as the libellants, L'Hommedieu et al., made no effort to collect their claim for towage service until after the commencement of this action,—nearly six months after the service was rendered,—the whole of the proceeds of sale should be paid to libellant, Robert Palmer & Son Company.

The report of the commissioner is affirmed.

DARNOLD et al. v. SIMPSON.

(Circuit Court, W. D. Missouri, W. D. April 2, 1902.)

No. 2,504.

1. CREDITORS—REMEDIES AGAINST SURETIES—LIMITATIONS.

Though ordinarily creditors will be allowed to proceed against property conveyed by their debtor to secure his sureties, such action must be taken on their part within the statutory period of 10 years, or will be barred.

2. SAME—IGNORANCE OF SITUATION—EFFECT.

The mere fact that the debtor concealed his fraudulent conduct, and that the creditors knew nothing of the situation until a short time before bringing the action, is insufficient to take the case out of the statute of limitations, where diligence on the part of the creditors to discover the situation would have enabled them to secure the property in payment of their debts.

3. SAME—LACHES.

Regardless of the statute of limitations, laches on the part of the creditors in delaying their action 10 years or more may defeat the right.

J. D. Shewalter, for complainants.

Lipscomb & Priest, and Lovelock & Kirkpatrick, for defendant.

McPHERSON, District Judge. This is quite a lengthy bill of complaint, with much immaterial matter therein. In addition thereto, there is an unwarranted and unprovoked attack upon a judge of a state court of the state of Missouri, a gentleman with whom I have no acquaintance, but I have not the slightest doubt is a judge of character and purity. If his rulings were wrong, then why was there no appeal, a course much the better than that of abuse, and allowing a ruling to remain which may or may not be an estoppel? This bill ought to be stricken from the files because of the unseemly language of and concerning the state court of Missouri. But I content myself with making this statement to show my own condemnation of such attacks.

One of complainants is a citizen of Kentucky, and the other of Illinois, and the defendant of Missouri, and the amount in controversy more than \$2,000. In 1858 William Hudgins conveyed certain lands in Ray county, Mo., to James Hudgins and Thos. Bayliss, in trust for Mary Darnold, for life, and at her death to her heirs. James Hudgins died in 1862, and Mary Darnold, 1871. Bayliss, as he had the right to do, under said trust deed, sold and conveyed the lands, receiving therefor \$1,500. In 1873 the probate court of Ray county, Mo., required said trustee to give bond in the sum of \$3,000 for the faithful performance of said trust. William Donaldson, John Harmony, and William Holman signed that bond as sureties. In 1877, Bayliss, the trustee, gave a mortgage or trust deed conveying certain Missouri lands to indemnify said sureties on his bond. Mary Darnold died in 1871. The plaintiffs are two of the four (by inference of the three) heirs of Mary Darnold, deceased. The other heir was settled with many years ago by the trustee. Bayliss, the trustee, died many years ago, but just when does not appear. The sureties on said bond are all dead, and have been for several years. The land covered by the trust deed to secure the sureties was, in 1889, conveyed to defendant Simpson. And this deed is attacked as having been made fraudulently. The prayer is to subject the land covered by the trustee's trust deed given to secure the sureties of the trustee. To this bill there is a demurrer, on the grounds, generally, of the statute of limitations, and that complainants are guilty of laches. Ordinarily, creditors such as complainants are will be allowed to proceed against property conveyed by the debtor to secure his sureties who have agreed to stand good to the creditor for the debtor. I need not fortify this proposition by argument or authorities. But on the face of the alleged cause of action it was barred by the statute of limitations of Missouri, under any phase of those laws. Any date that may be chosen for any act of Bayliss that can be complained of was more than 10 years prior to bringing this action. The only allegations seeking to take the alleged cause of action out from the statute of limitations are that Bayliss concealed his fraudulent conduct, and that complainants knew nothing of

the situation until a short time before bringing the action. But they knew their relationship to the parties to whom the trust was originally created. They knew her residence. The slightest examination of the records of the probate court of Ray county, Mo., would have put them on the track which would have led to the unearthing of the whole situation. The only allegation is that they did not know until recently. This is not sufficient. I do not have before me the exact wording of the Missouri statute. But Indiana, and many other states, have statutes which provide that the party has 10 years in which to bring action after the discovery of the fraud. In *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, was a case in which it was alleged that complainant, only a few months since, had discovered the fraud. But the supreme court held this not sufficient. The court held the bill defective, in that there should have been allegations showing diligence,—showing what had been done to discover the situation. See *School Dist. v. Deweese* (C. C.) 93 Fed. 602, and *Id.*, 100 Fed. 705-712. In the case at bar it was within complainants' knowledge of who their ancestors were, where their estates were situated, and what courts took jurisdiction over their estates, and the records of such courts were open to their inspection. Had they gone there, they would have ascertained all facts, and the sureties, and property given to indemnify them, would have been subjected to the payment of complainants' claim. The case of *Wood v. Carpenter*, has been followed with approval many times: *Pearsall v. Smith*, 149 U. S. 233, 13 Sup. Ct. 833, 37 L. Ed. 713; *Felix v. Patrick*, 145 U. S. 331, 12 Sup. Ct. 862, 36 L. Ed. 719; *Bates v. Preble*, 151 U. S. 162, 14 Sup. Ct. 277, 38 L. Ed. 106; *Ware v. Galveston City Co.*, 146 U. S. 116, 13 Sup. Ct. 33, 36 L. Ed. 904; *Johnston v. Mining Co.*, 148 U. S. 370, 13 Sup. Ct. 585, 37 L. Ed. 480,—and by a great many state supreme courts and federal trial courts.

I therefore hold that the alleged cause of action is barred by the statute of limitations, which statute it is the duty of this court to follow.

I do not discuss the question of laches, but, regardless of the statute, I believe and so hold, that the bringing of the action has been so long delayed that complainants ought not maintain the action. There has been no judgment rendered against the debtor, Bayliss. Neither his heirs nor representatives are made parties. Neither the grantor to the alleged fraudulent conveyance nor his heirs are made parties defendant. Complainants content themselves with making the grantee to the alleged fraudulent conveyance, and him alone, a defendant. See *Gaylord v. Kelshaw*, 1 Wall. 81, 17 L. Ed. 612.

In the absence of reasons for not making the other parties defendant, there are many authorities which hold that the bill is fatally defective.

But these questions I do not decide, as for the other reasons which I have given the demurrer must be sustained. And the demurrer of defendants to complainants' bill is sustained.

In re PURSELL.

(District Court, D. Connecticut. March 18, 1902.)

BANKRUPTCY—PRIOR PROCEEDINGS UNDER STATE INSOLVENT LAWS—EXAMINATION OF TRUSTEE IN INSOLVENCY.

Under Bankruptcy Act, § 21, providing that a court of bankruptcy may require any designated person who is a competent witness under the laws of the state to appear to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under the act, a trustee in bankruptcy could require the examination of a trustee in insolvency appointed in Connecticut more than four months before the commencement of the bankruptcy proceedings, concerning the disposition made by him of the bankrupt's assets.

In Bankruptcy.

A. D. Penney, for the petitioners.

TOWNSEND, District Judge. The question raised herein concerns the power of a trustee in bankruptcy in regard to property assigned to a trustee in insolvency under the Connecticut Statutes more than four months before the commencement of proceedings in bankruptcy. The trustee in bankruptcy attempted to examine the trustee in insolvency as to the disposition of the assets. The trustee in insolvency under the state law filed a petition that all proceedings in regard to the assets in his hands as trustee be stayed and dismissed, and that all examinations regarding said matters should proceed no further.

The facts and the rulings of the referee thereon are stated by him as follows:

"Bankrupts made an assignment in insolvency in the probate court on March 9, 1900, and on March 18, 1900, Willis G. Braley was appointed and qualified as trustee in insolvency of their estate. October 25, 1900, Braley filed an account purporting to be a final account showing that the assets had been entirely consumed in the expenses and charges of the trustee, leaving nothing for the creditors. The hearing on this account has been continued from time to time in the probate court, and that court has never adjudicated upon it. June 18, 1901, the Pursells were adjudicated bankrupt in the United States court, and a trustee was thereafter appointed. The trustee in bankruptcy has summoned Braley to appear before the referee in bankruptcy for an examination as to the disposition of the assets received by him under the assignment in the probate court, and claims that Braley has failed to take part of the assets into his possession, and has sold part of them, through a third party, to himself, and disposed otherwise of part, for the benefit of his family. Braley insists that the probate court only has jurisdiction of his doings under the assignment, and that the district court has no right to examine him in regard to it.

"The main question here is whether a trustee in bankruptcy would have a right to recover judgment against Braley, if it should be found that he has not acted properly and in good faith in respect to the property assigned by the Pursells. A suit for this purpose can only be brought in the state court. Will the state court sustain such a suit? Several cases have been cited in which the proceeding in bankruptcy followed an assignment in a state court. But in each of them the proceedings in bankruptcy were instituted within four months of the assignment. In the present case they are instituted more than a year after. The effect of the United States bankrupt act of 1898 upon the operation of the state insolvent law was carefully considered by the supreme court of errors of Connecticut, its highest appellate court, in *Ketcham v. McNamara*, 72 Conn. 709, 46 Atl. 146. That was a suit brought by a trustee

in insolvency to set aside a conveyance made in actual fraud of creditors. The court holds that the insolvent law of Connecticut has been suspended by the United States bankrupt act. Referring to the suit by the trustee in insolvency, the court says (page 713, 72 Conn., and page 148, 46 Atl.): 'His only right to maintain such an action comes from the decree by which he was appointed or confirmed. Congress has seen fit to provide a different means of impeaching such transactions, and one that leads to different results, both as to the debtor and his creditors. That no resort to this means has ever been had is not important. It was, after four months from the passage of the act, at latest, the only means that could be pursued to set aside fraudulent conveyances, which, like that in the case at bar, were thereafter executed.' And the following language, although obiter, seems intended to express the opinion of the court upon the point in question: 'Any different construction of the act of congress would often lead to frittering away insolvent estates in legal expenses. One creditor would resort to the state insolvent court. Another, later, would institute bankruptcy proceedings in the district court of the United States. Costs would accrue in each tribunal, and in suits brought under orders of each. Creditors proving claims in the state court would have to present them again in that of the United States, and yet the proceedings there, if taken more than four months after the act of bankruptcy, might result in nothing more than a barren decree adjudicating the debtor, in deed, a bankrupt, but affording no means of reclaiming property which he had previously made way with or placed in the hands of a trustee in insolvency.' The last sentence quoted implies that under the construction of the act of congress adopted by the court, to wit, that the state law has been totally suspended, the trustee in bankruptcy may reclaim property which the bankrupt had previously placed in the hands of a trustee in insolvency, even though the proceedings in the state court were begun more than four months before the proceedings in the United States court. The motion of Braley is overruled, and the examination as to his disposition of the assets placed in his hands by the bankrupt will proceed."

The question is apparently a novel one. No precedents bearing directly upon it have been cited. The statement of the referee also shows that "most of the claims filed with the referee were proved before the commissioners and in the probate court, but ten of the claims filed with the referee, aggregating \$591.30, were not so filed."

There is not, as yet, any attempt to set aside any conveyances made in good faith by the trustee in the probate court. Although the account of the trustee in that court was filed considerably more than a year ago, the court has never adjudicated upon it, and it seems most probable that in view of *Ketcham v. McNamara*, 72 Conn. 709, 46 Atl. 146, cited by the referee, it will proceed no further in the matter. Whether the creditors of the bankrupt can have any remedy in the state courts if the trustee has really abused his position is very doubtful.

It is not necessarily impossible that the property assigned to him may not have been of sufficient value to pay all the claims proved in the probate court, and leave a balance to be recovered by the trustee in bankruptcy. It seems probable that the highest courts in Connecticut would hold an attempt at an assignment in the probate court to be void, except in so far as those who have joined in it or assented to it are estopped from contesting it. If the probate court has jurisdiction, it was the duty of the trustee in insolvency to press the hearing of his account in that court to conclusion.

The bankruptcy law (section 21) provides that a court of bankruptcy may require any designated person who is a competent witness under

the laws of the state to appear to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. The provisions of this section are apparently broad enough to cover the examination in question. The trustee in bankruptcy should be allowed to test his rights in the state court, and should be allowed to use all means which the bankrupt act places at his command for obtaining the information necessary for the purpose.

The decision of the referee is affirmed.

In re RYAN.

(District Court, M. D. Pennsylvania. April 4, 1902.)

No. 57.

INVOLUNTARY BANKRUPTCY—AMOUNT OF CLAIMS—JURISDICTION.

Payments made by a bankrupt to certain of the petitioning creditors, reducing the aggregate amount of the petitioning creditors' claims below the statutory limit, does not defeat the jurisdiction of the bankruptcy court, where subsequently enough other creditors come in to raise the amount above the jurisdictional limit.

In Bankruptcy. Exceptions to report of referee.

W. J. Young, for exceptions.

C. M. Culver and H. K. Mitchell, for petitioners.

ARCHBALD, District Judge. At the date of filing the petition, October 11, 1901, the claims of the petitioning creditors amounted to \$513.80. Subsequently, and before the adjudication, the bankrupt made certain small payments to two of them, amounting in all to \$38, which reduced the aggregate amount of the claims as they then stood below the statutory limit. Within a few days afterwards, however, two other creditors, holding claims to the amount of \$78.60, petitioned to join in the proceedings. Is this sufficient to sustain the jurisdiction of the court, or was it ousted by the reduction of the claims of the original petitioners below the sum of \$500? The referee has found in favor of the proceedings, and I am satisfied that this is a correct conclusion. The petition was good when it was filed, and the proceedings which were thus instituted inured to the benefit of all parties. By the express provisions of the bankrupt act (section 59f), other creditors were entitled to come in at any time and join in them, and the petition could not be withdrawn or dismissed without consent or for want of prosecution until notice had been given them. Section 59g. The purpose of the latter provision undoubtedly is to prevent collusion, and enable creditors to exercise the right to come in if they desire. The payments made by the bankrupt in the present instance, in the evident attempt to oust the jurisdiction of the court, were therefore of no effect, enough other creditors having now joined in the proceedings to raise the amount above the jurisdictional limit.

The report of the referee is confirmed, and an adjudication ordered as prayed for.

CLARK v. ALLEN, Marshal.

(District Court, W. D. Virginia. April 4, 1902.)

1. JUDGMENTS IN CRIMINAL CASES—ENFORCEMENT.

Rev. St. § 916, providing that the party recovering a judgment in any common-law cause in a federal circuit or district court shall be entitled to similar remedies on the same as are provided in like causes by the law of the state, does not apply to judgments in criminal cases.

2. SAME—CONSTRUCTION OF STATUTE.

Rev. St. § 1041, providing that judgments in criminal and penal cases as to the fine or penalty may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced, means only that the government in enforcing judgments for fines and penalties is not restricted to mere imprisonment of the defendant, but may proceed also by execution against his property.

3. SAME—HOMESTEAD EXEMPTION—ASSERTION AGAINST FINE.

Rev. St. § 1042, provides that a poor convict, who has been imprisoned because of the nonpayment of a fine, may be released on making oath that he has no property (exceeding \$20 in value), except such as is by the state law exempt from being taken on "civil precept for debt." There is no United States statute expressly making a homestead in Virginia subject to fines imposed by the government. *Held* that, though the homestead laws of Virginia apply only to contract debts, and the exemption cannot be claimed against a fine due to the state, or even against a judgment for tort obtained by a private individual, the exemption may be asserted against a fine due to the United States government.

A. I. Harless, for complainant.

J. C. Blair, Asst. U. S. Dist. Atty.

MCDOWELL, District Judge. At a former term J. B. Clark was tried on an indictment charging him with retailing liquor without license (Rev. St. § 3242), found guilty, and sentenced to 30 days' imprisonment and to pay a fine of \$100 and costs. He served out his term of imprisonment, and, after having served 30 days on account of the nonpayment of the fine, he made the oath under Rev. St. § 1042, and was released. Thereafter fieri facias was issued directing the marshal to make the fine of \$100 and \$96.40 costs out of the goods, chattels, and real estate of the convict. Under this execution the marshal levied on certain real estate belonging to Clark and advertised it for sale. After the levy, but before sale, Clark filed a homestead deed, whereby he set apart as a homestead the real estate levied on, as well as certain personal property. He then applied for an injunction restraining the marshal from selling the land. On August 25, 1900, a temporary injunction was granted. The petition praying for the injunction alleges that Clark is a householder and head of a family, and that his entire estate is less in value than the amount exempt under the Virginia homestead laws. The case is before the court on a demurrer to the petition.

The only question presented by counsel is whether or not the homestead exemption can be claimed as against a judgment for a fine in favor of the government. The homestead laws of this state are unlike those generally in force, in that they apply only to contract debts. Article II of the state constitution reads: "Every householder or head of a family shall be entitled * * * to hold exempt from levy,

seizure, garnisheeing, or sale under any execution, order or other process, issued on any demand for any debt heretofore or hereafter contracted, his real and personal property, or either, * * * to the value of not exceeding two thousand dollars to be selected by him." Then follow certain exceptions not now of importance. The statute (section 3630, Code 1887) reads, " * * * on any demand for any debt or liability on contract * * *." The right to select property and set it apart as a homestead after judgment, but before a sale, by filing a homestead deed, is not questioned. In *Whiteacre v. Rector*, 29 Grat. 714, 26 Am. Rep. 420, the court of appeals of Virginia decided that the homestead exemption cannot be claimed against a fine due the commonwealth, imposed for a violation of the criminal laws. So far as I am advised, this decision, rendered in 1878, has never been overruled, or ever questioned, by the court of appeals. I am compelled to treat it as the proper construction of the state law. In *Frazier v. Baker* (1881) 5 Va. Law J. 565, the court of appeals held that the homestead exemption could not be claimed against a judgment for a tort. In *Burton v. Mill* (1884) 78 Va. 468, the same court made the same ruling as to a judgment for damages for breach of promise to marry, holding such damages to be, not a debt contracted, but a quasi tort. It is true that the late Judge Hughes, United States district judge, Eastern district of Virginia, in *Radway's Case* (1877) 3 Hughes, 609, Fed. Cas. No. 11,523, held to the contrary. But the rulings of the state court of appeals (the court of last resort) are, I conceive, of higher authority on the construction of the state law. By Rev. St. § 1042, a poor convict who has been imprisoned 30 days, solely because of the nonpayment of a fine, or fine and cost, may be released on making oath that he has no property (exceeding \$20 in value) except such as is by the state law exempt from being taken on civil precept for debt. This language clearly includes the property exempt from sale for a judgment on a contract debt. The bearing of this section on the question will be considered later. At present the point of most interest is to learn where, if at all, congress has shown an intent to give to the federal government in the enforcement of fines imposed in Virginia the same rights that are exercised by the state of Virginia in enforcing fines imposed by the state courts for violations of the state criminal laws. By section 916, Rev. St., the party recovering a judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies upon the same as are now provided in like causes by the laws of the state. It is settled that the language—"the party recovering a judgment"—includes the government. *Green v. U. S.*, 9 Wall. 655, 19 L. Ed. 806; *Fink v. O'Niel*, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. Ed. 196. But this section in terms applies only in "common-law causes." If no similar statutes had been construed, we might be at liberty to treat the term "common-law causes" as including all causes, civil and criminal, other than equity or admiralty causes. But section 721, Rev. St., providing that the laws of the several states shall be regarded as the rules of decision in trials at common law in the courts of the United States, has been construed as not applying to criminal trials. *U. S. v. Reid*, 12 How. 361, 13 L. Ed. 1023. Section 858, Rev. St., which, after providing cer-

tain rules as to the competency of witnesses, reads, "In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty,"—has also been held not to include criminal trials. *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; *U. S. v. Hall* (D. C.) 53 Fed. 352. In view of the similarity of the language used in the three statutes, and of the construction put upon this language by the supreme court, I do not feel at liberty to construe section 916 as applying to judgments in criminal cases.

In this connection section 1041, Rev. St., has given me some trouble. It provides that judgments in criminal and penal cases, as to the fine or penalty, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. But the best conclusion I can reach is that this section means nothing more than that the government in enforcing judgments for fines and penalties is not restricted to mere imprisonment of the defendant; that it may proceed also by execution against the defendant's property, as in civil cases. It would seem, therefore, that congress has not seen fit to provide any greater rights for the federal government when collecting fines imposed in criminal cases by execution than are given individuals in the collection of private debts. It follows that the mere fact that the state of Virginia in collecting fines is not hampered by the homestead laws does not necessarily give the same right to the federal government. It is true that in this state an individual recovering a judgment for a tort has the right to subject the homestead. But nothing follows from this fact except that, when the government recovers in Virginia in a civil action for tort, its judgment can be enforced against the tortfeasor's homestead. It does not follow that the government's judgment in a criminal case can likewise be enforced against the convict's homestead. The analogy between a fine and a judgment in tort is strong; but it is only an analogy. If congress had intended that the government should have greater rights in the states where the homestead is not exempt from torts, or in the two states (Thomp. Homest. § 386) where commonwealth fines are not subject to the exemption, than in other states, it would have made some specific provision for such cases.

It is rather startling to be led to the conclusion that in this state the federal government has not as great rights in collecting fines as has the state, and that it has not even as great rights as has an individual recovering a judgment in tort. But I am forced to this conclusion, not only because of the absence of any federal legislation specifically giving the government such rights, but also because of the intent evidenced by section 1042. This section provides for the discharge from prison of a convict if he has no property, exceeding \$20, except such as is exempt from civil precept for debt. This implies that the exemption is allowed the convict notwithstanding that his homestead is not by the state law exempt from process for the collection of a state criminal judgment. Otherwise, why "civil precept" for debt? Again, imprisonment for debt, or for the nonpayment of a fine, was ever imposed merely to coerce payment thereof. It would be anomalous to discharge one imprisoned for nonpayment

of a fine, if the very affidavit made to effect his release showed that he had, or might have, property subject to the payment of the fine. If it had been the intent of congress to subject the homestead in Virginia and Georgia to fines, because those two states subject it, I think some special and specific provision would have been made as to those two states. The absence of any such provision leads to the belief that congress, whether to have uniformity throughout the United States in the collection of fines, or because it adopted the view that the homestead was intended for the benefit of the family, and as a shield against the improvidence, indolence, or criminality of the head of the family, intended that in all the states the government should have no greater rights against the homestead than the state law gives to the least favored individual judgment creditors. It is certain, as seen by its own homestead statutes, that congress has adopted the view that the general policy of the homestead exemption laws is a wise one. It is also certain, as is shown by section 1042, that, at least in the majority of the states, congress does not intend that the homestead shall be subjected to the payment of fines imposed for violations of the federal statutes. The federal government is great enough and wealthy enough to make very plausible the contention that congress intended that in every state having any sort of homestead exemption laws the families of poor convicts should have the benefit of such exemptions. These views, which, I must confess, are not entirely satisfactory, are in some measure strengthened by the following language used in the opinion in *Fink v. O'Neil*, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. Ed. 196:

"Nothing can be more clear than this [referring to section 1042, Rev. St.] as a recognition by congress that in case of execution upon judgments in civil actions the United States are subject to the same exemptions as apply to private persons by the law of the state in which the property levied on is found; and that, by this provision in favor of poor convicts, it was intended, even in cases of sentences for fines for criminal offenses against the laws of the United States, that the execution against property for its collection should be subjected to the same exemptions as in civil cases."

It follows that the demurrer must be overruled.

No opinion is expressed as to the legality of a levy of execution on real estate in this state, since it is unnecessary to determine this question.

WADE v. NATIONAL BANK OF COMMERCE OF TACOMA et al.

(Circuit Court, D. Washington, W. D. March 21, 1902.)

MALICIOUS PROSECUTION OF CIVIL ACTION.

Action will lie to recover for injuries to reputation and business caused by malicious prosecution of a civil action without probable cause, in which a complaint was filed containing false and defamatory matter.

At Law. Action to recover damages for alleged malicious prosecution of a civil action, in which the pleadings contained slanderous accusations, injurious to the present plaintiff. Demurrer to complaint overruled.

Stiles & Nash, for plaintiff.

Bogle & Richardson, for defendants.

HANFORD, District Judge. The demurrer to the complaint in this case raises the question whether an action can be maintained to recover damages for injuries to the plaintiff's reputation and business caused by the malicious prosecution of a civil action without probable cause, in which a complaint was filed containing false and defamatory matter; there having been in said action no arrest or detention of the plaintiff, nor seizure of or interference with his property by any form of process. Upon the argument the demurrer was well supported by citations from text-books and adjudged cases. Some of the authorities hold that it is contrary to public policy to permit litigants to reverse their positions, and consume the time of the courts in a mere prolongation of disputes which have been once adjudicated. Others maintain that the taxable costs recovered by a defendant in an action is the legal measure of compensation which he may claim for whatever injuries he may have suffered by being compelled to appear in court and defend an action prosecuted wrongfully; and others hold that the courts of justice must be kept open and free to all who may invoke their protection, and that a plaintiff who submits his controversy for adjudication to a lawfully constituted tribunal should not be subjected to the peril of being sued for damages if he fails to secure a judgment in his favor. By other authorities the rule is established that the allegations of a pleading which are relevant to the issue are privileged, in the sense that, although defamatory and false, an injured person cannot maintain an action to recover compensation for any injury caused thereby. On these several grounds, and upon the authorities referred to, the defendants contend that this action cannot be maintained. For the sake of brevity I will give only a list of authorities cited, without arranging them with reference to the several propositions supported, or commenting thereon: *Wetmore v. Mellinger*, 64 Iowa, 741, 18 N. W. 870, 52 Am. Rep. 465; *McNamee v. Minke*, 49 Md. 133; *Supreme Lodge v. Unverzagt*, 76 Md. 104, 24 Atl. 323; *Smith v. Buggy Co.*, 175 Ill. 619, 51 N. E. 569, 67 Am. St. Rep. 242; *Tribune Co. v. Bruck* (Ohio) 56 N. E. 198, 76 Am. St. Rep. 433; *Terry v. Davis*, 114 N. C. 31, 18 S. E. 943; *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878; *Mayer v. Walter*, 64 Pa. 283; *Mitchell v. Railroad Co.*, 75 Ga. 398; *Bitz v. Meyer*, 40 N. J. Law, 252, 29 Am. Rep. 233; *Potts v. Imlay*, 4 N. J. Law, 377, 7 Am. Dec. 603; *Rice v. Day*, 34 Neb. 100, 51 N. W. 464; *Commerce Co. v. Levi* (Tex. Civ. App.) 50 S. W. 606; *Biering v. Bank* (Tex. Sup.) 7 S. W. 90; *Johnson v. King*, 64 Tex. 226; *Tunstall v. Clifton* (Tex. Civ. App.) 49 S. W. 244; *Eberly v. Ruff*, 90 Pa. 259, 1 Am. Lead. Cas. (4th Ed.) 210; *Willard v. Holmes, Brook & Haydens Co.*, 142 N. Y. 492, 37 N. E. 480; *Cooley, Torts* (1st Ed.) 188, 189; *Id.* (2d Ed.) 217, 220; *Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156; *Abbott v. Bank*, 20 Wash. 552, 56 Pac. 376; *Id.*, 175 U. S. 409, 20 Sup. Ct. 153, 44 L. Ed. 217; *Ray v. Law*, Fed. Cas. No. 11,592; *Luby v. Bennett* (Wis.) 87 N. W. 804.

The defendant also contended that, if the action can be maintained, the recovery must be limited to the amount of the actual pecuniary loss, in the way of expenses necessarily incurred in defending the former suit, over and above the taxable costs (*Closson v. Staples*, 42

Vt. 209, 1 Am. Rep. 316; *Eastin v. Bank*, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77; *Brown v. City of Cape Girardeau*, 90 Mo. 377, 2 S. W. 302, 59 Am. Rep. 28; 19 Am. & Eng. Enc. Law [2d Ed.] 652), and that as the complaint alleges expenditures amounting to only \$500, and no greater sum can be recovered in any event, the amount involved is not sufficient to make a case cognizable in this court.

On the main question,—as to whether the action will lie to recover damages for injury to reputation and business prospects, there is a conflict of authorities; and, as the point has not been decided by an appellate court having jurisdiction to review the decisions of this court, it is necessary to consider the reasons as well as the authorities. The common law of England, so far as it is applicable to existing conditions in this country, furnishes the rule of decision for the courts in this state; and by the ancient common law cases of this nature were controlled by the elementary principle that a wrongful act causing injury entitled the injured party to compensation in money, and there was no rule barring such an action as this on any theory that the rights of an individual may be sacrificed out of regard for public policy or convenience, or any notion that the prosecution of an action in bad faith, and for the mere purpose of inflicting an injury, is a matter of right or privilege. The first departure from this rule of the common law has been traced to an English statute, referred to in the books as the "Statute of Marlbridge" (52 Hen. III.), which gave a successful defendant the right to recover damages as well as costs in the original action. 19 Am. & Eng. Enc. Law (2d Ed.) 652. There being no statute or rule of practice in this state by which a defendant can claim damages for malicious prosecution without bringing an independent action, we are not required to blindly follow English decisions based upon the statute of Marlbridge. All the arguments which may be drawn from the public policy idea, and from consideration of the evil consequences which may result from making one lawsuit the foundation for another, are proper only for consideration of the legislature. The courts are not authorized to create rules changing the law and denying substantial rights for any such reasons. The gravamen of the wrong charged against the defendants is their bad faith, in misusing judicial process, intentionally, to oppress and injure the plaintiff; and I am unable to accept as a right principle the proposition that to employ the judicial power of the government as an instrument to inflict a wanton injury is any man's privilege. It is my opinion that the true doctrine is affirmed in the text-books and decisions denying that a case such as this must be excepted from the general rule making a wrongdoer liable for damages to a party suffering injury as a consequence of his wrongful act. See *Cooper v. Armour* (C. C.) 42 Fed. 215, 8 L. R. A. 47, and cases therein cited; *Newell, Mal. Pros.* §§ 23, 24, 26, 28; *Eastin v. Bank*, 66 Cal. 123, 4 Pac. 1106; *Machine Co. v. Willan* (Neb.) 88 N. W. 497; *Kolka v. Jones* (N. D.) 71 N. W. 558, 66 Am. St. Rep. 615.

Demurrer overruled.

MOORE v. NEW ORLEANS WATERWORKS CO.

(Circuit Court, E. D. Louisiana. March 14, 1902.)

No. 12,973.

1. DRAINAGE COMMISSION—WATERWORKS COMPANY—PROTECTION OF POLICE POWER.

Both the drainage commission of New Orleans and the New Orleans Waterworks Company are agencies of the state and city in providing for the public health and safety, and both are entitled to the support and protection of the police power in executing their respective functions.

2. WATERWORKS COMPANY—PROPERTY—WATER MAINS AND PIPES.

The water mains and pipes, as laid in the public streets of New Orleans and forming part of the waterworks system, are the property of the New Orleans Waterworks Company.

3. SAME—REMOVAL OF MAINS AND PIPES BY DRAINAGE COMMISSION—POLICE POWER—PAYMENT OF COMPENSATION—INJUNCTION.

The drainage commission, in prosecuting its drainage works in the city of New Orleans, cannot require the removal of mains and pipes belonging to the New Orleans Waterworks Company, thereby interfering with the latter's legitimate business by cutting off the water supply through many large tracts of the city, without previously making just and adequate compensation, as required by Const. La., art. 167, declaring that private property shall not be taken or damaged for public purposes without just compensation being first made; and if it attempts to do so, an injunction pendente lite should issue to protect the company's rights.

4. SAME—AGREEMENT BY WATERWORKS COMPANY—VALIDITY AS AGAINST RECEIVER.

An agreement made by the waterworks company with the drainage commission respecting the removal of the pipes at the former's expense, and the settlement of the rights of the parties in a subsequent amicable suit, not supported by any consideration, however binding on the waterworks company itself, could not bind a receiver afterwards appointed for the company and holding the property for the bondholders under a paramount title.

In Equity.

Robert Moore, an alien, filed the bill in this case on November 14, 1901, praying for the appointment of a receiver for the New Orleans Waterworks Company, a corporation organized under the laws of the state of Louisiana. Frank T. Howard was appointed receiver of said corporation on said date, and duly qualified as such receiver. On February 17, 1902, the receiver filed a petition in the receivership proceeding, praying for an injunction against the drainage commission of New Orleans and the National Contracting Company, to prevent them from interfering with or trespassing upon the property, or disturbing the mains and connections therewith, of the New Orleans Waterworks Company, and praying, further, for reference to a master to take an account of damages already inflicted. A rule nisi was entered on the petition, directing the drainage commission and the contracting company to show cause why an injunction should not issue. The drainage commission filed a return and answer to the rule. The contracting company filed no return or answer to the rule. The matter was heard upon the pleadings, affidavits, exhibits, and arguments of counsel.

Rouse & Grant, for the receiver.

J. R. Beckwith, for the New Orleans Waterworks Company.

Carleton Hunt, for the drainage commission of New Orleans.

PARDEE, Circuit Judge. A full statement of this case covering the pleadings and questions argued and presented is unnecessary, he-

cause on the present application only action pending the litigation is wanted, and the reasons which control my action can be shortly given.

The case has been argued as though the drainage commission of New Orleans was vested with full possession of the police power of the state, to the exclusion of all and any rights of the New Orleans Waterworks Company, while the fact is that both the commission and the waterworks company are agencies of the state and city in providing for the public health and safety, and that both are entitled to the support and protection of the police power in executing and performing the functions respectively assigned; and the work of each would seem to be of equal importance from the sanitary standpoint, as the one is intended to bring a sufficient supply of water into the city for the supply of the inhabitants, and the other to expel from the city the overflow and surface water. If there were only room for one of these agencies, it might be argued with great force that the waterworks company, being prior in time and in possession with its mains and pipes laid, would have the supreme right; but, fortunately for all, there is room for both, and the condition is that with certain removals and transfers of water mains and pipes the plans of drainage as determined by the city and intrusted to the commission can be fully carried out; and the matter in hand here is to determine at whose expense shall be the removal and replacement of the water mains and pipes. It is to be noticed that the commission has been provided with large funds to carry on and execute its work, and to pay the costs and expenses of the same, and this presupposes that, for work done and property taken necessary and proper to the construction, compensation is to be made. Are the water mains and pipes, as laid in the public streets of the city of New Orleans, and forming a part of the waterworks system, the property of the New Orleans Waterworks Company? Unquestionably; because the case shows that many of them as laid were directly purchased from the city under state authority, and the balance have been laid under a contract with the state and city, which contract has been declared valid beyond the impairment by state legislation in *Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525. Does the waterworks company own this property subject to the legitimate exercise of the police power of the state? Unquestionably; but the waterworks company also owns the property under the protection of constitutional principles, and as declared in the constitution of the state of Louisiana, article 167, which provides "that private property shall not be taken or damaged for public purposes without just and adequate compensation being first made." In prosecuting its drainage works in the city of New Orleans, the drainage commission requires the removing of certain mains and pipes of the waterworks company, with the result that the mains and pipes are taken or damaged, the legitimate business of the waterworks company interfered with and damaged by cutting off the supplies of water through many and large tracts of the city. If carried out, is this the taking or damaging of the waterworks property for public purposes, within the meaning of article 167 of the constitution above quoted? It certainly is a taking and damaging of the property. If part of the

mains and pipes can be removed, why not all? Why cannot the drainage commission go through every street in which there are mains and remove the same? It is no answer to say, "We do not take your property, we just remove it;" for, when removed, it is nothing but iron pipes, and no longer a part of the system. Nor is it an answer to say that after we have removed your mains you may replace them somewhere else out of our way; for this all requires expense, subjects the waterworks company to damage, and is equivalent to saying, "We do not take or damage your property, for after we have removed your mains and pipes you can get others placed elsewhere." This question seems too plain for further discussion.

Is such taking or damaging warranted as a legitimate exercise of the police power of the state without compensation is first made? The question covers a very large field. Many cases have been, and can be, cited, where, in the legitimate exercise of the police power, property has been incidentally, more or less remotely, and, perhaps, even directly, damaged through the exercise of the police power, without requiring compensation to be made to the owners of property so damaged; but I have found no well-considered case, and none has been cited to me, where private property has been actually taken or physically damaged that the owners were held not to be entitled to damages. In *National Waterworks Co. v. City of Kansas* (C. C.) 28 Fed. 921, there was no such contract as here, and there was a reservation in favor of the city as to the designation of streets, etc., where pipes might be laid. Under a constitutional provision of the state of Illinois, which is very similar to the constitutional provision of the state of Louisiana, the supreme court of the United States, in *City of Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638, have discussed and decided the matter, with the result that the owner was entitled to compensation in all cases where private property has "sustained a substantial injury from the making and using of an improvement that is public in its character, whether the damage be direct, as when caused by trespass or physical invasion of the property, or consequential, as in a diminution of its market value." Other interesting cases in this respect are *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557; *Ponchartrain R. Co. v. Board of Com'rs of Orleans Levee Dist.*, 49 La. Ann. 576, 21 South. 765; *Eaton v. Railroad Co.*, 51 N. H. 504, 12 Am. Rep. 147. See, also, *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 978, wherein it is held that "since the adoption of the fourteenth amendment, compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution." In the light of these authorities, and under the facts of this case, I am disposed to hold at this time, and for this case, that the police power of the state, so far as vested in the drainage commission under the legislation which creates the commission, goes to the extent of, and no further than, the right to the joint occupancy of the streets of the city with the waterworks

company, and the right to remove and replace, provided the same can be replaced, the mains and pipes of the waterworks company, whenever necessary to secure such joint occupancy and construct works in accordance with the plans for drainage adopted by the city; but that so far as it may be found necessary in prosecuting the drainage work to appropriate, expropriate, take, or damage the property of the New Orleans Waterworks Company, including the removal and replacing of waterworks mains and pipes, it can only lawfully proceed by previously making just and adequate compensation.

The correspondence introduced in evidence between the president of the waterworks company and the president of the drainage commission with regard to the matter of removing and relaying water mains and pipes, as might be necessary to give the drainage commission right of way, and to the effect that the waterworks company, reserving its rights, would, as notified and required, remove its mains and pipes and replace them elsewhere at the expense of the waterworks company, the same to be adjusted and settled in an amicable suit at the conclusion of the work, is very creditable to the public-spirited waterworks' officials, but it resulted, so far as it was an agreement at all, in an agreement without consideration, and not binding on the waterworks company beyond the pleasure of its board of directors. And, however binding it may have been on the waterworks company, it is not binding at all upon the receiver in this case, who holds for the bondholders under a paramount title. Besides this, the receiver is not in funds nor condition to advance the necessary expenses, and it is somewhat as counsel asserts that the drainage boards and drainage commissions and other temporary public agencies are of a transitory nature, with no certainty of being in existence to meet demands of a receiver, who is also a temporary officer, to be settled at the end of a litigation.

So far as the present suit seeks a relief for outlays and expenses and damages incurred before the appointment of the receiver, it may be left to the termination of the litigation herein in due course. So far as the interferences are made by the drainage commission with the property in the hands of the receiver, and since his appointment, either the drainage commission must remove the waterworks mains and pipes as found in its way and relay the same at its own expense, and without unnecessary hindrance or delay, or must make arrangement with the receiver to do the said work, either by advancing the funds necessary, or by giving satisfactory security to pay the same in due course; or, an injunction pendente lite may issue for the protection of the receiver and the property in the custody of the court.

PEOPLE'S GASLIGHT & COKE CO. v. CITY OF CHICAGO et al.

(Circuit Court, N. D. Illinois, N. D. January 15, 1902.)

No. 25,780.

1. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACT—ORDINANCE REGULATING PRICE OF GAS.

Under the Illinois constitution of 1870, and the general incorporation act adopted in conformity therewith, there is a reserved power in the state to regulate from time to time, within reasonable limits, the rates to be charged by gas companies incorporated under such act, in the absence of explicit contracts created by ordinance fixing such rates. Act June 5, 1897, authorizes gas companies doing business in the same city or town to consolidate into a single corporation, which shall be one of the merging companies, but provides that the consolidated corporation shall be subject to the legal obligations resting upon each of the constituent companies, none of them being, in the contemplation of the act, extinguished. Complainant, a Chicago gas company, was incorporated in 1855 by special act, which, as subsequently amended, gave the city the right to regulate its charges, but provided that it should not have authority to compel the company to furnish gas at a less rate than \$3 per thousand feet. Subsequently complainant acquired by consolidation, under Act 1897, the lines of other companies organized after 1870, and later brought suit in a federal court against the city to enjoin the enforcement against it of an ordinance limiting the charge to be made for gas by any corporation or person furnishing the same to 75 cents per thousand feet, the bill alleging that as applied to complainant such ordinance was unconstitutional as impairing the obligation of the contract made by its charter, as denying it the equal protection of the laws, and as depriving it of its property without due process of law. *Held* that, in the absence of allegations showing that the rate fixed by the ordinance was unreasonable, complainant was not entitled to the relief demanded on either of such grounds; that the limitation upon the power of the city to fix rates contained in its original charter did not extend to the lines it acquired, without the consent of the city, by the absorption of other companies; but that it took such lines, under the provisions of the consolidation act, subject to all rights which the city or the state possessed as against the original companies.

2. FEDERAL COURTS—JURISDICTION—CONSTRUCTION OF STATE LAWS.

Whether an ordinance is within the powers delegated to a city by the laws of the state is a question the decision of which belongs primarily to the courts of the state, and a federal court will not determine it, in a suit between citizens of the same state in which its jurisdiction is invoked for the decision of a federal question, unless necessarily involved in such decision.

In Equity. On demurrer to bill.

Meagher & Whitney, for complainant.

C. M. Walker, Corp. Counsel, for defendants.

GROSSCUP, Circuit Judge. The bill is to restrain the city of Chicago from putting in force an ordinance passed October 15, 1900, providing that corporations, companies or persons manufacturing, selling or distributing gas in the city of Chicago for illuminating or fuel purposes shall not charge individual consumers more than seventy-five cents per thousand cubic feet, provided the same is paid within ten days from the rendering of the bill, or eighty-five cents per thousand feet if payment be postponed. The ordinance provides penalties against the company, corporation or person violating its provisions.

It is a general ordinance, relating to all manufacturers and distributors of gas in the city, and applicable to the complainant only because complainant happens to be such a manufacturer and distributor of gas in the city.

The bill, in substance, avers that the complainant is now furnishing such gas at the net rate of one dollar per thousand cubic feet, and that the enforcement of the ordinance in question, compelling a reduction, would be in violation of the contract embodied in the charter of complainant under which its plant was installed and expanded, and, therefore, in contravention of the first paragraph of section 10, article 1, of the constitution of the United States, providing that no state shall pass any law impairing the obligation of contracts; also that its enforcement would be in violation of the fifth amendment to the constitution, providing that no person shall be deprived of life, liberty or property without due process of law; also in violation of the fourteenth amendment to the constitution, providing that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person the equal protection of the laws. Unless, however, the complainant's charter constitutes a contract, it is difficult to see how the ordinance would result in depriving the complainant of its property without due process of law, or be a denial to complainant of the equal protection of the laws. The whole case, therefore, in its constitutional aspect, turns upon the question whether the ordinance violates any contract right of complainant as embodied in its charter.

The complainant's charter was by special act of the legislature, approved February 12, 1855, creating it a corporation with the usual powers and liabilities, with a capital stock not to exceed five hundred thousand dollars, and providing in section 4 that the company should furnish to the city of Chicago, for its public uses, gas at a rate not exceeding two dollars per thousand, and to the inhabitants of said city at a rate not exceeding two dollars and fifty cents per thousand.

February 7, 1865, this act was amended, allowing an indefinite increase of capital stock; repealing expressly the fourth section relating to the limit upon price, and providing that "ten years after the passage of the act the common council of the city of Chicago may by resolution or ordinance regulate the price charged by said company for gas, but said common council of the city of Chicago shall in no case be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet." Laws 1865, p. 590.

The contention of the complainant is that no matter what may now be the general power of the city in the way of regulating the price of gas, under the constitution of 1870, and the corporation acts coming into force thereafter, the city may not, without impairing the obligation of complainant's contract, fix for complainant, a price at less than three dollars per thousand feet; and the decree invoked is to maintain this supposed constitutional right of inviolability of contract.

The city contends that in the absence of a clear provision in the charter in maintenance of complainant's contention, the general right of cities to regulate the price of gas is applicable to complainant, as well as to other manufacturers or distributors; and that the clause

in question embodies no such clear prohibition or limitation as to interfere with the city's general right of regulation of rates. It is insisted that the clause was intended, not as a limitation upon the powers of the city, but as a restriction laid upon the legislature itself in respect of further legislation on the subject involved.

The interpretation of the clause is not free from considerable difficulty. It is not easy to see why the legislature should have intended it as a restriction upon itself or its successors; for, however precisely or emphatically such attempted restriction may have been formulated, it would have been an empty phrase when the succeeding legislature came into existence. Nor is it easy to see how the legislature intended that the prices of 1865, measured by the then depreciated dollar standard, should be made perpetual in favor of complainant, in face of the certainty that the legal tender dollar would some time rise to its true value, and that, in the course of events, the cost of manufacturing gas would decrease. But in view of the conclusion to which I have come, it is needless to pivot this case upon the interpretation to be put upon this clause.

The supreme court of the United States in *Freeport Water Co. v. City of Freeport*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679, ruled that under the Illinois constitution of 1870, and the subsequent acts, relating to municipalities and the incorporation of companies, there is reserved in the state the power to prescribe in the government of corporations such regulations as it may deem advisable; and that such right of regulation extends to the fixing, from time to time, of reasonable water rates, unless, possibly (and on this the court refrains from ruling), there be an explicit limitation to the contrary in the ordinance or contract under which the works are installed. It is clear, in the application of this decision to the case under consideration, that, as between the state and any gas companies organized under the constitution of 1870, and the act of the legislature in pursuance thereof, under ordinances containing no explicit contract relating to minimum rates, there is a reserved power in the state to regulate, within reasonable limits, the rates from time to time. Whether such power has been delegated to the city is an inquiry, that, for reasons stated later, I need not enter upon. In considering the phase of the case I now approach, it is a matter of indifference whether the general power of regulation be in the general assembly, or in the city as an agent of the state. It is sufficient to the argument that it is lodged somewhere in the instrumentalities of the state.

It was disclosed at argument in answer to inquiries of the court—though not set forth in the bill—that the complainant originally manufactured and distributed gas upon the West side only, and that its South and North side system was acquired through merger or purchase of other gas companies under the consolidation act of 1897.

Two of these companies, the Equitable Gas Company and the Consumers' Company, were organized under the constitution of 1870 and the acts in pursuance thereof. The Chicago Gaslight & Coke Company was organized under a special act of February 12, 1849, amended February 9, 1855; but contains no restriction upon the right of the general assembly, or the city, to regulate from time to time the

prices of gas; nor, so far as disclosed, is there, in any ordinance or contract between these companies and the city, any restriction upon its general right of regulation from time to time.

The act under which the merger of the companies took place, approved June 5, 1897, provides that gas companies organized in Illinois are authorized and empowered to sell, transfer, convey or lease their real and personal property, rights, franchises and privileges, in whole or in part, to any other gas company doing business in the same city, and that such other gas company is authorized to purchase, lease, hold and enjoy such property; also, that gas companies doing business in the same city, town or village may lawfully consolidate and merge into a single corporation (to be one of the merging companies) by complying with a certain procedure therein specified. A further section of the act provides that the consolidated corporation thus organized shall be subject to the legal obligations now resting upon each of the companies so merged, respectively, under their several charters and ordinances, in the same manner and to the same extent as if the companies had remained individual and distinct,—none of said companies being, in contemplation of the act, extinguished.

In answer to an inquiry of the court at argument, counsel for the complainant contended that the merger of the other gas companies with the complainant was the equivalent of the complainant's extension, by original installation, of its works and pipes into the field occupied by the other companies. Were this so, the supposed restriction contained in the charter of 1855 would follow the merger, and extend to the entire system now operated by the consolidated company.

But a little reflection shows this position unsound. The act of 1855 authorizes complainant to erect its works and lay its pipes in the streets and alleys of the city, subject to the consent of the city council. In the absence of consent, no pipes could have been laid. It is possible that the city may not, in mere arbitrariness, withhold its consent, where the consent asked for was in the ordinary development of the complainant's plant; but absence of consent, founded on refusal to extend the field for the application of complainant's three-dollar minimum rate, would not be arbitrary. The city council was, therefore, from the organization of the complainant company, in contemplation of complainant's charter, a necessary party to any substantial extension of its plant, carrying the charter restriction as to regulation of rates. No consent of the city has been given to the merger, and, therefore, no consent has been given to the enlargement of complainant's franchise, as affected by the limitation in the charter of 1855 relied upon. I do not see how the complainant can, in the absence of such consent, carry over to the territory acquired under the merger its supposed charter exemption from regulation of price. A contrary holding would enlarge the subject-matter of this exemption without the consent of the city,—a result which the act of 1855 does not contemplate, but clearly negatives.

The terms of the merger act of 1897 reinforce this conclusion. It specially provides, as already stated, that the consolidated corporation shall be subject to the legal obligations now resting upon each of the

companies absorbed. One of these obligations is (in the absence of a contrary contract provision) to submit to the state's right of reasonably regulating the price of gas from time to time. In this respect, the consolidated company stands precisely where each of the merged companies stood, and, as we have seen, neither of these was exempt from the state's general right of regulation. In respect to the system acquired through the merger, therefore, the complainant has no contract of exemption under the charter of 1855.

It is obvious then from what has been stated, as against the state's power to reasonably regulate rates from time to time, the complainant, to the extent, at least, that it is successor to the merged companies, enjoys under the act of 1855 no exemption from regulation. But it is urged that the powers of the general assembly, in this respect, are not delegated to the city, and, therefore, however this reasoning might apply to the powers of the general assembly, it is inapplicable to any claim of such power upon the part of the city.

I refrain at this time from entering into so far-reaching a question,—a question involving the policy of the state respecting the custody of some of its greatest powers. The question thus raised, growing out of the interpretation of state statutes, is one primarily belonging to the state courts. My jurisdiction of the case under consideration does not extend to that question, unless its decision, one way or the other, is a necessary predicate to the constitutional question involved. I do not see that it is. If I hold that, under existing legislation, the city has not been delegated with the state's power to regulate rates, it is manifest that the real and adequate reason for annulling the ordinance complained of would be, not any provision of the federal constitution, but this lack of power, as shown in the state legislation. On the other hand, if I should hold that the state's power had been delegated to the city, then, according to the reasoning already stated, the injunction prayed for would be refused. Whichever way one looks at this phase of the case, it turns, not on federal constitutional law, but upon the interpretation of the state statutes, and is not, therefore, within the meaning of the judiciary act, a case involving the construction of the laws or the constitution of the United States. If complainant's substantial remedy against the ordinance complained of is lack of power in the city, its relief must be found in the state courts.

Whether, by the merger, the complainant has lost its right to exemption from regulation, to the extent that the consent was given to the installation of its original system, it is not necessary to decide, for the bill asks for no divisional relief. Nor is it necessary to consider the reasonableness of a seventy-five cent rate, as provided in the ordinance, for no facts challenging the ordinance as unreasonable are set forth in the bill.

I realize that this case is one of great importance, both to the city and to the gas company, and that it may finally be brought under the review of the supreme court, and have, therefore, considered it upon a larger survey of the facts than the pleadings before me justify. I suggest that the bill be amended to bring in these facts, or that the demurrer be withdrawn and an answer filed, bringing them in, reserving

the right of demurrer to the bill as it now stands. If the facts thus disclosed are as I apprehend them, an order will then be entered in accordance with the conclusions of the law already stated.

FIDELITY INSURANCE, TRUST & SAFE DEPOSIT CO. v. NORFOLK & W. R. CO. (HAMPTON, Intervener).

(Circuit Court, W. D. North Carolina. March 20, 1902.)

1. RAILROADS—EFFECT OF RECEIVERSHIP—JUDGMENT AGAINST COMPANY.

A railroad corporation does not go out of existence because of the appointment of receivers for its property, and may be sued, and a judgment obtained against it, notwithstanding the receivership; but, where the cause of action arose before the appointment of the receivers, such judgment does not constitute a debt of the receivership whether the receivers were parties to it or not.

2. SAME—FORECLOSURE SUIT—PREFERENTIAL DEBTS.

A judgment obtained against a railroad company after its property has been placed in the hands of receivers in a suit to foreclose a mortgage thereon for a tort committed by the company prior to the receivership is not entitled to priority of payment over claims of the mortgage bondholders from the earnings of the receivership.

2. SAME—NORTH CAROLINA STATUTE.

Code N. C. § 1255, which provides that the giving of a mortgage by a corporation shall not exempt its property or earnings from execution for the satisfaction of a judgment against the corporation for a tort, can operate only on property within the state; and where the property of a railroad company in the state consisted solely of a lease of the property and franchises of another company, taken subject to a mortgage given by the lessor, and which had been displaced and superseded by the appointment of receivers in a suit to foreclose such mortgage and the subsequent sale of the property therein prior to the rendition of a judgment by a state court against the lessee company for a tort, there were at the time of the rendition of the judgment no property or earnings of the defendant within the state to which such statute can apply, and it does not affect the rights of the judgment creditor with respect to other property or funds of the defendant.

In Equity. Suit for foreclosure of a mortgage. On petition of intervention of Gideon D. Hampton.

The petition of the intervener was as follows:

"The petition of Gideon D. Hampton respectfully sheweth to the Court: (1) That on the 22d day of February, 1897, he recovered judgment against the defendant, the Norfolk & Western Railroad Co., in the superior court of the county of Forsyth and state of North Carolina, for the sum of one thousand dollars and costs in an action for tort against the said railroad for personal injuries inflicted by the said railroad upon the said Gideon D. Hampton. That the said judgment remains wholly unpaid and unsatisfied, although demand had been made upon defendant and the receivers herein-after referred to for the payment thereof. (2) That by an order made in the above-entitled cause on the 7th day of February, 1895, Frederick J. Kimball and Henry Fink, Esqs., were appointed receivers of the properties and franchises of the defendant, the Norfolk & Western Railroad Co. That as such receivers there came into their hands large sums of money, and, as your petitioner is informed, advised, and believes, there are still in the hands of said receivers large sums of money, more than enough to satisfy the judgment of your petitioner; and your petitioner insists that there ought now be paid by the said receivers to your petitioner enough of said funds to satisfy the said judgment and costs. (3) That your petitioner is informed and be-

lives, and so avers, that from the properties and franchises aforesaid, besides the mortgage properties coming into the possession of the said receivers, there also came into the hands of the said receivers a large amount of properties of the said railroad not covered by any lien or mortgage, the exact amount of which your petitioner is unable to ascertain; but your petitioner avers, as aforesaid, that the same would be more than enough to satisfy his judgment, and therefore asks that the said receivers be ordered to account with petitioner, and show what funds and properties not subject to the mortgage sought to be foreclosed came into their hands. (4) Your petitioner further alleges that the purported lease of the Roanoke & Southern Railway Company to the Norfolk & Western Railroad Company for nine hundred and ninety-nine years was, in effect, a sale; that, although the aforesaid lessee at the time of the injury complained of was nominally operating said road as such lessee, that it was in reality the owner thereof. (5) Your petitioner further prays that an order be passed by this honorable court directing that any property, franchises, leasehold interests, or other property whatever, subject to the lien of petitioner's judgment, be applied to the satisfaction of the same. (6) And your petitioner further prays for such other and further relief in the premises as may be just and proper.

"J. S. Grogan,

"Jones & Patterson,

"Holton & Alexander,

"Attorneys for Petitioner."

"To Watson, Buxton & Watson, Attorneys for Defendant: You will take notice that on the 27th day of January, at 12 o'clock m., 1902, before his honor the circuit judge of the United States circuit court presiding at the city of Greensboro, N. C., at the special term, to be holden, beginning on the 20th day of January, 1902, a motion will be made in the above-entitled cause for the relief demanded in the accompanying petition.

"This January 9th, 1902.

J. S. Grogan,

"Jones & Patterson,

"Holton & Alexander,

"Attorneys for Gideon D. Hampton."

Indorsed on back:

"Executed by delivering a copy of this writ to J. C. Buxton, of the firm of Watson, Buxton and Watson, attorneys for the N. & W. Railroad Co.

"January 13th, 1902.

J. M. Millikan, U. S. Marshal,

"Per A. O. Griffin, D. M."

[Seal United States Circuit Court, Western Dist. of N. C., at Greensboro.]

"A true copy. Test: Sam'l L. Trogdon, Clerk."

J. S. Grogan, Jones & Patterson, and Holton & Alexander, for intervenor.

Watson, Buxton & Watson and Jos. I. Doran, for defendants.

SIMONTON, Circuit Judge. This case comes up by petition of intervention in the main cause, of the Fidelity Insurance, Trust & Safe Deposit Company against the Norfolk & Western Railroad Company. On 6th February, 1895, under proceedings instituted in the circuit court of the United States for the Eastern district of Virginia by the Fidelity Insurance, Trust & Safe Deposit Company against the Norfolk & Western Railroad Company, the defendant company was placed in the hands of F. I. Kimball and Henry Finck as receivers of all of its property and assets. On 7th February in the same year, by auxiliary proceedings had in this court, the appointment of said receivers was recognized and confirmed, and they were made receivers in this jurisdiction. Before the appointment of said receivers, and whilst the Norfolk & Western Railroad Company was operating the

Roanoke & Southern Railway under a lease of 999 years, the petitioner, Gideon D. Hampton, on 21st December, 1894, was injured on the track of the Roanoke & Southern Railway in or near the town of Winston, N. C. On the 6th March, 1895, subsequent to the appointment of said receivers, Hampton instituted a suit in tort in the superior court for Forsyth county, N. C., against the Norfolk & Western Railroad Company, the lessee, for injuries sustained on this leased road. On 22d February, 1897, he obtained a verdict against the defendant in the sum of \$1,000, and entered judgment therefor, which judgment was affirmed on appeal by the supreme court of North Carolina on 21st April, 1897. *Hampton v. Railroad Co.*, 120 N. C. 534, 27 S. E. 96, 35 L. R. A. 808. The summons and complaint in this case were served upon H. H. S. Handy, who had been an official of the defendant company at Winston, and who also had been appointed by this court the agent of the receivers, upon whom process might be served. In the suit the firm who were counsel for the receivers appeared and defended the action in the name and on behalf of the railroad company. Some discussion arose in the argument of the present cause upon the question if the suit in the state court was a suit against the receivers. In its terms it was a suit against the Norfolk & Western Railroad for a tort committed by that company before the cause in which the receivers were appointed was instituted. The railroad company did not go out of existence when the receivers were appointed. *First Nat. Bank v. Pahquioque Nat. Bank*, 14 Wall. 383, 20 L. Ed. 840. It still remained a legal entity, and could be sued, no injunction forbidding it having been passed. *Ex parte Bates* (C. C.) 84 Fed. 67. The act complained of was not the act of the receivers or their agents. Nor did the receivers make themselves parties to the suit on the record. It may be—no doubt it was—the fact that they instructed defense to be made to the suit. This it was their duty to do. *Bosworth v. Association*, 174 U. S. 186, 19 Sup. Ct. 625, 43 L. Ed. 941; *Davis v. Gray*, 16 Wall. 217, 21 L. Ed. 447. But in doing this they did not assume the obligation of the corporation; nor was the judgment against them as receivers for things done in the receivership; nor could it rank as such judgment, even were the judgment against the receivers *eo nomine*. Conclusive as it might be as to the existence and amount of the plaintiff's claim, the time and manner of its payment must be controlled by the court appointing the receiver. *Dillingham v. Hawk*, 9 C. C. A. 101, 60 Fed. 494, 23 L. R. A. 517. Having obtained and entered his judgment, Hampton intervened in a cause entitled "*Mercantile Trust & Deposit Company v. Roanoke & Southern Railway Company and Norfolk & Western Railroad Company*". This cause was instituted to foreclose a mortgage upon the property of the Roanoke & Southern Railway Company, and had ripened into an order for foreclosure, and a sale thereunder; the purchaser being the Norfolk & Western Railway Company. The order for sale had provided as follows:

"The purchaser shall, as part consideration for the railroad property and franchises purchased, take the same, and receive the deed therefor, upon the express condition that, to the extent that the assets or the proceeds of assets in the receivers' hands not subject to any other lien or charge shall be in-

sufficient, such purchaser, his successors or assigns, shall pay, satisfy, and discharge (a) any unpaid compensation which shall be allowed by the court to the receivers; (b) any indebtedness and obligations or liabilities which shall have been contracted or incurred by the receivers before delivery of possession of the property sold in the management, operation, use, or preservation thereof; and (c) also all unpaid indebtedness or liability contracted or incurred by the defendants, or either of them, in the operation of said railroad and property sold, which is prior in lien or superior in equity to said mortgage, except such as shall be paid or satisfied by the receivers, upon the court adjudging the same to be prior in lien or superior in equity to said mortgage, and directing payment thereof."

The intervention sought to subject the property so purchased to the lien of his judgment. The prayer of the intervention was refused. The intervener had based his claim on the provisions of section 1255 of the Code of North Carolina. This section gives priority to a judgment in tort over any mortgage executed by a corporation. The court held that, as the property sold was the property of the Roanoke & Southern Railway Company, lessor, a judgment against the Norfolk & Western Railroad Company, the lessee, did not take priority, under this section, of the mortgage creditors of the lessor, to whose rights the Norfolk & Western Railway Company had succeeded. 90 Fed. 175. Mr. Hampton now files his intervention in the case of the Fidelity Insurance, Trust & Safe Deposit Company against the Norfolk & Western Railroad Company, claiming to be paid out of the earnings and assets which came into the hands of the receivers of the defendant railroad company. It is evident that this is a different proceeding from the first intervention. That sought to subject the purchaser of the property of the Roanoke & Southern Railway Company to the payment of this judgment, which had been obtained against the Norfolk & Western Railroad Company. This intervention seeks to subject funds which came into the hands of the receivers of the Norfolk & Western Railroad Company, during their receivership, to the payment of the judgment. The matter is not *res judicata*.

Under the decisions of the supreme court of the United States the earnings in the hands of receivers derived from the management of property in their hands are devoted to the payment of claims arising during the receivership, and expenses necessarily incurred in the management. Besides this, when there has been, before or during the receivership, a diversion of earnings to the payment of interest upon the mortgage debt, or to the improvement of the security of the mortgage debt, the courts have required the receivers to restore the amounts so diverted, and to apply them to certain claims for supplies furnished within a limited period before the receivership, which were necessary to keep the railroad company a going concern. Sometimes the necessity to this end for these supplies has been such as to warrant the court in subjecting the corpus of the property to their repayment. This doctrine has been established by a long line of cases, beginning with *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 399, down to *Southern R. Co. v. Carnegie Steel Co.*, 176 U. S. 273, 20 Sup. Ct. 347, 44 L. Ed. 458. And in applying this doctrine the courts are not disposed to enlarge it in any way. They realize the necessity of a court of equity confining itself within very restricted limits in the ap-

plication of the doctrine that in certain cases a court having a road or fund under its control, may be justified in awarding priority over the claims of mortgage bondholders to unsecured claims originating prior to the receivership. *Kneeland v. Trust Co.*, 136 U. S. 97, 10 Sup. Ct. 950, 34 L. Ed. 379; *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663. In the *Kneeland Case* it is said that such priority has been given in a few specified and limited cases. In all the long line of cases referred to, in not one is this extraordinary preference allowed to a judgment obtained, after the receivership, on a tort of the corporation committed before the receivership. After a road has been placed in the hands of a receiver, and is managed and controlled by him, the receivership is responsible for all lawful contracts of the receiver, and for the negligent acts and torts of him or of his agents. A judgment against a receiver for any of these causes of action binds the receivership, and must be paid out of its earnings in the hands of the receiver; and, if these be deficient, then out of the corpus of the property of the proceeds of its sale. *Cowdrey v. Railroad Co.*, 93 U. S. 352, 23 L. Ed. 590; *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672; *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796. But this doctrine is confined to cases in which the act complained of occurred during the receivership. It does not apply to a tort or to an ordinary contract of the corporation before the receivership began. A receiver is not bound by such torts or contracts. *Oil Co. v. Wilson*, 142 U. S. 313, 12 Sup. Ct. 235, 3 L. Ed. 1025. He cannot be compelled to assume the obligations of a lease made by the company. *Railroad Co. v. Humphreys*, 145 U. S. 105, 12 Sup. Ct. 795, 36 L. Ed. 690; *Railroad Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632. In *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663, it is declared that indebtedness for necessary supplies can seldom be allowed priority to the mortgage debt, and, whilst that case allowed priority to claims for rental of cars by and during the receivership, it disallowed such priority to rental of cars prior to the receivership. In *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625, the supreme court refused priority out of proceeds of the sale of a railroad to one who had advanced money to pay operating expenses of a railroad prior to the receivership. If contracts of this character have no priority, surely damages for tort have none, unless such priority is secured by the statute laws of the state.

This brings us to the discussion of section 1255, Code of North Carolina. This section is in these words:

"Mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in the courts of the state against such incorporation, for labor performed, nor for materials furnished such incorporation, nor for torts committed by such incorporation, its agents or employees, whereby any person is killed or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

This statute, being a statute of the state of North Carolina, can only operate upon property within that state. It will be noted that this

section gives priority over a mortgage executed by a corporation to a judgment obtained against the mortgagor corporation, and declares that neither the property nor earnings of such mortgagor corporation are exempt from execution for the satisfaction of a judgment. It appears that in the case at bar the Norfolk & Western Railroad Company had a lease of the Roanoke & Southern Railway, its property and franchises. Prior to this lease all the property and franchises of the Roanoke & Southern Railway Company had been mortgaged to the Mercantile Trust & Deposit Company of Baltimore, this mortgage bearing date March 16, 1892. The lease was subordinate to the mortgage. On 29th May, 1896, the Mercantile Trust & Deposit Company of Baltimore filed its bill for foreclosure of this mortgage against the Roanoke & Southern Railway Company, the mortgagor and lessor, and the Norfolk & Western Railroad Company, the lessee; and on the same day F. J. Kimball and Henry Fink were appointed receivers of the Roanoke & Southern Railway Company, and were put in possession of all its property and franchises, thus displacing and superseding the lease. This bill of foreclosure culminated in a decree for sale. Under this decree all the property and franchises of the Roanoke & Southern Railway Company were sold, the sale was confirmed by the court, and on the 25th November, 1896, a deed sextipartite was executed, Messrs. Bowden and Sharp, special masters of the court, being of the first part, Kimball and Fink, receivers of the Roanoke & Southern Railway Company, of the second part, the Mercantile Trust & Deposit Company, of Baltimore, trustee under said mortgage, of the third part, the Roanoke & Southern Railway Company, of the fourth part, certain other persons (Glyn and others), of the fifth part, and the Norfolk, Roanoke & Southern Railroad Company, of the sixth part; whereby the whole of the property and franchises of the Roanoke & Southern Railway Company was conveyed to the party of the sixth part in fee. So that it appears that when the judgment of Gideon Hampton against the Norfolk & Western Railroad Company was obtained (February 22, 1897) the lease of the Norfolk & Western Railroad Company had been displaced by the proceedings for the foreclosure of a mortgage prior to the lease, and that on the day the judgment was entered the whole property of the Roanoke & Southern Railway Company had for nearly six months been conveyed to another wholly distinct corporation, in whose property and earnings at the date of the judgment the Norfolk & Western Railroad Company had no interest whatever. There was, therefore, no property upon which this section of the Code could operate, over which the Norfolk & Western Railroad Company had given a mortgage, or in whose earnings it shared,—nothing which could be taken in execution. The record does not disclose any other property of the Norfolk & Western Railroad in North Carolina, covered by mortgage, to which section 1255 of the Code of North Carolina can apply. The only other property in North Carolina in which the Norfolk & Western Railroad Company had an interest,—the Durham Division,—like the Roanoke & Southern, was held under a lease from the Lynchburg & Durham Railroad Company to the Norfolk & Western Railroad Company, subsequent to and subordinate to a mortgage of the lessor

company. This mortgage was foreclosed in 1896. So at the entry of this judgment the Norfolk & Western Railroad Company had lost all estate and interest in the Durham Division and its earnings.

The petition of intervention is dismissed.

MUTUAL LIFE INS. CO. OF NEW YORK v. PEARSON.

(Circuit Court, D. Massachusetts. March 28, 1902.)

No. 1,486.

1. EQUITY—JURISDICTION—ADEQUACY OF LEGAL REMEDY—DISCRETION OF COURT.

The application of the rule that equity jurisdiction cannot be invoked where there is an adequate remedy at law depends on the circumstances of the particular case, and rests in the sound discretion of the court, where there are any circumstances which show that the legal remedy may not be perfect and complete.

2. CANCELLATION OF INSURANCE POLICY—FRAUD—CONCEALMENT OF ILLNESS.

Insured applied for a life policy, his application reciting that the insurance should not take effect "until the first premium shall have been paid during my continuance in good health." On January 6th thereafter, insured became suddenly ill with appendicitis, and the following day his private secretary paid the first premium to the agents, and received the policy from them, concealing the fact of insured's illness. On January 8th insured died. It appeared that the insurance company and insured's executors were citizens of different states, and also that the policy as issued did not call for the payment of a stipulated sum of money, but for the delivery of 240 bonds, of \$1,000 each, payable 35 years from date, with interest coupons annually. *Held*, that the company's remedy by way of defense to an action at law was inadequate under the facts, and that it could sue in equity for the cancellation of the policy.

In Equity.

Lewis S. Dabney, Edward Lyman Short, and Reginald Foster, for complainant.

Alfred Hemenway and Charles T. Gallagher, for defendant.

COLT, Circuit Judge. This bill in equity seeks the delivery and cancellation of a life insurance policy on the ground of fraud and conspiracy, and an injunction against bringing any suit upon the policy. The defendant has demurred to the bill. The principal grounds of demurrer are that the bill does not state such a cause of action as entitles the complainant to relief in equity, and that it appears from the bill that the complainant has a plain, adequate, and complete remedy at law.

The inherent power of a court of equity to set aside a contract obtained by fraud is ancient, familiar, and elementary; and the only serious question raised by the demurrer is whether, upon the state of facts set forth in the bill, the complainant has an adequate and complete remedy at law.

The material facts disclosed by the bill are as follows: On December 27, 1900, James C. Pearson applied to the Mutual Life Insur-

ance Company of New York, complainant, for a contract of insurance. The application contained the provision that this contract "shall not take effect until the first premium shall have been paid, during my continuance in good health." A few days later, after Pearson had been examined by the medical examiner of the company, the application was approved. A contract of insurance was then made out for 240 bonds, of \$1,000 each, payable in 35 years from their date, bearing interest at the rate of 4 per cent. per annum, payable semiannually. On January 8, 1901, the policy was handed to Fowler & Streich, agents for the company, to be delivered to Pearson upon the payment by him of the first annual premium of \$15,594.90. On January 6, 1901, Pearson, while on his way from New York to Boston, suddenly became ill with appendicitis, and on arrival in Boston was taken to a private hospital. On January 8th an operation was performed, and he died about noon the next day. On January 7th, Oliver H. Story, the private secretary of Pearson, after an interview with him at the hospital, and with full knowledge of his illness, went to New York, and on January 8th obtained possession of the policy from Fowler & Streich by the payment of the first premium. Story fraudulently concealed from Fowler & Streich the fact that Pearson was in the hospital and dangerously ill. This fact was not known to the company, or to any of its officers or agents. If known, the premium would not have been received, or the policy delivered. Pearson died before Story could deliver the policy to him, and before Fowler & Streich had paid over to the company the premium. The company, upon learning of Pearson's sickness, refused to receive the premium from Fowler & Streich, and at once tendered Story the premium, and demanded the return of the policy, which was refused. Upon the probate of the will of Pearson, and the appointment of the executrix, the company again tendered the premium, and demanded a return of the contract, which was again refused.

The application of the rule that equity jurisdiction cannot be invoked where there is an adequate remedy at law depends upon the circumstances of each case. *Watson v. Sutherland*, 5 Wall. 74, 79, 18 L. Ed. 580. In a broad sense, the application of the rule rests upon the sound discretion of the court, where there are any circumstances which show that the remedy at law may not be perfect and complete. *Boyce v. Grundy*, 3 Pet. 210, 215, 7 L. Ed. 655; *Sullivan v. Railroad Co.*, 94 U. S. 806, 811, 24 L. Ed. 324. In view of the circumstances under which the defendant gained possession of the policy, the complainant is clearly entitled to a prompt and complete remedy. It appears from the bill that, pending negotiations, or before the contract had been perfected by the payment of the first premium, the assured had become suddenly ill of appendicitis, and that this fact was fraudulently concealed from the complainant; in other words, that the delivery of the policy was procured by the fraudulent concealment of a material fact affecting the subject-matter of the contract. It may be said, therefore, that the minds of the parties never met with relation to the subject-matter of the contract, for the reason that, before the completion of the contract, the subject-matter had changed; and it follows that the

contract is absolutely void ab initio. The bill is not founded upon breach of warranty, but states a case in which the possession of the policy was obtained by fraud of a character which goes to the very essence of the contract, and prevents the existence of any contract except in form. The case presented would not have differed in principle had the bill alleged that the assured had died before the completion of the contract, and that this fact had been fraudulently concealed from the company at the time the first premium was paid and the policy delivered. The complainant having stated a case which entitles it to the speedy surrender and cancellation of the policy, the remedy at law is not perfect and complete, for the following reasons: If the relief prayed for be denied, and the bill be dismissed, the complainant must wait until the defendant brings an action at law in some court. The defence to an action at law, the bringing of which is dependent upon the will of the defendant, does not afford the complainant that prompt and efficient relief which it may justly claim, under the bill.

In *Bank v. Stone* (C. C.) 88 Fed. 383, 391, Judge Taft said:

"It would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is 'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.'"

In that case, Mr. Justice Harlan and Judge Lurton sat with Judge Taft.

In *Schmidt v. West* (C. C.) 104 Fed. 272, 275, the court said:

"It may well be doubted whether a defense at law is an adequate remedy in any case in which it cannot be used until the wrongdoer, or one claiming under her, sees proper to put the machinery of the law in motion to enforce her pretended right. For there would be, not only no adequate remedy, but no affirmative remedy whatever, available to the complainant, unless a court of equity may entertain jurisdiction and grant appropriate relief for the wrong."

In *Insurance Co. v. Cable*, the circuit court of appeals for the Seventh circuit, in overruling the demurrer to a similar bill for the cancellation of a policy, on the ground that the remedy at law was not adequate and complete, said:

"The remedy open to the plaintiff is one not under its own control, but in the control and discretion of the opposite party." 39 C. C. A. 264, 98 Fed. 761, 763.

It further appears that the complainant is a citizen of New York, and the defendant a citizen of Massachusetts, and that consequently the complainant is entitled to litigate in the federal courts, and that it should not be obliged to answer to a threatened suit in the state courts of Massachusetts, and especially if it be true, as alleged in the bill, that the complainant would thereby be prevented from putting in Pearson's application as evidence, or having it considered as part of the contract. *Insurance Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 761, 763.

Again, the policy does not call for the payment of a certain sum of money, but for the delivery of 240 bonds, of \$1,000 each, payable 35 years from their date, with interest coupons payable semiannually. Under this contract, the defendant might sue upon each coupon as it became due, and thus put the complainant to the trouble and expense of defending for many years a multiplicity of actions brought in various jurisdictions. *Buzard v. Houston*, 119 U. S. 347, 352, 7 Sup. Ct. 249, 30 L. Ed. 451.

It is true,—where a contract of insurance for the payment of a definite sum of money has been perfected and one or more premiums paid, and the amount payable has become due, and the defense is the ordinary breach of warranty,—that a court of equity will refuse, as a general rule, to take jurisdiction upon a bill brought by the insurance company to cancel the policy, both on the ground that the defense at law is adequate, and because such issues of fact are more properly triable by jury; and this is especially true where an action at law is already pending in the same court. *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501; *Hoare v. Bremridge*, 8 Ch. App. 22. But in cases like the present bill, where possession of the policy has been obtained by gross fraud, intentional or otherwise, and there are special circumstances showing that the remedy at law will not be “as practical and efficient to the ends of justice and its prompt administration,” a court of equity will entertain jurisdiction of the bill. *Insurance Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 761; *Id.*, 49 C. C. A. 216, 111 Fed. 19; *Insurance Co. v. Dick* (Mich.) 72 N. W. 179, 43 L. R. A. 566; *Trail v. Baring*, 4 Giff. 485; *British Equitable Ins. Co. v. Great Western Ry. Co.*, 38 Law J. Ch. 132, 20 Law T. (N. S.) 422.

Demurrer overruled.

In re MONROE.

(District Court, D. Washington, N. D. April 7, 1902.)

1. BANKRUPT—DISCHARGE—EFFECT.

A bankrupt's discharge will not release him from any debt omitted from the schedule annexed to his petition, where the omitted creditor had no notice or knowledge of the bankruptcy proceedings in time to have proved his claim.

2. SAME—SETTING ASIDE.

The omission is not ground for setting aside the discharge because not prejudicing the creditor.

Voluntary Bankruptcy.

Heard upon an application by the Capital Brewing Company, a creditor, to vacate an order discharging the bankrupt from his debts, the creditor alleging in its petition that it was not listed in the schedule of creditors annexed to the petition filed by the bankrupt, and did not have notice or knowledge of the proceedings, until after the time allowed for making proof of debts had elapsed, and charging that the bankrupt has been guilty of fraud in concealing valuable assets, which should have been scheduled.

Pierre P. Ferry, for petitioner.

Hugh A. Tait, for bankrupt.

HANFORD, District Judge. One of the fundamental principles in the jurisprudence of this country is that no man can be deprived of any legal right by a judicial proceeding to which he is not a party, and of which he has not received lawful notice or had actual knowledge. Upon this principle, I hold that the bankrupt in this case has not obtained a discharge from any debt which was omitted from the schedule annexed to his petition which may be due to a creditor who did not have notice or knowledge of the bankruptcy proceedings in time to have proved his claim. Creditors who have not been notified of the proceedings in the manner prescribed by the bankruptcy law are not estopped from asserting their rights by reason of mere failure on their part to be diligent in discovering the insolvency of their debtors or their resort to a court of bankruptcy. As the petitioning creditor has not lost any rights by the order of the court discharging the bankrupt from his liabilities, this proceeding to vacate that order is unnecessary. Demurrer to petition sustained.

In re MANHATTAN ICE CO.

(District Court, S. D. New York. July, 1901.)

BANKRUPTCY—PROVABLE CLAIMS—REQUISITE AMOUNT.

AN ice company agreed to deliver ice to the petitioning creditors in bankruptcy for specified terms, and at a specified price, and afterwards broke the agreement. The current damages sustained by petitioners up to the time of the filing of their petition did not aggregate \$500, but the ruling market price of ice was such that new contracts could not be made for the terms covered by the old contracts without such loss to petitioners as would in the aggregate exceed that sum. *Held*, that the loss for the entire term was provable, and not merely the current damages, and therefore petitioners were creditors for an amount sufficient to give the court jurisdiction.

Moritz Frank, for petitioners.

Samuel H. Wandell, for Manhattan Ice Co.

THOMAS, District Judge. This is a proceeding instituted May 4, 1901, to adjudge the Manhattan Ice Company, a corporation organized under the laws of New Jersey, but doing business in the state of New York, an involuntary bankrupt. Each of the petitioning creditors entered into a written contract with the company, whereby the latter agreed to deliver to such creditor all ice to be consumed on its premises for a specified term, at the price of two dollars per ton, with weekly payments, for the following terms: Stern Bros., from January 1, 1901, to January 1, 1903; Yaretsky, March 13, 1901, to March 13, 1903; Mendelowitz, January 1, 1901, to January 1, 1906; Pannamacoer, March 13, 1901, to March 13, 1903. Shortly thereafter attachments were levied against the property of the bankrupt, and temporary receivers were appointed by the state courts in New Jersey and New York. This resulted in a failure on the part of the company to make delivery, and the creditors have been compelled to make other arrangements for the future delivery of ice, at higher prices.

Upon a previous hearing it was urged on the part of the respondent, as the claim of each of the creditors was unliquidated, it was not provable in bankruptcy, so as to give the several petitioners standing as creditors. This objection was overruled by Judge Brown, and a reference was ordered for the purpose of determining whether the claims were sufficient in amount to meet the requirements of the act. The conclusion of Judge Brown will not be reconsidered.¹ From the evidence taken before the referee, it appears that the current damages sustained by the petitioners up to the time of filing of the petition did not aggregate \$500, but that the ruling market price of ice during the time intervening between the failure of the respondent to meet its contract and the time of the filing of the petition was such that new contracts could not be made for the terms covered by the old contracts without such loss to the petitioners as would amount to the sum requisite to give the court jurisdiction. Therefore the question is whether the whole damages for the term are provable in bankruptcy, or only such sum as the petitioners were obliged to pay in excess of the contract price up to the time of the filing of the petition. The petitioners owned contracts which bound the respondent to furnish them ice for their business through specified terms. That contract was broken. The petitioners were obliged to pay, for the time intermediate the breach of the contracts and the filing of the petition, prices in excess of that reserved by the contracts, and could not replace the contracts at prices as favorable as those provided by the contracts. Such evidence tends to show that the petitioners could not replace the contracts without suffering a direct loss much in excess of \$500. Whatever such loss was, that they were entitled to recover, without awaiting the expiration of the time for which the contracts were to continue. *Baker Transfer Co. v. Merchants' Refrigerating & Ice Mfg. Co.*, 12 App. Div. 260, 42 N. Y. Supp. 76; *Lavens v. Lieb*, 12 App. Div. 487, 42 N. Y. Supp. 901; *Wakeman v. Manufacturing Co.*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; *Sulzbacher v. J. Cawthra & Co.*, 14 Misc. Rep. 545, 36 N. Y. Supp. 8, affirmed in court of appeals 148 N. Y. 755, 43 N. E. 990; *Dart v. Laimbeer*, 107 N. Y. 664, 14 N. E. 291.

The petitioners are creditors for the requisite amount.

¹ The following is the opinion referred to, which was handed down May 21, 1901, by Brown, District Judge: "The practice in this district is that a creditor having a provable debt may be a petitioning creditor, though the debt is unliquidated. These creditors evidently have a present fixed debt to some amount. Only a trial can determine the amount of the debts. If insufficient in amount, the petition will be dismissed, unless others join. The defense must be taken by answer. Motion denied."

GABRIEL et al. v. UNITED STATES.

(Circuit Court, S. D. New York. April 10, 1902.)

CUSTOMS DUTIES—LITHOPHONE.

The decision of the board of general appraisers that "lithophone" was assessable as "sulfid of zinc, white," within Tariff Act July 24, 1897, par. 57, and not as "white paint or pigment containing zinc, but not containing lead," within the same paragraph, where amply supported by evidence, will not be disturbed by the circuit court on appeal.

Appeal from a Decision of the Board of United States General Appraisers.

W. Wickham Smith, for the importers.

D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge. The imported merchandise in question consists of "lithophone." The collector assessed duty at one and one-fourth cents per pound as "sulfid of zinc, white," under paragraph 57 of the schedule for "paints, colors, and varnishes" of the tariff act of July 24, 1897. The importers protested, insisting that it should have been classified under the same paragraph as a "white paint or pigment containing zinc, but not containing lead." Paragraph 57 is as follows:

"Zinc, oxide of, and white paint or pigment containing zinc, but not containing lead, dry, one cent per pound; ground in oil, one and three-fourths cents per pound; sulfid of zinc white, or white sulphide of zinc, one and one-fourth cents per pound; chloride of zinc and sulphate of zinc, one cent per pound."

The question before the board was one of fact, namely, was "lithophone" commercially known as "sulfid of zinc white, or white sulphide of zinc," on the 24th of July, 1897, and prior thereto?

The board have written an elaborate and carefully considered opinion reviewing the testimony of the 19 witnesses examined and have reached the following conclusion:

"We find that the article before us, while known as lithophone or lithofone, is also commercially known as sulfid of zinc, white, and hold that it is properly assessable for duty as such at the rate of 1¼ cents per pound."

Additional testimony was taken in this court, but it only strengthens the conclusion of the board.

Their finding on the facts is not against the weight of evidence. On the contrary, it is amply supported by evidence, and should not be disturbed, within the well-known rule so often followed in this court.

The decision of the board is affirmed.

THE TURQUOISE.

(District Court, E. D. Pennsylvania. April 9, 1902.)

No. 46 of 1900.

INJURY TO STEVEDORE—LIABILITY OF SHIP—CREW WORKING FOR ANOTHER THAN THE SHIP.

A ship is not liable for injury to a stevedore in unloading the ship, through negligence of the winchmen, though they were members of the ship's crew, they at the time being under a special contract of hire, either for the consignee or the head stevedore.

In Admiralty.

Eugene Raymond, for libelant.

Horace L. Cheyney, for respondent.

J. B. McPHERSON, District Judge. This is a suit to recover damages for personal injuries suffered by the libelant while assisting to unload the steamship *Turquoise* in March, 1900. He was a stevedore engaged in unloading asphalt from the hold, and was hurt by the falling of a heavy iron bucket; the fall being due, as he asserts, to the negligence of one or both of the two winchmen that were helping to hoist and lower. It is unnecessary, however, to determine the correctness of this assertion, because, even if the negligence of the winchmen be assumed, it appears clearly that they were not the servants of the vessel, but were the servants either of the Barrett Manufacturing Company, the consignee of the cargo, or of the head stevedore who was employed by the company to unload. Against which of these persons the libelant should have proceeded is not now material, but the testimony makes it plain to me that the ship, at least, is not liable. It is true that the winchmen were the second mate and a seaman from the vessel's crew, but during the night when the accident happened they were working under a special contract of hire, either for the consignee or for the head stevedore. They were paid for their services by an agent of the consignee, and for the time being were not the servants of the ship. The libelant has apparently brought his action against the wrong person, and the libel must therefore be dismissed.

In re PHILADELPHIA & LEWES TRANSP. CO.

(District Court, E. D. Pennsylvania. April 8, 1902.)

BANKRUPTCY—CORPORATIONS SUBJECT THERETO—CARRIERS—TRADING OR MERCANTILE PURSUITS.

A carrier corporation is not engaged in trading or mercantile pursuits, so as to bring it within Bankr. Law 1898, subjecting thereto corporations "engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits."¹

Motion to Dismiss Petition.

Horace L. Cheyney and John F. Lewis, for petitioning creditors.
Ira Jewell Williams, for alleged bankrupt.

J. B. McPHERSON, District Judge. The petition avers that the bankrupt is "a corporation engaged in the business of carriage by water of passengers and goods for hire, between the city of Philadelphia and Lewes, Delaware." The bankrupt moves to dismiss, upon the ground that a corporation of this character is not "engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits," and is therefore not within the provisions of the act. It is apparent that the corporation cannot be embraced within the clause just quoted, unless it is found to be engaged principally in "trading or mercantile pursuits," and to this point the argument has been addressed. The construction of these words that is contended for on behalf of the petition makes them equivalent to "commerce" or "commercial pursuits," and would require the court to hold that every other kind of corporation engaged in commerce was also included within the act. The railroad and steamship lines of the country, the insurance companies, the telephone and telegraph companies, the express and transfer companies, and perhaps other corporations having something to do with the movement of persons or commodities, would all be embraced within the words if they should be thus construed. In my opinion, this result is sufficient to condemn the proposed construction. I feel sure that, if congress had intended to subject such well-known and important classes of corporations as railroad, steamship, express, telegraph, and other companies engaged in commerce, to the operation of the bankrupt act, they would have been named directly and specifically, or else the act would have contained such all-embracing terms as were used in the act of 1867,—“all moneyed, business or commercial corporations and stock companies.” But to specify the narrower classes of manufacturing, printing, and publishing corporations, and then to add “trading or mercantile corporations,” indicates to my mind that these latter words are to have a restricted meaning, and are not to be so broadened as to cover the whole field of commerce or commercial pursuits. See *In re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co.* (D. C.) 96 Fed. 757; *In re New York &*

¹ What persons are subject to bankruptcy law, see note on *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.

W. Water Co. (D. C.) 98 Fed. 711; In re Elk Park Min. & Mill. Co. (D. C.) 101 Fed. 422; In re Woodside Coal Co. (D. C.) 105 Fed. 56; In re Keystone Coal Co. (D. C.) 109 Fed. 872.

The question is not, I think, whether some one or more of the dictionary meanings of the words "trading" or "mercantile" may be broad enough to embrace such a business as is done by the bankrupt. In the construction of a statute, the effort must always be to determine in what sense the words were used by the legislature; and, while it is true that the natural and ordinary meaning of language is to be followed, it may often happen, as I think it has happened in the present case, that a word may have several natural and ordinary meanings. In that event, the court is obliged to determine by the help of other considerations which meaning the word was intended to convey. For the reasons given, I do not believe that congress intended the words "trading or mercantile" to carry the meaning that is contended for by the petitioning creditors, and accordingly the petition will be dismissed.

MURPHY v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, D. Indiana. March 19, 1902.)

No. 10,020

LIFE INSURANCE—ACTION ON POLICY—SUFFICIENCY OF ANSWER.

An answer in an action on a life insurance policy setting up as a defense that the policy had lapsed by reason of the failure of the insured to pay an assessment must affirmatively show that such assessment was legally made; and, where it does not appear that the amount was fixed either by the policy or the constitution or by-laws of the company, facts must be alleged showing that it was duly made by the board of directors, or other corporate body, pursuant to an authority conferred upon them by the constitution or by-laws. A general allegation that the insured was duly notified of the assessment, and failed and refused to pay it within the time limited, is insufficient.

At Law. Action on a policy of life insurance. On demurrer to answer.

Rowland Evans, for plaintiff.

Guilford A. Deitch, for defendant.

BAKER, District Judge. The plaintiff has interposed a demurrer to the second, third, and fourth paragraphs of the answer of the defendant. The suit is upon a certificate or contract of insurance on the life of John W. Murphy for the benefit of his wife, Ann E. Murphy. The certificate was executed December 8, 1884, and the assured died on July 15, 1900. Due proof of death was properly made. The amended complaint avers due performance of all the conditions of the certificate by the assured. The certificate, a copy of which is made part of the amended complaint, provides that:

"In further consideration of the dues for expenses to be paid on or before the 8th day of December in every year during the continuance of this certificate, and of the further payment of all mortuary assessments payable at the

home office of the association, in the city of New York, within thirty days from the first week day of the months of February, April, June, August, October, and December of each and every year during the continuance of this certificate (or from such other periods as the board of directors may from time to time determine), and within thirty days from the day of the date that each assessment is ordered, the Mutual Reserve Fund Life Association, from and after the delivery hereof, with a receipt for the payment of the first annual dues, signed by the president, secretary, or treasurer of the association, does hereby receive John W. Murphy, of Indianapolis, county of Marion, state of Indiana, as a member of said association."

The certificate contains no agreement or statement of the amount of annual dues for expenses, nor of the amount of the bimonthly mortuary assessments. There is found indorsed upon the certificate, but constituting no part of the written contract, a statement that the annual dues for expenses are limited to \$2 for each \$1,000, payable annually, in advance. There is also indorsed thereon an "assessment rate table," showing the rate of assessments on each \$1,000, commencing with the age of 15 years, and ending with the age of 65 years. The answer consists of a general denial, and of three special paragraphs in confession and avoidance. The second paragraph admits the execution of the certificate of insurance, and that it was issued to the plaintiff's husband, and it further avers:

"That the consideration for said policy was the application for membership, the admission fee paid, and dues for expenses to be paid on or before the 8th day of December in every year during the continuance of said policy, and of the further payment of all mortuary assessments payable at the home office of the defendant, in the city of New York, within thirty days from the first week day of the months of February, April, June, August, October, and December of each and every year during the continuance of said policy. A copy of said certificate is filed with the amended complaint herein, and is hereby referred to, and made a part of this answer. The defendant says that the said John W. Murphy was duly notified, by notice dated the 1st day of April, 1898, that an assessment was made on him in the sum of \$141.00, and that the same was to be paid within thirty days from said date, in accordance with the conditions of said policy. The defendant says that the said John W. Murphy neglected, failed, and refused to pay said assessment call, or any part thereof, within said thirty days from said 1st day of April, 1898, or at any time thereafter, and that the same was never paid by the said John W. Murphy, or by any one acting for or on his behalf, or for or on behalf of the plaintiff herein. Defendant further says that after the said thirty days had elapsed from the said first day of April, 1898, the defendant notified the said John W. Murphy that said policy might be reinstated and put in full force and effect upon the payment of said assessment, but that said John W. Murphy neglected, failed, and refused to reinstate said policy or to pay said assessment."

It is a fundamental rule in the law of insurance that a policy shall be construed most strongly against the insurer, and liberally in favor of the assured. Such a construction is manifestly just. The conditions embodied in modern policies are carefully prepared for the insurance companies by counsel learned in the law, and it is plainly right that every doubt should be resolved against those who have caused the doubt. The policy does not fix the amount of the bimonthly mortuary assessments. Nor is there anything contained therein from which the assured can determine the amount of any such assessment. There are but three conceivable ways in which the

amount of such assessments can be fixed and determined, namely: (1) By an agreement as to the amount, stated in the policy; or (2) by the amount of such assessments being fixed in the constitution or by-laws of the association; or (3) by an assessment duly made by the board of directors of the association pursuant to authority conferred on such board by the constitution or by-laws. The certificate does not fix the assessment. The table of rates of assessment constitutes no part of the certificate. And if it did, it would show that the assessment mentioned in this paragraph of answer was wholly unauthorized. It is not alleged that the amount of the assessment which the assured was required to pay was fixed either by the constitution or by-laws. Hence no authority is shown, either in the certificate or in the constitution or by-laws, authorizing the assessment of \$141.90 upon the assured. If the assessment was a lawful one, it must be because it was authorized by the constitution and by-laws, and because the same was duly made by the board of directors or other corporate body pursuant to an authority conferred upon them by such constitution and by-laws. The answer wholly fails to allege how, in what manner, or by what authority the assessment of which the assured was notified was made. It does not even allege that it was duly made. The defendant must, by averment and proof, show that the assessment of \$141.90 was lawfully made by some competent body authorized thereto, pursuant to an authority which was binding at the time upon the assured. The rule is well stated in 2 Joyce, Ins. § 1310:

"The act of making an assessment is a ministerial, and not a judicial, one. Therefore no presumption can arise in favor of the regularity or legality of assessments; and it is an affirmative matter, both of pleading and evidence, necessary to establish a forfeiture for nonpayment of an assessment, that the assessment should appear to have been made in the manner, mode, and in conformity with the authority given, and for a proper purpose. A general allegation that it was duly made is insufficient."

There is no direct averment that an assessment was made upon the assured. It is simply stated that he was notified on the 1st day of April, 1898, that an assessment was made upon him for the sum of \$141.90; but when, by whom, for what purpose, and under what authority, is not shown by this paragraph of the answer. Forfeitures are not favorites of the law, and whoever seeks to make out a case of forfeiture must do so by pleading every essential fact with certainty and precision. This paragraph of answer is fatally defective. The same reasons apply with equal force to the third and fourth paragraphs of answer, and each must be held insufficient.

The demurrer to the second, third, and fourth paragraphs of answer is sustained, and the defendant is given an exception. The defendant has leave, if so advised, to amend these paragraphs of answer within 15 days.

THOMAS & SONS CO. v. ELECTRIC PORCELAIN CO. et al.

(Circuit Court, D. New Jersey. March 12, 1902.)

No. 190.

PATENTS—INTERLOCUTORY DECREE FOR INFRINGEMENT—MOTION FOR MODIFICATION.

An interlocutory decree having been entered, sustaining the validity of a patent and directing the defendant to account, a motion to modify the decree, so as to obtain a decision whether a special article made by the defendant infringes, will be refused where that question was not raised by the pleading or made the subject of proof. It is not the province of the court to advise a defendant what he can or what he cannot do, under such a decree, to avoid being charged with contempt, nor to determine in advance on motion questions which may subsequently arise before the master in the accounting.

In Equity. On motion to vacate and modify interlocutory decree.

H. P. Denison, for the motion.

Hubert Howson, opposed.

ARCHBALD, District Judge (orally).¹ There is no doubt in my mind as to my authority on a proper occasion to modify an interlocutory decree such as has been entered in this case, but I am not moved to do so by the affidavits and exhibits which have been laid before me. The question now sought to be raised is not one that was made by the pleading or evidence upon which the case was previously disposed of. 111 Fed. 923. It was touched upon, it is true, at the final hearing, where it was suggested by counsel for the defendants that some of the insulators which he there produced were not of an infringing character, because they had been made by dipping the shells into glaze, and were fastened together in that way, and not by pouring extra glaze between them. But this was at the very close of the argument, and counsel for the plaintiff protested against their being considered because they had not been offered in evidence before the examiner, and were entirely outside of the case as it had been made up, giving notice also that in case the patent was sustained they would be regarded as an infringement.

The only question at the hearing was with regard to the validity of the plaintiff's patent, the insulators manufactured by the defendants being conceded to be an infringement. What I am really now asked to do therefore is to dispose of something brought into the case anew, entirely outside of any issue made or evidence offered leading up to the final disposition of it. The defendants' counsel is, no doubt, acting in entire good faith, and confesses to have two purposes in view—First, to avoid any possible proceedings for contempt, he having advised his client that the character of the insulator that he produces here to-day does not infringe the plaintiff's patent according to his understanding of the opinion of the court upon the subject; and, second, to meet the same question which is likely to

¹ Specially assigned.

come up before the master if the case goes to an accounting. The motion to modify is made on the authority of a case in the Ninth circuit (*Bowers v. Reclamation Co.* [C. C.] 99 Fed. 745), which I have examined in a general way, but not critically. My remembrance is that the use now made of it is based, not upon anything directly decided, but upon an incidental remark advanced by the court by way of argument. Speaking of the want of good faith on the part of the defendant, as evidence of it, it is said that he went ahead and took the chances of infringing, acting upon the advice of counsel, without obtaining, as he might have done, the opinion of the court by an application for a modification of the decree which had been entered; that is to say, the court assumed, without really deciding it, that there could properly be a modification of the decree in that way. How far this view of the practice is called in question by the cases which have been cited in this circuit (*Edison Electric Light Co. v. Westinghouse Electric & Mfg. Co.* [C. C.] 54 Fed. 504; *Sprague Electric R. & Motor Co. v. Steele Motor Co.* [C. C.] 105 Fed. 959) I will not undertake to say. A serious objection to it is that it practically makes the court advise the defendant what he can and what he cannot do, and that is exactly what defendant's counsel frankly says he desires in the present instance. He wants the court to tell in advance what the defendant has a right to do. The courts are established to decide cases, and not to advise parties. That is a matter for counsel, which courts cannot assume without entirely reversing the established order. They can only pass upon such matters as are brought before them in a due and regular way, and cannot anticipate.

So far as any charge of contempt which may hereafter be made in the present case is concerned, I shall have to meet it when it comes up, and in the way it comes up; and, with regard to the accounting before the master which has been ordered, all questions that pertain thereto must, in the first instance, be disposed of by him, acting on his own views, and to that time and place they must for the present be relegated. It is true there is a method by which questions which arise can be certified by the master to the court for determination, but that is resorted to only after due proceedings have been taken and the issues fully developed, which differs very much from such *ex parte* affidavits and exhibits as are now brought forward.

It is evident from these observations, which are necessarily hasty, that I am not inclined to sustain this motion, and I will overrule it, leaving the defendant to take such action with regard to these insulators as he may be advised by counsel is proper, for which he must assume the responsibility, without calling upon the court for guidance. Did I attempt to tell him now that a certain line of action was open to him, I might be compelled, when both sides have been fully heard, to take the contrary view, which would lead to considerable embarrassment.

The motion to vacate and modify the interlocutory decree is dismissed.

THE FLEETWING.

THE MAJOR BARRETT.

(District Court, E. D. Pennsylvania. March 22, 1902.)

No. 72.

1. COLLISION—OVERTAKING VESSEL—DUTY TO GIVE SIGNALS.

It is the duty of an overtaking vessel to see to it that she does not come so near the overtaken vessel as to cause danger of collision; and, if she does come within the line of danger, it is her duty to warn the other vessel by signals, whether she intends to pass or not.

2. SAME.

A steamship which overtook, ran down, and sank a small tug in the Schuylkill river in the daytime, and without giving any signal of her approach, was in fault, and is liable for the damages, in the absence of evidence clearly showing that the collision was caused by some fault of the tug.

In Admiralty. Suit for collision.

J. Warren Coulston and Alfred Driver, for the Fleetwing.

John G. Johnson, Horace L. Cheyney, and John F. Lewis, for the Major Barrett.

J. B. McPHERSON, District Judge. This is an action for a collision that took place in the Schuylkill river on October 2, 1900. The injury occurred about 5 o'clock in the afternoon; the tide being about half flood, and the day clear, with little or no wind. The Fleetwing—a small wooden vessel, 47 feet long, 13 feet wide, drawing about $4\frac{1}{2}$ feet of water—had come down the Delaware river, had turned into the mouth of the Schuylkill, and was proceeding up the eastern side of the channel. The Major Barrett—a steamship 185 feet long, 35 feet wide, drawing 13 feet of water—had come up the Delaware river, and turned into the Schuylkill, two or three hundred yards astern of the tug. The Fleetwing was proceeding at her full speed, which was about seven miles an hour, and I think the evidence shows that, while the Major Barrett may not have been going at her full speed, she was nevertheless going faster than the tug. She certainly overtook the tug before either vessel had gone far from the mouth of the river, struck her a blow upon her port quarter near the stern, turned her over, and sank her, drowning two of the crew. The Major Barrett gave no signals whatever, because, as she argues, she had no intention of passing the tug, and therefore was under no obligation to give the signals required by the inland regulations. Whether or not she was bound to give the passing signals in the absence of an intention to pass, does not seem to me to be important to decide, for the evidence makes it abundantly clear that the steamship had come dangerously near the tug; and, under such circumstances, I think she was clearly at fault for having failed to give some signal that would have made her presence known, so that the tug might have been distinctly notified that the steamship was in the immediate neighborhood. As the steamship was the overtaking vessel, it was

her business to see to it that she did not come so near the tug as to make a collision probable, or, if she did approach within the line of danger, to give the tug such signals as would warn her that the steamship was at hand, and thus require her to be as vigilant as the circumstances called for. It seems to me that the case is on all fours with the decision of Judge Benedict in *The Osceola* (D. C.) 30 Fed. 383. I quote his opinion, substituting the names of the vessels involved in this suit:

"If, as the libelants contend, the *Fleetwing* made no sheer, the liability of the *Major Barrett* is clear. If, on the other hand, the *Fleetwing* did sheer, still the *Major Barrett* was in fault; for she was the overtaking vessel, and approached dangerously near to the *Fleetwing* without giving the signals required by the inspectors' rules. Had the signal been given, or had it been proved that the *Fleetwing* had been otherwise informed of the position of the *Major Barrett*, the *Fleetwing* would have been in fault for changing her course when she did; but, in the absence of such signal or such knowledge, her change was not a fault."

I do not think the evidence establishes satisfactorily that the tug did make a sudden sheer to port, as is claimed by the respondent. That she changed her course slightly to the westward may be true, but I am satisfied that, under the circumstances, she was not in fault, even if a change in some degree was made.

The libelant is entitled to a decree, and upon the proper application a commissioner will be appointed to assess the damages.

THE ATKINS HUGHES.

THE ALSENBORN.

(District Court, E. D. Pennsylvania. March 22, 1902.)

No. 16.

TOWAGE—VALIDITY OF CONTRACT—SERVICES IN THE NATURE OF SALVAGE.

An agreement fixing the price to be paid for towing a vessel into port will not be set aside as exorbitant, although the price is considerably in excess of customary towage rates, where, owing to the perilous situation of the tow, which was unable to make headway against the seas, and the fact that there was no other tug in the vicinity which could have rendered assistance, the service was in the nature of a salvage.

In Admiralty. Suit to recover on a contract for towage services.

Horace L. Cheyney and John F. Lewis, for the *Atkins Hughes*.

Thomas Leaming, for the *Alsenborn*.

J. B. McPHERSON, District Judge. This suit is brought to recover the sum of \$600, which the master of the steamship *Alsenborn* agreed to pay for the services of the tug *Atkins Hughes* in towing the steamship from a point upon the Atlantic Ocean, several miles north of the Capes of the Delaware, to the city of Philadelphia. The service was performed on February 7, 1901, when ice in considerable quantity was running down the river, and at some places interfered a good deal with navigation. The *Alsenborn* was coming down the

coast, bound for the port of Philadelphia. Her precise dimensions do not appear in the evidence, but it is manifest that she was not a large ship. She was high out of the water, drawing a foot or two forward, and about seven feet aft, and was carrying very little, if any, cargo. She encountered a high wind from the northwest on the night of February 6th, and was obliged to anchor in order to avoid being blown out to sea. Her engines were not powerful enough to enable her to keep up to the wind. On the morning of February 7th she lost her ground tackle, and the wind was carrying her steadily away from the land and from the mouth of the river. It is conceded that, if her movement seaward had not been stopped, she would speedily have been in great danger, perhaps of being overturned, but certainly of being injured, and probably wrecked, by the violence of the wind and waves. In this situation she signaled to the tug, which is a large, powerful, sea-going vessel, and was cruising about looking for ships to tow up the river, to come and give her aid. The tug responded, and when she came within hailing distance of the steamship the captains of the respective vessels began to bargain. The Alsenborn desired to be towed to Philadelphia, and offered \$100 for the service. The captain of the tug asked \$600, and this sum was finally accepted, after the steamship had offered \$500 and this offer had been refused. By the agreement the tug was to furnish the hawser. The service was performed, the Alsenborn assisting by the use of her own steam; and the voyage lasted about 15 or 16 hours, which is the usual time required for towing from the break-water to the city. At one place in the river the vessels were fast in the ice for some time, and, in consequence of the injury to the hawser done by the ice, a loss was thereby inflicted upon the tug of about \$100. After the steamship came to her dock, her master approved a bill for the sum agreed upon, but payment was afterward refused upon the ground that the amount charged was exorbitant, and that the agreement was made under circumstances which left the steamship no choice. This is the only question for determination, and upon this point my conclusion is in favor of the libellant. Undoubtedly, if the service is to be regarded as no more than ordinary towage, the sum is much too large; for, while there appear to be no established rates for towage in the Delaware river during the winter months, enough has been proved concerning the amounts usually paid for towing to enable the court to say that, for an ordinary tow, \$600 would be much in excess of the proper sum, even in the month of February. But when the danger to which the Alsenborn was exposed is taken into account, and the further facts that there was no other tug in the neighborhood by whom assistance could be rendered; that, even if she had been able to enter the Delaware, she had so little power that she could not have proceeded to Philadelphia under her own steam alone; and that the tug has suffered a loss of \$100 in performing the service by reason of the injury to her hawser,—I think that the sum of \$600 is not too large for the work that was done. The service may not have been technically salvage, but it certainly approached it closely, and I am clearly of opinion that the peril-

ous situation of the steamship is proper to be considered in deciding what compensation should be paid to the tug: *The Elfrida*, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. Ed. 413.

A decree will therefore be entered in favor of the libellant for \$600, with interest and costs.

PACIFIC STATES SAV., LOAN & BUILDING CO. v. GREEN et al.

(Circuit Court, D. Oregon. March 12, 1902.)

BUILDING AND LOAN ASSOCIATIONS—CONTRACT WITH BORROWING STOCKHOLDER—VALIDITY.

By a contract between a building and loan association and a stockholder the latter sold, assigned, and transferred the 110 shares of stock owned by her, of the par value of \$100 each, and which she obtained at the same time, to the association, absolutely, in consideration of its advancement to her of \$5,500, "by way of anticipation of the value at their maturity" of the 110 shares. It was further provided that \$5,500, being the par value of 55 shares, was given to the association as a premium. The bond required the borrower to repay the loan within 7 years, together with interest, and the full amount of the premium, provided the stock had at the time matured and become worth par, and, if not, so much of the premium as had then been earned, or, in default of such payment, to keep up the dues on the 110 shares until they matured, in addition to the payment of interest. *Held*, that the transaction was merely one of loan, the borrower retaining no interest as a stockholder in any case, and that, since the association would receive, in case the stock was paid out until it reached par value, as contemplated, double the amount loaned, besides interest thereon, the contract was unconscionable, and would not be enforced by a court of equity by a foreclosure of the mortgage given to secure it, for the sum claimed to be due thereunder, amounting to \$2,600, after the borrower had paid to the association a sum exceeding the amount borrowed, with interest.

In Equity. Suit to foreclose mortgage. On demurrer to bill.

G. W. Baker and G. W. Allen, for plaintiff.

Lionel R. Webster, for defendants.

BELLINGER, District Judge. This is a suit to recover \$2,594.93, and to foreclose a real estate mortgage given, as is alleged, to secure said sum. The complaint alleges, in effect, that on February 23, 1893, the defendant Lizzie A. Green was the owner of 110 shares of the capital stock of plaintiff, of the par value of \$100 per share, for which she agreed to pay 60 cents per month per share, or \$66 per month, until said shares, "by said payments and the accumulations allotted to the same by reason of profits earned, would become matured, and of the par value of \$100 each;" that on the same day said defendant applied for a loan of \$5,500, and accompanied such application with a bid for the loan, which bid was as follows:

"Amount of money desired as loan, \$5,500. Applied for Feb'y 23rd, 1893. I hereby agree to hold 110 shares of stock in the Pacific States Savings, Loan and Building Co., and to continue payments of installments on said stock until the same shall mature, or until the loan is otherwise paid. I also hereby agree to pay said company a bonus of fifty-five shares of the stock above

referred to, as a consideration for the loan of \$5,500 applied for. Lizzie A. Green [Signature of applicant]. February 23rd, 1893. Witness: I. C. Hicks."

—That the plaintiff company, upon or prior to March 10th, accepted said bid, and agreed to loan Lizzie A. Green the sum of \$5,500 in accordance with the terms and conditions mentioned, and according to the terms and conditions of a certain indenture of bond which was, on the 15th of March, 1893, executed by Lizzie A. Green and James W. Green, her husband, a copy of which is made a part of the complaint. This bond was secured by a mortgage upon certain real estate, represented in the application for the loan to be of the cash value, with improvements, of \$12,000. The bond recites that whereas the company only loans its money to its stockholders, and only in proportion to the amount of stock held by such stockholders, and that whereas Lizzie A. Green is the owner of 110 shares, and has bid the sum of \$5,500, being the par value of 55 shares of said stock, "as and for a premium for the advancement by said company of \$5,500 by way of anticipation of the value at their maturity of 110 shares of the capital stock of said company now owned by said Lizzie A. Green, and whereas the said company, in consideration of said premises, and by way of said anticipation, has this day advanced to said Lizzie A. Green and James W. Green \$5,500, now, therefore," etc. Then follows the obligation of the bond, which will be referred to later.

From what is stated so far, it appears that the transaction was one of loan, and that the stock subscription was merely a mode adopted by the parties of making the loan. According to the recital in the bond, the \$5,500 loaned was an "advancement" by the company in anticipation of the value at their maturity of the 110 shares of stock subscribed for by Lizzie A. Green. In other words, the 110 shares of matured stock were valued at \$5,500, and by way of anticipation of such value there was an "advancement" of that sum. One-half of the 110 shares of stock were, as a part of the transaction by which they were acquired, given back to the company as a "bonus" for the loan or advancement. The remaining 55 shares are treated as pledged to the company, but by the terms of the bond executed on March 10th the entire 110 shares were "sold, assigned, transferred, and set over" to the company absolutely, no right or interest whatever remaining in the subscriber. This is in keeping with the theory of an "advancement" by the company of the value of the 110 shares at their maturity, but if the defendant is obligated to pay the \$66 per month until the 110 shares become, by such payments and earnings, fully paid, and of the par value of \$100 per share, together with interest on such loan or advancement, the contract becomes one of unusual hardship, and such as a court of equity will not enforce.

The obligation of the bond is that the Greens are to pay, on or before seven years, the sum of \$5,500 and the full amount of the premium, if said 110 shares shall have matured and become worth par, or, in case said stock has not matured, then so much of said premium as may have been earned at the time the whole of the sum advanced is repaid, together with interest, etc., or, in default of such

payment, then the alternative is to pay the \$66 each month, "as and for the monthly dues on said one hundred and ten shares, now owned by said Lizzie A. Green, and by her hereby sold, assigned, transferred, and set over to said company," together with \$27.50 each month as interest, and also all fines and charges until said stock becomes fully paid in and of the par value of \$100 per share, and shall then surrender said stock to the company. If by the word "premium" in the provision in this bond requiring the Greens to pay the sum of \$5,500 and the full amount of the premium, if the said 110 shares shall have matured and become worth par, or in case said stock has not matured, then so much of said premium as may have been earned at the time the whole of the advance is repaid, is meant the par value of the 55 shares bid as a bonus, or the amount of the installments paid at the time the loan is repaid, the stock not having matured, it results that, if the stock has matured, the full value of \$5,500 is required to be paid as a premium in addition to the repayment of the sum of \$5,500 loaned or advanced, or, if the stock has not matured, then whatever has been paid in installments on account of this stock must go to the company in addition to the repayment of the money loaned and interest. The th other alternative of the bond is the payment of the monthly installments, together with interest installments, until the entire 110 shares are matured, or are of par value, and the surrender of the 110 shares to the company. Between these alternatives, there is no choice. In either case the company will receive double the amount advanced.

The proviso in the bond by which, upon a six months' default in the payment of installments, the company may elect to declare the loan and the premiums then earned due, and recover the same, less the withdrawal value of said 110 shares, allows nothing to the borrower for the withdrawal value of the 110 shares above the debt. This is consistent with the recital in the bond that the \$5,500 was an advancement by the company by way of anticipation of the value at their maturity of 110 shares of the capital stock owned by Lizzie A. Green. This recital, as well as the condition in the bid by which the defendant borrower agreed to hold 110 shares and to continue payments of installments thereon until the same shall mature, or until the loan is otherwise paid, shows that all installments paid on the 110 shares were so much paid on the loan, or on account of it. If the loan was "otherwise paid" the obligation to pay installments ceased. It was not intended that the loan would be "otherwise paid," and yet this phrase is cumulative of what is plain enough without it,—that the stock subscription and holding and the payments to be made nominally on that account were merely the means of repaying the loan and of securing an unconscionable bonus besides. In this connection consider this allegation in the complaint: That thereupon, upon the execution of the bond by Lizzie A. Green and her husband, the said plaintiff advanced to said Lizzie A. Green the said sum of \$5,500, "which was to be repaid by the maturing of the shares which she held in said plaintiff corporation by making the monthly payments thereon as specified in her said application and

the indenture of bond executed by her and her said husband." The monthly payments to be made as specified in the bond and in the bid which accompanies the application are required to be on the 110 shares. The allegation that the \$5,500 was an advancement by way of anticipation of the value at maturity of 110 shares of the company's capital stock is in keeping with what elsewhere appears,—that the defendant Lizzie A. Green was to have merely a borrower's, not a stockholder's, interest in the company; that the stock subscribed for by her at par value would only repay the advancement which had been made to her.

Upon what pretense of fair dealing the company intended that \$5,500 advanced by it, and upon which it had received interest, was to represent the value of shares actually worth \$11,000, does not appear. It is argued that the defendant Lizzie A. Green became a stockholder, and that the payments made by her and sought to be enforced against her in excess of her debt are in the nature of a stock investment. But the facts as they already appear do not support this contention. Her so-called stock conferred no rights upon her. It merely imposed an obligation upon her, which the most guileless right-minded person in the world could not be expected to assume in any transaction less devious and complicated than that in question. And so it transpires that although she "sold, assigned, transferred and set over," absolutely and unconditionally, to the company the 110 shares of stock which she is described as holding, although neither the conditions of the bond nor the allegations of the complaint admit of any present interest, or of any possible interest at any time, on her part in the company, and although she has paid \$5,544 on the principal sum of \$5,500 advanced or loaned, or, what amounts to the same thing, has paid installments to that amount to mature stock by which the sum advanced or loaned was to be repaid, and has paid interest meanwhile on the unpaid balance of the principal debt at the rate of above 12 per cent. per annum, yet a decree is sought against her in a court of equity for \$2,594.90, with \$250 additional as an attorney's fee, for which a foreclosure is prayed upon property stated in the application for the loan to be worth \$12,000.

The question of usury was discussed at some length on the argument, and a recent decision of an Eastern court, in which a contract like the one in suit was enforced, was cited. In that case the contract was held not to be usurious. That question is not necessary to be considered here. If it was a mere question of an interest charge, and the rate appeared to me to be unconscionable, there could be no relief in this court that included it.

The fact is that this so-called stock subscription is not in any proper sense a stock subscription at all. It is a mere expedient to secure unconscionable terms in a money-lending transaction. The penalty in a bond may be avoided by a performance of the condition upon which the penalty depends, but in this case there was no such avenue of escape for the hapless borrower. By prompt repayment of the advancement—a payment otherwise than by maturing the stock—she would still lose the installments that had been paid in the meantime

and were then due. But if unable to make prompt payment the exaction would be increased, and might, according as the company saw fit to act, equal the principal sum advanced, not taking into account the interest payments made. Among the earliest exercises of the equity jurisdiction was the relief it afforded against penalties and forfeitures, and so far there is no case in which its jurisdiction has been invoked to enforce either. What is asked in this case is something quite as unconscionable as a penalty,—a thing that equity will not enforce, and will not permit, in any case coming within its jurisdiction.

The complainant credits the defendant Lizzie A. Green with the value of 55 shares of so-called pledged stock, at \$4,214.10. The remaining 55 shares are of course donated or premium stock. There is, therefore, no pretense that this defendant has, or is to have, any interest as a stockholder on account of payments made and sought to be enforced against her in excess of the loan and interest. As a matter of fact, there is no distinction between pledged and other stock. The fiction adopted by the company is that 55 shares were given to the company as a bonus and the remaining 55 shares were given as a pledge, but it all went to the company by absolute assignment and transfer. There is nothing in the conditions of the bond that admits of any interest in Lizzie A. Green in the so-called pledged stock. The transaction was one of loan, and nothing else, and equity, which looks to the intent, not the form, must so regard it. The installment payments of \$66 per month were payments on the loan. These payments continued for seven years, during which interest installments were also paid. There has thus been paid, as already stated, \$5,544 and interest.

The complainant is entitled to its loan or advancement, and interest. More than this it has had. More than this it is not entitled to. It cannot, in a court of equity, collect installments in the nature of premiums upon stock, subscribed for merely to qualify the subscriber to borrow from the company, and which, by the terms of the agreement between the parties, was to be, and was in fact, transferred to the company, and of which the company has at all times been and now is the absolute owner.

Demurrer to the bill of complaint is sustained.

EMPIRE STATE-IDAHO MINING & DEVELOPING CO. v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO.

(Circuit Court of Appeals, Ninth Circuit. March 8, 1902.)

1. APPEAL—REVIEW—ACTION TRIED TO COURT.

It is settled law in the federal courts that, where an action at law is tried to the court, its findings upon questions of fact are conclusive, and that the only matters reviewable in the appellate court are the rulings on questions of law, when properly presented by bill of exceptions, and, when special findings are made, whether the facts found are sufficient to sustain the judgment.

2. MINING CLAIMS—VALIDITY OF LOCATION—EXTRALATERAL RIGHTS.

Extralateral rights of a lode mining claim apply only to what is beneath the surface, and never operate to enlarge surface rights which, under the statute, are limited to 300 feet in width on each side of the center of the ledge or lode; and where the ledge or lode is of greater width, so that the outcroppings extend beyond a side line, another claim may be located thereon which will carry all surface rights within its boundaries, and underground extralateral rights, subject to those of the older claim; and where the end line planes of the two claims are not parallel, or do not coincide, the second locator may follow the vein in its dip between the planes of his own end lines wherever not included between the end line planes of the senior location, as against any subsequent locator along the lode beyond an end line of the first claim.

In Error to the Circuit Court of the United States for the District of Idaho.

For opinion below, see 106 Fed. 471.

W. B. Heyburn and E. M. Heyburn, for plaintiff in error.

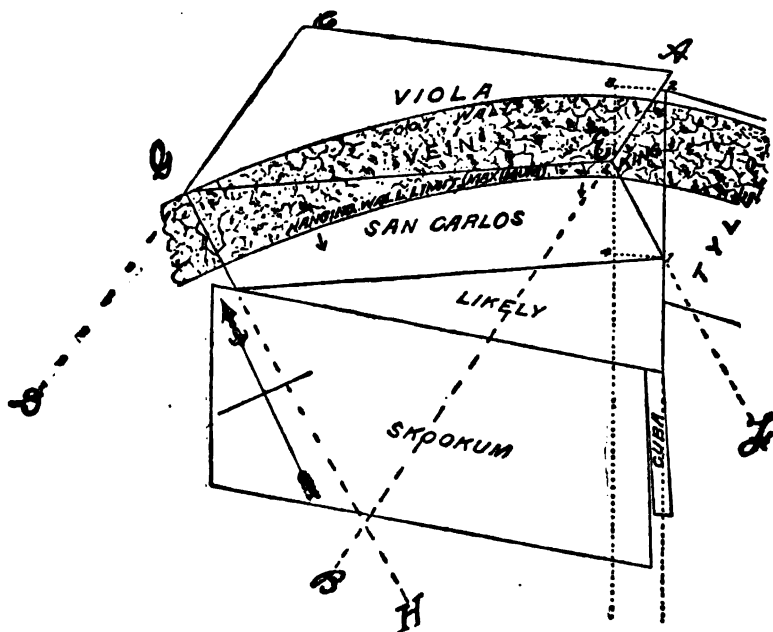
Curtis H. Lindley and John R. McBride, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action of ejectment, in which the defendant in error was plaintiff in the court below, brought for the recovery of certain underground portions of a vein or lode alleged to have its apex within the surface lines of a mining claim called the "King," which vein or lode, it is alleged in the complaint, in its course crosses the end lines of that claim. The incidental question of damages, for which the plaintiff also sued, has been, by stipulation of the respective parties, withdrawn from present consideration. The case was tried without a jury, and resulted in certain findings of fact made by the court, and a judgment thereon in favor of the plaintiff to the action. The record contains a bill of exceptions embracing, among other things, various assignments of error, the 2d, 3d, 4th, and 5th of which are to the effect that the trial court erred in making certain of its findings of fact, which findings of fact so complained of these assignments of error respectively set out at large. The 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, and 20th assignments of error are to the effect that the court below erred in refusing to make certain findings of fact requested by the defendant to the action. It is very clear that these assignments are unavailing. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive in the appellate court. Only rulings upon matters of law, when properly presented in a bill of exceptions,

can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. *Stanley v. Supervisors*, 121 U. S. 535, 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; *Distilling & Cattle Feeding Co. v. Gottschalk Co.*, 13 C. C. A. 618, 66 Fed. 609; *Cable Co. v. Fleischner*, 14 C. C. A. 166, 66 Fed. 899; *Consolidated Coal Co. of St. Louis v. Polar Wave Ice Co.*, 45 C. C. A. 638, 106 Fed. 798.

The remaining assignments of error embodied in the record relate to the question of the sufficiency of the findings of fact made by the court below to sustain the judgment given by it, which is the real, and, indeed, the only, question in the case. Annexed to the opinion of the court below, as illustrative of its views, is the following diagram:



It appears from the findings that the defendant to the action (the plaintiff in error here) is the owner of the Viola mining claim, located February 20, 1886, and patented April 13, 1895; the San Carlos, located April 24, 1886, and patented April 22, 1895; the Skookum, located April 5, 1886, and patented August 10, 1891; the Likely, located April 24, 1898; and the Cuba, located May 7, 1898,—neither of which last two have been patented. The King, according to the findings, was located June 22, 1898, and is owned by the defendant in error (plaintiff in the court below). The ore bodies in controversy, and which were awarded to the defendant in error by the judgment of the court below, lie beneath the surface of the Likely, Skookum, and Cuba claims. As these three claims are also, according to the findings, the property of the plaintiff in error, *prima facie* the ore bodies in question belong to it. *Cheeseman v. Shreeve* (C. C.) 37 Fed. 36;

Mining Co. v. Murray (Mont.) 23 Pac. 1022. They are also embraced by vertical planes drawn down through the end lines of the San Carlos claim, extended in their own direction, which claim has been patented by the government, and is also owned by the plaintiff in error. The court below held that the King claim, which was not located until long subsequent to all of the others mentioned, was so located as to entitle its owner to the underground bodies of ore found under the surface of the Likely, Skookum, and Cuba, and within the end line planes of the San Carlos, extended in their own direction. At the time of the location of the King claim the only unappropriated piece of surface ground in the vicinity, according to the findings, was the triangular piece lying between the Tyler claim and the Viola and San Carlos. The same vein or lode of mineral bearing rock that outcropped in the Viola, San Carlos, and Tyler outcropped in this triangle, and it was therefore open to location, subject, of course, to all pre-existing rights. In making the location of the King, the entire westerly and southerly lines, and almost all of the northerly line, were laid within the patented claims of the plaintiff in error, all of which was done, according to the findings of the court below, "without the consent or knowledge of the owners of said Viola and San Carlos lode claims." And the contention of the plaintiff to the action, which was sustained below, was, and here is, that lines so laid (being otherwise also in accordance with law) confer extralateral rights upon the locator as against the owner of the patented ground so entered upon. It is the settled law that, for the purpose of acquiring the extralateral rights conferred by statute, a locator may place his lines on a prior mining location with the consent of such prior locator, or, when it is done openly and above board, without objection on his part (which in reality constitutes consent); and perhaps the same thing may be done on patented claims, where the lines are established openly and peaceably. It was so held by the secretary of the interior in the case of the Hidee Gold Mining Company (decided January 30, 1901). But it is equally well settled that no such right can be acquired by any forcible, fraudulent, or clandestine entry upon the possession or ownership of another. *Cosmos Exploration Co. v. Gray Eagle Oil Co.* (C. C. A.) 112 Fed. 17; *Cowell v. Lammers* (C. C.) 21 Fed. 202; *Nevada Sierra Oil Co. v. Home Oil Co.* (C. C.) 98 Fed. 680; *Hosmer v. Wallace*, 97 U. S. 579, 24 L. Ed. 1130; *Mower v. Fletcher*, 116 U. S. 385, 6 Sup. Ct. 409, 29 L. Ed. 593; *Nickals v. Winn*, 17 Nev. 188, 30 Pac. 435; *McBrown v. Morris*, 59 Cal. 72. Under which of these conditions the findings of the court below place the entry of the King locator upon the patented claims of the plaintiff in error need not be determined, for the reason hereinafter appearing.

The findings and diagram annexed to the opinion of the court below show that the vein or lode in question is a very wide one, and crosses both end lines of each of the plaintiff in error's patented claims, Viola and San Carlos, the common side line of these two claims being entirely on the vein or lode. The Viola, being the older of the two locations, would, under the doctrine of *St. Louis Min. & Mill. Co. of Montana v. Montana Min. Co.*, 44 C. C. A. 120, 104 Fed. 664, and like decisions there cited, be entitled, in the pursuit of its extralateral

rights, to the entire width of the vein underground within its bounding planes. But extralateral rights apply only to what may be found beneath the surface within the limits fixed by the statute, and never operate to enlarge or contract surface rights. Surface rights are limited by the statute to 300 feet in width on each side of the center of the ledge or lode, yet such ledge or lode may extend beyond such side lines, and, in the case at bar, did extend southerly of the southerly side line of the Viola claim, and into unappropriated public land. The locator of the San Carlos claim, finding it outcropping there, made the San Carlos location upon it, as he had the right to do, and as the government recognized by issuing its patent in confirmation thereof. The ledge or lode crossing both of the end lines of that claim, the extralateral rights conferred by the statute thereupon arose, subject, however, to the extralateral rights of the prior Viola location, which were, as all such rights are, confined between vertical planes drawn down through its end lines, extended indefinitely in their own direction, which gives to the Viola, as against all of the claimants here appearing, the underground portion of the vein or lode on its dip between vertical planes drawn down through the lines A E, and C G of the diagram, extended indefinitely in their own direction. But where the prior extralateral rights of the Viola cease, namely, at the line E, B of the diagram, those of the next locator—that is to say, the locator of the San Carlos—commence, and embrace that portion of the dip of the vein or lode not included within the rights of the Viola, and embraced within vertical planes drawn down through the end lines of the San Carlos extended indefinitely in their own direction. These lines include the ore bodies in controversy. They were therefore not subject to inclusion by the extension of the end lines of the subsequent location of the King claim, even if it be conceded that its lines were so laid as to entitle its locator to extralateral rights.

The judgment is reversed, and cause remanded to the court below, with directions to enter judgment for the defendant on the findings.

EMPIRE STATE-IDAHO MINING & DEVELOPING CO. et al. v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO.

(Circuit Court of Appeals, Ninth Circuit. March 10, 1902.)

No. 704.

MINING CLAIMS—CONCLUSIVENESS OF PATENT—CONFLICT OF SURFACE LINES.

Issuance of a patent, after due notice, for a mining claim, conclusively determines its priority, as to the surface and the incident extralateral rights, over claims whose surface lines conflict therewith.¹

In Error to the Circuit Court of the United States for the District of Idaho.

W. B. Heyburn, for plaintiff in error.

Curtis H. Lindley and John R. McBride, for defendant in error.

¹ Conclusiveness of patents to mining claims, see note to Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co., 48 C. C. A. 674.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. These were cross writs of error sued out by the defendant to the action of ejectment brought in the court below by the defendant in error as plaintiff, based upon its ownership of the Stemwinder mining claim. The case was tried without a jury, and resulted in certain findings of fact, annexed to which, as illustrative of them, was a diagram showing, among other things, the underground segment of the ledge for which the court below gave the plaintiff to the action judgment. The plaintiff brought the case here by writ of error, and we held that the underground segment for which the court below awarded the plaintiff judgment constituted a part of the Last Chance mining claim, of which the findings showed the defendant Last Chance Mining Company to be the owner, and, being awarded more than it was entitled to, the then plaintiff in error had no just cause of complaint. The judgment thus brought under review was accordingly affirmed. Bunker Hill & S. Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co., 48 C. C. A. 665, 109 Fed. 538. The then plaintiff in error thereupon filed a petition for a rehearing of the cause solely upon the ground that this court erred in holding, as it did, that the owner of the Stemwinder claim was estopped from claiming anything embraced by the Last Chance patent, by reason of the failure on the part of the Stemwinder to contest the application of the Last Chance for its patent. The defendants to the action having meanwhile sued out the present cross writs of error, the respective parties requested the court to hear and consider the petition for rehearing along with the cross writs, which has been done. A careful re-examination of the questions considered in the opinion of the court above cited satisfies us of its correctness, although to avoid the misconception of that opinion taken by counsel for the then plaintiff and present defendant in error, and make it more clearly express its meaning, we here so alter the clause of the opinion, as reported at the top of page 547 of volume 109 of the Federal Reporter, and page 674, 48 C. C. A., as well as the original, as to make it read as follows:

The application for the patent for the Last Chance was, as has been seen, for the whole claim, as indicated in the diagram hereinbefore set out, and carried with it, as has been said, the implied, if not the expressed, allegation that the location was made upon land at the time open to location, and was therefore prior to any location thereof by any one else. The issuance by the government of its patent, after due notice to all the world of the application, and ample notice to every one to contest it, conclusively determined, as against every one whose surface lines conflicted therewith, the priority of that location over every other, including the Stemwinder, and conferred upon the patentees and their successors in interest not only the entire surface of the claim, but, as against every one whose surface lines conflicted with those of the Last Chance, the extralateral rights conferred by section 2322 of the Revised Statutes to follow on their dip outside of the side lines, and within vertical planes drawn through the parallel end lines extended in their own direction, all veins, lodes, or ledges the tops or apexes of which lie inside the surface lines of the claim. As a mat-

ter of course, in the absence of a surface conflict, there would be no ground for an adverse claim, and no question would arise of which the land department could take cognizance. Conflicts in respect to extralateral rights growing out of locations whose surfaces do not conflict, and which are therefore beyond the purview of the proceedings in the land department, are matters solely for the determination of the courts when brought before them.

The necessary result of an adherence to that opinion is that on the present writs the judgment of the court below awarding to the plaintiff to the action the underground segment above indicated, and which the findings show constitute a part of the Last Chance claim, must be reversed. And as the findings fail to show that the defendant Empire State-Idaho Mining & Developing Company has infringed upon any right of the plaintiff, judgment must be directed in favor of both of the defendants. In the brief of counsel for the present defendant in error we are asked to now adjudicate between the extralateral rights of the Stewindler claim and the Viola claim, shown in a suit just decided by this court to be the property of the defendant Empire Company. But the judgment roll upon which the present writs must be disposed of presents no such question. The bill of exceptions embodied in the record cannot be considered, for the reason that the assignment of errors, save only the one challenging the sufficiency of the findings of fact to support the judgment, relate only to questions which cannot be considered by the appellate court. *Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co.* (just decided) 114 Fed. 417.

The judgment is reversed, and cause remanded, with directions to the court below to enter judgment for the defendant on the findings.

UNION CASUALTY & SURETY CO. v. GRAY.

(Circuit Court of Appeals, Third Circuit. February 20, 1902.)

No. 18.

1. AGENCY—CONTRACT—LIABILITY OF PRINCIPAL TO SUBAGENTS.

A principal cannot be made liable to a subagent appointed by his general agent, where such principal in the contract with his general agent has expressly stipulated that such general agent is to be responsible to the principal for the acts and conduct of his subagents, and that in no case and under no circumstances shall the principal be liable for commissions or compensation to such subagents.

2. SAME—CONSTRUCTION OF CONTRACT.

By a contract between an insurance company and its general agent, appointed for certain territory, the latter was authorized to appoint or employ all subagents reasonably necessary for the proper transaction of the business contemplated by the contract, "and for the fulfillment of his agreements hereunder." It further provided that the general agent should be directly accountable to the company for all moneys, premiums, etc., belonging to the company, and liable in respect to all acts, doings, and agreements of the subagents, and should pay all salaries, commissions, or compensation earned by them, "and said company shall under no circumstances nor in any manner be liable for the same or any part thereof." *Held*, that a contract made by the general agent in his own

name, appointing a subagent for a definite term, who was required to give bond, and to account to him alone, did not create a contract of agency between the subagent and the company which could be enforced against the latter after the general agent had been removed in accordance with the terms of his own contract.

8. PLEADING—EFFECT OF ADMISSIONS.

An admission in an affidavit of defense made by an officer of defendant corporation that plaintiff was appointed a subagent of defendant by its general agent, who had authority to make such appointment, is not inconsistent with the defense that under the contract between defendant and its general agent the authority of the latter was limited to the appointment of subagents subordinate to his own agency, and that the subagency was terminated by the termination of the general agency.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Samuel B. Huey, for plaintiff in error.

John G. Johnson, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. The record brought before us by this writ of error, discloses a suit instituted in the court below by Delbert B. Gray, plaintiff below, defendant in error here, against the Union Casualty & Surety Company, defendant below, plaintiff in error here. The cause of action, as set out in the statement of claim, was the alleged breach of a contract contained in a certain agreement in writing, executed on the 2d day of September, 1893, between David Black, general agent for the Middle states of the Union Casualty & Surety Company, of St. Louis, Mo., and Edward P. Carpenter, Delbert B. Gray and George A. Hincken, partners under the firm name of Carpenter, Gray & Hincken, of Philadelphia. By this agreement, it is alleged, said firm entered into contractual relations with the said company, by which they were to act as its subagents, for a term of five years, in certain territory comprised within eastern Pennsylvania, New Jersey and Delaware, covenanting that they, on the one hand, would perform certain designated services as agents, or subagents, for the said company, in the insurance business; the said company on the other hand, becoming bound that opportunity for the performance of such services should be continued for said term of five years, at and for the compensation stipulated, by way of commissions, in said articles of agreement.

By assignments from his partners, the said Gray became vested with all the rights and responsibilities created by this contract, and has been recognized as standing for said partnership, by the defendant below, throughout this litigation. He will be spoken of hereafter as sole subagent under the contract. The plaintiff below alleged in said suit, and contends here, that a breach of this contract, as construed by him, was made by the defendant below, by refusing to recognize his right to act as agent for said company, for the remainder of the term of five years, after the discharge of David Black, its general agent, from its employment, and by discharging him, Gray, from its service within the term aforesaid. The defendant below, on the other hand, contends, that it was not privy to any contract with

plaintiff below, and that the contract, the breach of which is stated as the cause of action in the said suit, was a contract with David Black, its general agent, and bound him, and not it, by its stipulations and covenants. The parts of the said contract pertinent to our present inquiry, are substantially as follows:

"This agreement made and entered into this second day of September, 1898, by and between David Black, general agent for Middle states of the Union Casualty and Surety Company of St. Louis, Mo., hereinafter designated 'Said General Agent' of New York, party of the first part, and Edward P. Carpenter, Delbert B. Gray and Geo. A. Hincken, partners under the firm name and style of Carpenter, Gray and Hincken, hereinafter designated 'Said Agents,' parties of the second part. It is understood and agreed that the Union Casualty and Surety Company of St. Louis, Mo., will be designated throughout this agreement as 'Said Company.' That upon the terms and conditions, and in consideration of the several covenants and agreements to be kept and performed by said agents, parties of the second part, hereinafter set forth, said general agent, party of the first part, has this day appointed, and does by these presents make, constitute and appoint said parties of the second part agents of said company for the procuring of business for the said company in the following described territory, that is to say: Eastern Pennsylvania, southern New Jersey and Delaware, said territory being more particularly defined in a map filed in each of the offices of the parties to these presents. The term of the agency hereby created, the said agents faithfully performing their duties hereunder, shall be and continue for five years from the date thereof, to wit, until the second day of September, A. D. 1898. Said agents, parties of the second part, are and shall be authorized and empowered, but only upon the terms and conditions and fulfilling the agreements on their part hereinafter set forth, to issue and countersign all descriptions of policies of insurance procured by them within the territory above mentioned which are now or may during said term be issued by said company and to make necessary and proper indorsements upon the same, provided that the insurance of all such policies and all indorsements made thereon shall be subject to the approval of said general agent, and said agents, keeping and performing their said agreements, shall be authorized as such, during said term to collect, for the benefit of said general agent, the premiums paid upon and for all policies issued by them, said agents, and to give proper receipts for the same. In consideration of, and as full compensation for all services rendered and disbursements made by them under and pursuant to this contract during said term, said party of the first part, agrees to allow the said agents commissions on all gross premiums, by the said agents, collected during said term upon policies for the several kinds or classes of insurance procured and issued by said agents during said term, which commissions may be deducted by said agents from said premiums collected by them at the following rates or percentage thereon respectively, that is to say: * * * Said general agent will from time to time, furnish said agents, for the purposes aforesaid, with such forms of policies of insurance and such manuals as may be requisite for the use of said agents in securing business and procuring the issue of policies of insurance such as herein contemplated, and with such other documents and supplies as said general agent shall deem necessary for the proper transaction by said agents of the business of said company within said territory."

Said Gray agrees that he will make prompt collection of all premiums, and duly account for the same to the said general agent, and keep books and accounts showing all premiums collected by him "subject to full and convenient inspection by said general agent whenever required." He also agrees that he, and all his subagents employed by him, will make to the said general agent, from day to day, true and complete daily reports of all policies issued, etc., and on the 1st day of each month, will render to him, the general agent, a true

and complete statement, in form such as the party of the first part may require, showing the number, description and amount of all policies written or issued by authority of said Gray during the preceding month, and that on the 12th day of each month, will pay or remit to the said general agent, the balance of all premiums collected by him during the last preceding month. By a provision, identical in language with one contained in the contract between said general agent and the said company, which will hereafter be referred to, it is stipulated, that the said Gray may appoint and employ, subject to the rules and regulations prescribed by said general agent, any and all subagents reasonably necessary for the proper transaction of the business contemplated by the contract, and for the fulfillment of his agreement thereunder; but it is expressly understood and agreed, that said Gray shall be directly accountable to the said general agent, for all policies issued and moneys collected under the provisions of said contract, and shall be directly liable to said general agent, for the acts and doings of said subagents in and about the transaction of said business, and that all salaries and commissions and compensation earned by such subagents, shall be paid by said Gray, and that "said general agent shall, under no circumstances, nor in any manner, be liable for the same or any part thereof." Said agreement further provides that, in default of the performance by said Gray, of the conditions and agreements in said contract set forth, the "said general agent, party of the first part, shall have the right, without further demand or notice, to cancel the contract and terminate the agency hereby created." And at the close, it is stipulated as follows:

"It is a further expressed condition of this contract that said agents, parties of the second part, shall and they hereby jointly and severally agree that they will within thirty days from the date hereof deliver to said general agent at his office in New York a bond in the penal sum of (\$5,000) five thousand dollars, duly executed by said agents and by the American Surety Company or other good and sufficient surety or sureties, and containing such conditions for the payment of said penal sum to said party of the first part as obligee therein as shall be satisfactory to the said general agent, party of the first part," etc.

To this contention of the defendant company, that the contract sued upon was *res inter alios acta*, the plaintiff below replies, that the contract was made by Black, as general agent of the company, by authority and in behalf of the said company, and created such contractual relations between the said plaintiff below and said company, as to make the stipulations as to term of service and compensation, obligatory upon said company. In support of his position, he refers to the provision of the contract between the said company and its general agent, Black, with reference to the prospective appointment by Black, of subagents. This contract, which was dated September 2, 1893, both in form and general provisions, is almost identical with that between Black and the plaintiff below, as above set forth. The authorization referred to and relied upon by plaintiff, is contained in the beginning of the following paragraph of this agreement:

"Such agent is authorized as such to appoint and employ, within and for the territory aforesaid, but subject always to such rules and regulations as may be prescribed in respect thereof by said company, any and all subagents.

subordinates, and employes reasonably necessary for the proper transaction of the business contemplated by this contract and for the fulfillment of his agreements hereunder; but it is expressly understood and agreed that said agent, party of the second part, is and shall be directly accountable to, and shall and will on demand therefor, at all times account to and with said company for all moneys, premiums, policies, supplies, documents, and other property belonging to said company, or for or in respect of which it may from time to time be entitled to an account under the provisions of this contract, and shall be directly liable to this company for and in respect of all acts, doings and agreements of any and all solicitors, agents, special agents, canvassers, clerks, and other employes appointed or employed by said agent party of the second part, in or about the transaction of said business, but all salaries, commissions and compensations of any kind earned by or which may become payable to such solicitors, special agents, canvassers, clerks, or employes, or either of them, shall be paid by said agent, party of the second part, and said company shall under no circumstances nor in any manner be liable for the same or any part thereof."

As we have before said, it is identical in language with a corresponding paragraph in the articles of agreement, by which Black appoints Gray his subagent. In addition to this authorization of the appointment of subagents, the plaintiff below refers to testimony tending to show, that his contract with the general agent was due to his application made directly to the company, and to correspondence with one Huff, general manager of said company; that during the time that he was acting as subagent, he had numerous letters directly from the office of the company in St. Louis, and that after the termination of Black's service with the company, he was recognized for a period of nearly three months as an agent by the executive officers of the company. We are also referred by counsel of the said plaintiff below, to the following language in the affidavit of defense, made in this cause by the secretary of the said company:—

"It is true, that on the 2nd day of September, 1893, the said defendant, acting by David Black, its then general agent for the Middle states, did appoint the plaintiff, Delbert B. Gray, Edward P. Carpenter and George A. Hincken, partners trading under the firm name of Carpenter, Gray and Hincken, subagents for the company, with an office in Philadelphia, and that the said David Black, general agent as aforesaid, was at that time duly authorized to make such appointments."

The plaintiff, as a witness, testified that he had always considered the contract he had made with Black as one made with the company, and that he had a right to hold the said company to the performance of the agreements in said contract contained, for a period of five years, and that the obligations of the said company in that behalf did not cease with the termination of its contract with Black, and that he so told the president of the company, in an interview had with him after Black's discharge. Ellerbe, president of the company, on the other hand, denies this statement of the plaintiff below, and says that the continuance of the plaintiff below as an agent of the company, after Black's discharge, was provisional only, and until other arrangements could be made; that after the notification from him as president of the company, dated July 31, 1894, that the contract with Black, as general agent, had terminated, and directing him to make all remittances for premiums collected to Huff, general superintendent, in New York, and to put his accounts in shape for exam-

ination, had been acknowledged by plaintiff below, in a letter dated August 1, 1894, the said plaintiff below, under date of August 2d, wrote to said Huff, as general manager of the Union Casualty & Surety Co., as follows:

"Dear Sir:—We should like very much, now that our arrangements with David Black & Co. are terminated, to have the agency direct, the same to include all of Pennsylvania, inasmuch as Pittsburgh and Clearfield county are closely identical with Philadelphia in all the leading industries and manufactures. Yours very truly, D. B. Gray & Co., General Agents."

Ellerbe also testifies that, neither at the final interviews in the last of October, in which he says an account was stated between the said plaintiff below and the company, and in which finally the said plaintiff below was informed that his services were dispensed with, did he, the said plaintiff below, nor at any other time, claim that his contract made with Black continued with the company after Black's discharge. Upon this state of the testimony, the case went to the jury under the charge of the court. The exceptions to the said charge are somewhat meagre, but are sufficient to support such of the assignments of error as, in our view of the case are important.

The construction of the contract sued upon, was especially the function of the court, and the charge of the learned judge in that respect, is properly before us for review, upon the exceptions taken by the defendant to the court's refusal to answer certain of its requests to charge, and the assignments of error founded thereupon. It is perfectly plain that, if the suit of the plaintiff below can be maintained against the defendant company below, it is because the said company was a privy to the written contract, by which Black constituted Gray a subagent, thereby entering into a contractual relation with the said Gray as to the term of his employment, and as to the affording him opportunity to earn, and the allowance of, his commissions. The principal question before us is, whether this is or is not a correct interpretation of the said contract. The interpretation of the contract, as made by the learned judge of the court below, is comprised in the following statements made by him in his charge to the jury:

"Let us see what was the relation between these parties at the beginning. As you have heard, a man named David Black was appointed the general agent for this company for certain territory, the Middle states. He was given power by his contract to appoint subagents within that territory. These subagents, while sustaining a certain relation to him, were of course agents for a certain territory of the Union Casualty and Surety Company of St. Louis. Black's own appointment was for the purpose of obtaining business for the company, and these appointments he was authorized to make were for the same purpose. He, and those he might appoint under him, were all engaged in the same business, to further the business and advance the interests of the company, and to get business for it. His appointment was to last for five years. After his appointment was made he appointed a firm of which the plaintiff was a member, and about which I need not specially concern myself—we will treat it as an appointment of Mr. Gray himself, because the rights which the other members of the firm got under that appointment afterwards became vested in Mr. Gray, and there is no occasion to distinguish between the firm and Mr. Gray himself—we will consider the appointment as having been made of Mr. Gray himself, for convenience sake. Black appointed Gray, and by one of the provisions of the contract it was

to last for a term of five years. It is at that point that the first dispute arises. Early in August, I think, of the following year, Black was dismissed from the service of the company, and we shall assume, since we know nothing to the contrary, that he was properly dismissed. One of the contentions of the defendant is that by the dismissal of Black, the severance of his relations with the company, Gray's relation with the company was also severed; that his contract made with Black, as general agent of the company, fell at the same time that Black's own contract was terminated by the company's action. I instruct you that was not the case; that when Black made his contract with Gray, and appointed him for a term of five years, he had power to make that appointment. He himself was entitled to serve the company as general agent for five years, subject of course to their right to dismiss him for cause, and when he made the contract with Gray, he had the power to make it, and to make it for five years; and we instruct you, therefore, that the fact that the company dismissed Black did not operate to dismiss Gray from the company's service and put an end to his relations with them. He had a valid contract which was to last for five years, unless sooner terminated for good and sufficient reason."

We are compelled to dissent from this construction of the contract sued upon. On its face, the contract was signed and sealed by David Black individually, and not in the name of the company defendant, nor on its behalf. It is true, that in the caption of the articles of agreement, Black is described as general agent for the Middle states of the Union Casualty & Surety Company of St. Louis, and is designated throughout the subsequent provisions of the contract as "said general agent." This, however, was a proper and, considering the subject-matter of the contract, a natural, designatio personæ. The business in which Gray was to be employed was that of assisting Black in his business as general agent of the Casualty Company, by soliciting insurances, issuing policies and collecting premiums for him, and under his supervision. It is true, of course, that this business was for the benefit of the company, and that the premiums collected, less the commissions of himself and Black, belonged to the company, and he was in certain respects a subagent of the company, as Black had been expressly authorized in his contract with the company to appoint such subagents. But this classification of his position, as that of subagent, does not necessarily bring him into contractual relations with the company, without express stipulation to that effect. The authority to Black, in his contract with the company, to appoint subagents, and relied upon by plaintiff below, as making said company privy to his contract with Black, cannot, without straining the language used, from its natural meaning, have the effect contended for. Black was about to engage as general agent of the company for the Middle states, and it was obvious, from the extent of territory over which he was to preside, that the work of procuring and conducting the business he had undertaken, could not be transacted personally by him over so extensive a territory. This fact being obvious, the parties to the contract, by the clause in question, recognized the necessity that a general agent would be under, of calling to his assistance subagents, who could act under his direction and control. He, however, by the terms of the contract and of its provisions, was the general agent for the whole territory. He was not required to appoint any particular number, or indeed any, subagents, unless he chose so to do. If such should be appointed, they were to be selected and

appointed by him, absolutely, and what he should do by them, he would be doing by himself. By the contract, he alone was made responsible to the company, and was expressly accountable to it for the acts and conduct of his subagents. It was evidently a recognition of this well-settled mode of transacting the business of a general agency, that caused the authorization to appoint subagents to be inserted in the contract. Otherwise, there might be a question as to the company's being liable upon the contracts made for Black by such subagents. This authority to appoint them for the purposes mentioned, removed all question as to the company's liability for contracts so made. So far, and in this qualified sense as to third parties holding policies of the company, it may be said to have been privy to the contract between Black and Gray. That is, the company was bound thereby to recognize policies duly issued within the scope of his authority, by Black, or his subagents, as liabilities of the company.

The use of subagents by Black, in the transaction of his business as general agent, having thus been sanctioned in the contract appointing him, we find nothing therein which required, or even seemed to contemplate, that they should be appointed in the name or on behalf of the said company. If there had been such requirement, the contract between Black and Gray should have been in different form. It should, on its face, have purported to be a contract made by the company, or on behalf of the company, through David Black, as its agent, and should have been signed and sealed for the said company by the said Black. This, however, is not the case. It is true that, in some cases, where the contract does not purport, on its face, to be so made, evidence dehors the contract itself, may establish the fact that it was made on behalf of an undisclosed principal. In such cases, however, the evidence for that purpose must be clear, and the provisions of the contract must not be inconsistent therewith. In his contract with the said company, Black was expressly made responsible for all moneys collected, or acts performed, by subagents, and there is not a word in the contract from which it could be inferred that he could relieve himself from such responsibility. Consistently with his contract with the company, as we understand it, the contract with Gray was signed and sealed by David Black, individually, and not in the name of the company, nor on its behalf. The obligations it imposed upon Gray were obligations to Black, although their due performance was in furtherance of what he had contracted with the company to do and perform. Gray worked for him and was compensated, therefor, by him. It was expressly for the benefit of Black, that Gray was authorized, under his contract, to collect the commissions allowed to the general agent by the company, and it was expressly for the benefit of Black, that Gray was authorized by his contract here sued upon, "to collect the premiums paid upon and for all policies issued by him," and for which Black was accountable to the company. It was to Black that Gray bound himself by the terms of his contract to render, on the 1st day of each month, a statement of moneys received, and on the 12th of the same month, to pay or remit the same. It was to Black that Gray, by his contract, bound himself to be liable, for any acts of his employés or subagents, and it is Black that is ex-

empted from liability for the compensation of any of Gray's employés. It is also provided that the general agent, Black,—not the company—shall have power to terminate the agreement; and the bond required to be given by Gray, was to be given to the general agent—not the company—and the general agent, and not the company, had the right to cancel the contract, in default of the giving of such bond. All the covenants in Gray's favor also, were to be done and performed by Black, and not by the company. And so we find that, in the long contract sued upon, all the stipulations or covenants therein contained, are expressly mutual ones between Black, the general agent, and Gray. No one of them purports to have been made for or on behalf of the company, and there is nothing in the character of any one of them, that is not appropriate to an individual contract between the general agent and Gray, or that does not concern individual interests of the said general agent, which it was natural for him to protect, and the duties imposed upon Gray are such as he appropriately should perform for that purpose.

In considering the contract thus clear and unequivocal upon its face, the evidence disclosed in the record, as to correspondence between Gray and the executive officers of the company, and the conduct of such company in dealing with him after the discharge of the general agent, even if it were more pointed than it is, is totally irrelevant. That after the discharge of the general agent, the company should have received from Gray the premiums already collected by him, or that it even should have allowed him, for the time being, to continue his work as subagent, cannot alter his status under his contract with Black, as Black's subagent. The most that could be inferred or result from such dealings of the company with Gray, after the discharge of Black, is, that a new contract might be implied therefrom, covering the situation in which Gray and the company found themselves after Black's discharge. Under such implied contract, Gray probably became the agent for the time being of the company. As no term of service attached thereto, it was a contract terminable at the will of either party, and with which, in this case, we have nothing to do.

So far, we have considered the contract sued upon, and the case made in support of it by the counsel for the plaintiff below, as they have presented it. We have not called attention to a carefully worded provision, contained in the paragraph already quoted from the contract between the company and its general agent, by which said company, *ex industria*, by express terms, exempts itself from all liability for compensation to the subagents, who may be appointed by its general agent. It logically relates to this part of the authorization clause. After providing that the said general agent shall be directly liable to the company "for and in respect of all acts, doings and agreements of any and all solicitors, agents, special agents, canvassers, clerks, and other employés appointed or employed by said agent, party of the second part, in or about the transaction of said business," it proceeds as follows:—

"But all salaries, commissions and compensation of any kind, earned by, or which may become payable to, such solicitors, subagents, canvassers

clerks, or employes, or either of them, shall be paid by said agent, party of the second part, and said company shall, under no circumstances, nor in any manner, be liable for the same or any part thereof."

This express stipulation for exemption must be taken in connection with the authorization to appoint subagents, upon which plaintiff below so much relies. Out of abundant caution, apparently, it clears up all doubt, if any could have existed without it, that whatever contractual relations may, under certain circumstances, exist between a principal and subagents appointed by his general agent, none such as those here guarded against, can exist in this case. It makes perfectly clear, what we think was clear independently of it, that the contract of subagent Gray, with the general agent, Black, expired with the termination of the latter's contract with the company, and the relations to the business of the company on Gray's part, which commenced with and sprang from his contract with the general agent, ceased when the latter's general agency ceased. What implication of a contractual relation in this respect, between the company and a subagent appointed by Black, can exist, in the face of this express provision forbidding it? Any business connection thereafter existing between Gray and the company must depend, as we have said, upon authority implied from the conduct of the parties, subsequent to the discharge of Black, and terminable at the will of either. The suit in this case is *ex contractu*, and the defendant, it is contended, is privy to the written contract upon which it is founded. Whatever argument has been made for the contention of plaintiff below, apart from this exemption clause, none, it seems to us, can be made when it is taken into consideration. It would be doing violence to the law of the contract, if it were ignored. In view of this clause, it is hardly worth while to discuss the authorities and cases cited by counsel. We have examined them all, both text-books and cases, and find no support for the proposition, that a principal can be made liable to a subagent, appointed by his general agent, where such principal, in his contract with his general agent, has expressly stipulated that such general agent is to be responsible to the principal for the acts and conduct of his subagents, and that in no case, and under no circumstances, shall the principal be liable for commissions or compensation to such subagents. In the view we take of the contract upon which this suit purports to be founded, the interpretation put thereupon by the learned judge of the court below, in his charge to the jury, was erroneous, and we cannot, therefore, agree with his instruction to the jury, founded upon that interpretation, which was as follows:—

"And we instruct you, therefore, that the fact that the company dismissed Black did not operate to dismiss Gray from the company's service, and put an end to his relations with them. He had a valid contract which was to last for five years, unless sooner terminated for good and sufficient reason."

On the contrary, we think he should have instructed the jury, that the contract sued upon, taken in connection with the clauses quoted from the contract between the company and its general agent, was not a contract between the defendant company and the plaintiff, and no liability, on the part of the said defendant to the said plaintiff,

was created thereby. Such an instruction as this, which we think should have been given, would be equivalent to a binding instruction to find a verdict for the defendant.

Counsel for plaintiff below make a point of the statement in the affidavit of defense, sworn to by the secretary of the company, and duly filed, that it was true that, on the 2d day of September, 1893, the said defendant, acting by David Black, its then general agent for the Middle states, did appoint the plaintiff and his partners, subagents for the company, with an office in Philadelphia, and that the said David Black, general agent as aforesaid, was at that time duly authorized to make such appointments. How far the admission of a fact stated in an affidavit of defense could be used against the defendant in a trial upon the issues subsequently formed by the pleadings, may be a question. In the present case, the affidavit containing the allegation referred to, was made by the secretary of the company, in compliance with the requirements of law, to prevent judgment being had by default against the defendant at the appearance term. The case subsequently went to issue upon the pleas of non assumpsit, payment and set-off, and upon these issues, was tried. The contract sued upon was in writing, and was set out in totidem verbis, by the plaintiff, in his statement of claim. The due interpretation of said contract was the province of the court, as a question of law, and not of the jury, as a question of fact. The statement referred to in the affidavit of defense, made by the secretary of the company, was not a statement of a fact, but an interpretation of the written contract upon which the suit was expressly brought, and, therefore, cannot be used as an admission of fact upon any sound theory, and does not come within the reasoning of the decision of the court, in the case of *Bowen v. De Lattre*, 6 Whart. 434, referred to by counsel for defendant in error. But be this as it may, the most that can be made of the statement in question, as an admission, is, that Gray was duly appointed by the defendant company, as a subagent of Black. Taking this to be true, it by no means follows, that the company was liable to him as subagent, for his compensation as such, in face of the express condition in his written appointment by Black, that he was to look to Black for payment, and the express condition in the defendant company's authorization of his appointment, that said company should, under no circumstances, nor in any manner, be liable for the said compensation, or any part thereof. Nor does it at all follow, that an admission that Gray held the office of subagent under Black, would give him a tenure of office extending beyond that of Black himself. A subagency cannot rise higher than the general agency to which it is subordinate, and when that general agency ceases to exist, of necessity, no subagency, with reference to it, can continue. If this were not true, we should have the anomalous condition of a subagency with no principal agency in existence, and if Black had so chosen, we might have had, at the termination of his general agency, his whole territory filled with subagents, holding terms of five or more years, which the company would have been powerless, according to the contention of plaintiff below, to terminate or control. If it be true that Gray was appointed subagent of Black, by

the company, still, the appointment must be taken as made subject to the express conditions set out in the letter of appointment, and to the limitations inherent in the nature of the office. These express conditions are, that Black may appoint subagents "for the fulfillment of his agreements" with the company. Here is a clearly defined purpose for the appointment in question. No other and independent purpose can be attached thereto. If the appointment is made by the company, it is made, in order that the subagent may assist Black in transacting the business that he is under contract with the company to perform. The company did not authorize Black to appoint for any definite term, and Black clearly transcended his power of appointment in behalf of the company (conceding that he was acting for the company), by presuming to attach a term to the office of subagent, that might, by possibility, transcend the period of the existence of his own general agency.

Conceding, therefore, for the sake of the argument, that the effect of the statement in the affidavit of defense was conclusive upon the defendant, and that Gray was appointed a subagent of Black, by the defendant company, we are still brought to the same conclusion, that the instruction of the learned judge of the court below to the jury in the premises, was erroneous. The proper construction of the contract should have been, in this regard, directly contrary to that which was given, and above quoted, to wit;—that the appointment of Gray by Black, for a term of five years, was not binding upon the company, and that Gray had no valid contract with the company which was to last for five years, and that when the company dismissed Black for good and sufficient reason, it did operate to dismiss Gray from the company's service, and put an end to his relations with it under his appointment as subagent. Such an interpretation of the contract would also have put an end to the suit, and be equivalent to a binding instruction to find for the defendant.

The judgment, therefore, of the court below is reversed.

GUARANTY TRUST CO. OF NEW YORK v. GROTRIAN et al.

(Circuit Court of Appeals, Second Circuit. February 4, 1902.)

No. 37.

DRAFTS—CONDITIONAL ACCEPTANCE—ACCOMPANYING FORGED BILLS OF LADING.

A draft directed the drawee to pay, and to charge the same to account of certain flax seed, forged duplicate bills of lading for which were attached to the draft. The acceptance was, "Accepted * * * against indorsed bills of lading" for the flax seed. Before arrival of the steamship on which was the flax seed, according to the bills of lading, and without knowledge that it was not there, or that the bills of lading were forged, the acceptor paid the draft. *Held*, that acceptance was conditioned on delivery of genuine bills of lading, and that this condition was not waived by payment without knowledge of the facts; so that, in the absence of special equities, the acceptor could recover the money paid.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon a writ of error by defendants below to review a judgment overruling a demurrer to the complaint and directing judgment for the plaintiff. 105 Fed. 566.

Julian T. Davies, for plaintiff in error.

Arthur J. Baldwin, for defendants in error.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

TOWNSEND, District Judge. John Glen, of New York City, drew a draft upon Grotrian & Co., plaintiffs, in these words:

"Frederick B. Grotrian & Company, New York.

1911.

"Exchange for £1,518. 8. 7 stg.

11 Nov., 1898.

"Sixty days after sight of this first (second unpaid) pay to my order in London fifteen hundred and eighteen pounds 8. 7 sterling, value received, and charge the same to account of 8,417.50 bush. flax seed.

"John Glen.

"To F. B. Grotrian & Co., Hull."

To this draft he attached forged duplicate bills of lading for the flax seed mentioned in the draft, and on the same day he cashed the draft with defendant. The defendant, 10 days later, presented to the plaintiffs for acceptance the draft accompanied by the forged bills of lading and an insurance policy. The plaintiffs accepted the draft in these words:

"Hull, 21st Nov., 1898.

"Accepted, payable at Lloyd's Bank, Ltd., London, against indorsed bills of lading for 8,417 bushels of flax seed per Buffalo S. S. at New York & Certificate of Insurance \$8,500.

"Fred. B. Grotrian & Co.

"Due 22nd Jan., 1899."

There was no representation as to the genuineness of the bill of lading. At the time of the presentation of the draft for acceptance the steamship Buffalo had not arrived at Hull, England, but was in transit. A few days before her arrival the plaintiffs, in order to procure possession of the goods immediately upon arrival, took up the draft, and paid to the defendant, Glen's assignee, \$7,319.29. Plaintiffs, at the time of said acceptance and payment, believed the bills of lading to be genuine, and that the flax seed was on the steamship. There was no such flax seed on the steamship, and immediately upon discovering the fraud plaintiffs notified the defendant, and have since duly tendered to defendant the draft, bills of lading, and insurance policy, and have demanded repayment of the \$7,319.29. Defendant insists that the acceptance of the draft bound the plaintiffs absolutely without regard to the genuineness of the bills of lading, and that, whether or not defendant could have recovered judgment against plaintiffs if payment of the draft had been refused, the money paid by them cannot be recovered back. It is not disputed that the unconditional acceptance of a draft accompanied by a paper purporting to be a bill of lading, but fictitious, binds the acceptor in ordinary cases, as between him and the payee, where both parties are ignorant of the fraud, even though the payee has cashed the draft for the drawer before presenting it for acceptance to the drawee. In the case at bar, however,

plaintiffs rely on the direction in the draft to charge the amount to account of the flax seed, and the acceptance "against indorsed bills of lading." The defendant insists that by "bills of lading" in the acceptance is to be understood the papers in the form of a bill of lading accompanying the draft, and that, even if the plaintiffs had delayed payment of the draft until its maturity, whereby the fraud would have been discovered before payment, defendant could nevertheless have sued and recovered judgment; and this preliminary question is of vital importance. No case precisely in point has been cited. In *Smith v. Vertue*, 30 Law J. C. P. 59, it was said that an acceptance substantially like that of the plaintiffs was conditional, and that the bill of lading must be delivered to enable payee to recover; but no question of genuineness was involved, and the statement is obiter. The principal cases on this subject in the United States courts are *Hoffman v. Bank*, 12 Wall. 181, 20 L. Ed. 366; *Goetz v. Bank*, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515. In *Hoffman v. Bank* bills of exchange accompanied by forged bills of lading were discounted by a bank, and subsequently accepted by the drawees. The drawers of the bills had been accustomed to ship flour to the plaintiffs, who, at the request of the drawers, and on their representations that the flour mentioned in the bills of lading had been shipped to their firm for sale, promised to accept them, and did accept them on presentation. The acceptors paid the bills, and, on learning of the forgery of the bills of lading, tendered the same, with the bills of exchange, to the bank, and, repayment being refused, brought suit. The court refers to the argument that the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached to the same, and says:

"It is not perceived that the concession, if made, would benefit the plaintiff, as the bills of exchange are in the usual form, and contain no reference whatever to the bills of lading; and it is not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine." And again: "Beyond doubt the bills of lading gave some credit to the bills of exchange beyond what was credited by the pecuniary standing of the parties to the same; but it is clear that they are not a part of those instruments, nor are they referred to, either in the body of the bills or in the acceptance, and they cannot be regarded in any more favorable light for the plaintiffs than as collateral security accompanying the bills of exchange."

In *Goetz v. Bank*—a similar case—the court cites with approval the doctrine in *Hoffman v. Bank* that, supposing the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached, that fact would not benefit them, as the bills of exchange were in the usual form, and contained no reference whatever to the bills of lading. In most of the cases of acceptance of drafts accompanied by forged bills of lading, cited by defendant, there were special circumstances influencing the equities between the parties, as that the acceptor was the regular correspondent of the drawer, and had been accustomed to accept such drafts from him, or had authorized the making or discounting of the drafts, and in all of said cases the acceptance was unconditional. In the present case, no facts are alleged which establish an equity in favor of the payee against the acceptor. Defendant might have refused to receive any acceptance

other than an absolute one. In fact, Glen had given it a written assignment of the draft, in which it was particularly stated that it might exercise this option. The request to pay was conditioned upon the delivery of the flax seed, and plaintiff's acceptance of the draft was conditioned upon the delivery of the indorsed bills of lading for it. The payment of the draft before the arrival of the steamer does not justify a construction of the entirely intelligible words "indorsed bills of lading" as importing "documents purporting to be indorsed bills of lading," or as importing documents in the form of bills of lading attached to this draft.

It is contended that the equities are equal, and therefore that the party having the money should retain it. This would have been the case if the acceptance had been unconditional. Defendant first paid the money and received the forged documents. But, under their conditional acceptance, plaintiff had a right to genuine documents and to rely on the genuineness of those delivered upon the discharge of their obligation. The precedents cited by defendant of waiver of condition by payment without performance of the condition are cases where the party paying knew at the time of payment that the condition had not been performed. Here both parties supposed that it was performed, and no such waiver can be inferred. There was no relinquishment of any right, for the parties were ignorant of the facts. A waiver is an intentional relinquishment of a known right. Transfer of valid bills of lading would have been equivalent to delivery of the flax seed.

Finally, defendant contends that this is a case where a pledgor had given an order to a third party to receive the security upon payment of the debt, and that the party paying cannot recover back the money from the pledgee on the ground that the security was found to be valueless; and cites *Ketchum v. Stevens*, 19 N. Y. 499; *Baker v. Arnot*, 67 N. Y. 448; and *Aiken v. Short*, 37 Eng. Law & Eq. 592. In each of these cases the court held that under the particular circumstances the plaintiff paid the debt as the agent of the original debtor, and that the transaction was, in effect, a redelivery of the security to the original pledgor, and a subsequent transfer by him to the plaintiff. But in the present case the plaintiffs qualified their acceptance so as to make it dependent upon the shipment of the flax seed and the genuineness of the bill therefor. They paid the money, not on the original contract of the drawer, but upon the new contract created by their conditional acceptance, and the assent thereto of defendant. In *Aiken v. Short*, cited at length in *Ketchum v. Stevens*, which is relied on in *Baker v. Arnot*, Baron Bramhall said:

"It seems to me that the right to recover money paid under a mistake of fact must have reference to a belief in the existence of a fact which, if true, would have given the person receiving a right against the person paying the money."

The case at bar falls within this rule. The acceptance herein was conditioned upon receipt of bills of lading, which, however, were forged, and therefore nullities, unless some intervening right should arise,—as by estoppel, agency, or otherwise. It is true, the payment was prematurely made, but no intervening rights or liabilities were acquired or imposed. Defendant had no rights under the forged papers,

and, if he had any, they would not have been prejudiced. *Munger v. Shannon*, 61 N. Y. 251; *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515. The judgment is affirmed.

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In re PAQUET.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1902.)

No. 1,116.

CIRCUIT COURTS OF APPEALS—JURISDICTION—WRIT OF PROHIBITION.

Under section 6 of the act creating the circuit courts of appeals (26 Stat. 826), which provides that such courts "shall exercise appellate jurisdiction to review by appeal or writ of error final decisions," and section 12, which gives them power to issue "all writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdiction and agreeable to the usages and principles of law," such writs are to be issued only when necessary to the appellate jurisdiction of the court, and the court has no power to issue a writ of prohibition to stay proceedings in a circuit court in a case in which its appellate jurisdiction has not been invoked either by an appeal or writ of error.

On Application for Writ of Prohibition.

The relator presents the following:

"To the Honorable United States Circuit Court of Appeals for the Fifth Circuit: The petition of Louis P. Paquet, a citizen of the state of Louisiana and a resident of the city of New Orleans, respectfully shows: That he is an attorney at law, duly admitted to practice in the courts of the United States, and that he has recently had occasion in his professional capacity to appear in the United States circuit court for the Northern district of Florida in a cause pending therein, entitled 'Mrs. Florida McGuire vs. The Pensacola City Company et al.,' No. 71 of the docket of said court, and that said cause, on motion of counsel for the plaintiff, discontinued at her costs on Monday, November 11, 1901. That previously, to wit, on Saturday, the 9th day of November, 1901, plaintiff in said cause had instituted an action in ejectment in the circuit court of Escambia county, Florida, against Chas. Swayne for certain property, of which the said Florida McGuire claimed to be the owner, and of which she charged that the said Chas. Swayne was in possession. That your petitioner, while not of counsel in said cause for the reason that he had not been admitted as a practitioner in the state courts of Florida, assented to and advised the institution of the same as counsel for the plaintiff generally. That on the 14th day of December, 1901, the Hon. Chas. Swayne, judge of the United States circuit court for the Northern district of Florida, issued and signed an order, a copy of which is hereto annexed and made a part of this petition as an exhibit, marked 'Exhibit A,' in which he directed that this petitioner 'be, and he is hereby, cited to appear before me, Chas. Swayne, judge of this court, at 10 o'clock a. m., on Saturday, December 21, 1901, to show cause why he should not be punished for contempt, upon the grounds and for the reasons set forth in said motion (i. e., the motion of W. A. Blount, Esq., an attorney and counselor of said court, for a citation to the said defendant, etc.), which is now of record in the records of said court, and a copy of which is to be attached by the clerk to the copy of this order to be served upon the said Louis Paquet;' and that said citation, together with a statement of the said judge attached thereto and the motion of the said Blount, all of which are attached to and made a part of this petition, marked 'Exhibit B,' were served upon your petitioner on the 16th day of December, 1901. That upon the 21st day of December, 1901, your petitioner, in obedience to the said citation, appeared

before the said judge at Pensacola, and then and there objected to the jurisdiction of the said judge to proceed with the said citation and motion upon the grounds set forth in the demurrer then filed by petitioner, a copy of which is hereto annexed and made a part of this petition, marked 'Exhibit C.' That said judge thereupon overruled the demurrer and objections of this petitioner, and declared that he would proceed with the trial of said motion; whereupon petitioner filed an answer thereto, in which answer he expressly disavowed any intention to commit any contempt against the authority of said court, and averred that the acts which he had done and as charged in said motion were done in the exercise of his rights as a citizen of the United States, and pursuant to the laws and constitution of the state of Florida, and constituted no contempt against the authority of said court, which answer was duly verified by the affidavit of this petitioner, and filed in the records of said court; and petitioner thereupon objected to the introduction of any evidence to controvert the facts stated in said answer, and demanded his discharge, which objection was overruled by the said judge, who thereupon declared his intention to hear evidence upon the said motion, and after hearing the same to decide whether or not your petitioner was guilty of contempt of the authority of his said court, and the said proceeding was continued for further hearing until the 4th day of January, instant. Now, your petitioner shows that all the acts, doings, and proceedings of the said judge, hereinafter recited, are wholly without jurisdiction or authority or warrant in law; that the same are oppressive, and that your petitioner will be deprived of his liberty, unless this honorable court will prohibit further proceedings therein; and that petitioner has no other remedy except the writ of prohibition which can prevent the said judge from unjustly, unlawfully, and without any jurisdiction so to do, depriving your petitioner of his liberty, and condemning him to pay a fine or be imprisoned in default thereof, or to be imprisoned, as the said judge may determine. Petitioner further shows that upon identically the same state of facts the said judge has passed sentence upon E. T. Davis and Simeon Belden, attorneys and counselors at law, who were associated with petitioner in the prosecution of the case of Florida McGuire against the Pensacola City Company, hereinbefore referred to, and who filed the suit hereinbefore referred to against Charles Swayne, who is the presiding judge of the United States circuit court for the Northern district of Florida. Petitioner further shows that the offense charged against him in the motion of W. A. Blount, Esq., heretofore annexed, is that he, as attorney and counselor of the said United States circuit court for the Northern district of Florida, caused and procured to be issued, as attorney of the circuit court of Escambia county, state of Florida, a summons in ejectment, wherein Florida McGuire was plaintiff and the Hon. Chas. Swayne was defendant, and caused the same to be served on the said judge of the United States circuit court to recover the possession of block 91 of the Cheveaux tract in the city of Pensacola, Florida, a tract of land involved in a controversy in ejectment then depending in the said United States circuit court, wherein the said Florida McGuire was plaintiff and the Pensacola Company et al. were defendants, and in the motion of the said Blount it is alleged: That the said action in ejectment against the said judge was instituted after a petition had been presented to the said judge to recuse himself in the case of Florida McGuire, referred to, and after the same had been submitted and overruled, because the said judge had stated in the presence of this petitioner and the other counsel in the case that the allegation that he or any member of his family was interested in or owned the property in controversy in said suits was untrue, and that he had refused to permit a member of his family to buy the said land, because the suit of Florida McGuire, involving the title of said tract, was then in litigation before him. That after this declaration by the judge the counsel were aware that neither he nor any member of his family were interested in any part of the said tract, and had no reason to believe that they were so interested, and could easily have known that the said block was not in the possession of any one, but was entirely unoccupied. That the said suit against the said judge was instituted on Saturday, the 9th of November, 1901, after six o'clock, and after the court had overruled a motion to postpone the trial

of the case of Florida McGuire vs. The Pensacola City Company for a week or more, and after the judge had announced that he would call said cause for trial on Monday, November 11, 1901, and would proceed to try it, unless the plaintiff made a sufficient showing why he should not do so, and that counsel had announced that they would make such showing. Your petitioner shows that, according to the foregoing charges contained in said motion, he is now summoned before a judge of the United States circuit court to show cause why he should not be punished for contempt for disregarding a verbal statement made by said judge, and for filing a suit against him individually in one of the courts of the state of Florida, by which said suit he contradicted the verity of the declaration made by said judge. Petitioner shows that, while the statement of the said judge was conclusive so far as it affected the question then pending before him, to wit, the motion to recuse him by reason of his interest in the cause, it was not conclusive in his favor in any matter personal to him, and was not bound to be accepted by a party in interest elsewhere, or for any other purpose than so far as the same formed part of a ruling of the said judge in a cause then pending before him, and that petitioner's client had the constitutional right to test the question of the interest of the said Charles Swayne in the said property by a suit in the courts of the state of Florida. That under the statute of the United States in such case made and provided the said judge has jurisdiction to punish for contempt (1) in case of misbehavior of persons in the court or so near to the place where it is held as to obstruct the administration of justice; (2) in case of the misbehavior in official transactions of officers of court; and (3) in case of obstruction to the process of the court. And that jurisdiction to try for such offenses does not extend to acts committed elsewhere, not embraced in any of the foregoing definitions, and especially not to acts committed in an official capacity in another court, which is one of concurrent jurisdiction. Now, your petitioner is advised and believes, and so believing avers, that the said judge, under the jurisdiction which he has usurped herein, will deprive petitioner of his liberty or property, unless restrained by process of this honorable court; that such imprisonment or fine will be in violation of petitioner's rights as a citizen of the United States, and that the same will work him an irreparable injury, for and against which there can and will otherwise be no redress. Wherefore, the premises considered, your petitioner prays that your honors will grant a writ of prohibition herein directed to the said Charles Swayne, presiding judge of the United States circuit court for the Northern district of Florida, restraining and prohibiting the said judge from further proceeding with the trial of the said motion to punish your petitioner for contempt as aforesaid; that a writ of certiorari issue to the said judge, requiring him to cause to be made and to be sent to this honorable court a true and complete transcript of the proceedings aforesaid, the same being entitled 'In re Contempt Proceedings against Louis Paquet'; that upon trial hereof the said writ of prohibition may be confirmed and made perpetual. Petitioner prays for all such other and further orders and decrees as the nature of the case may require, and for general and equitable relief.

"Boatner, Dodds & Boatner, Attorneys.

"Before me, the undersigned authority, personally came and appeared Louis P. Paquet, who, on being duly sworn, deposes that all the facts stated and allegations made in the foregoing petition, so far as they are made on his own knowledge, are true, and that, so far as they are made on information obtained from others, he believes them to be true.

"Louis P. Paquet.

"Sworn to and subscribed before me, this 2d day of January, 1901.

"[Seal.]

Martin H. Harrison, Not. Pub."

This petition has attached exhibits showing proceedings had in the circuit court of the United States for the Northern district of Florida in the matter of the contempt proceedings against Louis P. Paquet, to wit, the rule to show cause, the written charge for contempt, and the demurrer of Louis P. Paquet.

In this court, on behalf of the respondent judge, a demurrer has been filed as follows:

"The respondent, the said Charles Swayne, by his attorney, William A. Blount, demurs to the said petition and the said rule upon the following grounds, to wit: (1) That this honorable court has no jurisdiction to issue a writ of prohibition in the cause and under the circumstances set forth in said petition and rule; (2) that the said petition and rule do not show that the respondent has not jurisdiction to do each and every of the things which it is alleged in said petition that he has done and is about to do, and does not show that he has exceeded, or is about to exceed, his jurisdiction."

J. C. Boatner, for relator.

W. A. Blount, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This court is an appellate court, and depends entirely for its powers upon the statute of March 3, 1891 (26 Stat. 826), and statutes amendatory thereof. Its power to issue writs is derived from section 12 of that act, which gives the court the power specified in section 716, Rev. St. U. S., to issue writs of scire facias, and "all writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdiction and agreeable to the usages and principles of law." Further than this, the appellate jurisdiction appears to be limited by the act creating the court to two methods of review,—by appeal and writ of error. Section 6 provides that the courts of appeal established by this act "shall exercise appellate jurisdiction to review by appeal or writ of error final decisions," etc., and no other method of review is provided. In issuing writs not specially provided for by statute, it appears by the letter of the law that such writs are to be issued when necessary for our jurisdiction, and it would seem that, by the intent of the law, only when necessary to such jurisdiction; and this is supported by *Ex parte Gordon*, 1 Black, 503, 17 L. Ed. 134; *Ex parte Christy*, 3 How. 296, 322, 11 L. Ed. 603; *In re Bininger*, 7 Blatchf. 159, Fed. Cas. No. 1,417. See, also, *U. S. v. Williams*, 14 C. C. A. 440, 67 Fed. 384. In the case referred to in the petition herein the appellate jurisdiction of this court has never been invoked, perhaps never may be, and, on reason and authority, we have no jurisdiction at this time to issue any writ. Whether or not, after final decision in the circuit court, a writ of error will lie to this court is perhaps open to some question. Certainly the supreme court, through a long line of decisions ending in *Chetwood's Case*, 165 U. S. 443, 462, 17 Sup. Ct. 385, 41 L. Ed. 782, held that "judgments in proceedings in contempt are not reviewable here on appeal or error,"—citing *Hayes v. Fisher*, 102 U. S. 121, 26 L. Ed. 95; *In re Debs*, 158 U. S. 564, 573, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Id.*, 159 U. S. 251, 15 Sup. Ct. 1039.

But in *Tinsley v. Anderson*, 171 U. S. 101, 105, 18 Sup. Ct. 805, 43 L. Ed. 91, referring to the statement in *Chetwood's Case*, the supreme court said:

"But that statement was made in regard to such judgments in independent proceedings for contempt in the circuit courts of the United States, and the reason is, as in cases referred to in *Hayes v. Fisher*, above cited, such judgments were considered as judgments in criminal cases in which this court had no appellate jurisdiction of those courts."

Now, it may be that under the act of March 3, 1891, creating the circuit courts of appeals, wherein appellate jurisdiction is conferred upon this court to review by appeal or writ of error final decisions of the district and existing circuit courts in criminal cases, a writ of error will lie from a judgment of conviction and the imposition of a fine or imprisonment in an independent proceeding for contempt in one of the circuit courts of the United States in this circuit, but, if this be so, it cannot avail the petitioner herein at this time. The general rule is that where relief can be obtained through the usual course by writ of error extraordinary writs will not issue. In *re Tampa Suburban R. Co.*, 168 U. S. 583, 587, 18 Sup. Ct. 177, 42 L. Ed. 589.

Writ of prohibition denied.

PERKINS COUNTY, NEB., v. GRAFF.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1902.)

No. 1,619.

1. **ISSUE OF BONDS—ELECTION—OFFER OF EMPLOYMENT NOT BRIBERY.**

In an election to determine whether or not bonds shall be issued to aid the construction of a work of internal improvement, an offer in the proposition submitted to employ bona fide residents upon the work is not an offer of an unlawful inducement, and will not invalidate the bonds.

2. **SAME—"ISSUE"—INTERPRETATION OF.**

The verb "issue" means to emit or send forth, and it does not embrace the preliminary acts of signing and dating, but is confined to the delivery of bonds.

3. **CONTRACT—NOTICE—CONSTRUCTION.**

Where the proposition accepted called for the delivery of bonds in installments of \$1,000 upon presentation of certificates of performance of work of the value of \$1,000, a notice that the county will deliver the same in accordance with the terms of the proposition is a notice that the bonds will be issued at the times when the certificates are presented.

4. **SAME—CONSIDERATION—LOSS TO OBLIGEE.**

A loss of property or money by the obligee is as valid a consideration for an obligation as a gain by the obligor. A company agreed to construct and complete a canal, for bonds to be delivered in installments as the work progressed. Work of the value of \$25,000 was performed, and bonds to this amount were delivered; but the work was never completed, and the county issuing the bonds derived no benefit from them. *Held*, the work performed by the company was a valid consideration for the bonds, though the county derived no advantage from the work.

5. **COUNTY BONDS—PUBLIC PURPOSE—INTERNAL IMPROVEMENT.**

A canal constructed for the purpose of irrigating lands in the state of Nebraska is an internal improvement, and bonds issued by a county in that state to aid it are sent forth for a public purpose, although its waters are drawn from a river or from other sources without the state.

6. **IRRIGATION—DRAWING WATER FROM ANOTHER STATE—LEGALITY OF ACT.**

Drawing water through a canal from one state into another for the purpose of irrigating lands in the latter state is not necessarily a violation of the constitution, laws, or policy of the former state, although that state reserves all the waters for itself and its citizens, so far as they are necessary for the beneficial uses to which the state and its citizens apply them.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Nebraska.

This was an action on coupons cut from bonds of Perkins county, Neb. The county defended on various grounds, which are noticed in the opinion. The material facts established at the trial were these: On July 12, 1894, the Equitable Irrigation & Water Power Company, a corporation, submitted to the board of county commissioners of Perkins county, Neb., a proposition to construct a canal for the purpose of irrigation, the development of water power, and other useful purposes, from a point on the Platte river about eight miles west of Julesburg, in the state of Colorado, to and through Perkins county, to the east line thereof, on the condition that the county would donate to the company its 6 per cent. coupon negotiable bonds for \$90,000, dated September 1, 1894, due 20 years thereafter; that these bonds should be delivered to the fiscal agency of the state of Nebraska, in the city of New York; and that this fiscal agency should deliver them to the company, in installments of \$1,000, upon presentation of certificates of the engineer in charge of the work, attested by the president and secretary of the company, and approved by the board of county commissioners of Perkins county, that work to the amount of \$1,000 had been completed upon the canal. The company also proposed, in consideration of receiving the proposed aid in this way, to commence work upon the canal on or before August 20, 1894, to complete it on September 1, 1895, and to give employment in its construction to bona fide residents of Perkins county so far as this course should not conflict with the completion of the work at the time proposed. The board of county commissioners of the county submitted the question of the issuing of the bonds in pursuance of this proposition to a vote of the electors of the county on August 17, 1894, and more than two-thirds of them voted to accept the proposition and issue the bonds. On August 21, 1894, the board of county commissioners of the county caused the proposition and the result of the vote to be entered upon the records of the county, and caused a notice of its adoption to be published for two successive weeks in the Woolly West, a newspaper published in the county. The company entered upon the construction of the work, and, from time to time as it progressed, certificates of the amount of work completed, in the form and signed by the parties named in the proposition, aggregating altogether \$25,000, were issued; and, in pursuance of the contract, bonds to the amount of \$25,000 were issued upon these certificates to the irrigation company. At the time of the commencement of this action the plaintiff was the owner of the coupons in suit, which were cut from these bonds. None of the bonds were issued until after October 30, 1894. The canal has never been completed. Upon this state of facts the court below instructed the jury at the close of the trial to return a verdict for the plaintiff for the amount of the coupons he owned and interest. The writ of error has been sued out to reverse the judgment based upon this verdict, and the county assigns as error the ruling of the court admitting the coupons in evidence, and its instruction to the jury to return a verdict for the plaintiff.

Frank H. Gaines (J. E. Kelby, J. A. Storey, and B. F. Hastings, on the brief), for plaintiff in error.

C. B. Keller and J. M. Johnson, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first ground upon which the validity of the bonds and coupons in issue is challenged is that the voters of the county were bribed to vote for their issue, because the proposition of the irrigation company, which they voted to accept, contained the offer "to give employment in the construction of said canal to bona fide residents of

Perkins county, Nebraska, so far as it shall not conflict with the completion of the work at the time herein stated." But there was no corrupt or illegal inducement in this proposal. When electors are called upon to choose between great moral or political principles or between candidates for official positions, the use of any pecuniary inducement to sway the choice of the voter is illegal and corrupt. But there was no choice of principles or of persons involved in the question whether or not this county should aid the construction of this canal. When the question to be determined is whether or not public aid shall be given to the construction of an internal improvement within a county, city, or other political division of a state, the primary question is whether or not the improvement will be of pecuniary benefit to the political subdivision and its people. The very purpose of the submission of the question to the voters is to enable them to balance in their own minds the pecuniary advantages and disadvantages which their county, city, or precinct will derive from the improvement, and the taxation which must follow the aid to its construction proposed; and it is both lawful and proper that they should consider and be influenced by the gain or loss which, in their judgment, its construction will entail upon themselves and their county or city. Farmers along the line of this proposed canal were undoubtedly influenced to vote for it by the belief that the water it would conduct would enable them to raise larger crops and obtain larger incomes. The inhabitants of villages were probably induced to vote for it because it would furnish water power and water to their communities, and thus enable them to employ, and be employed in, the use of the machinery it would operate. These were proper inducements to influence the action of the voters of this county upon the question of the issue of these bonds. They were the very inducements which it was the intent and purpose of the legislature that they should consider and be governed by in their action upon the proposition to aid the project submitted. The consideration that the building of this work would give to the residents of the county employment and wages during its construction was of the same character as the consideration that its waters, when it was constructed, would irrigate farms, drive factories, and furnish water for domestic purposes, and thereby increase the income and the comfort of the residents along its line. This inducement was offered to every resident of the county. The offer was not restricted to any individuals or classes. It was not limited to the voters. This offer was neither a corrupt nor an illegal consideration, and there is no reason why the county should be relieved from its just and voluntary obligations because this consideration may have had its legitimate influence in inducing the voters to accept the proposition which offered it.

The second objection to the bonds is that there was no consideration for their execution, because the canal was never completed. But the contract between the county and the irrigation company was that the former would aid the latter in the construction of the canal by delivering to it a bond for \$1,000 as often as the irrigation company completed work upon the canal of the value of \$1,000, evidenced by the certificate of its engineer and of the board of county

commissioners of the county. The company completed work of the value of \$25,000, obtained the proper certificates, and secured bonds to that amount. It is said that there was no consideration for these bonds, because the county has received no benefit from the canal. But a loss to the party who receives the obligation is as legal and valuable a consideration as a benefit to the party who makes it, and the evidence of these certificates is conclusive that the irrigation company incurred a loss of \$25,000 by the performance of work of the value of \$25,000 in consideration of the delivery of these obligations. There was, therefore, no lack of consideration for the issue of the bonds.

Another objection to the judgment is that the bonds were void because the statutes of Nebraska under which they were issued required the county commissioners to publish a notice of the adoption of the proposition of the irrigation company by the vote of the county for two successive weeks in some newspaper before they issued the bonds (Comp. St. 1899, p. 727, § 3509), and the bonds contain a recital that the board of county commissioners "on the 21st day of August, A. D. 1894, while in regular session, by an order duly made, caused a notice to be published that on September 1st, 1894, they would execute said bond, and deliver the same in accordance with the terms of the proposition voted upon, and this bond has been issued in pursuance of said order." The bonds bear the date of September 1, 1894. The objection is that the date of the bonds (September 1, 1894) shows that they were issued before the notice of two weeks was published, inasmuch as there were only ten days between August 21, 1894, when the notice was directed to be published, and the date of the bonds, September 1, 1894. But the date of the bonds does not evidence the date of their issue. The recital in the bonds is that the commissioners directed a notice that they would execute the bonds and deliver the same in accordance with the terms of the proposition voted upon. The terms of the proposition voted upon prohibited the delivery of any bond until it was earned by the completion of work to its amount upon the canal, and the stipulation of the parties is that none of the bonds were issued prior to October 30, 1894. The result is that the publication of the two-weeks notice of the adoption of the proposition by the vote of the people was completed long before any of the bonds were issued. It was commenced on August 23, 1894, and it was completed on September 7, 1894. No bond was issued until after October 30, 1894. The objection that the bonds were prematurely issued, or that the commissioners of the county had no authority to issue them when they were delivered, is therefore without support in the evidence, and cannot be sustained.

In the argument of the objection which has been considered, it was suggested that the term "issue," in the statute under consideration, included not only the delivery of the bonds, but all the preceding acts of signature and preparation. The meaning of this term in statutes of this character was considered with some care by this court in *Corning v. Board*, 42 C. C. A. 154, 102 Fed. 57; and the conclusion was there reached that, in the absence of other definition, it must be given its usual significance to persons of ordinary intelligence, and

that that significance was to send forth; to emit. The bonds in this case were in the absolute control of the county commissioners, in the hands of the fiscal agency of the county, in the city of New York, until they executed the certificates that the requisite amount of work had been done to entitle the irrigation company to receive them. The company could not obtain them or apply them to any use until it first obtained these certificates from the board of county commissioners. The bonds, therefore, were neither actually nor legally issued until the commissioners certified that the work had been done, and upon the presentation of those certificates the fiscal agency delivered the bonds to the company.

Another objection to the bonds is that this canal was not a work of internal improvement, within the meaning of the statutes of Nebraska which authorize the issue of bonds to aid in such a work (Comp. St. 1899, c. 45, § 3506), because the water for it was not to be taken out of any of the rivers or lakes in the state of Nebraska. Counsel for the county concede that the construction of an irrigation canal for the purpose of drawing water from any of the rivers or lakes of the state of Nebraska is a work of internal improvement, within the meaning of this statute, under both the legislative and the judicial interpretation of its terms. *Id.* § 5491; *Cummings v. Hyatt*, 54 Neb. 35, 42, 74 N. W. 411; *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.*, 45 Neb. 884, 64 N. W. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585; *Clark v. Improvement Co.*, 45 Neb. 798, 64 N. W. 239; *Board v. Collins*, 46 Neb. 411, 64 N. W. 1086. Their contention is that although an irrigation canal, which derives its water from the rivers or lakes of the state, is an internal improvement, and bonds issued to aid its construction are sent forth for a public purpose, a canal which derives its water from a private source, or from the rivers or lakes of another state, and conducts it into or through the state of Nebraska, is not a work of internal improvement, and bonds issued to aid it are emitted for a private purpose, and are therefore void. Their argument is that the only ground upon which bonds to aid in the construction of an irrigation canal have been or can be held to have been issued for a public purpose is that they were issued to improve the rivers or water ways of the state from which they derive their water, and that, as the construction of this canal would not improve any of the rivers of Nebraska, the reason of the rule, and therefore the rule itself, cease to operate, and the bonds here in question were issued for a private purpose. The argument is certainly ingenious, but it is not persuasive. Its major premise can neither be conceded nor sustained. The controlling reason why canals for irrigating purposes are works of internal improvement, and why municipal aid in their construction is for a public, and not for a private, purpose, is not that they improve the rivers or water ways of the states in which they are constructed, but because they redeem waste places; make barren, arid lands fruitful, and thereby increase the actual value of the property and of the products of precincts, towns, and counties far more than the amount of taxes required to assist in their construction. It is the general benefit to the entire property of the com-

munity, and not the mere improvement of the rivers or lakes from which the waters of the canals are drawn, that stamps the purpose of their construction as public, rather than private. There is no legal distinction in purpose between a canal whose waters are drawn from the rivers or lakes of the state in which it is constructed, and one whose waters are drawn from private sources, or from the rivers or lakes of other states. The construction of the latter is as public a purpose as the construction of the former, and these bonds cannot be defeated because they were issued to aid the construction of a canal whose waters were to be taken from the Platte river in the state of Colorado.

Finally it is said that the bonds are void because they were issued to assist the irrigation company in violating the constitution and laws of Colorado, and the comity between the states. Section 10 of article 16 of the constitution of Colorado provides that "the water of every stream is hereby declared to be the property of the public and is dedicated to the use of the people of the state as hereinafter provided." The proposition of the irrigation company was to construct a canal which should take the waters of the Platte river from a point in the state of Colorado about eight miles west of Julesburg, and conduct them thence easterly to and through Perkins county, Neb. It is contended that the acceptance and execution of this proposal would violate the constitution and laws of Colorado, because the waters of the river in that state were reserved by its constitution and laws for its people. But the constitution, the statutes, and the judicial decisions of Colorado limited the power of its citizens to use the waters of the rivers of that state to the amounts which are necessary for the beneficial uses to which they apply or intend to apply them. *Emigration Co. v. Gallegos*, 32 C. C. A. 470, 89 Fed. 769, 772; *Thomas v. Guiraud*, 6 Colo. 530, 532; *Reservoir Co. v. People*, 8 Colo. 614, 616, 9 Pac. 794. The constitution and laws of that state have been in force for many years, and yet there is a surplus of the waters of the Platte river, which flows from the state of Colorado into the state of Nebraska. No reason is perceived why the irrigation company might not lawfully withdraw this surplus water from the river at such place in the state of Colorado as it should select, and lead it through a portion of that state into the county which issued these bonds, to irrigate the arid lands in that region. Corporations of other states are not prohibited from transacting business in the state of Colorado. There is no law of that state to which our attention has been called which prohibits such corporations from obtaining by purchase the right of way through private property, and no reason is perceived why the scheme of the irrigation company was not both rational and lawful. The construction and maintenance of canals for the purpose of irrigating arid lands is both permitted and promoted by the legislation and the public policy of the state of Colorado. It was undoubtedly a part of the scheme of this company to irrigate the lands in the state of Colorado which should be adjacent to its canal. When this had been done, no injury could result to the state or to the citizens of the state of Colorado from leading the surplus waters of the Platte river through the canal

beyond the limits of that state into the county of Perkins, because these surplus waters would flow beyond the borders of that state, and into the state of Nebraska, along the natural channel of the river, if they were not drawn into it through the canal. When the proposition of the irrigation company is carefully and rationally considered, it is not obnoxious to the constitution, the laws, or the public policy of the state of Colorado, and these bonds cannot be defeated because the intention of the company was to draw the waters to irrigate the lands of this county from without the state of Nebraska.

There was no error in the trial of this case, and the court below properly instructed the jury to return a verdict against the county for the amount of the coupons in suit, with interest. The judgment based on that verdict is accordingly affirmed.

C. S. MOREY MERCANTILE CO. v. SCHIFFER.

(Circuit Court of Appeals. Eighth Circuit. March 24, 1902.)

No. 1,611.

1. BANKRUPTCY—PAYMENTS ON ACCOUNT CURRENT—PREFERENCES.

The receipt by a creditor of payments upon an account current in the usual course of business, which are followed by new credits for property delivered to the debtor, which becomes a part of his estate, for which the creditor is not paid, and which equals or exceeds in amount and value the payments, does not constitute a preference, under section 60a, and does not require the creditor to surrender such payments, as a condition of the allowance of his claim, under section 57g of the bankrupt act of 1898.

2. SAME—CREDITOR'S CLAIM ON ACCOUNT CURRENT NOT DIVISIBLE.

The claim of a creditor for a balance due upon an account current with the bankrupt is one single claim, and in determining its allowance, and the existence of alleged preferences arising out of the acts it evidences, it must be so considered. It may not be divided into its items or into separate claims for that purpose.

3. SAME—SURRENDER OF PREFERENCES—NEW CREDITS.

A creditor who comes within the provisions of section 60c of the bankrupt act may set off the amount of his new credits therein mentioned against the amount he would otherwise be required by section 57g to surrender before proving his claim, although he did not have reasonable cause to believe that the transfer of the property to him was intended as a preference, and although the property so transferred is not recoverable by the trustee under section 60b.

(Syllabus by the Court.)

Appeal from the District Court of the United States for the District of Colorado.

W. Scott Bicksler, Lester McLean, and Edmon G. Bennett, for appellant.

George A. H. Fraser, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Walter F. Pierce was a merchant engaged in conducting a retail business in Colorado. The C. S. Morey Mercantile Company was engaged in the business of selling groceries

at wholesale, and it sold and delivered to Pierce small amounts of groceries, on a credit of 60 days, for some months before he was, on January 21, 1901, adjudged a bankrupt. There was owing upon this account between \$300 and \$400 on September 23, 1900. Between that day and October 2, 1900, Pierce paid the mercantile company \$221.26 on account. After these payments were made, and before Pierce was adjudged a bankrupt, the mercantile company sold and delivered to him, upon a credit of 60 days, goods of the value of \$444.03, which became a part of his estate. At the close of the transactions between them there remained due from Pierce to the mercantile company the sum of \$550.23. The court below ordered the disallowance of this claim unless the creditor should surrender to the trustee the \$220.63 which it had received upon its account within four months of the adjudication in bankruptcy. This is the order challenged by this appeal.

This order is based on section 57g of the bankrupt act, which reads:

"The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

But there are two reasons why the order in question is not warranted by this section. Section 60a reads:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The payment of money is the transfer of property, within the meaning of this section. But it is only a payment or transfer the enforcement of which will enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class that constitutes a preference. Before the enforcement of the payment of the \$220.63 which this creditor received about October 1, 1901, can be held to create a preference in his favor, it must appear in some way that this payment enabled it to obtain a greater percentage of its debt than any other creditor of its class. The facts of this case disclose nothing of this kind. The amount owing by the debtor just before these payments were made was less than \$400. When the account subsequently closed, it was \$550.23. The payment of the \$220.63 was followed by the sale and delivery of goods to the debtor of the value of \$444.03, on account of which nothing has ever been paid. The net result, therefore, of the payments, and the subsequent sales of the goods upon credit, was that the estate of the bankrupt was increased \$223.40, and the amount owing to the creditor was increased by the same amount. How, then, can it be said that the enforcement of these payments enabled this creditor to obtain a greater percentage of his debt than any other creditor of his class? Courts cannot be, and ought not to be, blind to the habits, practices, and motives of business men, which are a part of the common knowledge of mankind. Payments upon current account constitute the inducement for further sales and credits. Let them be refused,

and the sale and delivery of goods cease. It was doubtless the payment of this \$220.63 in September and October, 1900, that induced this creditor to make its subsequent sales, and to increase the indebtedness of Pierce to it \$223.40 above its amount before the payments were made. The enforcement of such payments does not enable the creditors who receive them to obtain greater percentages of their debts than any other creditors of the same class. It has the opposite effect. It decreases their percentages by as much as the goods sold after the payments exceed the payments, and it increases the percentages of the other creditors correspondingly. The items of debit and credit upon a running account, where goods sold are charged, and payments are credited, are not separate claims. They constitute a single claim. When it is asserted that payments made upon such a claim, followed by goods subsequently delivered on credit, for which no payment has been made, constitute preferences of the creditor, the question is whether the net result of those payments and of the subsequent credits has been an increase or a diminution of the claim. If, taken together, they decrease the claim, their enforcement effects a preference. If, taken together, they increase the claim, they work no preference of the creditor who has received them, but confer a benefit upon the other creditors who share in the estate of the bankrupt, because that estate is increased by the excess of the value of the goods subsequently sold above the payments made. The circuit court of appeals of the First circuit, in treating this subject, well says:

"It is beyond all reason to hold, because a creditor has, in the ordinary course of business, during the four months preceding bankruptcy, received payments which under some circumstances might operate as a preference, in some views of the law, that that fact can be held to bar the proof of his claim, when, looking at all the transactions together, they demonstrate not only that they were without any intention to acquire any unjust preference, but also that they have increased the net indebtedness to the creditor, and correspondingly increased the bankrupt's estate. In order to avoid so unreasonable a result, we might say that all the transactions covered by the account current should be regarded as one, so that it could not be held that the effect of the payments was to enable the creditors at bar to obtain a greater percentage of their debt than any other creditor of the same class, within the meaning of paragraph 'a' of section 60." *In re Dickson*, 49 C. C. A. 574, 111 Fed. 726, 728.

The result is that the payments challenged in this case worked no preference, because the net result of these payments and the subsequent sales of goods on credit to the debtor increased, and did not diminish, the claim, so that their effect was not to enable the mercantile company to obtain a greater percentage than any other creditor of its class, but it was to increase the percentage of every other creditor. The receipt by a creditor of payments upon an account current in the usual course of business, which are followed by new credits for property delivered to the debtor which becomes a part of his estate, for which the creditor is not paid and which equals or exceeds in amount and value the payments, does not constitute a preference, under section 60a, and does not require the creditor to surrender such payments as a condition of the allowance of his claim under section 57g of the bankrupt act of 1898. *Kimball v. A. E.*

Rosenham Co., 114 Fed. 85; In re Richter's Estate, 20 Fed. Cas. 749, 752 (No. 11,803); In re Dickson, 49 C. C. A. 574, 111 Fed. 726, 728; Peterson v. Nash (C. C. A.) 112 Fed. 311, 314.

In the second place, if the payment of the \$220.63 had worked a preference, this creditor would have been entitled to set off against it the amount of the new credit subsequently given, under section 60c of the bankrupt law of 1898. That section reads:

"If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

It is contended that this section authorizes these new credits to be set off only against amounts which might be recovered by the trustee from creditors who have knowingly received preferences in the way described in section 60, subd. "b." The question presented by this contention has been the subject of much debate. All the reasons for and against it have been repeatedly stated by the various courts, and it would be a work of supererogation to repeat or review them here. The arguments in support of the position of counsel for the trustee will be found in *Re Christensen* (D. C.) 101 Fed. 243; *Re Arndt* (D. C.) 104 Fed. 234; *Re Abraham Steers Lumber Co.* (D. C.) 110 Fed. 738, 743. The reasons why, in our opinion, this contention cannot be and ought not to be sustained, have been presented in *Peterson v. Nash* (C. C. A.) 112 Fed. 311; *McKey v. Lee*, 45 C. C. A. 127, 105 Fed. 923; *Re Dickson*, 49 C. C. A. 574, 111 Fed. 726; *Re Ryan* (D. C.) 105 Fed. 760; *Re Seckler* (D. C.) 106 Fed. 484; and *Re Southern Overalls Mfg. Co.* (D. C.) 111 Fed. 518.

Since the decision in *Peterson v. Nash*, our attention has been called to the following remark contained in the opinion of the supreme court in *Pirie v. Trust Co.*, 182 U. S. 455, 21 Sup. Ct. 906, 45 L. Ed. 1171:

"Nor, again, do we find anything which militates against our conclusion in subdivision 'c' of section 60. That subdivision is applicable to the cases arising under 'b,' and allows a set-off which otherwise might not be allowed."

But there are at least two reasons why this remark is neither controlling nor persuasive: In the first place, the question whether or not the set-off provided for by subdivision "c" might be allowed to creditors who had innocently obtained preferences, as well as to those who had done so with intent to evade the provisions of the bankrupt act, was not in issue in that case, and was not decided; and, in the second place, there is nothing in this remark inconsistent with the view that offsets against such preferences may be allowed. It merely states that subdivision "c" is applicable to cases arising under subdivision "b." No one disputes that proposition.

After a careful consideration of the authorities, and the arguments which they so forcibly present upon each side of the question now under consideration, this court, at its last term, arrived at the conclusion that section 60c entitles an innocent creditor who comes within its provisions to set off the amount of his new credits against

the amount he would otherwise be required by section 57g to surrender before proving his claim, and that it is not limited in its application to cases where the trustee may sue to avoid the preferences under section 60b. *Peterson v. Nash* (C. C. A.) 112 Fed. 311. The circuit courts of appeals of the First and Seventh circuits have arrived at the same conclusion. *McKey v. Lee*, 45 C. C. A. 127, 105 Fed. 923; *In re Dickson*, 49 C. C. A. 574, 111 Fed. 726. A thoughtful reconsideration of this question at this term in the light of subsequent decisions, and of the remark of the supreme court to which reference has been made, has served but to confirm us in the righteousness and soundness of that conclusion. The result is that the order below must be reversed, and the case must be remanded to the district court, with directions to allow the claim of the appellant, without the repayment of any of the moneys it has received.

FIRST NAT. BANK OF ROCK SPRINGS, WYO., v. RODER.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1902.)

No. 1,618.

1. MARSHALING ASSETS—JUNIOR INCUMBRANCER—RESORT TO FUND NOT COVERED BY SUPERIOR LIEN.

One who has a lien upon a single fund or property may compel another, who has a superior lien upon the same fund or property and upon another fund or property, to first resort to the fund or property which is not doubly incumbered for the satisfaction of his claim.

2. SAME—DEMAND BY A JUNIOR INCUMBRANCER.

A demand or notice by the holder of an inferior lien on one fund or property upon the holder of the superior lien thereon that he preserve and first exhaust his lien upon other funds or property covered thereby, made or given before his lien upon such funds or property is relinquished or lost, is indispensable to the enforcement of the right of the holder of an inferior lien upon property doubly incumbered to compel the holder of the superior lien to preserve or first exhaust that lien upon property covered by it alone.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Wyoming.

N. E. Corthell, for appellant.

W. L. Maginnis, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is a bill in equity by a junior mortgagee against the holder of the first mortgage upon personal property for an accounting of the proceeds of the mortgaged property and the application of the surplus after the payment of the debt secured by the first mortgage to the payment of the debt secured by the second mortgage. The result of the final hearing was a finding that on March 13, 1897, the First National Bank of Rock Springs, Wyo., the senior mortgagee, had received \$7,227.23 more than an amount sufficient to pay its debt and its necessary expenses, and that

this sum was applicable to the payment of the debt of the junior mortgagee, Mrs. J. W. Roder. A decree followed that the bank should pay this \$7,227.23, interest and costs, to Mrs. Roder. From this decree an appeal has been taken to this court, and the errors assigned relate to the allowance and disallowance of various items in the accounting between the appellant and the appellee. The most convenient and expeditious way of presenting our answers to the questions raised and our reasons for them will be to state the rulings challenged, the facts pertinent to them, and our conclusions, *seriatim*, and that method will accordingly be pursued.

1. It is assigned as error that the court charged the bank with the proceeds of certain wool which it received in the amounts and at the times following, namely, on May 14, 1895, \$4,889; on May 2, 1896, \$1,555; on June 24, 1896, \$3,000; and on November 9, 1896, \$1,204.78. The conclusions which have been reached upon other specifications of error render it unnecessary for us to consider any of the items here challenged except the charge of \$4,889 made against the bank as of May 14, 1895, and the discussion upon which we are about to enter will be directed to a consideration of the question whether or not the appellant was lawfully chargeable with that item in this accounting. These are the facts which condition the answer to this question: This \$4,889 was the proceeds of wool clipped from the sheep hereinafter mentioned in the spring of 1895. The mortgage to the bank, which was made on April 6, 1895, covered 10,750 sheep and the wool growing and to grow thereon, and it secured the payment of a promissory note of even date for \$16,728.58, due one year after its date. The mortgage to Mrs. Roder, which secured the payment of a note for \$8,300, due on demand, and which was made on April 8, 1895, covered these sheep, and some horses, household furniture, and other personal property of little value, that was not described in the mortgage to the bank, but it did not cover the wool. Mrs. Roder was an aunt of the mortgagor in these mortgages, Edwin S. Murray, and his mother, Mrs. Ellen J. Murray, was her attorney in fact. Mrs. Roder resided in Philadelphia. Mr. Murray and Mrs. Roder's attorney in fact, his mother, lived together at Rock Springs, in the state of Wyoming. The sheep were in the possession of the mortgagor in Sweet Water county and in adjoining counties in the state of Wyoming, where they remained until November, 1895. In the spring of 1895 the wool was clipped from the sheep, and sold, and its proceeds—this \$4,889—were sent to the bank, where they were placed to the credit of the account of the mortgagor, Edwin S. Murray, and he drew them out as he pleased, and applied them in part to the payment of his personal expenses and in part to the payment of the expenses of herding and caring for the sheep. In November and December, 1895, Murray shipped 10,500 of the sheep in the name of the bank to the state of Nebraska, where they were left until the spring of 1896, when they were sold, and their proceeds were sent to the bank, which placed them to the credit of the mortgagor, Murray, in his account with it, and permitted him to draw them out as he chose. On March 13, 1897, Murray still had 7,269 sheep. He then owed the bank about \$23,000. Thereupon he

agreed to turn these sheep over to the bank for a credit in his account of \$2.25 a head, or for a credit in the aggregate of \$16,355.25. The bank took them at this price under this agreement, and credited Murray's account accordingly. It sold 6,209 of the sheep for \$2 per head, and this was all they were worth. During all this time Murray kept his account with the bank. That account was credited with the proceeds of the wool and with the proceeds of the sheep. Murray drew out the money to his credit in it to pay his personal expenses, to pay interest on the mortgage debt to Mrs. Roder, and to pay the expenses of herding and feeding the sheep. He drew out \$6,151.93 that was not applied in any way to the care, maintenance, or sale of the sheep or the wool. During all this time Mrs. Ellen J. Murray, the attorney in fact of Mrs. Roder, lived with her son, the mortgagor, at Rock Springs, in the state of Wyoming, and from time to time, as they were disposed of, she knew that the sheep and the wool were sold, but neither she nor Mrs. Roder ever notified or required the bank to apply to the payment of its mortgage debt the proceeds of the wool to the end that a larger proportion of the value of the sheep might be applied to the payment of her debt; but the bank was aware of the existence of the second mortgage to Mrs. Roder. In this state of the case the court below charged the bank with this \$4,889, the proceeds of the 1895 clip of the wool, on the theory that it held its mortgage on the wool in trust for the junior mortgagee of the sheep, and that it was bound in equity to preserve and exhaust its lien on the wool before it could be permitted to have recourse to the sheep, for the reason that it held a lien on both the wool and the sheep, while the junior mortgagee had a lien upon the sheep only. But does not this ruling carry the equitable principle of marshaling assets beyond its just limits? The bank did not derive this \$4,889 from the property mortgaged to Mrs. Roder. It did not appropriate it to its own use. It had not taken possession of the sheep or of the wool under its mortgage, or commenced to foreclose it, when the \$4,889 was received, and credited to Murray in his account with it. The junior mortgagee had not demanded that the bank should collect its debt by foreclosure or otherwise, or that it should apply this money to its payment. The bank simply permitted the mortgagor to use the proceeds of this wool to pay his personal expenses and the expenses of caring for the sheep. In other words, it simply neglected to enforce its mortgage upon the clip of wool of 1895, and it did nothing more. How does this neglect charge it with liability to Mrs. Roder for this money? The answer of counsel for appellee is that the bank had a lien upon two classes of property (the wool and the sheep), while Mrs. Roder had a lien upon one (the sheep). But does this fact, without more, impose upon the holder of the senior lien the duty to preserve and exhaust the property that is subject to that lien only before it can have recourse to that covered by both liens? Does it make the holder of the senior mortgage the guardian of the holder of the junior mortgage, relieve the latter from all duty and diligence, and impose upon the former the burden of marshaling and realizing upon the securities for the best interests of the latter without any demand or requirement from the latter that

this shall be done? Does the mere taking of an inferior lien upon a part of the property subject to a superior lien relieve the holder of the former from all action and diligence to protect and enforce it, and impose the duty to do so upon the holder of the latter? Let us see. The rule which counsel for appellee invokes is well stated by Mr. Justice Story in section 633 of his work on Equity Jurisprudence in these words:

"If one party has a lien on or interest in two funds for a debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the rights or operate to the prejudice of the party entitled to the double fund."

It will be noticed that under this rule the burden of action and diligence is imposed upon the holder of the second lien, not upon the owner of the first. It gives the former the right in equity to compel the latter to resort first to the fund subject to the single lien. But it does not impose upon him the duty to do so if the former does not exercise this right. Rights in equity do not enforce themselves. Nothing but good faith, conscience, and reasonable diligence can successfully appeal to a court of equity for relief, and, if the holder of an inferior lien upon a doubly incumbered fund intends to insist that the holder of the superior lien shall first resort to the fund subject to that lien alone for its satisfaction, good faith and reasonable diligence require that he shall give notice of his intention, and that he shall point out the course of action which he requires the holder of the first lien to take, before the latter has changed his position and lost his opportunity to pursue it. In *McIlvain v. Assurance Co.*, 93 Pa. 30, Mr. Justice Sterrett well says:

"It is the duty of the latter [holder of a junior incumbrance], if he intends to claim an equity through the prior incumbrance, to give the holder notice, so that he may act with his own understanding; and, if he fails to do so, the consequences of his neglect must be visited on himself. While the law makes it the duty of every man to so deal with his own as not to injure another unnecessarily, it imposes on the latter a greater obligation to take care of his own property than it does on a stranger to take care of it for him. To hold otherwise would compel the senior incumbrancer to do for the holder of the junior security what in equity and good conscience he ought to do for himself. The doctrine is one of equity jurisprudence, and not of positive law, and hence, to affect the conscience of the former, he should have actual, and not merely constructive, notice of the equity claimed by the latter."

In *Ocobock v. Baker*, 52 Neb. 447, 452, 72 N. W. 582, 66 Am. St. Rep. 519, a bank had a lien by judgment upon certain real estate, and Ocobock had a lien by mortgage upon a portion of the same real property. The bank released its lien upon some of the property which was not covered by the mortgage of Ocobock, and proceeded to enforce its judgment against the mortgaged property. The supreme court of Nebraska held that, although the bank had notice of the existence of the mortgage of Ocobock, the latter could not charge it with the receipt of the value of the lots released in payment of its judgment, because Ocobock had not demanded of the

bank that it should first exhaust its lien upon the lands that were not covered by its mortgage before it had released them from the judgment. It said:

"But neither constructive notice nor actual notice on the part of the bank of the existence of Ocobock's mortgage was alone sufficient to postpone the bank's judgment lien to his mortgage, because the bank, in possession of such notice or knowledge, released certain lands of Baker's from the lien of its judgment. Ocobock being a subsequent incumbrancer, he was the party that the law required to be vigilant, and the bank was under no obligation to inquire of him as to the amount of his debt, the sufficiency of the security, nor whether he desired it to first exhaust its lien upon lands not covered by its mortgage, or whether he desired it not to release these lands from the lien of its judgment. Ocobock, by his laches, has forfeited the right to have the court apply to his case the doctrine of subrogation."

The rule on which the claim of the appellee is founded here is nothing but a corollary of the equitable principle of subrogation, of the general principle of equity jurisprudence that the holder of an inferior lien may pay off the superior claim and be subrogated to all the rights of its holder. One who has a first lien upon two funds or two pieces of property may collect his debt from one or from both of them. When another procures a second lien upon one of them, the lien of the former is not destroyed or impaired. The primary right of the latter is to redeem the property from the first lien by paying the debt it secures. When he does this he becomes substituted in equity for the holder of the first lien, and acquires the right to enforce that lien against both the funds or properties originally incumbered. In this way the holder of the junior lien may compel the exhaustion of the property covered by the first lien alone to satisfy that claim. Circuity of action is avoided, and the same result is attained, by permitting the holder of the second lien to compel the holder of the first to exhaust the property covered by that lien only, before he has recourse to that which is doubly incumbered. Thus the rule here invoked sprang up as a corollary to this principle of subrogation. But in all these proceedings, in the exercise of the right of redemption, of the right of subrogation, and of the right of compelling the exhaustion of the property covered by the first incumbrance only, the burden of diligence is upon the holder of the second lien, and not upon the owner of the first incumbrance; and he must act, or suffer the loss which his silence and inaction induce. The holder of the first lien is not required to accept redemption or to permit subrogation until the holder of the inferior lien pays, or tenders payment of, his debt. Nor is he required to preserve and exhaust his lien upon the property or fund which it alone covers until the holder of the second lien demands that he shall do so for his protection. The law provided a sure method by which Mrs. Roder could have availed herself of the lien upon the wool which was held by this bank. She could have paid its debt, and have been subrogated to its rights. It provided another way by which she could have secured the benefit of that lien. She might have demanded of the bank, before it permitted Murray to use the proceeds of this wool, that it should preserve and exhaust its lien upon the wool, and apply all its proceeds to the payment of its claim, before it had recourse

to the sheep to satisfy it. She followed neither course. Her note was due on demand. She could have enforced its collection at any time. The note of the bank was not due until April 6, 1896. The \$4,889 was paid to the bank, and placed to the credit of Murray, on May 14, 1895,—more than eight months before its debt was due. The appellee, when she filed her bill in this case on June 3, 1898, prayed for no part of this money, but limited her demand to an accounting for the proceeds of the sheep, which she alleged were seized by the bank in satisfaction of its mortgage in October, 1895. It was not until some time during the preparation for the hearing of this case, years after Murray had spent the money here in question, that the claim to charge this bank with this \$4,889 as her trustee was first presented by the appellee. Meanwhile Murray's debt to the bank had never been paid, and, after crediting him with all the proceeds of the wool and the sheep, he remained indebted to it many thousands of dollars. The appellee rested in silence and supine indifference while Murray clipped the wool from the sheep, placed its proceeds in the bank to the credit of his account, which was already overdrawn, and drew it out to pay his personal expenses and the expenses of caring for the sheep upon which she held her mortgage. She now appeals to this court of equity to charge upon this bank a loss which was not willfully sustained or inflicted by it, but which was the direct result of her own silence and negligence. There is no equity in her claim. There was no diligence in its pursuit, and it cannot be sustained. A demand or notice by the holder of an inferior lien on one fund or property upon the holder of the superior lien thereon that he preserve and first exhaust his lien upon other funds or property covered thereby, made or given before his lien upon such funds or property is relinquished or lost, is indispensable to the enforcement of the right of the holder of an inferior lien upon property doubly incumbered to compel the holder of the superior lien to preserve or first exhaust that lien upon property covered by it alone. *Taylor's Ex'rs v. Maris*, 5 Rawle, 51, 57; *McIlvain v. Assurance Co.*, 93 Pa. 30; *Hart v. Anderson*, 198 Pa. 558, 561, 562, 48 Atl. 636; *Ross v. Duggan*, 5 Colo. 85, 102; *Clarke v. Bancroft*, 13 Iowa, 320, 327; *Gilliam v. McCormack*, 85 Tenn. 597, 607, 4 S. W. 521.

In reaching this conclusion the familiar rule that where a mortgagee of numerous lots of land, who knows that they have been conveyed by the mortgagor, at various times subsequent to the execution of the mortgage, to different purchasers, releases those still held by the mortgagor or by the last purchasers, he may be charged by the earlier purchasers with the reception in payment of his debt of an amount equal to the value of the lots thus released, has not been overlooked. *Patty v. Pease*, 8 Paige, 277, 35 Am. Dec. 683; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Skeel v. Spraker*, 8 Paige, 195; *Brown v. Simons*, 44 N. H. 475; *Lyman v. Lyman*, 32 Vt. 79, 76 Am. Dec. 151; *Chase v. Woodbury*, 6 Cush. 143; *Shannon v. Marselis*, 1 N. J. Eq. 413. But this rule has no application to cases involving the marshaling of assets to pay liens upon personal property, because the interests of the grantees of the mortgagor of real

estate are fixed, certain, and apparent from the conveyances, while those of the holders of subsequent liens are uncertain, since their debts may have been paid, or they may have elected to rely upon the personal credit of their debtors, or on other security, and to abandon their liens, and because this rule rests upon the principle that lots of land conveyed by a mortgagor subject to the mortgage are primarily liable for the mortgage debt in the inverse order of alienation,—a principle which has no application to funds or personal property incumbered by numerous liens.

This case is governed by the equitable rules and principles to which we have already adverted. The appellee had the right in equity to compel the appellant to preserve its lien upon the wool, and to apply its proceeds to the payment of its claim. But the burden of exercising that right with due diligence, so that no unnecessary loss should be imposed upon the bank, rested upon her. If she desired to exercise it, it was her duty to inform the bank that she intended to do so, and to demand of it that it should preserve and enforce its lien upon the wool before it released it, or permitted its proceeds to pass beyond its control. She took no such action. The \$4,889 received by the bank on May 14, 1895,—eight months before its debt was due,—has been dissipated by the mortgagor. He still owes the bank thousands of dollars. To compel it to pay this \$4,889 is to impose upon it an absolute loss, which reasonable diligence on the part of the appellee in demanding its application to the payment of the first lien might have prevented. He who seeks equity must do equity. The appellee cannot be permitted to impose this loss upon the bank, which reasonable diligence on her part would have prevented. The \$4,889 should not have been charged against the appellant in this accounting.

2. Between May 6, 1895, and August 29, 1895, \$1,516.43 was drawn out of the bank by the mortgagor, Murray, and paid to Mrs. Roder in satisfaction of the interest accruing upon her mortgage debt. The referee and the court refused to allow the bank any credit for this amount of money, although they charged it with all the proceeds of the wool and of the sheep which it received and placed to the credit of Murray in the account from which he drew this money. This was error. This was an accounting between the bank and Mrs. Roder for the proceeds of the wool and the sheep. Since the bank was charged with all those proceeds, it was certainly entitled to a credit of all the moneys which it paid to Mrs. Roder out of these proceeds, whether it paid them directly or by the hand of Murray. The bank must be credited with this \$1,516.43.

3. It is assigned as error that the bank was charged in this accounting with \$2.25 a head, the price which it agreed with Murray to credit him for 6,209 sheep in March, 1897, when it should have been charged with only the amount it realized from them and the amount which they were actually worth, \$2 a head. This specification is well founded. This was not an accounting between Murray and the bank, but between Mrs. Roder and the bank. In this accounting the latter was not chargeable with the amounts which it might have agreed to pay for property in the worthless notes or

accounts of Murray, but only with the actual value of the property which it received. As the evidence is conclusive that 6,209 of these sheep were sold by the bank for \$2 per head, and that they were not worth more than that amount, the charge against the bank on their account must be reduced by 25 cents per head on 6,209 sheep, or by \$1,552.25.

There are many other items in this account which are challenged, but it is unnecessary to consider them, because those already considered so change the account that there is no longer a balance against the bank. The amount of that balance on March 13, 1897, as found by the court, was \$7,227.23. The disallowance of the charge of \$4,889 against the bank, the reduction of the charge against it for the sheep by \$1,552.25, and the credit to it of the interest paid to Mrs. Roder, \$1,516.43, make a change in the state of the account in favor of the bank of \$7,957.68, so that it is no longer liable to account to or pay to Mrs. Roder anything on account of the wool or the sheep; and the decree below must be reversed, with directions to the circuit court to enter a decree in favor of the bank and against Mrs. Roder for the dismissal of the bill on the merits and the costs, and it is so ordered.

CHOCTAW, O. & G. R. CO. v. HOLLOWAY.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1902.)

No. 1,625.

1. NEGLIGENCE OF MASTER—ORDINARY CARE.

It is error to instruct a jury that it is the duty of the master to provide reasonably safe appliances, tools, or working places for his servants, or to keep them in a reasonably safe condition of repair. The limit of the duty of the master is to exercise ordinary and reasonable care, having regard to the hazards of the service, to provide his employes with reasonably safe appliances, machinery, tools, and working places, and to exercise ordinary and reasonable care to keep them in a reasonably safe condition of repair.¹

2. ERROR—PREJUDICE PRESUMED FROM.

The legal presumption is that error produces prejudice. It is only when it appears beyond all doubt from the record that the error complained of did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal is applicable.

3. ERROR WITHOUT PREJUDICE.

Where the court rightly charges the jury, on the conceded facts, that the master was negligent, as a matter of law, an erroneous charge relative to the degree of care required of the master appears beyond all doubt to be error without prejudice, because no question of the negligence of the master was submitted to the jury for their determination.

4. MASTER AND SERVANT—DUTY OF SERVANT—ASSUMPTION OF RISK.

The servant assumes all the ordinary risks of the employment which are known to him, and which would have been known, by the exercise of ordinary care, to a person of reasonable prudence and diligence in his situation. It is his duty to exercise ordinary care and diligence to observe and become cognizant of obvious defects in the machinery and

¹ Duty of railroad company to furnish safe appliances, see note to Felton v. Bullard, 37 O. C. A. 8.

working place; and he is chargeable with a knowledge and assumption of the risk of all such defects which are known to him, or which would have been known by the use of ordinary care to a person of reasonable prudence and diligence in his situation.²

5. VERDICT—SUFFICIENCY OF EVIDENCE—INSPECTION.

The court may not reverse a judgment because there was no evidence to support a finding of fact by a jury based upon testimony and an ocular inspection of machinery, a knowledge of the defects of which is in issue, because the evidence derived from the inspection is not, and cannot be, presented to the appellate court for consideration.

6. NEGLIGENCE—CONCURRENCE OF THIRD PARTY NO EXCUSE FOR.

One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent as for one caused entirely by his own negligence.

7. INJURY TO EMPLOYE—NEGLIGENCE—FAILURE TO PROVIDE BRAKES.

The failure to provide an ordinary road engine with brakes, in the absence of evidence excusing it, is, as a matter of law, evidence of the want of reasonable care to provide a reasonably safe locomotive engine to operate upon a railroad.

8. SAME—PROXIMATE CAUSE OF COLLISION—ABSENCE OF BRAKES ON ENGINE MAY BE.

Collisions and accidents may be reasonably anticipated as the natural and probable consequence of the failure to provide brakes to control the movements of road engines.

9. SAME—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF KNOWN RISKS.

Contributory negligence regarding, or assumption by a servant of, known risks, will not constitute contributory negligence regarding, or the assumption of, an unknown risk, nor a defense for the master whose negligence produces it. A servant knew and assumed the risks of running an engine backward, tender foremost, in the night, without any light or employé on the forward end of the tender. *Held*, that his contributory negligence and assumption of risks in this regard constituted no defense to his action against the master for negligence in failing to supply the engine with brakes, where he did not know, and a person of reasonable prudence and discretion, exercising ordinary care, would not, in his situation, have known, of the absence of the brakes.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

In the early morning of October 30, 1900, while it was yet dark, a road engine of the Choctaw, Oklahoma & Gulf Railroad Company collided with a horse which was caught in a trestle as the engine was backing, tender foremost, from Brinkley to Hulbert, and injured Will Holloway, the defendant in error. There was no light on the forward end of the tender, and no employé there to warn of danger. There was no brake on the engine, although there was a brake upon the tender. Holloway was a fireman working on the engine. He was aware of the darkness of the night, of the absence of a light and of an employé upon the end of the tender, but he insisted that he did not know that there was no brake upon the engine. He sued the company for negligence, in that it failed to supply the engine with a proper brake; alleged that the accident would not have occurred if such a brake had been provided, and that through its absence he was caught between the tender and the engine when the air was applied to the brake upon the tender, and seriously injured. The court instructed the jury that if there was no brake upon the engine, and Holloway did not know, and would not by the exercise of reasonable diligence and prudence have known, that the engine was supplied with a brake, and if the absence of the brake caused the accident, the company was liable, and they might return a verdict

²Assumption of risk incident to employment, see note to *Railroad Co. v. Henneddey*, 88 C. C. A. 314.

against it, but that, if there was a failure of proof of either of these facts, their verdict must be for the defendant. This instruction, and the refusal of the court to instruct the jury to return a verdict for the defendant, are the principal errors assigned by the company, although many others are specified.

E. B. Peirce and C. B. Stuart (J. W. McCloud, on the brief), for plaintiff in error.

J. W. House (M. House, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Actionable negligence is a breach of duty. Where there is no breach of duty, there is no negligence, and there can be no recovery. It is not the duty of the master to furnish his servants with reasonably safe appliances, machinery, tools, or working places, or to keep them in a reasonably safe condition of repair. His failure to do so is not the breach of any duty, and it furnishes no basis for an action of negligence. The limit of his duty here is to exercise ordinary and reasonable care, having regard to the hazards of the service, to provide his employes with reasonably safe appliances, machinery, tools, and working places, and to exercise ordinary and reasonable care to keep them in a reasonably safe condition of repair. *Railway Co. v. Jarvi*, 3 C. C. A. 433, 435, 436, 53 Fed. 65, 67, 68; *Gowen v. Harley*, 6 C. C. A. 190, 197, 56 Fed. 973, 980; *Railway Co. v. Linney*, 7 C. C. A. 656, 660, 59 Fed. 45, 48; *Railway Co. v. Needham*, 69 Fed. 823, 825, 16 C. C. A. 457, 459; *Railroad Co. v. Johnson*, 81 Fed. 679, 680, 27 C. C. A. 367, 368; *Railroad Co. v. Myers*, 11 C. C. A. 439, 63 Fed. 793; *Id.*, 22 C. C. A. 269, 76 Fed. 443. A servant may assume that his master has discharged this duty, unless he knows, or by the exercise of reasonable care he would have known, that the duty had not been discharged, and that there were defects in the machinery and appliances with which, or in the place in which, he undertakes to work. On the other hand, the servant assumes all the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to a person of ordinary prudence and care by the exercise of ordinary diligence. He is not required to search for latent defects or hidden dangers, but it is his duty to exercise reasonable diligence to observe and be cognizant of all obvious defects in the machinery and appliances with which he is working; and he assumes the risks and dangers of all such defects of which he has knowledge, and of which he would have had knowledge by the exercise of ordinary care and diligence. *Manufacturing Co. v. Erickson*, 55 Fed. 943, 946, 5 C. C. A. 341, 344; *Fordyce v. Edwards*, 60 Ark. 438, 442, 30 S. W. 758; *Anderson v. Railway Co.*, 39 Minn. 523, 41 N. W. 104; *Railroad Co. v. Leverett*, 48 Ark. 347, 3 S. W. 50, 3 Am. St. Rep. 230; *Wormell v. Railroad Co.*, 79 Me. 405, 10 Atl. 49, 1 Am. St. Rep. 321; *Way v. Railroad Co.*, 40 Iowa, 341; *Batterson v. Railway*, 53 Mich. 125, 18 N. W. 584; *Illick v. Railway Co.*, 67 Mich. 632, 35 N. W. 708; *Morton v. Railroad Co.*, 81 Mich. 435, 46 N. W. 111.

The plaintiff in this case alleged that his injury was caused by the

failure of the railroad company to provide the engine upon which he was working as fireman with suitable brakes to arrest its motion when occasion required. The court charged the jury that if there was no brake upon the engine, if the absence of the brake caused the injury, and if the plaintiff was not aware of the fact that the engine was not provided with a brake, and if a person of ordinary prudence, exercising reasonable care, would not, under the circumstances of this case, have been aware of this fact, they might render a verdict against the company. It is contended that this charge was erroneous, (1) because there was no substantial evidence to warrant the finding of the jury that the plaintiff did not know, or by the exercise of ordinary care would not have known, of the absence of the brake; (2) because there was no substantial evidence to warrant their finding that the injury could have been avoided by the presence of the brake upon the engine; and (3) because there was no substantial evidence to warrant the finding that the absence of the brake was the proximate cause of the injury. A careful and painstaking examination of the testimony has satisfied us, however, that this position cannot be sustained. The plaintiff testifies that he was not aware that the engine was not furnished with a brake. Another witness, who was employed about the engine as a brakeman for some time, demonstrates by his testimony that he did not know whether there was a brake on the engine or not; and the jury made an ocular inspection of an engine of the same character as that upon which the accident occurred, for the express purpose of determining this question, and they found this issue in favor of the plaintiff. The knowledge upon this question which an inspection of the engine conveyed to the minds of the jurors is not, and cannot be, presented to this court by the record; and we cannot undertake to say that all reasonable men, with the testimony and the knowledge which this jury lawfully acquired, would necessarily come to a conclusion contrary to that which these jurors have reached. *McReynolds v. Railway Co.*, 14 Am. & Eng. R. R. Cas. 172, 174; *Railroad Co. v. Hopkins*, 90 Ill. 323.

Upon the question whether or not the engine could have been stopped after knowledge of the presence of the horse in the trestle in time to prevent the accident, the testimony was not so clear that it was the duty of the court to withdraw this issue from the jury. Nor can it be properly said, as a matter of law, that the absence of this brake was not the proximate cause of the injury. It is undoubtedly true that one of the proximate causes of the accident was the negligence of the party who permitted the horse to stray into the trestle. But if the injury would not have been inflicted if there had been a brake upon the engine, it cannot be truthfully said that the absence of this brake was not another of the proximate causes of the damage, inasmuch as the accident would not have happened if the brake had been provided. If it be true, as the jury have found, that no injury would have been inflicted upon the plaintiff if this engine had been provided with a brake, it is no defense for the railroad company that the concurring negligence of the owner of the horse contributed to the infliction of the injury. One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent

as for one caused entirely by his own negligence. It is no defense for a wrongdoer that a third party shared the guilt of the same wrongful act, nor can he escape liability for the damages he has caused on the ground that the wrongful act of a third party contributed to the injury. *Railway Co. v. Callaghan*, 12 U. S. App. 541, 56 Fed. 988, 6 C. C. A. 205; *Railway Co. v. Sutton*, 27 U. S. App. 310, 312, 63 Fed. 394, 395, 11 C. C. A. 251-253; *Railway Co. v. Chambers*, 68 Fed. 148, 153, 15 C. C. A. 327, 332; *Railway Co. v. Needham*, 69 Fed. 823, 824, 16 C. C. A. 457, 458; *Railroad Co. v. Cummings*, 106 U. S. 700, 702, 1 Sup. Ct. 493, 27 L. Ed. 266; *Harriman v. Railway Co.*, 45 Ohio St. 11, 32, 12 N. E. 451, 4 Am. St. Rep. 507; *Lane v. Atlantic Works*, 111 Mass. 136; *Griffin v. Railroad Co.*, 148 Mass. 143, 145, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526; *Cayzer v. Taylor*, 10 Gray, 274, 69 Am. Dec. 317; *Elmer v. Locke*, 135 Mass. 575; *Booth v. Railroad Co.*, 73 N. Y. 38, 29 Am. Rep. 97; *Cone v. Railroad Co.*, 81 N. Y. 206, 37 Am. Rep. 491.

Nor does the absence of brakes from this engine fall without the legal definition of the proximate cause of the injury which the plaintiff suffered. An injury that is the natural and probable consequence of an act of negligence is actionable, while one that could not have been foreseen nor reasonably anticipated as the probable result of such an act cannot be made the basis of an action for damages. The purpose of brakes upon engines and cars is to quickly arrest their speedy motion, and to prevent collisions and accidents. The natural and probable consequences of their absence from machines as powerful and as rapid in their movements as locomotive engines are the collisions and accidents which it is the purpose of their use to avoid. From the failure to provide this engine with proper brakes to arrest its motion, the accident and injury which resulted, or others of like character, might well have been anticipated as probable consequences; and the evidence in the record is ample to sustain the finding of the jury that the injury to the plaintiff was caused by that absence. The very fact that it is the common—the almost universal—practice to provide locomotive engines with brakes for the purpose of controlling their movements, and preventing accidents and collisions, is very persuasive, if not conclusive, evidence that such disasters may be reasonably anticipated as and are the probable consequences of their absence. *Railway Co. v. Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582; *Railway Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256.

It is assigned as error that the court instructed the jury that the failure of the company to provide this engine with brakes was actionable negligence, for which the defendant was liable. But this specification is untenable. Actionable negligence in this case was the failure of the railroad company to exercise reasonable care to provide a reasonably safe engine for operation upon this railroad. The plaintiff testified that he had never worked upon an engine before which was not provided with a brake, although he had been in the employment of railroad companies for some years. The knowledge that it is the usual practice to provide road engines with brakes to control and arrest their motion is so common and general that courts cannot assume to be ignorant of it. Courts take judicial notice of

business customs and practices which form a part of the common knowledge of the people of the country. *Brown v. Piper*, 91 U. S. 37, 42, 23 L. Ed. 200; 1 Greenl. Ev. 11. There may be, and probably are, circumstances under which the absence of a brake from an operating engine would not constitute a want of reasonable care to provide a reasonably safe locomotive for the purpose to which its use is applied. This might be true of an engine employed in a yard for switching purposes. It might be true under many circumstances which could be shown by evidence. But in the case at bar the defective engine was a road engine, employed in the usual service of moving loaded trains along the railroad. There was no evidence of any circumstances tending to excuse the failure to supply it with the ordinary appliances used to control the movements of such engines. This, then, was the case presented to the court below: Railroad companies ordinarily provide their road engines with brakes. The exercise of ordinary and reasonable care induces carriers to equip their road engines in this way. The purpose of the exercise of this care is to prevent accidents and collisions. Such accidents and collisions are the natural and probable consequences of a failure to exercise this care. The conclusion was inevitable that the failure to provide this road engine with brakes, in the absence of any evidence excusing it, was a failure to exercise ordinary care to provide a reasonably safe engine for operation upon this railroad. And the charge of the court that the defendant was liable for any injury which resulted from the failure to provide the brakes is sustained by the evidence, the law, and the reason of the case.

It is assigned as error that the court refused to instruct the jury that a servant is bound to take reasonable care and make reasonable effort to discover any dangers and defects in the place and machinery in which and with which he is to work; that, the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him; and that if the plaintiff could, by using ordinary care and diligence, have informed himself of the condition of the engine, as to brakes, and if he failed to do so, and an ordinarily prudent man, under like circumstances, would have done so, his failure to take such precautions was negligence, and would bar his recovery in the case. The rules which measured the respective liabilities of the plaintiff and the defendant in this case have been stated at the opening of this opinion. So far as this requested instruction conforms to those rules, it was given in the general charge of the court; and, so far as it does not conform to them, it was erroneous, and should not have been given. The court charged the jury that if the engine was without brakes, and this fact was unknown to the plaintiff, "and could not have been known to him by the exercise of reasonable diligence, under the circumstances of the case as shown by the evidence," the company might be liable; and, when the entire charge is carefully read, nothing inconsistent with this declaration can be found in it. There was no error in the refusal of the court to give the requests under consideration, in view of the general charge, which presented to the jury all the sound propositions of law stated therein.

Another specification of error is that the court refused to instruct the jury that if the plaintiff was guilty of negligence in riding on an engine backing with the tender foremost in the dark, without a light upon the forward end of the tender, he could not recover. But there was no error in this refusal. The plaintiff could not recover for the negligence of the company in running this engine backward in the night without a light upon the forward end of the tender, because the plaintiff was aware of this negligence, and assumed the risk of it. But he did not know that the engine upon which he was riding was not provided with brakes. The exercise of ordinary care by the defendant would have equipped it with these appliances. He had the right to assume that the defendant had exercised this care. He did undoubtedly indulge in that assumption. The jury have found that the absence of the brakes was not an obvious defect,—not a defect which a person of ordinary prudence, exercising reasonable care, would have discovered under the circumstances of this case. As he was ignorant of the absence of the brakes, he did not assume the risk of that absence; and his assumption of the risk of riding upon an engine and tender in the night, with a headlight upon its forward end, was not an assumption of the risk of operating this engine without brakes. His negligence regarding, or his assumption of, the former risks, was neither such contributory negligence regarding, nor such an assumption of, the latter risk, as bars him from a recovery for the negligence of the defendant producing it. A servant may not assume a risk, or be guilty of contributory negligence in exposing himself to a risk, of which he is ignorant, and of which an ordinarily prudent person would not have been aware by the exercise of ordinary care and diligence. *Manufacturing Co. v. Erickson*, 55 Fed. 943, 948, 949, 5 C. C. A. 341, 346; *O'Neill v. Railway Co. (Neb.)* 86 N. W. 1098; *Railway Co. v. Keegan*, 87 Fed. 849, 852, 31 C. C. A. 255, 258.

Counsel for the defendant also complain that, when the jury were sent to inspect the engine, the court instructed them to "go inside, and try to put themselves only in the same place that the fireman would naturally occupy, and then, occupying that place, to determine whether the wheels of the engine on which the brakes would be could be seen from there, without looking for them, while a man was employed for several hours doing work on the engine as a fireman; that is to say, whether he could easily see them by just keeping his eyes open." If this excerpt from the instructions of the court had been all that was said to the jury on this subject, it might have been erroneous. But it was followed with the direction that "a man cannot shut his eyes, and say he don't want to see anything which a reasonable man could not help but see if he kept his eyes open," and that "if the fact that there were not any brake shoes on that engine was obvious to any reasonably prudent man who runs on it as a fireman for several hours, as the evidence shows that this plaintiff did for six hours, from Hulbert to Brinkley, before he went back again before the accident happened, that is perfectly obvious to a man who is fireman and traveling for six hours without hunting for it, then the court will tell you that he had knowledge of, and ought to have known of, it, and he is chargeable with it as if he had known it," and that "if in getting off and on and

working and firing for six hours as any reasonably prudent person would have noticed it, then you are to consider that fact. If, on the other hand, a man could not have noticed it, who was a fireman, by getting on and off, and then attending to his duty and business, as the evidence shows plaintiff is, you may reach another conclusion." Excerpts from a charge cannot be wrested from their connection and relation, and fairly criticised. The entire charge upon a given subject must be taken together, and if, when so read, it conforms to the law, no just objection to it can be urged. When the instruction of the court upon the duty of the jury in inspecting this engine is so read, it will be found to be in accordance with the established rules of law which control this case, and which are stated in the opening of this opinion. There was no error in the instruction of the court upon this subject.

It is assigned as error that the court repeatedly instructed the jury that it was the duty of the company to furnish its servants with reasonably safe machinery and a reasonably safe working place. This instruction was a patent and unquestionable error. It has been so declared by this court repeatedly, from *Railway Co. v. Jarvi*, 3 C. C. A. 433, 435, 436, 53 Fed. 65, 67, 68, decided in 1892, through *Gowen v. Harley*, 6 C. C. A. 190, 197, 56 Fed. 973, 980, *Railway Co. v. Linney*, 7 C. C. A. 656, 660, 59 Fed. 45, 48, *Railway Co. v. Needham*, 69 Fed. 823, 825, 16 C. C. A. 457, 459, to and including *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.*, 114 Fed. 133, decided in 1902. The limit of the duty of the master to the servant in the matter of place of service, of machinery, and of appliances, is to exercise ordinary care to furnish him with a reasonably safe place and reasonably safe appliances, and to use ordinary care to keep the place and the appliances in a reasonably safe condition. Moreover, the presumption is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice, and could not have prejudiced, the complaining party, that the rule that error without prejudice is no ground for reversal is applicable. *Association v. Shryock*, 20 C. C. A. 3, 11, 73 Fed. 774, 781; *Railway Co. v. McClurg*, 8 C. C. A. 322, 325, 326, 59 Fed. 860, 863; *Deery v. Cray*, 5 Wall. 795, 807, 808, 18 L. Ed. 653; *Smiths v. Shoemaker*, 17 Wall. 630, 639, 21 L. Ed. 717; *Moore v. Bank*, 104 U. S. 625, 630, 26 L. Ed. 870; *Gilmer v. Higley*, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62; *Railroad Co. v. O'Brien*, 119 U. S. 99, 103, 7 Sup. Ct. 118, 172, 30 L. Ed. 299; *Mexia v. Oliver*, 148 U. S. 664, 673, 13 Sup. Ct. 754, 37 L. Ed. 602; *Railroad Co. v. O'Reilly*, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; *Peck v. Heinrich*, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302. But in the case at bar the record makes it clear beyond all doubt that this error did not prejudice, and could not have prejudiced, the railroad company, because no question concerning its duty or its negligence was left to the jury to consider by the charge of the court. The railroad company conceded that there were no brakes upon the engine. The absence of brakes upon this road engine, in the absence of any evidence excusing it, was conclusive evidence, as a matter of law, of the lack of ordinary care to provide reasonably safe machinery to operate this railroad. The court clearly and pos-

itively instructed the jury to this effect. It instructed them that the railroad company was liable for any injury that was caused by the failure to supply this engine with brakes, unless the plaintiff knew and assumed the risk of their absence. This left the jury nothing to consider relative to the care or the negligence of the company, and limited the issues they were to determine to the questions whether or not the absence of the brakes was the proximate cause of the injury, and whether or not the plaintiff knew, or ought to have known, and hence assumed the risk, of this absence. As there was no question of the care or negligence of the company submitted to the jury, it conclusively appears beyond all doubt that the erroneous charge upon that subject could not have prejudiced the defendant, and error without prejudice is no ground for reversal.

There are other specifications of error which have not been recited in detail. They have all been carefully considered. So far as they present any debatable question, they have been disposed of by the rules and principles to which we have adverted, and the discussion in which we have already indulged. Suffice it to say that a patient and painstaking review of all the evidence, of the charge of the court, and of all the assignments of error, has led us to the conclusion that this case was fairly and impartially tried, and that the rulings and charge of the court were free from prejudicial error. The judgment below must therefore be affirmed, and it is so ordered.

THAYER, Circuit Judge. I concur in the order affirming the judgment below for the reasons stated in the foregoing opinion, but I would not be understood as concurring in the broad statement, which the opinion contains, that a servant "assumes the risks and dangers of all * * * defects [in machinery and appliances] of which he has knowledge, and of which he would have had knowledge by the exercise of ordinary care and diligence." Nor do I think that such a broad statement of the law is necessary to a correct decision of the case. It is well settled that a servant who uses machinery, tools, or appliances known to be defective, but, in pursuance of a promise by the master that they will be repaired, does not assume the risk of injury, but may recover if hurt, excepting where the risk of injury is so imminent that a prudent person would not have used them at all. And I conceive that there may be other exceptions to the rule. *Hough v. Railway Co.*, 100 U. S. 213, 225, 25 L. Ed. 612, and cases cited; *Mining Co. v. Fullerton*, 16 C. C. A. 545, 549, 69 Fed. 923. See, also, *Southern Pac. Co. v. Yeargin*, 48 C. C. A. 497, 109 Fed. 436, 441.

CALDWELL, Circuit Judge, joins in the views expressed in this concurrence.

SOUTHERN PAC. CO. v. SCHOER.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1902.)

No. 1,568.

1. MASTER AND SERVANT—NEGLIGENCE—STATES MAY REGULATE LIABILITY FOR.

The states have the right to regulate within reasonable limits the relations between employers and employes within their borders, and to fix by legislative enactments the liabilities of the former for the acts and negligence of the latter.

3. NEGLIGENCE OF SUPERIOR SERVANTS—LIABILITY UNDER UTAH STATUTE.

Sections 1342 and 1348 of the Revised Statutes of Utah make all servants employed in the service of a master doing business in that state, who are intrusted by him with authority to command his other servants, or with the authority to direct another of his servants in the discharge of his duties, vice principals of their master, and charge him with liability for their negligence whether it was committed in the discharge of the positive duties of the master or in the performance of the primary duties of the servants.

3. SAME—ACTS NOT DONE WHILE EXERCISING SUPERINTENDENCE.

Those sections make the master liable for the negligence of superior servants committed in the discharge of their duties as employes, whether the negligence was committed while they were exercising their authority to command or superintend others or not.

4. EVIDENCE—WRITINGS.

A writing which contains competent evidence upon a material issue cannot be lawfully rejected because it also contains evidence which is incompetent and irrelevant.

5. ACT OF GOD EXCUSING PERFORMANCE OF DUTY.

Nothing less than such a fortuitous gathering of circumstances as prevents the performance of a duty, and such as could not have been foreseen by the exercise of reasonable prudence, or overcome by the exercise of reasonable care and diligence, constitutes an act of God which will excuse the discharge of a duty.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Utah.

Thomas T. Fauntleroy (Cornelius H. Fauntleroy, on the brief), for plaintiff in error.

W. L. Maginnis (A. J. Weber, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Between 1 and 2 o'clock on the dark and foggy morning of December 20, 1899, the second section of a passenger train of the Southern Pacific Company, upon which H. A. Schoer was a fireman, ran into the rear of the first section near the yard limits of the company at Terrace, in the state of Utah, threw this fireman against the boiler of the engine, and fastened him there under a mass of coal which was thrown from the tender by the shock of the collision, until he was so scalded by steam that escaped on account of the breaking of the water gauge that he died. C. Schoer, the administrator of his estate, brought an action against this company for alleged negligence causing his death, and obtained a verdict and judgment which this writ of error has been sued out to review.

The main complaint of the company is that the court below charged the jury that under the statutes of the state of Utah the engineer of the locomotive on which the deceased was a fireman was the representative of the company, and that his negligence, if any, in following the first section of the train too closely, and in running his engine too rapidly as he approached the yard limits at Terrace at the time of the collision, was the negligence of the company. The sections of the statute of Utah which induced this instruction are:

"1342. All persons engaged in the service of any person, firm or corporation, foreign or domestic, doing business in this state, who are intrusted by

such person, firm, or corporation as employer with the authority of superintendence, control, or command of other persons in the employ or service of such employer, or with the authority to direct any other employee in the performance of any duties of such employee, are vice-principals of such employer and are not fellow servants.

"1343. All persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being intrusted by such employer with any superintendence or control over his fellow employees, are fellow servants with each other; provided, that nothing herein contained shall be so construed as to make the employees of such employer fellow servants with other employees engaged in any other department of service of such employer. Employees who do not come within the provisions of this section shall not be considered fellow servants."

Rev. St. Utah, 1898.

It is not denied that the engineer in charge of the engine upon which the deceased was employed at the time of his death was intrusted by the company with authority to superintend and direct him in the performance of his duties, but it is contended that this master was not responsible for his negligence, because the negligence which caused the injury was committed while this engineer was discharging the primary duty of a servant, and was not engaged in performing one of the positive duties of the master, and because this negligence was committed while he was not exercising his authority to superintend the action of the fireman or to direct him in the performance of any of his duties.

The argument in support of the first contention is: Under the general law the master was not liable for the negligence of this engineer, because he was discharging one of the primary duties of the servant, and was not performing one of the positive duties of the master, when he committed the fatal acts of negligence. The purpose and effect of the sections of the statute of Utah which have been cited were not to change or to extend the liabilities of masters for the negligence of their servants, but their sole object and effect were to give an authoritative legislative definition of the terms "vice principal" and "fellow servant," and to leave the liabilities of the masters for the acts of their servants as they were before these sections were enacted. Therefore, since the Southern Pacific Company would not have been liable for the negligence of this engineer under the general law, it is not liable for it under this statute. The truth of the major premise of this syllogism is conceded. In the absence of a statute the liability of a master for the negligence of his servant is a question of general law, upon which the decisions of the state courts are not controlling upon the federal judiciary, and, unless the negligent servant is the general manager or general superintendent of the business of the master, it is not his grade, rank, or authority over other employés, but it is the nature of the duty he is discharging when he is guilty of the negligence, that determines whether he is a vice principal or a fellow servant, and when the master is liable or is exempt from liability for the injury caused by his carelessness. If he is discharging one of the absolute duties of the master, the latter is liable for his acts and for his negligence. But, if he is discharging one of the primary duties of the servants, his

employer is exempt from liability. *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Railroad Co. v. Conroy*, 175 U. S. 323, 327, 20 Sup. Ct. 85, 44 L. Ed. 181; *City of Minneapolis v. Lundin*, 58 Fed. 525, 527, 7 C. C. A. 344; *Coal Co. v. Johnson*, 56 Fed. 810, 6 C. C. A. 148. The construction and maintenance of a railroad is the business of the master. Its operation is the business of his servants. The failure to exercise reasonable care in construction and maintenance is the negligence of the master. The failure to exercise such care in the operation of a railroad is the negligence of the servant for which the master is not liable. The alleged negligence of the engineer of the second section of this train in running his engine too close to the preceding section, and too rapidly as he approached the yard limits at Terrace, was negligence in the operation of the railroad, for which the Southern Pacific Company was not liable, in the absence of a statute which changed the rules and principles of the general law. *Railroad Co. v. Needham*, 63 Fed. 107, 109, 11 C. C. A. 56, 58, 25 L. R. A. 833; *Railroad Co. v. Mase's Adm'x*, 63 Fed. 114, 115, 11 C. C. A. 63; *Brady v. Railway Co. (C. C. A.)* 114 Fed. 100. These principles and authorities amply sustain the first proposition of counsel for the plaintiff in error.

But the correctness of the second premise of their syllogism is not so obvious. A vice principal is the representative of the master, for whose acts and negligence the master is responsible. *City of Minneapolis v. Lundin*, 58 Fed. 525, 527, 7 C. C. A. 344. The rule that the master is liable for the negligence committed by a servant while he is discharging one of the positive duties of the master, and that he is not liable for his negligence when he is performing one of the primary duties of a servant, was not adopted to measure the liability of the master for the acts of a vice principal. It was established to determine who were and who were not vice principals. The master has been invariably held liable by all the courts for the acts and for the negligence of his vice principals. The question upon which they have disagreed—the question which has occasioned debate—has been who were vice principals. Under the general law in the federal courts and in many of the state courts that question has been answered by the rule which has already been stated, based upon the nature of the duty the servant was discharging when the negligence was committed. In this condition of the law and of the decisions the legislature of the state of Utah enacted the statute which has been quoted. It declares that employes who are intrusted by their employers with the authority to superintend other employes of the same master, or with the authority to direct any other employe in the discharge of any of his duties, are vice principals of such employer. This declaration is a plain departure from the general rule of law which we have been considering; an unequivocal declaration that servants who have the authority to direct and superintend other servants are vice principals of their masters, whether they are engaged in discharging the duties of their employers or the duties of their servants. There is no ambiguity in the terms, no uncertainty in the meaning of this statute, and no possible doubt of the purpose of the legislature in enacting it: It is too positive to be dis-

regarded, too plain for construction, and its manifest legal effect cannot be ignored. To sustain the position of counsel for the plaintiff in error that this clear and authoritative declaration of the relation of superior servants to their masters in the state of Utah did not modify or extend the liability of the master beyond that fixed by the general law would be to defeat the manifest object of the legislature in passing this act, and to arbitrarily strike down a law which that body had the undoubted right to enact and to enforce; for the unquestioned rule is that the states have the right to regulate within reasonable limits the relations between employers and employes within their borders, and to fix by legislative enactments the liabilities of the former for the acts and the negligence of the latter. *Railroad Co. v. Baugh*, 149 U. S. 368, 378, 13 Sup. Ct. 914, 37 L. Ed. 772; *Railroad Co. v. Hogan*, 63 Fed. 102, 105, 11 C. C. A. 51. Our conclusion is that sections 1342 and 1343 of the Revised Statutes of Utah of 1898 make all servants employed in the service of a master doing business in that state, who are intrusted by him with authority to command his other servants, or with the authority to direct another of his servants in the discharge of his duties, vice principals of their master, and charge him with liability for their negligence, whether it was committed in the discharge of the positive duties of the master or in the performance of the primary duties of the servants.

Another reason why counsel for the plaintiff in error insist that the Southern Pacific Company is not liable for the negligence of this engineer is that when he committed the acts of negligence charged he was not engaged in exercising his authority to superintend the fireman, or his power to direct the performance of any of his duties. It is earnestly contended that it is only when the superior servant is guilty of negligence while he is actually engaged in exercising his authority of superintendence and control over those subject to his direction that his master is liable for his negligence under the provisions of this statute. In support of this position *Shaffers v. Navigation Co.*, 10 Q. B. Div. 356, 357; *Fitzgerald v. Railroad Co.*, 156 Mass. 293, 31 N. E. 7; *Brittain v. Railway Co.*, 168 Mass. 10, 46 N. E. 111, and *Dantzler v. Iron Co.*, 101 Ala. 309, 14 South. 10, 22 L. R. A. 361, have been cited, and these cases adopt and enforce the rule for which counsel contend. But they enforce it because the limitation which counsel seek to read into the statute of Utah was written into the statutes these decisions were interpreting by the legislative bodies which enacted them. The employers' liability act of 1880 (43 & 44 Vict. c. 42) § 1, subsec. 2, which the opinion in the *Shaffers Case* was construing, charges the master with liability for injuries caused "by reason of the negligence of a person in the service of the defendants who had superintendence intrusted to him whilst in the exercise of such superintendence." The Alabama and Massachusetts statutes under which the cases from those states arose contain a like limitation. *Dantzler v. Iron Co.*, 101 Ala. 318, 14 South. 10, 22 L. R. A. 361, St. Mass. 1887, c. 270, § 1, subsec. 2. The statute of Utah under which this case arose contains no such limitation, and no indication that the legislature intended to adopt any such restriction. On the other hand, it plainly

declares that all persons intrusted by the master with the authority of superintendence of other persons in his employ are vice principals, and are not fellow servants. This is a declaration that they are vice principals not only when they are engaged in performing acts of superintendence and control, but at all times when the authority of superintendence and control is vested in them, and they are engaged in discharging their duties as servants of their master. This statute is so plain that it cannot be lawfully construed. To write into it the limitation suggested by counsel and found in the laws of England, Alabama, and Massachusetts would be to so amend it as to deprive it of the greater portion of its effect, in violation of its terms, and of the intention of the legislature which its words clearly disclose. It would be judicial legislation, which it is not the province of the courts to enact.

In their brief in reply counsel for the company suggest a third reason why, in their opinion, the Southern Pacific Company was not liable for the negligence of this engineer. It is that this company pleaded in its answer that the night was so dark and foggy that the proximity of the first section of the train could not be discovered by employes on the engine of the second section in time to stop the latter. But, if the night was so dark and foggy that this engineer could not discover the first section in time to stop his engine, reasonable care and prudence on his part demanded that he should either send forward his fireman as he approached the yard limits at Terrace to ascertain its location, or should run his engine so slowly and carefully that he could stop at any moment, and could surely avoid a collision. The complaint of the plaintiff did not estop him from a recovery for the negligence of this engineer which the evidence at the trial established. The result is that there was no error in the charge of the court that the engineer upon the second section of this train was the representative of the company, and that, if his negligence in operating his engine caused the injury, the company was liable to the plaintiff for the damages that resulted. *Dryburg v. Milling Co.*, 18 Utah, 410, 412, 55 Pac. 367; *Railway Co. v. Calvert* (Tex. Civ. App.) 32 S. W. 246, 247; *Railway Co. v. McDonald* (Tex. Civ. App.) 31 S. W. 72; *Railway Co. v. Wrenn* (Tex. Civ. App.) 50 S. W. 210.

It is assigned as error that the train sheet of the railroad company, which disclosed the times when the two sections of the train which collided left the various stations of Toana, Montello, Tacoma, Gartney, and Lucin before they arrived at Terrace, and which also disclosed the time of the collision at Terrace, was admitted in evidence over the objection of counsel for the company. An examination of the record, however, discloses the fact that the only objection to this train sheet was leveled at the entries thereon of the times when the two sections arrived at Terrace. No objection whatever was made to the introduction of the train sheet for the purpose of showing the movements of the sections of the train before they reached Terrace, or to the train sheet as a whole; and the train sheet disclosed the times when the sections left all the stations mentioned above before they arrived at Terrace. It was tacitly conceded that for the purpose of showing everything which appeared upon this sheet except the time of the ar-

rival of these sections at Terrace it was admissible evidence. Conceding, without deciding, that the entries upon the train sheet of the times of the arrival of the two sections at Terrace and of the time of the collision were not competent testimony of those facts, the train sheet was still admissible, and the objection of counsel was properly overruled. If the train sheet contained any evidence competent and material to the issue, it could not be lawfully rejected; and it was tacitly conceded that the entries of the times when the sections of the train left the preceding stations were competent evidence of those facts, for no objection was made to these entries, and no objection was interposed to the train sheet as a whole. Since a portion of the train sheet was competent evidence, the objection to its introduction could not be sustained, and the proper remedy of counsel for the company was to request the court to instruct the jury at the time of its introduction or at the close of the case that it must not be considered as evidence of the time of the collision, or of the times of the arrival of the two sections at Terrace. No such request was made and there was no error in the ruling of the court upon this subject.

The next objection to the trial of this case is that the court refused to instruct the jury that, if the death of the deceased was proximately caused by a sudden and unusual fog, and without fault or negligence of the defendant, their verdict must be for the company. The court clearly and emphatically instructed the jury that there could be no recovery in this case, and that their verdict must be for the defendant, unless they were satisfied by a reasonable preponderance of the evidence that the death of the fireman was caused by its negligence. There was evidence at the trial that the night was dark and foggy, that it was difficult to distinguish objects at any considerable distance, and that the headlight of the second section of the train was not perceived until it was very near to the employes upon the first section. But there was nothing in all this, or in any of the evidence in the case, to warrant an instruction to the jury that they might find that this collision was caused by an act of God; and nothing less than an act of God would relieve the defendant from the duty of exercising reasonable care in the operation of these trains. The foundation of the rule that the act of God excuses the failure to discharge a duty is the maxim, "*Lex neminem cogit ad impossibilia.*" If, by the use of reasonable care, prudence, and diligence under the circumstances of a particular case, it is possible to discharge the duty, then those circumstances do not constitute a valid excuse for a failure to perform it. Nothing less than such a fortuitous gathering of circumstances preventing the performance of a duty as could not have been foreseen or overcome by the exercise of reasonable prudence, care, and diligence constitutes an act of God which will excuse the discharge of the duty. The record discloses no such circumstances. The night was dark and foggy. This condition of the atmosphere imposed upon the operators greater watchfulness and care to prevent collisions and the duty of driving their engines with less speed and more caution. But there was nothing in the foggy air or in the darkness of the night which would have prevented them from safely operating their trains if they had exercised a care, watchfulness, and diligence proportionate

to the situation and the circumstances in which they were placed. In other words, it was not impossible to operate these trains safely by the use of reasonable care; and in this state of the case there was no error in the refusal of the court to submit to the jury the question whether or not the death of the deceased was the act of God. It discharged its full duty when it told the jury that the defendant was not liable for his death unless it appeared by a fair preponderance of the testimony that the defendant was guilty of negligence which caused it.

Another complaint is that the court refused to instruct the jury that, if there was ample time for the flagman to go back and warn the second section of the train after the first section stopped, and no flagman went back a sufficient distance to give that warning, and if the failure or neglect to do so was the proximate cause of the death of the deceased, the verdict of the jury must be for the defendant. But the court instructed the jury in its general charge that there had been some evidence introduced tending to show negligence on the part of the employes of the first section of the train, and that, if there was any such negligence, the defendant was not in any way liable for it, because the employes of that section did not represent the company, but were fellow servants of the deceased. It further instructed them that the risk flowing from the negligence of these servants was a risk assumed by the fireman. This instruction, in view of the evidence in the case, sufficiently presented to the jury the principle of law stated in the request which was refused. That principle was that, if the proximate cause of the death was the negligence of the brakeman on the first section of the train, the plaintiff could not recover. A charge that the defendant was not liable if the proximate cause of the death was the negligence of any of the employes on the first section of the train clearly announced this rule, because the brakeman was one of those employes, and the whole is greater than any of its parts. Where a rule or principle of law is clearly declared by the court in its general charge, it is not error for it to refuse to repeat it in the words of counsel. *Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co.* (C. C. A.) 114 Fed. 133; *Telegraph Co. v. Morris*, 105 Fed. 49, 53, 44 C. C. A. 350, 353; *Trumbull v. Erickson*, 97 Fed. 891, 38 C. C. A. 536; *Railroad Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433.

One of the charges of negligence was the failure to use reasonable care to keep the coal gate of the engine in proper repair, and it is assigned as error that the court admitted the testimony of a witness that this gate was defective and weak 30 days before the accident. The only ground for this specification is that the time named by the witness was too remote from the date of the accident. But it is competent to prove defects in tools and machinery for a reasonable time before the accident which those defects are charged with inducing, and it cannot be said that 30 days is an unreasonable time within which to permit such testimony to range. There is at least a reasonable probability, in the absence of other evidence, that a defect existing 30 days before an accident was not remedied before the casualty occurred. There was no error in the admission of this evidence.

Finally, it is contended that the court erred because it permitted one witness to testify that a rule of the company which required trains to

keep 10 minutes apart did not apply to any train in particular, and permitted another to state that the conductor upon the first section of this train had "full charge of the running of the train over all the employes on the train." The only grounds for these objections are that the rules are the best evidence of their contents, and that the testimony of the witness as to the power of the conductor was a conclusion of law. Conceding that the written rule was the best evidence of its terms, it was competent for the witness to testify whether or not this rule applied to all the trains of the company or only to a portion thereof, and conceding that the statement of the witness who testified to the authority of the conductor was a conclusion of law, the admission of that testimony was not prejudicial, because the legal presumption is, in the absence of evidence, that the conductor has exactly the power which this witness testified was vested in him (*Railroad Co. v. Ross*, 112 U. S. 377, 390, 5 Sup. Ct. 184, 28 L. Ed. 787; *Railroad Co. v. Baugh*, 149 U. S. 368, 381, 13 Sup. Ct. 914, 37 L. Ed. 772), and error without prejudice is no ground for reversal.

There was, therefore, no error in these rulings, and the judgment below must be affirmed. It is so ordered.

FITZGERALD v. FIRST NAT. BANK OF RAPID CITY.
(Circuit Court of Appeals, Eighth Circuit. March 24, 1902.)

No. 1,583.

1. CONTRACTS—TERMS HAVE ORDINARY MEANING.

The legal presumption is that the words used in an agreement have their ordinary and customary meaning.

2. SAME—CONSTRUCTION—FUNDAMENTAL RULE.

The basic rule for the construction of a contract is to place one's self in the situation of the parties to the agreement when it is made, and then to ascertain and declare the intent with which they used its terms when their minds met.

3. SAME—PRACTICAL INTERPRETATION PERSUASIVE.

The practical interpretation given to their agreements by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their intent.

4. SAME—CONSTRUCTION.

Where A. was building a railroad in two ways: (1) By the use of his own employes; and (2) by the use of contractors, who had agreed to construct certain sections for specified prices,—an agreement to furnish beef to the "men working for" him is not an agreement to furnish it to his contractors, but is limited to a contract to furnish it to his employes or servants.

5. STATED ACCOUNT—ESTOPPEL BY.

One who delivers, or receives and accepts without objection, an account stating the debits and credits between him and the other party to the accounting, is thereby estopped from denying the correctness of the account thus stated, in the absence of fraud, mistake, or undue advantage.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Nebraska.

On May 26, 1890, John Fitzgerald & Bro. were engaged in constructing a railroad from Custer City to Deadwood, in South Dakota. They con-

structed a portion of this railroad by means of workmen whom they employed and fed themselves, and other portions by the use of subcontractors, who agreed with them to construct certain portions of the railroad for certain prices. Schleuning & Young were dealers in beef and other meats in Rapid City, S. D. Fitzgerald & Bro. made a written agreement with Schleuning & Young that the latter (called in the contract the "party of the second part") "agrees to furnish beef along the line of the B. & M. Railroad between Custer City and Deadwood, in South Dakota, during the building of said line, to the men working for the said party of the first part, for the sum of 6¼ cts. (six and three-quarters) per lb.; said beef to be of the best quality, and to be furnished whenever desired by the boarding bosses along said line; said party of the second part to be paid on or about the 25th day of the month following that in which the meat is furnished, less eleven per cent. (11%) to be retained by the party of the first part for collection of accounts due to party of the second part for beef furnished in accordance with this contract." Schleuning & Young furnished under this contract meat amounting in value to the sum of \$21,622.74, and were paid \$21,597.38, leaving a balance of \$25.36. A portion of this meat was furnished to men working for Fitzgerald & Bro., and a portion of it to contractors who were fulfilling their agreements with Fitzgerald & Bro. to construct certain portions of the railroad. Monthly statements of the meat so furnished and paid for were rendered to Fitzgerald & Bro. during the progress of the work. This work was commenced in May, 1890, and was completed in December of that year. During this time Chamberlain & Skinner and Wade & Jones were engaged in constructing certain portions of the railroad under contracts with Fitzgerald & Bro., and Schleuning & Young furnished meat of the value of about \$4,000 to Chamberlain & Skinner, and meat of the value of about \$750 to Wade & Jones. This meat was furnished during all the months between June and December 31, 1890; but no monthly statements of it were presented or delivered to Fitzgerald & Bro. as the work progressed, although such statements were made and presented to Chamberlain & Skinner and Wade & Jones, respectively. Schleuning & Young made independent contracts with Chamberlain & Skinner and Wade & Jones to furnish them meat at a lower price than that specified in the contract with Fitzgerald & Bro. More than three years after the railroad had been completed, and on July 17, 1893, Schleuning & Young made a statement of account against Fitzgerald & Bro., in which they charged them with the meat which they had furnished to Chamberlain & Skinner and Wade & Jones, and assigned the claim based upon this account to the First National Bank of Rapid City, S. D. On September 12, 1893, this bank brought an action against John Fitzgerald and David Fitzgerald, the members of the firm of John Fitzgerald & Bro., to recover the \$25.36 conceded to be due upon the account against them, and also to recover the value of the meats furnished by Schleuning & Young to Chamberlain & Skinner and Wade & Jones. The bank alleged, and Fitzgerald & Bro. denied, that the defendants had agreed to purchase and pay for the meats furnished to Chamberlain & Skinner and Wade & Jones, and that they were furnished to them by Schleuning & Young under the contract of May 26, 1890. None of the meat in question was ordered, desired by, or furnished to boarding bosses along the line, for neither Chamberlain & Skinner nor Wade & Jones had boarding bosses on the portions of the railroad which they constructed. At the trial the court instructed the jury (1) that by the agreement of May 26, 1890, Fitzgerald & Bro. agreed to pay Schleuning & Young for all the meat they might sell to subcontractors who under them were constructing portions of the railroad, as well as for the meat which should be furnished when desired by the boarding bosses to the men employed by Fitzgerald & Bro. along the line; (2) that Fitzgerald & Bro. became absolutely liable to Schleuning & Young for all beef furnished subcontractors under that contract, whether the subcontractors ratified and consented to such an agreement and arrangement or not,—and refused to instruct the jury that the meats furnished to Chamberlain & Skinner and Wade & Jones were furnished under contracts with them, and not under the contract between Schleuning & Young and Fitzgerald & Bro. Under these instructions, which are challenged as error, the jury returned a verdict in favor of the bank, and a judgment was rendered against the defendants

for \$6,748.07. During the progress of the litigation, John Fitzgerald died, and Mary Fitzgerald, the administratrix of his estate, was substituted for him in the proceedings, and she is now the plaintiff in error in this action.

J. W. Deweese (James Manahan and Frank E. Bishop, on the brief), for plaintiff in error.

Richard A. Jones (H. C. Brome and Arthur H. Burnett, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The question in this case is whether or not Fitzgerald & Bro. were liable to Schleuning & Young for the meats which the latter furnished to the subcontractors, Chamberlain & Skinner and Wade & Jones, between June 1, 1890, and January 1, 1891, under the contract of May 26, 1890. Chamberlain & Skinner and Wade & Jones held independent contracts with Fitzgerald & Bro. whereby they had agreed to build certain sections of the railroad for specified prices. Schleuning & Young made independent contracts with each of these subcontractors to furnish them meat at a rate lower than that made in their contract with Fitzgerald & Bro., of May 26, 1890, to the end that they might get the meat without paying the commission which Schleuning & Young agreed Fitzgerald & Bro. should receive under that contract for collecting their bills. The meat was delivered to these subcontractors during the months of July, August, September, October, November, and December, 1890; and Schleuning & Young sent them monthly statements of the amounts thus delivered, but did not send such statements of this meat to Fitzgerald & Bro., although they sent to the latter monthly statements of all the meat for which Fitzgerald & Bro. have paid, a portion of which was furnished to other subcontractors.

The court instructed the jury that the contract of May 26, 1890, bound Fitzgerald & Bro. to pay for all meat furnished by Schleuning & Young under it to subcontractors, as well as for that furnished by them to the men whom Fitzgerald & Bro. employed to work for them by the day, and that this absolute liability existed, whether the subcontractors consented to this agreement or not. But Fitzgerald & Bro. were engaged in the construction of this railroad in two ways,—by means of men whom they employed, paid wages, and fed through their boarding bosses, and by means of subcontractors, who built certain sections of the road for certain prices, and who hired and fed their own employes. The contract reads that the party of the second part [Schleuning & Young] agrees to furnish beef "to the men working for the said party of the first part [Fitzgerald & Bro.] for the sum of 6¾ cts. (six and three-quarters) per lb.; said beef to be of the best quality, and to be furnished whenever desired by the boarding bosses along said line; said party of the second part to be paid on or about the 25th day of the month following that in which the meat is furnished, less eleven per cent. (11%) to be retained by the party of the first part for collection of ac-

counts due to party of the second part for beef furnished in accordance with this contract." The legal effect of this agreement was that Schleuning & Young undertook to furnish to the men working for Fitzgerald & Bro., at the price named, such quantities of beef as the boarding bosses should desire; and Fitzgerald & Bro., for 11 per cent. of their amounts, agreed to collect and pay the monthly bills for this beef, if these bills were furnished to them before the 25th of the month succeeding their contracting. The question is, what was the meaning of the words "men working for the said party of the first part"? Did they mean the men hired and employed by the party of the first part, or did they mean the subcontractors who had agreed with the party of the first part to build separate sections of the railroad, as well? Now, the primary and natural meaning of the term "men working for the said party of the first part" is the servants of the party of the first part,—those over whom that party has the power of control; the right to direct them when, where, and how to do the work, and for whose acts the party is liable, under the maxim *respondeat superior*. It may, indeed, be said that all who are engaged in executing contracts for another are in some sense working for him. But after all, this is not the primary meaning of the words. It is in a secondary and subsidiary sense that such men may be described by this term. Contractors for the construction of a railroad, for the erection of a building, or for the manufacture of a machine do not, in the common understanding of either lawyers or laymen, fall within the class of men who are working for the railroad company, or for the promoter of the building or the machine. They form a different and distinct class,—the class of contractors, as distinguished from the class of servants or employés. In the ordinary and customary interpretation of the words "men working for a party," the class they describe is confined to those who are employed, paid, controlled, and directed by that party, and who are in fact his servants and employés.

The legal presumption is that the terms of a contract are used in their ordinary sense, and that they have their usual meaning; and this presumption points to the conclusion that the men working for Fitzgerald & Bro., to whom Schleuning & Young agreed to furnish as much beef as should be desired by their boarding bosses, were the employés and servants of Fitzgerald & Bro. only, and were not the independent contractors with them who had agreed to build certain sections of the railroad for specified prices. *Brady v. Railway Co.* (C. C. A.) 114 Fed. 100; *Corning v. Board*, 102 Fed. 57, 60, 42 C. C. A. 154, 157.

The situation and relations of the parties at the time this agreement was made tend strongly to confirm this construction. Fitzgerald & Bro. were building a portion of this railroad with their own employés, whom they were obliged to provide with food in their camps along the line. They accomplished this through boarding bosses, whom they doubtless employed under the contract that they should collect the bills against them for the beef furnished to them, and should retain 11 per cent. of their amount. All this they had the power and the right to do, because they could, and doubtless did,

employ their workmen and boarding bosses under the terms expressed in the contract of May 26, 1890. But they had no control of the hiring or the managing of the boarding bosses and employes of the subcontractors under them, and no right to subject them to these terms. They were employed, controlled, and paid by the independent contractors beneath them. Moreover, these contractors were not bound by these terms. They were not parties to the contract of May 26, 1890. There was no stipulation in that contract, nor in the contracts under which they were constructing their sections of the road, that they would take any beef of Schleuning & Young at the price named in the contract of May 26th, or at all, or that they would allow Fitzgerald & Bro. to collect the bills against them for 11 per cent. of their amounts; and they were under no legal or moral obligation to do so. In this state of the case, it would be unnatural and unreasonable to expect to find in the contract between Fitzgerald & Bro. and Schleuning & Young any agreement that these subcontractors should take, or that Fitzgerald & Bro. should pay for, beef furnished to them by Schleuning & Young; and the agreement will be searched in vain for any such provision. The practical interpretation given to this contract by the parties themselves while they were executing it demonstrates the fact that Schleuning & Young were not bound to furnish, and Fitzgerald & Bro. were not required to collect their bills for beef furnished to subcontractors. And the practical interpretation given to their agreements by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent. *Schofield v. Bank*, 97 Fed. 282, 38 C. C. A. 179; *Publishing Co. v. Swift*, 97 Fed. 290, 296, 38 C. C. A. 187, 193; *Leavitt v. Investment Co.*, 54 Fed. 439, 4 C. C. A. 429, 12 U. S. App. 193; *Topliff v. Topliff*, 122 U. S. 121, 131, 7 Sup. Ct. 1057, 30 L. Ed. 1110; *City of Chicago v. Sheldon*, 9 Wall. 50, 54, 19 L. Ed. 594.

It will be noticed that in its inception this contract was without consideration, without mutuality, and void, because it specified no amount of beef which Schleuning & Young should furnish, or for which Fitzgerald & Bro. were required to pay. The only measure of the quantity to be found in it is that which should be desired by the boarding bosses along the line. But there was no agreement in it as to what amount these bosses should desire, or that they should desire any. It follows that while the delivery of beef according to the terms of this contract, and the agreement of Fitzgerald & Bro. to pay for the beef thus delivered, constituted sales of the goods thus accepted by Fitzgerald & Bro., yet these deliveries constituted no contract to accept or pay for any beef which Fitzgerald & Bro. refused to accept and pay for under the contract, for the reason that the quantity to be thus accepted and paid for was still undetermined, and there was no valid contract concerning it. *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77; *Crane v. C. Crane & Co.*, 45 C. C. A. 96, 105 Fed. 869; *Oil Co. v. Kirk*, 15 C. C. A. 540, 68 Fed. 791.

There is another peculiarity of this agreement which must not be overlooked. It is that Fitzgerald & Bro. were to pay on the 25th

day of the month following that on which the beef was furnished for such quantity of beef as was desired by the boarding bosses, at the price fixed in the contract, less 11 per cent. From the promise to pay monthly, a promise on the part of Schleuning & Young to furnish monthly statements of account, accompanied by the orders of the boarding bosses, is necessarily implied; and this implied stipulation was a material term of the contract, because only by the presentation of such bills and orders could Fitzgerald & Bro. learn the amount to be paid, and collect it out of the sums due to the boarding bosses under the terms of the written contract. So it was only for beef desired by the boarding bosses to feed the men employed by Fitzgerald & Bro., and for which bills were presented to them monthly, that they were required to pay.

Now it is contended that, notwithstanding these provisions of the contract, the parties construed it to bind Fitzgerald & Bro. to pay for the beef furnished to Chamberlain & Skinner and Wade & Jones, because they did pay for beef furnished under this contract to other contractors, namely, to Cable & Chute, Carroll & Donohue, Thomas Mansfield, and Gurley. But the payment for the beef furnished to these four contractors by Schleuning & Young does not tend to establish the conclusion that Fitzgerald & Bro. were bound by the contract to pay for, or that the parties to the contract supposed that they were bound to pay for, the beef furnished to other contractors. The limitations of the agreement—to beef furnished to the employés of Fitzgerald & Bro., to beef desired by the boarding bosses, and to beef for which monthly bills were furnished to Fitzgerald & Bro.—were all for their benefit. They had the right and the power to waive these limitations, either in part or altogether; to agree to pay for beef furnished to certain contractors, or for beef furnished to all the world. If, however, they waived these limitations, and paid 89 per cent. of the bills for beef furnished to Cable & Chute, Carroll & Donohue, Mansfield, and Gurley, that waiver and payment in no way bound them to pay for meats furnished to Chamberlain & Skinner and Wade & Jones, or to any other parties to whom Schleuning & Young might deliver the goods. The truth is that Schleuning & Young had agreed to furnish meat to the employés of Fitzgerald & Bro. at a certain price, and the latter had agreed to collect their bills for 11 per cent. of their amounts. The former were anxious to furnish meat, and the latter were desirous to earn their 11 per cent. The contractors were under no obligation to take meat of Schleuning & Young, nor to permit Fitzgerald & Bro. to collect the bills against them, and retain their 11 per cent., and no contract concerning the beef to be furnished to these contractors had been made. Schleuning & Young persuaded four of the contractors to take meat from them, and to allow Fitzgerald & Bro. to get their 11 per cent. For this meat they sent monthly bills to Fitzgerald & Bro., and the latter collected these bills and deducted their percentage. But all the parties to the contracts and to the transaction understood that the contract of May 26, 1890, neither bound the contractors to take, Schleuning & Young to deliver, nor Fitzgerald & Bro. to pay for, any meat delivered to the contractors. That this was the interpretation of the

contract and the understanding of their legal rights by all the parties to the transactions clearly appears from the following facts, which are disclosed by this record: In May, 1890, Schleuning presented to Chamberlain a letter of Mike Corcoran, one of the agents of Fitzgerald & Bro., which stated the price at which Schleuning & Young were to furnish beef under the contract of May 26, 1890, and Chamberlain replied that he could do better. On July 2, 1890, Schleuning & Young made an independent contract with Chamberlain & Skinner to furnish them meat at a price so low that they could get it at the same price as Fitzgerald & Bro. received it, with their commission off. They made a similar independent contract with Wade & Jones. They furnished meat to these contractors from the 1st of July, 1890, to December in that year, inclusive. During all this time they sent to Fitzgerald & Bro. monthly bills of the meat which they furnished to the employes of Fitzgerald & Bro. and to the four other contractors, but they did not include in these accounts any of the beef which they furnished to Chamberlain & Skinner or to Wade & Jones, but they sent monthly bills of this meat to these contractors. The work on the railroad was completed in December, 1890. Between June 1, 1890, and February 1, 1891, Schleuning & Young sent to Fitzgerald & Bro. 12 accounts of beef furnished, but they did not in any one of these accounts charge anything for any of the beef furnished by them to Chamberlain & Skinner or to Wade & Jones. On March 10, 1891, they wrote Fitzgerald & Bro.:

"Will you please remit balance due on your a/c, and don't you think you could be able to secure John Chamberlain and Wade & Jones a/c on a discount? We surely have waited patiently, and you know there is money coming to them from the B. & M. by you. There is a chance for you to make a good discount, as the a/c of them is surely good."

On March 11th they wrote Mr. Cagney, one of the agents of Fitzgerald & Bro.:

"Should you not send us final check, we will draw on you for \$5,000, for that is a little less than coming to us, which please honor on presentation."

The amount due them on that day, excluding the Chamberlain & Skinner and Wade & Jones accounts, was \$6,084.88. The amount due them, including those accounts, was over \$10,800. On March 17, 1891, they wrote:

"In looking over our a/c, found that we forgot to hand in a/c of Wade & Jones, amounting to \$802.25. If you can use the same and discount it, all right; otherwise have it returned at once, and by so doing oblige us."

In the last days of March, Fitzgerald & Bro. demanded of Schleuning & Young a final account, and they furnished one, wherein they set forth the debits and credits of the entire account from the beginning of the work to its close. This account contains no charge of any beef furnished to Chamberlain & Skinner, but the last item of the account is a charge for beef furnished Wade & Jones, \$802.25. To this account Fitzgerald & Bro. answered:

"The last item of your statement, Wade & Jones, \$802.25, cannot be allowed, as you never at any time, nor in any bill, sent an account against these people. Consequently you must not charge us with this item, by including it in your statement at this late date."

On April 4, 1891, Schleuning & Young replied to this letter in these words:

"I expect you are correct in regard to Wade & Jones. I made a draft, and forwarded the same to you; and, as you did not return the same, I expected you would discount 10 %, the same as you would do with other a/c's. If you have a chance to protect me in this a/c, I wish you would do so."

On April 8, 1891, Schleuning & Young wrote to Mr. John Cleary, the bookkeeper of Fitzgerald & Bro.:

"This W. Jones a/c, I know, was not included; but, if you can see a way to help me get it, I will let you an extra fifty dollars to assist me. As I understand, you have not made a settlement with them, and could hold out the same, or can I stop payment in the banks of John Fitzgerald? If so, please be so kind and let me know."

On April 10, 1891, they wrote Fitzgerald & Bro.:

"We also state that we have, as you know, and as we have stated to Mr. Cagney months ago, due us from Skinner & Chamberlain \$4,000.00, which we had to furnish at the same price as yourself in a/c that they did not want to take any meat for two months while we were furnishing unless they could get the same for the same as yourself, with commission off; but, if you can handle same, we will turn in a/c's, rather than wait any longer."

The record contains the questionable testimony of Mr. Schleuning to the effect that once or twice he demanded the payment of a part or all of the bills against Chamberlain & Skinner and Wade & Jones from agents of Fitzgerald & Bro., and they agreed to pay them. But he does not claim that he ever presented any claim for these bills in the monthly accounts or in the final account which he rendered, with the exception of the claim in the latter for the bill of Wade & Jones, which his firm immediately conceded, by letter, to be an unfounded demand. There is, indeed, nothing in this record to overcome the conclusive effect of the stated accounts to which reference has been made, and the letters which have been quoted. Schleuning & Young delivered 12 accounts to Fitzgerald & Bro. during the progress of this work, and just subsequent to its completion, none of which contain any claim for beef furnished to Chamberlain & Skinner or Wade & Jones. At the request of Fitzgerald & Bro. they furnished a final account in which they made no claim for the beef furnished Chamberlain & Skinner, but which contained a claim for that furnished to Wade & Jones, which they immediately afterwards, in writing, conceded was improperly charged against the defendants. It is not claimed that Schleuning & Young were induced by fraud, mistake, or by the taking of any undue advantage, to state these accounts; and in the absence of fraud, mistake, or undue advantage, an account stated is conclusive, and estops the party who presents it from assailing its correctness. Porter v. Price, 80 Fed. 655, 657, 26 C. C. A. 70, 72, 49 U. S. App. 295, 300; Atkinson v. Allen, 71 Fed. 58, 60, 17 C. C. A. 570, 572, 36 U. S. App. 255, 260; Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81; Davenport v. Wheeler, 7 Cow. 231; Wiggins v. Burkham, 10 Wall. 129, 19 L. Ed. 884; Philips v. Belden, 2 Edw. Ch. 1; Langdon v. Roane's Adm'r, 6 Ala. 518, 41 Am. Dec. 60; Oil Co. v. Van Etten, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 319; Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; Manufacturing Co. v. Starks, 4 Mason, 297, Fed. Cas. No. 11,802; 1 Am. & Eng. Enc. Law, 121.

These accounts alone are ample to prove that the parties to the contract of May 26, 1890, did not construe it to bind Schleuning & Young to deliver, or Fitzgerald & Bro. to pay for, meat delivered to Chamberlain & Skinner and Wade & Jones, at the price named therein. This conclusion becomes irresistible when it is considered that Schleuning & Young conceded in their letter that they made independent contracts with Chamberlain & Skinner and Wade & Jones to deliver them meat at a price lower than that named in the contract of May 26, 1890, because the latter were unwilling to pay the commission which that agreement guaranteed to Fitzgerald & Bro.

In the construction of a contract, the great desideratum is to ascertain and declare the intent of the parties to it when they made it. The basic rule for its interpretation is to put one's self in the place of the parties when their minds met upon the terms of it, and then, from a consideration of the entire agreement, its purpose, and the circumstances surrounding the parties, to find what they intended to agree to do. In view of the facts that the natural and primary meaning of the term "men working for the said party of the first part" is servants and employés of that party, and not contractors who are not subject to the command or control of the party; that Fitzgerald & Bro. were using their own employés, whom they fed through their own boarding bosses, to construct a part of the railroad, while they had let contracts to independent contractors for the construction of other sections of it; that they had the power to hire the former, subject to the terms of the contract of May 26, 1890, but that they gave the latter such contracts that they were not in any way subject to or bound by those terms; that the legal presumption is that the terms of a contract are used in their ordinary and customary sense, and that the parties to this contract, in the 13 stated accounts which passed between them in the years 1890 and 1891, and in their letters concerning them, both conceded that Schleuning & Young were not bound to furnish, and Fitzgerald & Bro. were not liable to pay for, the meat furnished to the contractors Chamberlain & Skinner and Wade & Jones,—the conclusion is irresistibly forced upon our minds that the only men to whom Schleuning & Young agreed to furnish beef by the contract of May 26, 1890, were the employés or servants of Fitzgerald & Bro., and the only beef for which the latter agreed to pay was the beef furnished to such employés.

The result is that the charge of the court was erroneous in two particulars: First, in that it declared that Fitzgerald & Bro. were liable to pay for beef furnished to their subcontractors; and, second, in that it declared that this liability existed whether the subcontractors consented or assented to the furnishing of beef to them under the terms of the contract of May 26th or not. The judgment below is accordingly reversed, and the case is remanded to the circuit court, with directions to grant a new trial.

THAYER, Circuit Judge (concurring). The sole question of fact which the lower court submitted to the jury for its determination was whether the beef supplied to the two subcontracting firms of Chamberlain & Skinner and Wade & Jones was sold and delivered to the said

firms on their credit, and under the contracts made by those firms with Schleuning & Young on or about July 2, 1890, or whether the meat was delivered to Chamberlain & Skinner and Wade & Jones under the contract which Schleuning & Young had entered into with Fitzgerald & Bro. on or about May 26, 1890, and on the credit of the latter firm. The theory of the lower court appears to have been that as there were two contracts in existence with different parties, under which the meat might have been delivered, that party was liable whom the plaintiffs below trusted and intended or elected to hold when the meat ordered was delivered. The court below instructed the jurors that this issue of fact was the real issue for them to determine, and it was the issue on which the decision of the case hinged, so far as the jury was concerned. In view of the facts alluded to in the main opinion,—that Schleuning & Young, after their contracts with Chamberlain & Skinner and Wade & Jones were entered into, rendered monthly bills for the meat delivered to these subcontractors, to them; that they did not render bills therefor to Fitzgerald & Bro. for such meat from and after July 1, 1890; and that in their correspondence and dealings with Fitzgerald & Bro. they practically admitted on several occasions that the meat delivered to the two subcontracting firms was not chargeable to Fitzgerald & Bro.,—I am of the opinion that it conclusively appears that Schleuning & Young sold and delivered the meat for which they now seek to hold the firm of Fitzgerald & Bro. liable to Chamberlain & Skinner and Wade & Jones, and on the credit of the latter firms, and that the attempt now made to hold Fitzgerald & Bro. was an afterthought. In the face of such evidence as the record contains, showing an evident intent to deal with Chamberlain & Skinner and Wade & Jones, and to extend credit to them for the meat which they ordered, I think the lower court erred in submitting to the jury the question whether the meat was sold on the credit of Fitzgerald & Bro. On this ground, and no other, I concur in the reversal of the judgment of the lower court. I conceive that owing to the uncertainty which attends the construction of the contract between Fitzgerald & Bro. and Schleuning & Young, on which this action is brought, and because of the contemporaneous construction of the contract by the parties themselves, the lower court may have construed that contract correctly as embracing meat which might be ordered by and delivered to all of the subcontractors under Fitzgerald & Bro., who were engaged in building the line of road referred to in the contract,—between Custer City and Deadwood, S. D. I think, however, that as Chamberlain & Skinner and Wade & Jones saw fit to enter into contracts of their own for the supply of meat with Schleuning & Young, and as the latter firm, after making such contracts, rendered all of their bills to Chamberlain & Skinner and Wade & Jones, and did not attempt to charge Fitzgerald & Bro. therefor until long after the meat was supplied, and on one or two occasions admitted that Fitzgerald & Bro. were not liable to pay for such meat, it is now too late to interpose that claim. If the firm of Schleuning & Young was at one time in a situation, as it may have been, to elect whom they would charge, they made such an election long before this suit was brought, and cannot depart therefrom.

LAND TITLE & TRUST CO. v. ASPHALT CO. OF AMERICA.

(Circuit Court, D. New Jersey. April 4, 1902.)

CORPORATIONS—RECEIVERSHIP PROCEEDINGS—INTERVENTION BY STOCK OR BOND HOLDER.

A bond or stock holder in a corporation, though averring that its answer is collusive and void, cannot intervene as a party defendant in receivership proceedings against it, and, while admitting its insolvency and that the appointment of receivers is necessary, question the propriety of the appointment of the particular receivers, having other remedy under the New Jersey corporation act.

Petition of Harry C. Spinks for Intervention as Defendant.

Coult & Howell, for petitioner.

Corbin & Corbin, for opponent.

KIRKPATRICK, District Judge. On the 28th day of December, 1901, the complainant in this case, the Land Title & Trust Company, filed its bill of complaint, setting out the causes for which the defendant, the Asphalt Company of America, should be adjudicated insolvent. A copy of the bill had been previously served upon the defendant company, and on the same day it appeared by its attorney, and filed its answer to said bill, in which it admitted the charges thereof, and joined in the prayer of the complainant for the appointment of receivers to preserve its property and collect and distribute its assets. The court proceeded, in a summary way, in accordance with the provisions of the statute of New Jersey, to adjudicate upon the matters presented, and by its decree declared the said corporation insolvent, and appointed Messrs. Tatnall, Mack, and Shanley receivers for such purpose. In the petition now filed by Harry C. Spinks he asks to intervene as a party defendant, charging that the answer of the defendant is collusive and void, and in order that he may set up matters of defense and methods of collecting the assets of the corporation, which he insists will not be adopted by the present receivers, although, as he claims, for the interest of the shareholders. Mr. Spinks claims this right to intervene because he is the owner of \$128,000, par value, of the bonds or certificates of indebtedness of the defendant company, and the owner of \$50,000, par value, of the shares of the corporation, upon which he has paid an assessment of 20 per cent., and is liable for an assessment of 80 per cent. By his petition Spinks admits that the decree of insolvency already made was proper and right, because he says that the said defendant corporation is now "temporarily insolvent," and he admits that receivers are necessary to take charge of its property and collect its assets, because he asks that upon the "discharge of the present receivers others may be appointed in their stead." The petitioner cannot be admitted as a defendant to attack or question the propriety of the appointment of the present receivers. It is not necessary that he should be made a party defendant for this purpose. If in the administration of the affairs of the corporation the receivers appointed by the court fail, or for any reason are unable to properly discharge their duties in this respect either in the interest of this petitioner or of any or of all of its creditors and stockholders,

the court will, upon proper representation and proof of that fact, itself see to it that others are appointed in their stead. The proceedings in relation to the administration of the affairs of the company are now in the hands of the court, and beyond the control of any particular set of stockholders, and it is not necessary that intervention should be had by any creditor or bondholder to do the work which the court has appointed its officers to perform. The propriety of such action on the part of a creditor or stockholder was considered in the case of *Forbes v. Railroad Co.*, 2 Woods, 323, Fed. Cas. No. 4,926, where Bradley, J., in delivering the views of the court, said:

"A suggestion in the progress of a suit that an officer of the court [the receiver] is disposed to act fraudulently, or that the court has made an injudicious or erroneous order, will not be a sufficient ground to allow such a party to intervene. Indeed, it is questionable whether in any case where a suit is properly instituted against a corporation a stockholder of that corporation can, even on a suggestion of fraud on the part of its officers, come in by way of intervention as a party to that suit, and seek to defend or control the proceedings. An original bill would rather seem to be a proper mode of proceeding."

If the petitioner in this case should be able to maintain the allegations of fraud set out in his bill, or if he should find that the receivers by their action are negligent or jeopardizing his interests or those of his associates, his remedy as a creditor and stockholder is clearly pointed out in the New Jersey corporation act, as was stated by Judge Green in this circuit in the case of *Werner v. Murphy* (C. C.) 60 Fed 769.

The grievances of which the petitioner complains in his petition against the directors and stockholders of the Asphalt Company of America cannot be raised in this suit, the object of which is not to inquire into the reasons for the insolvency of the corporation, but to recognize the fact of insolvency as one accomplished and to be provided against. He cannot be permitted to intervene, therefore, to litigate those questions. The directors and stockholders are not parties to the suit, and would not be bound by any decree made therein, and any personal liability on their part must be enforced in a separate suit. It is also suggested by the answer, and in one of the schedules annexed thereto, that the question of fraud and the liability of the directors and stockholders here raised has already been determined, by a court of competent jurisdiction, adversely to the petitioner. I refer to the case of *Spinks v. Paving Co.*, determined in the court of chancery of New Jersey. The petitioner has failed, by any proof, to sustain any charge of misconduct or fraud on the part of its trustee, who alone, under an agreement to which he is a party, appears to be entitled to bring this suit, and, in the absence thereof, he cannot for that reason be permitted to intervene.

I do not find any analogy between the case at bar and that of the *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130, upon which the petitioner relies. That case was for the foreclosure of a mortgage, and the court held that the company had conspired with certain creditors to procure foreclosure for the purpose of defeating certain valid claims which existed against it. The court held that these acts were fraudulent, and that,

although the proceedings were regular on their face, the sale must be set aside on that account. In the case at bar no effort is being made to give a preference to one creditor over another, nor to make more or less valuable any particular set of what are known as "gold certificates." But the object avowed in the bill, and in the contemplation of the court and its receivers, its officers, is that all the assets may be collected for and applied to the equal benefit of all. I find nothing in the petition, or in the situation presented therein, which would justify the court in permitting the petitioner to intervene and set up his answer as the answer of the corporation defendant. His interests will, I think, be properly protected, and if a situation should arise by which, in his opinion, they would be jeopardized, he has other remedies pointed out by the statute.

The prayer of the petitioner, for the reasons above stated, is therefore denied.

In re STODDART.

(District Court, D. Washington, N. D. February 17, 1902.)

No. 1,940.

BANKRUPTCY—DISCHARGE—CONCEALMENT OF ASSETS.

The intentional omission by a bankrupt to schedule or bring to the attention of his trustee his interest in real estate of the value of \$10,000, which a short time prior to his bankruptcy he conveyed in trust, the income to be paid to another during life, and the property then to be held for his own benefit, constitutes ground for refusing him a discharge, and he is not relieved from the consequences of such concealment by the fact that he was advised by his attorney that his deed divested him of all interest in the property.

In Bankruptcy. On motion of bankrupt to vacate and set aside the findings and conclusions of the referee on his application for discharge.

The following are the referee's findings of fact and conclusions of law:

This matter having been heretofore heard and taken under advisement by the referee upon the objections of W. Rigby, a creditor, to the discharge of said bankrupt, and said referee, being sufficiently advised in the premises, finds facts as follows: That on the 20th day of January, 1900, the said bankrupt made a deed to John T. Harmes, of San Francisco, California, for certain real estate situated in the city of San Francisco, California, described as follows: "Commencing at the point of intersection of the southerly line of Geary street with the easterly line of Gough street; thence easterly along the southerly line of Geary street thirty (30) feet; thence at right angles southerly one hundred and thirty-seven (137) feet and six (6) inches; thence at right angles westerly thirty (30) feet to the easterly line of Gough street; thence at right angles northerly one hundred and thirty-seven (137) feet and six (6) inches to the southerly line of Geary street and point of beginning." That by the terms of said deed the fee-simple title to said property was conveyed to said Harmes upon certain trust conditions, which, in substance, gave to one Emma A. Stoddart the issues and profits of said property during her lifetime, and upon her death the property would be held for the benefit of the grantor in said deed, the said bankrupt, Archibald C. Stoddart. That said property was at the time of the filing of the petition in bankruptcy herein of the value of at least \$10,000. That no reference whatever was

made to this property in the petition or schedules filed by said bankrupt, and no mention made thereof by the bankrupt on his examination, until a specific inquiry by the attorney for the trustee showed that he had knowledge in regard to the matter, when, in answer to such question, bankrupt admitted that he knew of this property, but did not proceed voluntarily to fully explain his relations thereto until a certified copy of the deed above referred to was presented to him, which copy was admitted in evidence, and marked "Trustee's Exhibit A." That no satisfactory reason was given at said examination of the bankrupt or upon the hearing of the objections to his discharge for his failure to include this property, or his interest therein, in his schedules, and in view of that fact the referee finds that its omission from such schedules was intentional for the purpose of preventing his interest in said property being reached by his creditors. The referee therefore finds as a fact that specification 1 of the objecting creditor has been proven, and as a conclusion of law from the facts so found the referee finds that the bankrupt is not entitled to his discharge. The referee transmits herewith trustee's Exhibits A and B, offered on the examination of bankrupt, and the objecting creditor's Exhibit 1 and the bankrupt's Exhibit A, put in evidence upon the hearing of the objections, together with the evidence reduced to the form of a deposition of the bankrupt given upon his examination at the first meeting of creditors, for the information of the court.

G. Ward Kemp, for creditor.

Fred H. Peterson, for bankrupt.

HANFORD, District Judge. I consider that the referee has made a correct decision as to the facts and law with respect to the neglect of the bankrupt to return a true schedule of his property, and the effect of that neglect upon his right to a discharge from obligation to his creditors. During the pendency of these proceedings the bankrupt has filed an affidavit in which he claims that the omission was unintentional, being made under advice of counsel to the effect that the conveyance of his San Francisco property which he made to a trustee, completely divested him of all his interest in the property. If he acted upon such advice, it does not free him from the legal consequences of making an untrue representation to the court with respect to his property. To further show his good faith, the bankrupt also deposited in court a quitclaim deed to the property referred to to the trustee for the benefit of his creditors. It will be for the trustee and the creditors to decide whether they will accept this deed. Under the circumstances shown by the evidence, I consider that it will be proper for the trustee to commence legal proceedings in the state of California to have the trust deed set aside, provided the creditors furnish sufficient money to meet expenses of such litigation.

WESTERVELT et al. v. LIBRARY BUREAU.

(Circuit Court, D. Massachusetts. July 10, 1899.)

No. 673.

PATENTS—PRIOR INVENTION—EVIDENCE TO SUSTAIN PLEA.

A plea to a bill for infringement of the Stikeman patent, No. 541,386, for improvements in library shelving, alleging prior invention by another, held not supported by the evidence, which was directed entirely to showing prior invention of the bracket described in claim 1, which is but one element of the combination covered by claims 2 and 3.

In Equity. Suit for infringement of letters patent No. 541,395, issued June 18, 1895, to George Stikeman for improvements in library shelving. On plea to bill.

A. A. Connolly, for complainants.

Fish, Richardson & Storrow, Frederick L. Emery, and Nathan Heard, for defendant.

COLT, Circuit Judge. This bill in equity charges infringement of letters patent No. 541,395, issued June 18, 1895, to George Stikeman, for improvements in library shelving. To this bill the defendant filed a plea in bar setting up prior invention in one David E. Hunter. The plea alleges that:

"Prior to the alleged and pretended discovery or invention of said Stikeman, as alleged in said bill of complainant, one David E. Hunter, of Cambridge, Mass., did invent the library shelving, the use whereof by defendant is complained of as an infringement of the patent to said Stikeman, and with reasonable diligence adapted and perfected the same, and made, or caused to be made, before the alleged invention of said Stikeman, a structure embodying his said invention, which was complete and capable of producing the result to be accomplished, and thereupon and thereafter disclosed his said invention to others, and thereafter applied for and obtained letters patent of the United States for his said invention, No. 552,062, dated December 24, 1896, of which patent the defendant is the sole owner by duly-executed instruments of assignment here in court to be produced."

This plea is to the whole bill.

The Stikeman invention is expressed in the three claims of his patent, which are as follows:

"(1) A bracket for library shelves, consisting of a vertical plate having a vertical flange at its rear edge, a horizontal flange on its inner side and below the upper edge of the plate, a threaded nut or lug, and a perforated guiding lug on the inner side of the plate, in combination with a screw passing through the lug and nut and extending to the front edge of the plate, substantially as described.

"(2) In library shelving, the combination of a column composed of a flat plate, and a channel iron mounted on a suitable base, and secured at such distance apart as to leave a space between the flange of the channel iron and the face of the adjacent plate, with a bracket adapted to enter said space, and having a flange adapted to embrace the flange of the channel iron, substantially as described.

"(3) In library shelving, the combination with a suitable base of a flat vertical plate and a channel iron secured to the base, and arranged at such distance apart as to leave a space between the flat plate and the flange of the channel iron for the reception of a bracket, substantially as described."

The patent relates to library shelving. Claim 1 relates to the bracket; claims 2 and 3 relate to the combination of the standard with a suitable base and bracket. The evidence in support of the plea is limited to claim 1. It is directed to showing that Hunter was the prior inventor of the Stikeman bracket, or to the subject-matter of claim 1. It is not contended, and no evidence is introduced to the effect, that Hunter was the prior inventor of the combinations covered by the second and third claims of the patent.

The patent is not for a bracket alone, but for an improvement in library shelving. Such shelving necessarily embraces a standard as well as a bracket. The evidence introduced in support of the plea bears witness to the fact that in library shelving the form and construc-

tion of the standard is very nearly as important as the form and construction of the bracket.

The defendant's evidence falls short of proving the issue raised by the plea. The plea is overruled, with costs to the complainant.

In re HEAD et al.

(District Court, W. D. Arkansas, Texarkana Division. March 26, 1902.)

1. BANKRUPTCY—PARTNERSHIP—DISSOLUTION WHILE INSOLVENT.

The dissolution of a partnership while insolvent, and the division of the firm property between the partners, to be held as their individual property, thus giving individual creditors a preference over firm creditors, who are in justice and equity entitled to priority of payment from such property, is contrary to the whole theory of the bankruptcy law; and where such dissolution is made within four months before the firm is adjudged bankrupt it will be treated as a void transfer, under Bankr. Act 1898, § 67e, and the property in the hands of both partners as firm property, without regard to the actual intention of the partners, who must be held to have intended the necessary and inevitable consequences of their acts.

2. SAME—EXEMPTIONS.

Where, by the laws of the state, a partner cannot claim exemptions from firm property, the members of a bankrupt partnership cannot secure such exemptions by a dissolution of the firm while insolvent, and within four months prior to the bankruptcy.

In Bankruptcy. On review of action of referee disallowing exemptions claimed by bankrupts.

Scott, Lake & Head, for petitioning creditors.

W. H. Arnold, for bankrupts.

Pratt P. Bacon, in pro. per.

ROGERS, District Judge. Clyde Head and Charles P. Smith were merchants at Richmond, Ark., under the firm name and style of Head & Smith. They formed their copartnership and entered into business on the 1st of January, 1901, neither one of the partners having any capital. They purchased the remnants of two small secondhand stocks of goods on credit, and their purchases were subsequently made on credit, and the scope of their business was largely the furnishing of supplies to a large planter near by. They continued in business until the 14th of January, 1902, when they dissolved. Both parties testified that the immediate cause of their dissolution was a notice from said planter that he did not intend to patronize them during the year 1902. The partner Head took for his share 2 horses, 1 buggy, 25 bushels of corn, and some harness; the partner Smith took the merchandise and open accounts, and, indeed, all the other assets of the firm, nominally \$4,000, and assumed the debts of the concern, amounting to in the neighborhood of \$3,500. Smith testifies that he believed when he took the business that he could carry it on and pay the debts. He at once notified the creditors of the dissolution, and applied for an extension. He failed in that, and on the 7th of February, 1902, creditors filed their petition in bankruptcy against the firm, after both part-

ners had stated in writing that they were insolvent, and expressed a willingness to go into bankruptcy. Head was a single man; Smith married after the partnership was formed, and before it dissolved. No inventory of the stock was taken when the dissolution took place, but they estimated the stock would invoice at between \$4,000 and \$4,500. After the dissolution Smith bought some goods, sold others, and paid some small firm debts. Smith had no property except the assets of the dissolved firm, and no means of raising money to pay the creditors except by a sale of the goods. Head testifies that after the firm was dissolved he had no further connection with it; that he thought Smith would be able to take charge of the stock, pay the debts, and continue the business; they neither had any idea of going into bankruptcy; they both thought Smith could make sufficient arrangements to get time and convert the goods into cash; that they estimated the goods would invoice \$4,250, and liabilities in the neighborhood of \$3,600.

On this state of proof the referee found the partnership was insolvent when the dissolution occurred, and in that finding of facts the court concurs. If this transaction is upheld, its inevitable effect is that the mere act of the dissolution of the partnership converts all the partnership assets into individual assets of the respective parties, thereby enabling each partner, not only to claim exemptions out of the partnership assets in violation of the exemption laws of Arkansas as construed by its own courts (*Richardson v. Adler*, 46 Ark. 43), but also to pay their respective individual creditors out of the partnership assets to the exclusion of the partnership creditors, in plain violation of the express provisions of the bankrupt law (Bankr. Act 1898, § 5). Moreover, its effect is to enable the individual creditors to gain an advantage over the other creditors, which they did not have until the firm was dissolved. It was, in effect, a gift by the insolvent firm to the creditors of the individual members of the firm, and therefore a preference to them over the partnership creditors, who under the bankrupt law and in equity and good conscience were entitled to have the partnership assets appropriated to the payment of the partnership debts, to the exclusion of the individual creditors of the respective partners. Nor will it do to say that the members of this firm acted in good faith in what they did; that they did not intend to hinder, delay, or defraud their creditors. Every man must be held in law to have intended that which was the necessary and inevitable result of his acts, and the dissolution of an insolvent firm, if valid, is, in effect, an appropriation by the firm of the firm assets, which in equity and under the bankrupt law should be appropriated to the payment of the firm creditors to the payment of the debts of the individual members thereof. The firm, and the members thereof, must therefore be held to have intended that very result, and this the bankrupt law forbids.

The injustice of such a transaction, and the inequitable nature thereof, is, in the opinion of the court, in direct conflict with the whole theory of the bankrupt law. I am of the opinion that the dissolution of this firm, it being insolvent, and the withdrawal therefrom of assets by the respective partners, to be held as individual property, was in

violation of section 67e, Bankr. Act 1898, and that the court should set aside the terms of the dissolution, and treat the assets of the firm in the hands of both partners as partnership property, and to do otherwise is to defeat the whole spirit and policy of the bankrupt law. I am not aware that this question has been authoritatively settled by any court of appeals or by the supreme court of the United States, and there appears to be a conflict of authority upon the subject among the district courts. In support of the position assumed by the court may be cited *In re Cook*, Fed. Cas. No. 3,150; *In re Byrne*, Fed. Cas. No. 2,270; *In re Sauthoff*, 21 Fed. Cas. (No. 12,380); *Loveland*, Bankr. p. 190; *Coll. Bankr.* (3d Ed.) 70; *In re Jones & Cook*, 4 Am. Bankr. R. 141, 100 Fed. 781; *In re Gillette & Prentice*, 5 Am. Bankr. R. 119, 104 Fed. 769. I am aware that all of these cases are not directly in point, but they bear upon the principle involved.

The case of *In re Rudnick* (C. C.) 102 Fed. 751, is cited as opposing the conclusion reached by the court. The cases are not the same, but, if it may be treated as an authority against the conclusion reached by the court, I am unable to follow it. The action of the referee in disallowing the claim of both bankrupts is affirmed, and an order will be entered accordingly.

The referee will proceed in accordance with this opinion.

**WINDMULLER et al. v. STANDARD DISTILLING & DISTRIBUTING
CO. et al.**

(Circuit Court, D. New Jersey. March 12, 1902.)

1. CORPORATIONS—STATUS OF STOCKHOLDERS—RIGHT TO VOTE.

Stockholders of a corporation, unlike directors, are not trustees for the other stockholders, but each represents his own interest only in stockholders' meetings, and may vote on any measure, even though he has a personal interest therein separate from, or adverse to, that of other stockholders.

2. SAME.

A corporation which, as permitted by the laws of the state, owns the common stock of a second corporation, is not deprived of the right to vote such stock in favor of dissolution, because, as a consideration for its stock, it guaranteed the payment of dividends on the preferred stock of the second corporation so long as the latter should exist.

3. SAME—DISSOLUTION—POWER OF COURT TO ENJOIN.

The general corporation act of New Jersey provides that any corporation may be dissolved whenever deemed advisable by the board of directors, provided two-thirds in interest of all the stockholders shall consent thereto at a meeting called for the purpose. *Held*, that a court of equity had no power to review the decision of the board of directors of such a corporation as to the advisability of dissolution or to enjoin such dissolution at the suit of a minority stockholder.

In Equity. On rule to show cause against issuance of injunction.

James E. Howell and Robert H. McCarter, for complainants.

Charles E. Deming, Levi Mayer, and R. V. Lindabury, for defendants.

KIRKPATRICK, District Judge. The complainants are the holders of certain shares of the first and second preferred stock of the Spirits Distributing Company, a corporation organized under the laws of the state of New Jersey, upon which the Standard Distilling & Distributing Company have guarantied a dividend of 6 per cent. upon the first preferred, and 2 per cent. upon the second preferred, stock, during the existence of the said Spirits Distributing Company. It appears from the record that in 1896 the Spirits Distributing Company had an authorized capital of \$7,350,000, of which there was outstanding, in the early part of 1899, \$1,050,000 of first preferred, 7 per cent. cumulative stock; \$1,575,000 of 6 per cent., noncumulative second preferred stock; and \$3,675,000 of common stock. Among its sources of revenue was a contract with the American Spirits Manufacturing Company, under the terms of which it received a minimum payment of \$100,000 annually, which was to continue for a period of 45 years, unless sooner terminated by a vote of three-fourths of the stock of the said Distributing Company. It also appears that, even with the receipt of the \$100,000 provided to be paid by the Spirits Manufacturing Company, the Distributing Company, from the time of its organization until the early part of 1899, had never been in funds with which to pay in full the dividends upon its first preferred stock, nor any part of the dividends upon its second preferred stock. It was proposed, about December, 1898, by one C. H. Eicks, that the stockholders of the Distributing Company should surrender their right to receive 7 per cent. on their first preferred stock and 6 per cent. on their second preferred stock, and that in lieu thereof they should agree to take 6 per cent. on their first preferred and 2 per cent. on their second preferred stock; and, as an inducement for them so to do, he proposed that the said stockholders should surrender to the Standard Distilling & Distributing Company, which had then but recently been organized with a capital of \$24,000,000, all of their common stock in the Distributing Company, which constituted a majority of the whole. He also said to them that in consideration thereof the Standard Company would guaranty the said dividends on the first and second, preferred stock, as aforesaid, to the said stockholders during the existence of said Distributing Company. In order to carry out this plan, it became necessary that the charter of the Distributing Company should be amended, and the same was accordingly done, with the consent of every one of its stockholders, including these complainants.

The agreement between the stockholders of the Distributing Company and the Standard Company was carried into effect. The old stock of the Distributing Company was surrendered to its officers, and new stock issued to the shareholders, upon which was stamped the guaranty of the Standard Company, and the common stock of the Distributing Company, being a majority of the whole, was transferred to the Standard Company. From January, 1899, to the date of the filing of the bill, the Standard Company has paid to the complainants the dividends upon their stock in the Distributing Company, as provided in the agreement. The Standard Company took charge of the business of the Distributing Company by qualifying and electing as directors a majority of the board. During the time of their control

the business of the company has been successfully prosecuted, and its earnings have so largely increased that during the fiscal year ending June 30, 1901, it showed a profit of upwards of \$30,000. No complaint is made in the bill of the manner in which the property has been administered.

In June, 1899, the Distilling Company of America was organized, and it became the owner of \$22,742,750, par value, of the \$24,000,000, par value, of the stock of the Standard Company, above referred to. It also became the owner, by purchase, of \$2,592,650, par value, of the first and second preferred stock of the Spirits Distributing Company; so that at the time of the filing of this bill the stock of the Spirits Distributing Company was held as follows: By the Distilling Company of America, first and second preferred, \$2,592,650; by the Standard Company (of which the Distilling Company, as has been said, owned nearly all the stock), \$3,675,000 common stock; leaving outstanding stock of all kinds to the amount of \$232,350, of which the complainants hold but 1,524 shares, 324 of which is first preferred, and 1,200 second preferred.

At a meeting of the board of directors of the Distributing Company it was resolved that, in the judgment of the directors, it was most advisable and for the benefit of the corporation that it should be dissolved. In accordance with the general corporation act of New Jersey, a meeting of the stockholders was called to vote upon the propriety of adopting such a course. The prayer of the complainants' bill is that the Standard Company may be enjoined from voting upon its \$3,675,000, par value, common stock in favor of said proposition, because it has guarantied the dividends on the stock of the Distributing Company as aforesaid, and that the Distilling Company be enjoined from voting upon its \$2,592,650, par value, of first and second preferred stock, which it has purchased and owns, because it also owns a majority of the stock of the Standard Company, which is the guarantor thereof. That is to say, however advisable and for the benefit of the corporation it may be that the same should be dissolved, yet it cannot be done because two-thirds of the stockholders whose votes are necessary to accomplish such result are disqualified from voting by reason of their interest in the cancellation of a guaranty which the complainants now conceive to be adverse to their interests. To carry the doctrine to its logical conclusion would be to hold that, if the guarantor's company and those who own a majority of the stock in the guarantor's company should also be the owners of all the stock in the guarantied company except one share, the owner of that one share could prevent the dissolution of the company forever, if its charter were perpetual, or compel its operation at a loss until all its assets were wasted or consumed. Section 51 of the general corporation act of New Jersey provides that any corporation organized under it "may hold the shares of any other corporation of that or any other state," and, while the owner thereof, "may exercise all rights, powers, and privileges of ownership, including the right to vote thereon." In respect to the voting power, the rights of a corporation are identical with the rights of an individual, and only those reasons would operate to prevent a corporation from voting on its

stock which would effect the same object if the stock was held by an individual.

I have not been referred to any authority which holds that one stockholder is in any sense a trustee for other stockholders, or that he is debarred from voting on his stock according to what he may conceive to be his interest, or in a way which may result in a benefit to himself, and which other stockholders may not enjoy. Directors, by whomsoever elected, are the representatives of all the stockholders, and, as such, are charged with the duty of administering the affairs of the company for the equal benefit of their cestuis que trustent. But the doctrine is new that the stockholders are trustees one for another, or that an interest of one stockholder, which in the judgment of another stockholder may seem to be adverse to his own, can operate to prevent him from voting on his own stock as he sees fit.

In the case of *Transportation Co. v. Beatty*, 12 App. Cas. 589, one of the directors owned a majority of the stock of the corporation, and at a meeting of the shareholders, by reason of his majority, he caused to be passed a resolution ratifying a contract to sell to the company, upon advantageous terms, a vessel belonging to himself. In passing upon the propriety of his right to vote, the court said:

"Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company; and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to or different from the general or particular interests of the company. A shareholder has a perfect right to exercise his voting power in such manner as to secure the election of directors whose views on policy agree with his own, and to support those views at any shareholders' meeting."

The court cannot be called upon to manage the internal affairs of corporations, or to determine whether this or that stockholder is disqualified from voting upon one or another question which may be presented to the stockholders for their consideration by reason of his own interest. If the directors, who are the trustees of all, conspire with a few or some of the stockholders to deprive the others of their property, the court will interfere to see that justice is done. The court will not permit the directors to divert the business of the corporation so that a sale and sacrifice of its assets will become obligatory, and the distribution of the proceeds unequal among its shareholders. This is the doctrine which is at the foundation of the opinion in the case of *Farmers' Loan & Trust Co. v. New York & N. R. Co.*, 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689, and *Ervin v. Navigation Co. (C. C.)* 27 Fed. 625.

No case has been brought to the attention of the court where any stockholder has been deprived of his right to vote on his stock in such a way as may, in his opinion, best subserve his own interests. He may vote his stock as he pleases for the purpose of his own interest, but he may not sell, or cause to be sold, assets and keep the consideration. *Menier v. Telegraph Works*, 9 Ch. App. 350. In *Gamble v. Water Co. (N. Y.)* 25 N. E. 201, a stockholder's right to

vote was questioned because of interest, and the court of appeals reversing the decision of the lower court, said:

"A shareholder has a legal right, at a meeting of shareholders, to vote upon a measure, even though he has a personal interest therein separate from other shareholders. At such a meeting each shareholder represents himself and his own interests, and he in no sense acts as the representative of others. The law of self-interest has at such time very great and proper sway. There can be little doubt, too, that at such meetings those who do vote on their own stock vote upon it in the light solely of their own interest, or at least in what they conceive to be their own interest."

In the case at bar the court is not in possession of facts which would enable them to determine whether the interests of the corporation, as distinct from the interests of the individual shareholders, require that it should be dissolved. Under the general corporation act of the state of New Jersey, any corporation may be dissolved whenever in the judgment of the board of directors it shall be deemed advisable and most for the benefit of such corporation that it should be dissolved; provided that, at a meeting of the stockholders called for the purpose of passing upon the propriety of such dissolution, two-thirds in interest of all the stockholders shall consent thereto. Laws 1896, c. 185. There is no provision in the law which authorizes the court to review the judgment of the directors as to the advisability of dissolution. And in 4 Thomp. Corp. § 4443, it is said:

"It is believed that no case can be found in which a court of equity has granted an injunction at the suit of a minority stockholder against the majority to prevent them from discontinuing the business of the corporation and winding up its affairs."

It is urged in behalf of the complainants that it would be inequitable to allow the Standard Company, after having received a valuable consideration for their guaranty, by their own act to dissolve the corporation, and thereby cancel its said obligation. But it must be remembered that, in the proposition made to the stockholders of the Distributing Company by Mr. Eicks, Mr. Eicks said that, if such stockholders would consent to a reduction of the rate of their dividends, he would procure the Standard Company to guaranty and pay, during the existence of the company, dividends at the rate of 6 per cent. per annum on the first preferred, and 2 per cent. per annum on the second preferred, stock of the Distributing Company. To that proposition the complainants assented, and they did so with the knowledge that at any time, under the laws of the state of New Jersey, two-thirds in interest of the shareholders of the Distributing Company could dissolve the company, and thereby put it out of existence. They are in no position to complain if, in accordance with the terms of the agreement, the Standard Company and the Distilling Company, who are the stockholders of the Distributing Company, propose to put an end to their liability thereunder.

Other reasons are urged in behalf of the defendant company why this injunction should not be granted, but, having come to the conclusion that the Standard Company and the Distilling Company of America are not prohibited from exercising their right to vote at the stockholders' meeting upon the question of dissolution submitted by

the board of directors, it is not necessary to enter into any discussion of them.

For the reasons already stated, therefore, the rule to show cause in this case must be discharged.

UNITED STATES v. FIVE PACKAGES OF TAPESTRY et al.

(District Court, D. Massachusetts. March 20, 1902.)

No. 1,299.

CUSTOMS DUTIES—VIOLATION OF LAWS—FORFEITURE OF GOODS BROUGHT IN PASSENGER'S BAGGAGE.

The provisions of Rev. St. § 3082, apply to dutiable merchandise brought into the United States in the baggage of a passenger, and such goods, when discovered after their entry, are subject to forfeiture thereunder. It seems that section 2802, providing for the assessment of duty on dutiable articles found by the inspector in a passenger's baggage, is limited to articles so found, and has no application where the goods have been successfully passed through the customhouse without discovery.

Proceeding by the United States for Forfeiture of Goods for Non-payment of Duty.

Henry P. Moulton, U. S. Atty., and William H. Garland, Asst. U. S. Atty.

Elder, Wait & Whitman, for claimant.

LOWELL, District Judge. This is a proceeding, under section 3082 of the Revised Statutes, to forfeit certain goods liable to duty which were contained in the personal baggage of a passenger entering the port of Boston. It has been agreed that, "if the provisions of section 3082 apply to dutiable merchandise brought into the United States in the baggage of a passenger, a decree of forfeiture may be entered in this case." The claimant contends that the matter of passengers' baggage is dealt with in section 2802, and that section 3082 is totally inapplicable thereto. Section 2802 is derived from the Statutes of 1799, c. 22, § 46 (1 Stat. 661, 662). That statute exempted wearing apparel and other personal baggage from duty, provided for the entry thereof, and for the form of oath. It further provided that, in lieu of entry, the collector and naval officer might direct the baggage to be examined, and that, if dutiable articles were discovered in this examination, duty should be assessed upon them. The section then continued substantially in the form of section 2802, providing that, where an entry of the goods was made as theretofore provided, dutiable goods found in passengers' baggage should be forfeited, etc. Section 3082 is derived from St. 1866, c. 201, § 4 (14 Stat. 179). That act is entitled "An act to prevent smuggling and for other purposes." There is nothing in it to show that it does not apply to passengers' baggage. On the contrary, section 3, the section immediately preceding the section here in question, provides that "the secretary of the treasury may, from time to time, prescribe regulations for the search of per-

sons and baggage, and for the employment of female inspectors for the examination and search of persons of their own sex." Section 4 of the act of 1866 and section 3082 have been held to apply to passengers' baggage in several cases. *U. S. v. Nine Trunks*, Fed. Cas. Nos. 15,885, 15,886; *U. S. v. A Lot of Jewelry* (D. C.) 59 Fed. 684; *U. S. v. Ortega* (D. C.) 66 Fed. 713.

The claimant contends that to apply section 3082 to passengers' baggage would submit the passenger to an excessive number of penalties, and that section 2802 deals exhaustively with the matter; but section 2802, in its literal meaning, which meaning is supported by the context, deals only with articles subject to duty which are found by the inspector actually present in the baggage of a passenger. If they are not so found, it would seem that the section does not apply. If this be true, then section 3082 is needed to meet the case of a passenger who has smuggled goods through the customhouse in his personal baggage, and has not been found out until he has taken those goods out of his trunk. Let us suppose, again, the case of jewels smuggled upon the person. Plainly, these cannot be forfeited under section 2802; and so, if smuggling on the person is to be punished, and the jewels are to be forfeited, suit must be brought under section 3082. If this be true, and if the claimant's contention concerning section 2802 be correct, it follows that section 3082 applies to merchandise imported under an invoice, and to goods smuggled on the person, while section 2802 deals with the intermediate case of goods smuggled in passengers' baggage. The argument of the claimant, viz., that a distinction between goods which come with a passenger in his baggage and goods which are imported in the usual course as freight is a reasonable one, loses nearly all its force when we find that goods which are brought on the person must, according to this argument, be classed with goods imported as freight.

For these reasons, I hold that section 3082 applies to passengers' baggage, and that a decree of forfeiture must be entered.

LOWELL MACH. SHOP v. SACO & PETTEE MACH. SHOPS.

SAME v. PETTEE IRON WORKS et al.

(Circuit Court, D. Massachusetts. March 19, 1902.)

Nos. 1,297, 1,298.

PATENTS—INFRINGEMENT—DEVICE FOR GRINDING FLATS OF CARDING ENGINES.

The Knowles & Tatham patent, No. 464,029, for a device for grinding the flats used in carding engines, construed, and held not infringed by machines made in accordance with the Penney patents, Nos. 544,441 and 620,353.

In Equity. Suits for infringement of letters patent No. 464,029, issued to Knowles & Tatham December 1, 1891, for a device for grinding the flats employed in carding engines. On final hearing.

Wm. A. Macleod, for complainant.

Richardson, Herrick & Neave, for defendants.

BROWN, District Judge. These suits are for infringement of patent No. 464,029, to Knowles & Tatham, dated December 1, 1891. The patent has the misleading title, "Carding Engine," but it is apparent from the specification that its subject-matter is apparatus for grinding the revolving flats of a carding engine, and that it does not relate to the carding operation. The carding engine of the type to which the patent refers consists of a large main cylinder, having wire card clothing thereon. About this cylinder travels an endless chain of flats, which are long strips of metal having wire card clothing, which co-operates with the card clothing upon the cylinder. The wire clothing upon these flats must be adjusted to the cylinder with great accuracy, in order that a very thin and uniform film of cotton fibers, laid substantially parallel, may be formed by the co-operation of the main cylinder and flats. About one-half of the flats are in working position on the cylinder at one time, the other half moving slowly around from engagement with the cylinder until they again come into operation. The wire clothing on each flat requires to be ground from time to time. It was old to do this by bringing the wire clothing of each flat into contact with a grinding roll when the flat is not in position for carding, but is returning to the point where it is again operative for carding. The peculiar shape of the flat gives rise to certain mechanical difficulties in presenting the wire clothing of the flats to the grinding roll. It does not appear, however, that the problem of grinding the flats is connected with, or complicated by, the carding operation, which continues while the flats are being ground. During the carding operation the series of flats in operation is supported at each end upon guide ways called "flexible bends." Each flat is a substantially rigid bar, longer than the main cylinder. The card clothing on each flat is shorter than the length of the flat. Thus at each end of the flat there is a guiding surface, or "shoe," resting upon the flexible bend or support. It is impractical to bring the wire clothing of the flats to the grinding roll by the same means employed to bring it to the cylinder of the carding engine. In its proper working relation, one edge of the flat is nearer to the cylinder than the other edge of the flat. The wire surface is thus slightly tilted or heeled; the edge of the flat nearest the clothing on the main cylinder being called the "heel," and the edge furthest from the cylinder the "toe." The inclination of the flat is small; the "heel," or closest point, being commonly less than .01 of an inch away from the surface of the main cylinder, while the "toe" is slightly more than .03 of an inch. The middle portion of the end of the flats is cut away, so that the bearing of the flat upon the flexible bend is at two points, one under each edge. The tilting of the wire surface of the flat is due to the unequal length of the heel and toe. The flat stands on two legs of unequal length. The heel is higher than the toe by an amount proportionate to the amount that the heel is to stand nearer than the toe to the main cylinder clothing. It will thus be seen that if the flat, in its working position, were brought into contact with a grinder, the grinder would destroy the shape of the wire clothing by grinding off its heel. It is therefore necessary in the grinding operation to employ some device to correct the normal tilt of the

flat, in order that all portions of the surface of the wire may be brought into contact with the grinding roll without destroying the proper angle of the wire. The prior art discloses a number of devices for doing this. One method was to provide each flat with a separate guide surface on the back of the flat. The flat thus is given two separate guide surfaces,—one to support it in its proper angle when at work carding, and another to support it in the grinding operation. A second method is disclosed in the Clegg & Lucas British patent, No. 623, February 19, 1874. Briefly, the method of Clegg & Lucas was to raise the low edge of the flat by a sliding block, which corrected the tilt, and brought the wire surface into correct relation with the grinder. This involved mechanism for inserting and withdrawing the sliding block at the proper time. The British patent to Hetherington, No. 2,642 (1887), provides a movable guide whereby the flat is tilted so as to compensate for the bevel. In a second patent to Hetherington, No. 16,157 (1887), the grinding roll is given a movement with relation to the guide, instead of the guide with relation to the grinding roll. In both the Hetherington British patents the revolving flats are carried past the grinder, having the heel and toe bearings in immediate contact with a guide; and, at the time of grinding, the legs of this flat are at a different level, produced by the action of a movable part. The principal difference between the device of the patent in suit and these machines is in the employment of a stationary guide instead of a moving guide. The combination of a grinding roller, a guide controlling the position of the flat, and means to hold the flat against the guide, was old. The patent, therefore, is not for a machine having a new function, or for a new generic combination, but is for a combination of parts of a specific character, as appears by the claim:

"The hereinbefore described arrangements of apparatus for grinding the flats employed in carding engines in which revolving flats are employed, which arrangements of apparatus consist in fixed parts provided with surfaces, e^2 and e^3 , formed parallel with each other, and separated from each other by a difference of level such that a flat held against the surfaces, e^2 and e^3 , will have its card-wire surface parallel to said surfaces, e^2 and e^3 , and in levers, such as g , by means of which the flats being ground may be successively held against the surfaces, e^2 and e^3 , and arranged, employed, and operating in conjunction with the grinding roller, substantially as and for the purposes hereinbefore described."

The patent in suit shows stationary guides, or "fixed parts," of specific construction. The guides are fixed to the carding engine. Each guide has two parallel surfaces, separated by a difference of level. During the grinding operation, the heel bearing travels in a straight line along one surface, and the toe bearing in a straight line along the other. The difference of level of the two surfaces of the guide compensates for the difference in height of the two legs or bearings of the flat, and the wire surface of the flat is thus brought parallel with the surfaces of the guide. At the time of grinding, the two bearings of the flat stand at different levels. There was thus accomplished, by a combination of stationary guides and co-operating levers, what previously had been accomplished by the former machines having movable guides. It does not appear, however, that the device of the

patent in suit is more efficient than the former machines, which are practical and still in extensive use.

The defendants' device is covered by patents to Penney, No. 544-441, August 13, 1895, and No. 620,353, February 28, 1899. The defendants' grinding roll is supported by a "floating cradle," which is movable from one carding engine to another. This cradle has end plates carrying bearings for the grinding roll. To each end plate is secured a plate having its lower edge formed into a concave guide. When the floating cradle is applied to a particular carding engine, it rests upon brackets fixed to the carding engine; and surfaces of the end plates of the cradle slide upon surfaces of the bracket, so that the cradle has an up and down movement. As the flat approaches the grinder, it encounters a fixed abutment on the bracket, which raises it slightly, and the flat then engages with the concave guide on the lower edge of the cradle. The cradle and roll press downward by their own weight upon the flat during the grinding operation. The tilt of the flat is corrected, and the flat ground, by the co-operation of a fixed abutment on the carding engine, a concave guide of irregular curvature attached to the movable cradle, and the weight of the cradle and roll pressing down upon the flat. The advantages of this device are obvious and undisputed. The defendants have dispensed entirely with the levers of Knowles & Tatham, and of prior devices, and also with guides fixed to the carding engines. Thus, if we assume that a factory were fitted with 40 carding engines, Knowles & Tatham would require, for grinding, 80 levers, with studs and weights, and 40 pairs of guiding surfaces, each pair requiring very accurate adjustment. A single movable cradle, provided with bearings for a grinding roll, and with a single pair of guides for the flats, which can be successively applied to a number of different carding engines, is certainly an ingenious invention, which could not have been found in the Knowles & Tatham patent. The defendants' guides are portable guides, and not "fixed parts" attached to the carding engine. They have a fixed relation to the axis of the grinding roll at the time of grinding. But this must be true of all guides, movable and immovable; otherwise they would not be guides. It is also true that the guides have permanently a fixed relation to the axis of the grinding roll. In the Knowles & Tatham device, this is of consequence only at the time of grinding, and is a disadvantage at other times, since it involves useless friction; for the flats are continually pressed against the guides by the levers, not only during the grinding operation, which is infrequent, but during the long intervals when no grinding is being done. This defect may, however, be obviated by additional means—not disclosed by the patent—to hold the levers out of engagement with the flats when no grinding is being done. The defendants' guides are in a fixed and permanent relation to each other, and to the axis of the grinding roll, since they are parts of the movable cradle. The advantage of this is that it permits a single adjustment of two guides to each other and to the bearings of the grinding roll. That they permanently maintain this adjustment, makes them easily removable from the carding engine when not needed, and also ready to be applied to a machine without further adjustment when they are need-

ed. A pair of portable guides is practically a very different thing from the stationary "fixed parts" of Knowles & Tatham.

The complainant's case rests upon the proposition that there is a substantial similarity between the guides of the complainant and the guides of the defendants, and presents an extreme example of an attempt to hold a defendant liable not upon the ground that it infringes the claims allowed by the patent office, but claims constructed by experts. It is a complete answer to the complainant's case that the patentees have not taken out a patent for a guide having a fixed relation to the axis of the grinding roll. The patent is for a combination of three elements. One of these elements (i. e., levers) has no corresponding part in the defendants' device. The function of pressing a flat against a grinding roll was old, and therefore the fact that the defendants' device also performs this function is of no consequence. That it is done by substantially different mechanism from that used by the complainant, and that this new organization of parts gives a new result, and dispenses with a large number of moving parts, is undeniable. That the defendants do not employ the combination described and claimed in the patent in suit is clear. The defendants' expert regards the defendants' grinder as a radically different organism from that of the patent in suit, and as having many and important utilities and advantages not possessed by the Knowles & Tatham construction; and his evidence is much more convincing than that of the complainant's experts. It requires, however, no expert evidence to make it appear that the language of the claim is entirely inapplicable to the defendants' device. The complainant's counsel and experts concede that the defendants' device is not within the "literalism" of the claim; but it is apparent that the language of the claim describes elements—levers, *g*—which the defendants do not employ at all, and there is nothing whatever in the defendants' device which can be brought within the following language:

"Fixed parts provided with surfaces, *e*² and *e*³, formed parallel with each other, and separated from each other by a difference of level such that a flat held against the surfaces, *e*² and *e*³, will have its card-wire surface parallel to said surface, *e*² and *e*³."

The complainant contends that a pair of portable guides, not fixed to the carding engine, and having irregular, concave surfaces, performs the same functions as the above-described parts of the Knowles & Tatham device. This, of course, would be immaterial if true, for the complainant must stand on its patent, but it is not true. The function of the machine of Knowles & Tatham is to grind flats to a certain definite shape, to wit, a plane surface, with the wires of equal length. This cannot be done upon the defendants' machine. Nor can the complainant's machine produce the curved surface of the defendants' wire clothing. The machines are different in function. It is true that both grind the wire of flats, but the problem was not, broadly, to grind a flat, but to grind it to a predetermined form. The form to be produced determines the shape of the guide which is to produce it.

Invention is said to reside in overcoming the difficulties of using a stationary guide for the production of a predetermined form. The

complainant's experts enumerate these difficulties. A straight guide could not be employed, either horizontal or inclined in either direction, because this would grind one part of the surface, and not the other, and destroy the shape. A line of simple curvature would not answer, not because it would not grind, but because it could not be made to grind to a desirable shape. There is, however, a bare spot in the testimony of the complainant's experts. While it may show the difficulty of grinding a plane surface, and that Knowles & Tatham were the first to solve this difficulty, it does not close up the field of invention. There still remains open to other inventors the problem of grinding an irregular surface by an irregular guide. The contention of the complainant is that when Knowles & Tatham produced a guide whereon one leg of the flat traveled at one height, and the other at another, they closed the field of invention, and that any stationary guiding device whereon the two legs of the flat travel at unequal heights, and which produces any suitable form of wire surfaces, embodies the invention of Knowles & Tatham. It is said that the complainant's guide "is, in effect, two guides,—one for the heel bearing of the flat, and one for the toe bearing thereof. Throughout the entire grinding or trueing operation, the heel and toe bearings of the flat are each on its own guide." But it is surely a straining of language to say that the continuous curved surface of the defendants is two guides, or two independent guiding surfaces.

The brief says, of the Knowles & Tatham guides:

"These two guides are characterized by being at a difference of level, and this is the absolutely essential characteristic of the Knowles & Tatham guide, and necessarily of every equivalent thereof."

It is apparent, from the nature of the problem, and from an examination of the prior structures, that it is the essential characteristic of any guide, whether movable or immovable, that it should tilt the flat, and, as the flats are upon legs of unequal length, that the bearing points of the flats must be at an unequal level during the grinding operation. A very large part of the argument of the complainant and of its experts becomes valueless, from the insistence upon a difference of level of two bearing points of the flat upon a guide as a standard of comparison upon the question of infringement. As the problem is to correct the tilt of the surface to be ground, and as this necessarily involves a change in the position, not only of the wire surface, but of all other portions of the flat, and as flats are commonly constructed with two legs of unequal length, it is a requirement of the problem that the bearing points of the flats should be at a different level at the time of grinding, since this follows necessarily from the requirement that there should be a change of the inclination of the wire surface. It is impossible to tilt the top without tilting the bottom. The problem was how to accomplish the tilt, and it is absurd to make the solution of the problem the final test of infringement. Moreover, it is perfectly apparent that there must be some form of guide which will bring the flat into the appropriate relation to the roll. It is therefore absurd to make the fact that the guide has a proper relation to the grinding roll a test of identity of mechanism. A guide must, of course, establish a relation between the thing guided and the point

to which it is to be guided. All such contentions erroneously imply that Knowles & Tatham were the first to see that there must be a difference in the level of the bearing points of the flat at the time of grinding, or that a guide must guide. The complainant cannot base infringement upon the fact that, at the time of grinding, the guide holds the flat in a proper relation to the grinding roll, or upon the fact that the legs of the flat are at different levels at the time of grinding. The problem was how to shape a stationary guide so that it would accomplish this, and also permit the travel of the flat. Knowles & Tatham provided two straight lines at a difference of level which compensated exactly for the tilt. All parts of the flat advance in a straight line. It is necessary that the flat ends should have a special concavity between heel and toe, so that the shoe can straddle the set-off or inclined surface which separates the two guiding surfaces. If it be said that they were the first to utilize the fact that the flat had two independent bearing points, this involved, also, the use of the concavity between these bearing points. It is this concavity which makes the bearing points independent, and which prevents a change of position from the inclined surface or set-off. The defendants do not require the concavity between the heel and toe in order to tilt their flat, and there is no necessity for any independent legs or bearings, separated by a concavity. If both bearings of the shoe were connected by a plane surface, they would still travel along the guide. The device of the defendants, then, is not dependent upon seeing that the independent legs separated by a concavity could be utilized in tilting the flat. If their device will guide a flat equally well whether it has a single surface, or two independent legs separated by a concavity, then its essential feature is not the use of the independent bearings, nor the provision of a distinct guide for each of the independent bearings. The only remaining "essential resemblance" between the two guides is that each gets the flat into the correct position for grinding.

It is apparent that the case of the complainant is entirely outside the patent, and fails for this reason. But furthermore it appears that the case which has been constructed outside the patent is not a good case. There is no evidence before us, save in their descriptions of the invention, of what was the inventive conception of Knowles & Tatham. It is assumed by the experts that the patentees had a conception corresponding to what they attribute to them. It is by no means to be assumed in any case that the actual inventive conception of a patentee corresponds to the conceptions of an expert skilled in the principles of science. It is the province of scientific experts to detect resemblances and differences where none are apparent to the practical mind. The inventor is not entitled to enlarge his patent by asking the court to assume that he had a conception that embraced all that his experts can conceive. There is no evidence in this case that these inventors made any broader invention than that described by their patent; i. e., a particular device designed to perform a particular function. So far as appears, the Knowles & Tatham patent fully sets forth and covers the actual invention.

The complainant's experts, in my opinion, have failed not only in

getting within the patent, but also in showing that the defendants' guide is the embodiment of any novel idea first embodied in the device of Knowles & Tatham. On the contrary, I think that it appears that Knowles & Tatham left room for an independent solution of the problem of providing a grinding guide which was stationary at the time of grinding. This solution consisted partly in a change of function, to wit, a change of the form to be ground. As the whole problem is to provide a guide that will grind to a proper form, a change of form which involves or permits an important change of mechanism is a substantial change of function. This change of the form to be ground rendered the guide of Knowles & Tatham inapplicable, and called for the construction of a new form of guide, which was not suggested by the Knowles & Tatham patent. It rendered the use of two legs, separated by a concavity, nonessential. As the defendants' device is not dependent upon the conception that two independent legs, separated by a concavity, might be utilized in moving the flat to the required position, the defendants do not infringe the claims of the experts for the complainant.

I agree with defendants' counsel that the patent in suit and defendants' machine are alone necessary to a decision. The defendants' machine is not within the patent, even when construed without regard to the important limitations made by amendments after the rejection of claims. It seems unnecessary, therefore, to consider in detail the important question of anticipation by devices in the general art of guiding bodies of irregular shape to grinders or other shaping tools. In my opinion, the prior art of this case is not properly limited to devices formerly applied to carding engines. The problem was not peculiar to the art of carding, but was simply that of guiding a moving part of irregular shape against a grinding roll. It is impossible to say that the question of invention is to be decided solely upon the particular means of guiding that have been employed heretofore in carding engines. The guiding of parts to a cutting or grinding tool by means of a stationary guide is familiar, and any anticipations of stationary guides found in the general art of guiding an object of irregular shape against a tool would furnish complete instructions to a mechanic whose problem was to change the tilt of the flats of a carding engine. A mechanic who was absolutely ignorant of the carding art would be as well qualified to do this as one who knew it thoroughly. The "particular environment," as it is called, of these moving flats, though referred to in an indefinite way, has not been shown by the expert testimony to have presented any particular problem of difficulty which would not arise were these flats moving around in an endless chain, entirely disconnected from a carding engine. Given a chain of flats, having bearings at each end and moving along a guide; change the tilt of these flats by a stationary guide. That was the entire problem, which was not complicated in any way by the carding operation.

The patent to Holmes, No. 224,187, shows a contrivance closely resembling that of the patent in suit, both as a combination, and in the employment of a guide upon which the article to be shaped bears at two points of a different level. This patent at least throws serious doubt upon the soundness of the complainant's broad interpretation

of the Knowles & Tatham invention. The patent to Susemihl, No. 370,502, also shows a guide of substantially the same form as that of the patent in suit.

If the defendants' device were within the patent in suit, the question of invention would become important. It is unnecessary, however, to decide whether the patent is valid, since the brief of the defendants, in my opinion, presents a clear and conclusive defense of noninfringement.

The bills will be dismissed.

REGINA MUSIC BOX CO. v. F. G. OTTO & SONS et al. (three cases).

(Circuit Court, D. New Jersey. February 18, 1902.)

1. PATENTS—INFRINGEMENT—ACCOUNTING FOR DAMAGES.

Where it appears that, in infringing complainant's patent, defendants acted with full knowledge, and in wanton and willful disregard, of complainant's rights, every question of doubt, on an accounting for damages, should be resolved against the infringer.

2. SAME.

Where, on an accounting for damages for the manufacture and sale by defendants of infringing music boxes, it appeared that the patent was the foundation patent for that class of automatic instruments which it described and claimed; that complainant had a monopoly of their manufacture, and was able to supply those sold by defendants; and that defendants' infringement was wanton and willful,—it will be presumed that but for the infringement all the instruments they sold would have been purchased from complainant, either by defendants or their customers; and this presumption is not overcome by evidence showing that some of them were supplied on orders from customers who dealt exclusively with defendants.

In Equity. Suits for infringement of patents. See 106 Fed. 78. On exceptions by defendants to master's report, stating account for damages.

The following is the report of the master:

The above-entitled causes having been referred to me as master by decretal orders made at a stated term of the United States circuit court for the district of New Jersey, in the Third circuit, on the 29th day of January, 1901, with instructions to ascertain and report to the court an account of the gains, profits and advantages which the said defendants in each of the above-entitled causes have realized through their unlawful infringement of complainant's letters patent Nos. 569,233, 596,393, 621,025, together with the damages which the complainant has sustained thereby, I beg leave to report:

That the respective parties appeared before me by their counsel,—Antonio Knauth, Esq., of counsel for complainant, and Edwin H. Brown, Esq., and Donald Campbell, Esq., of counsel with defendants,—and by stipulation the testimony in the three several accountings was taken simultaneously, said testimony and the exhibits referred to therein being annexed hereto. The complainant duly waived any claim for profits or damages which the defendants may have gained by reason of the infringement in cases Nos. 2 and 3 of the above-entitled causes, and also duly waived the recovery of any profits in case No. 1, and therefore the issue to be passed upon by me, is what damages may have been sustained by the complainant by reason of the infringement by defendants in suit No. 1, F. G.

Otto & Sons and Gustav Otto, of letters patent No. 569,233, the letters patent included therein.

By stipulation the record before the court in each of the causes on which the several decrees were made, was made a part of the record upon this accounting, and from this record and the testimony taken herein, it appears that the defendants, F. G. Otto & Sons, a corporation, and Gustav Otto had full knowledge that the complainant, who is engaged in the manufacture of music boxes, had the sole right to manufacture and sell the interchangeable automatic music boxes covered by said letters patent No. 569,233, and that the infringement of these rights by said defendants was a wanton and willful disregard of the property rights of complainant therein. The defendants, being manufacturers of music boxes, commenced the manufacture of the infringing instrument early in the spring of 1899, and made the first sale thereof on the 21st day of December, 1899, the last sale being on the 9th day of October, 1900. The several actions herein were commenced on the 15th day of January, 1900, and the decrees made the 29th day of January, 1901. In the early part of December, 1900, the defendant Gustav Otto had a conference at Leipzig with Mr. Riessner, the patentee of the foundation patent, No. 569,233, relating to its use by the defendants in the United States, and also had a conversation with a representative of complainant about this time concerning the said letters patent. Moreover it appears that although a voluminous answer was interposed by the defendants herein, that no testimony whatsoever was taken to sustain the same, and no argument was made on the hearing by the defendants. From the circumstances above set forth, there appears to be no doubt but that the infringements herein were made by both defendants with full knowledge of complainant's rights and were a wanton and willful disregard of the same, and in such a case every doubt and difficulty arising on the accounting should be resolved against the infringer. *Rubber Co. v. Goodyear*, 9 Wall. 803, 19 L. Ed. 566; *Creamer v. Bowers* (C. C.) 35 Fed. 206, 208; *Rose v. Hirsh*, 36 C. C. A. 132, 94 Fed. 177, 51 L. R. A. 801.

The product of defendants' infringement of the several letters patent herein was the instrument in evidence known as "Complainant's Exhibit, Defendants' Instrument." This was the first instrument sold by the defendants, and was purchased by Mr. J. C. Breckinridge on the 21st day of December, 1899, from M. J. Paillard & Co., \$300 being paid by the purchaser to Paillard & Co. for the same. The instrument was billed by defendants to Paillard & Co. likewise on the 21st day of December, 1899. Defendants manufactured thirty-six instruments similar to the one sold by Paillard & Co., selling thirty-five of the same to various purchasers, the remaining one being sent to Germany, where it now is. This instrument is an automatic interchangeable music box, and is fully described in the record before the court on the hearing in the above-stated causes.

Complainant has offered in evidence a music box manufactured by it and known as the Sublima Corona, and has offered testimony which proves that there is a substantial identity between the Sublima Corona and the defendants' infringing instrument, the testimony showing that the test of the cost of instruments of this nature—that is of automatic interchangeable instruments—depends almost entirely upon the diameter of the tune disk used therein, as the whole mechanism is proportioned in accordance therewith. The diameter of the tune disks in the defendants' instrument is twenty and one-half inches,—of the Sublima Corona twenty and three-fourth inches. Moreover it appeared that the Sublima Corona contained a substantial embodiment of all of the features of the claims of the three letters patent which defendants infringed. The complainant has proved by satisfactory evidence that the cost of the Sublima Corona instrument, including the material, wages paid, the charges for general factory and selling expenses, and an additional fifteen per cent. on the cases alone, was \$106.81, and that this cost price was the sole basis for the payment of wages to its employes in the manufacture of the same, and that wages were actually paid in accordance with this scale; and moreover that the selling price of this instrument was based upon the cost so ascertained

by the complainant. The complainant produced two books, made about June, 1890, containing a detailed calculation of the cost of this instrument, showing the cost to be as above stated, and gave competent evidence to sustain the entries made therein. The selling price of this instrument to the trade varied between \$173.50 before February 1, 1900, the lowest selling price, and \$200 thereafter; but complainant concedes that the latter figure was not always used for sales to the trade after February 1, 1900, and therefore for the purposes of this accounting the lower price of \$173.50 must be presumed to have been the usual selling price of such instruments. From this selling price certain discounts were allowed to the trade, six per cent. for cash payment in ten days and an additional five per cent. whenever more than \$1,000 was purchased, and I find that in calculating the selling price of said instrument, so far as this case is concerned, that only the five per cent. discount should be allowed. It was complainant's custom to allow other discounts for sales made to customers where an amount was sold larger than is shown by the proofs herein, and these last-mentioned discounts therefore cannot be considered in estimating the net selling price of the complainant's instrument, the Sublima Corona. It further appears from the testimony taken herein that the complainant has the exclusive control of the sale and manufacture of these instruments; that the complainant had manufactured and sold a great many of the same, and had the capacity to manufacture thirty-five other instruments if it had been called upon to do so by the defendants, or the persons to whom these thirty-five instruments were sold by the defendant F. G. Otto & Sons. The testimony of the defendant F. G. Otto, the president of the defendant company, admits specifically that at the time the infringing instruments were sold by the defendant F. G. Otto & Sons, the complainant was the only manufacturer of automatic interchangeable music boxes. Therefore such instruments could only lawfully be purchased from the complainant, which maintained a close monopoly in the manufacture and sale of the same. The introduction of these instruments had displaced to a very great extent the music boxes made prior thereto by complainant, so that two-thirds of the product of complainant's factory is of the automatic interchangeable music box variety. I therefore find that the patent involved in the first suit (No. 1) was a foundation patent for that class of automatic music boxes which it describes and claims; that the machine is claimed by it as an entire organism which it covers by broad and comprehensive claims. It is not a patent for an improvement merely, but a patent for an entirely new class of machines, and it is this patent which gave the whole salable value to the machine. The patents in suits Nos. 2 and 3 are for improvements in such a machine as claimed in the patent in suit No. 1, but did not add anything to the value of the machine which could be assessed in money, and the testimony as to the great commercial value of the invention was confined to the letters patent No. 509,233, the infringement thereof being the cause of action in suit No. 1. *McDonald v. Whitney* (C. C.) 89 Fed. 460.

The rule of law to be applied to the facts as hereinbefore set forth is settled in *Rose v. Hirsh*, 38 C. C. A. 132, 94 Fed. 177, 51 L. R. A. 801 (circuit court of appeals, Third circuit). This case follows *Creamer v. Bowers* (C. C.) 35 Fed. 206, 208; *Sargent v. Lock Co.*, 114 U. S. 63, 5 Sup. Ct. 1021, 29 L. Ed. 67; and the rule is clearly stated in *Walk. Pat.* (3d Ed.) par. 563.

The substantial identity of complainant's instrument, the Sublima Corona, with the instrument sold by defendants being clearly shown, together with the cost and selling price of complainant's instrument, and also the wanton and willful disregard of complainant's rights by defendants, together with the close monopoly held by complainant in the manufacture of this instrument, and its ability to produce thirty-five additional instruments of the kind known as the Sublima Corona, the only point remaining to be considered is whether defendant would have purchased these instruments from complainant. Many authorities have been cited by defendant upon this point for the purpose of absolving defendant from any liability by reason of the sale to various individuals and corporations of the infrin-

ging instrument. A careful review of these authorities leads to the conclusion that while there are certain general principles of law applicable generally to this subject, yet each case must be decided in view of the peculiar circumstances pertaining thereto; and that there cannot in the nature of things be any one rule of damages which will equally apply to all cases, the mode of ascertaining actual damages depending on the peculiar nature of the monopoly granted (*Seymour v. McCormick*, 16 How. 489, 14 L. Ed. 1024), keeping in view, when applicable, the principles set forth in *Creamer v. Bowers* (C. C.) 35 Fed. 206, and followed in *Rose v. Hirsh*, supra, that in cases of wanton infringement any doubt arising in respect to the sufficiency of the evidence to warrant a finding of the amount of damages, must be resolved against the infringer. See, also, *Walk. Pat.* (3d Ed.) par. 563.

It appears from defendant's statement of sales that of the thirty-five boxes sold by defendants at least twenty-five were, according to the testimony of defendant, billed to parties who had an agreement with the defendant corporation to deal only with it in the purchase of music boxes, and while this agreement was not proven, or shown to have reference to the interchangeable automatic boxes, yet defendants urge that the fact of its exclusive right to sell music boxes to these parties, clearly shows that said parties would not have purchased the boxes from complainant, and therefore that defendants cannot be held liable for more than nominal damages. This theory rests upon the assumption that the burden is on complainant to prove that the parties to whom the defendant corporation sold the infringing instruments, would have purchased the same from complainant; while the cases cited above are decided on the theory that the defendants would have bought the infringing instruments from the complainant, because complainant had the exclusive right to sell and manufacture the same, actually was doing so, and the defendant had full knowledge of these facts. It is reasonable to assume that when defendant's customers ordered an automatic interchangeable instrument from defendant they supposed defendant would procure the same from complainant, as it will not be presumed that these customers contemplated that the defendant corporation would act unlawfully in supplying its customers with the automatic interchangeable music box desired by them. A court of equity will never presume that a contract relating to the exclusive purchase by its customers from defendant, contemplated the doing of an illegal act by defendant. Such a contract would be unlawful and inequitable. And the same reasoning will also apply to the other customers of the defendant corporation not included in the so-called exclusive agreement, the presumption being that these customers desired the defendant corporation to supply them with an automatic interchangeable music box procured by the defendant corporation from complainant, and which they could lawfully use. There is not sufficient evidence offered by the defendant to rebut this presumption.

Complainant contends that the defendants should be held responsible for the loss by complainant of the tune disks usually sold with the Sublima Corona, either by the complainant or its selling agent, upon the ground that by the sale of each of the thirty-five instruments by defendant corporation, a sale of one set of twelve disks for each instrument by complainant was prevented. It is admitted, however, that the tune disks used in the Sublima Corona instruments could also be used in other instruments made by the complainant. The evidence is not sufficiently clear to hold the defendants responsible for damages sustained by the complainant from the loss of the sale of tune disks.

I further find that if the defendant corporation had purchased thirty-five boxes of the Sublima Corona style from the complainant, the total charge for the same on the basis of \$173.50 for each instrument, after deducting the discounts allowed on such a sale, would be \$5,768.88. I further find that the total cost of thirty-five Sublima Corona music boxes at \$106.81 for each instrument would be \$3,738.35. I further find that the difference between the total net selling price and the total cost is \$2,030.53.

From the foregoing facts I find as a conclusion of law that the com-

plainant, the Regina Music Box Company, is entitled to recover of the defendant F. G. Otto & Sons and the defendant Gustav Otto the sum of \$2,030.53 damages in case No. 1, together with the costs and disbursements on this accounting, and in cases Nos. 2 and 3 only nominal damages against the defendant F. G. Otto & Sons.

Briesen & Knauth (Antonio Knauth, of counsel), for complainant.
Dickerson & Brown (Edwin Brown and Donald Campbell, of counsel), for defendants.

GRAY, Circuit Judge. A careful reading of the master's report in these cases, and consideration of the exceptions thereto by defendants, and the motion of complainant for an increase of the damages awarded, and of the arguments by counsel in support of said exceptions and motion, convinces me that the said report should in all things be confirmed, and that the complainant is entitled to recover of the defendants, F. G. Otto & Sons and Gustav Otto, the sum of \$2,030.53, the damages in case No. 1, together with the costs and disbursements of the accounting, and in cases Nos. 2 and 3 nominal damages against the defendant F. G. Otto & Sons.

Let a decree be so drawn.

INTERNATIONAL POSTAL SUPPLY CO. OF NEW YORK v. BRUCE et al.

(Circuit Court, N. D. New York. March 27, 1902.)

PATENTS—INFRINGEMENT BY OFFICERS OF UNITED STATES—JURISDICTION TO GRANT RELIEF.

Complainant's bill alleged infringement of certain patents for improvements in machines designed for use in the post offices of the United States in canceling stamps and postmarking mail matter; that one of the defendants, who was a postmaster, was using in his office two infringing machines under leases from his codefendants; that such leases would expire in the near future, and that defendants were preparing to renew the same. It was also alleged that complainant had tendered to defendant postmaster, for use in his office on the same terms, two machines made under the patent, which had been refused. The bill prayed for the usual relief for infringement, and for an injunction against the renewal by defendants of the lease. The postmaster, who was the only defendant residing within the district, alone appeared, and filed a plea, alleging that he never personally used or caused to be used the alleged infringing machines, but that they were contracted for and placed in his office by the post office department, where they were used by his subordinates by order of such department, solely in the service and for the benefit of the United States; that the rental for such machines was paid by order of the department from government funds; and that he had no control over the leasing of the same, or the renewal of the leases therefor. *Held* that, while the court was of opinion, on principle, that it had jurisdiction, and that complainant was entitled to the remedy invoked, the question of jurisdiction was so far in doubt, in view of the decision of the supreme court in *Belknap v. Schild*, 16 Sup. Ct. 443, 161 U. S. 10, 40 L. Ed. 599, that the plea should be sustained.

In Equity. Suit for infringement of patents. On bill of complaint and plea.

The amended bill is in the ordinary form for the infringement of four letters patent for improvements in marking and stamping apparatus designed for use in the post offices of the United States, in canceling stamps and postmarking mail matter. The bill alleges that these post offices afford the sole and only market for the patented machines and that complainant is fully equipped and ready to supply all the machines needed to do the necessary work. The bill alleges further that two of the patents relied on have been sustained by the United States circuit court of appeals of the Second circuit and that as to the other two priority of invention was adjudged in favor of complainant's assignors after interference proceedings in the patent office. The bill alleges that the defendants are maintaining and operating daily, at Syracuse, N. Y., two stamp-canceling machines containing and embodying the improvements and inventions described and claimed in and by said several letters patents; and that the said defendant Dwight H. Bruce, acting as postmaster of the city of Syracuse, N. Y., is using, and permitting to be used, in the post office of said city of Syracuse, in the conduct of the business of said post office, the aforesaid two stamp-canceling and postmarking machines owned and maintained by the defendants Rice and the American Postal Machines Company, and is paying an annual rental of \$110 per machine for the use of the aforesaid infringing stamp-canceling and postmarking machines to the defendants Rice and the American Postal Machines Company; that said defendants are acting conjointly and in concert in infringing said letters patents, and although notified of their aforesaid infringement and requested to desist and refrain therefrom they still continue the aforesaid infringement; that complainant has furnished to the defendant Dwight H. Bruce, a stamp-canceling machine made in accordance with the inventions and improvements described and claimed in said several letters patents; and in order that the facilities of the said Syracuse post office might not be impaired complainant has offered to and holds itself in readiness to supply additional stamp-canceling machines to take the place of the aforesaid infringing machines, and to do such other acts as may be necessary in the premises to save the public business of the Syracuse post office from inconvenience and enable the said defendant Dwight H. Bruce to conduct the affairs of the said post office without infringing complainant's patents in the conduct thereof, which said offer the said defendant Dwight H. Bruce has declined. The bill further states as follows: "That the said infringing machines used at the Syracuse post office are leased by the defendants Rice and the American Postal Machines Company, for the term of one year from June 30, 1901, for use in the Syracuse post office by the defendant Bruce as aforesaid, and that the lease or rental of said infringing machines will expire on June 30, 1902, and that the aforesaid defendants are jointly co-operating and making efforts to renew said lease or rental for another year from the 30th of June, 1902, and are endeavoring to and threatening to continue the use of the aforesaid infringing machines after the expiration of the said rental or lease on the 30th of June, 1902." The defendant Bruce, who is the only defendant residing in this district, and who alone appears, files an amended plea alleging "that he has never personally used or caused to be used any stamp-canceling and postmarking machines: that he is the postmaster of the United States post office at Syracuse, N. Y., where certain stamp-canceling and postmarking machines are used by some of his subordinates who are employes of the United States government, such use being entirely in the service and for the benefit of the United States; that such postmarking and stamp-canceling machines as are in use in said Syracuse post office were contracted for by the United States government through the post office department and were placed in the Syracuse post office, and used there, by order of said post office department; that the post office department hired said machines for the term of one year from June 30, 1901, which term is as yet unexpired; and that the rental of these machines is paid by order of said post office department out of funds appropriated for that purpose by the congress of the United States; that the renewal of said lease or rental, or the making of a new lease for another year from the 1st of July, 1902, is a matter which is wholly in the hands of the post office department and over which said defendant Bruce has no control; and de-

defendant avers that the question whether the use of the alleged infringing machines will be continued in the Syracuse post office after the 30th of June, 1902, is one which will be determined by the post office department in Washington." The defendant also contends that if the complainant is entitled to any remedy against him it is not by an action in equity but by a suit at law. The complainant has set the amended plea down for argument.

G. W. Hey, for complainant.

W. K. Richardson and Alex. D. Salinger, for defendant Bruce.

COXE, District Judge. The constitution says:

"The congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Article 1, § 8.

Under the power thus granted the congress has provided that any person who has invented "any new and useful art, machine, manufacture or composition of matter" and who complies with the law in other respects may "obtain a patent therefor."

Section 4884 of the Revised Statutes says:

"Every patent shall contain * * * a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States, and the territories thereof."

The theory of the plea is that this statute should be interpreted as though it contained a proviso as follows:

"Provided, however, that all officers of the government of the United States and their agents, servants and employes shall, when acting in their official capacity, at all times have the free use of such invention."

Although the defendant does not go so far as to assert that the complainant has no remedy whatever when its patent is used by government officers, this is the practical effect of his contention. If the plea to the jurisdiction be sustained all equitable remedies are denied to the patentee, his right to an injunction is gone and he is relegated to the court of claims to prosecute an inadequate remedy upon a questionable theory before a tribunal having doubtful jurisdiction. Prior to the decision in *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599, in February, 1896, the question presented by the plea, though often mooted, had never been decided adversely to the jurisdiction of the United States courts. The circuit courts had with great unanimity sustained their right to entertain these cases and the supreme court, though expressing doubt upon the subject, in at least two reported cases (*James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786; *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901), had nevertheless assumed jurisdiction and dismissed the bills upon the merits. Mr. Walker summarizes the law as follows:

"Patent rights are exclusive, not only of citizens and residents of the United States, but also of the government itself, and of its agents. The government has no more right than any private citizen, to make, use, or sell a patented invention, without the license of the patentee. When the government grants letters patent for an invention, it confers upon the patentee an exclusive property therein, which cannot be appropriated or used by the government itself, without just compensation, any more than land which has been patented to a private purchaser can, without compensation, be appropriated or used by the government." Walk. Pat. § 157; 3 Rob. Pat. §

897; *James v. Campbell*, 104 U. S. 356, 23 L. Ed. 786; *U. S. v. Burns*, 12 Wall. 246, 20 L. Ed. 388; *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901; *Solomons v. U. S.*, 137 U. S. 348, 11 Sup. Ct. 88, 34 L. Ed. 667; *Head v. Porter* (C. C.) 48 Fed. 481.

In the latter case Judge Colt, after carefully considering all of the leading authorities, concludes as follows:

"It is at least doubtful whether the present action could be brought in the court of claims. In its present form it is an action in tort, and not upon any contract, express or implied, and, as was said by Mr. Justice Bradley in *James v. Campbell*, the jurisdiction of that court does not extend to torts. While the supreme court have declined to pass upon the question of jurisdiction in these cases, they have assumed jurisdiction and disposed of each case on its merits; in other words, no case can be found where the court has dismissed the suit for want of jurisdiction, and this would seem to be sufficient ground, in this case, to overrule the plea, and allow the case to be heard upon bill, answer, and proofs. If, however, the principle established in the cases we have reviewed, and the rule laid down by Mr. Justice Miller in *Cunningham v. Railroad Co.*, are sound, it is difficult to see why the court has not jurisdiction in the present case. This is an action of tort for the infringement of a patent, brought against an individual, who is an officer or agent of the United States, and whose defense is that he acted under orders of the government. That this is no defense in actions of this general character has, as we have seen, been repeatedly held by the supreme court and the objections interposed that these suits are substantially against the government, and that, therefore, it is a necessary party to enable the court to grant relief, has been many times urged without avail. The rights secured to a patentee under his grant from the government are a form of property, in the enjoyment of which he is entitled to protection against all trespassers, including the government. To deprive him of the full enjoyment of these rights by using his invention without his consent is to deprive him of his property without just compensation or due process of law, and therefore in conflict with those provisions of the constitution which secure this protection to the citizen. I am of opinion, therefore, that the plea in this case should be overruled."

It is thought that this is a fair exegesis of the law at the time the opinion was filed, in December, 1891. This court is in accord with the views thus expressed.

It has always seemed to the court illogical, to use no harsher term, for the government to give to an inventor an exclusive right to his invention and thereupon proceed to render nugatory its own grant. The grantor of the right should, of all parties, be the last one to invade it. For the government to permit its own agents for its own benefit to violate its own covenant savors of bad faith. To use the language of Mr. Justice Harlan, in the dissenting opinion in *Belknap v. Schild*, if such evasion be permitted "the government may well be regarded as organized robbery so far as the rights of patentees are concerned." Of what avail is it that the patentee is informed that although his exclusive right can be trampled on with impunity he may yet resort to the court of claims for partial relief and failing there he may apply to congress? The right to use the invention is his and he should not be required to relinquish that right, in invitum, except in cases of public peril or necessity. Not only does good faith require that the government should respect its own patents, but good policy also demands it. To hold otherwise strikes at the foundation upon which our patent laws rest. It discourages that class of inventors who are devoting their energies to the improvements of appliances used in the great de-

partments of the government and upon which the progress and safety of the nation may depend in the future, as it has depended on more than one notable occasion in the past. Is it prudent to expect that the men of genius who have brought our engines of attack and defense to such a high state of perfection on sea and land will continue to work for a government which appropriates at will the fruits of their genius and labor? If the doctrine which forms the basis of this plea be once firmly established a patentee will be practically, though not theoretically, remediless against the encroachments of the officers of the government. What fundamental principle of law requires that the circuit courts should be ousted of a jurisdiction which they have so long maintained? Is it not safe to intrust to the judges of the United States courts the interests of the government, in all confidence that the writ of injunction will not be abused or issued in any case where the public interests are at all involved or are likely to suffer? A patentee has rights which are exclusive of the United States. The United States has no more right than an individual to use, without license, a patented invention. This proposition is no longer open to dispute and yet it is asserted that it is a right without a remedy and must so continue until congress provides a remedy. Conceding that the jurisdiction of the circuit court is not free from doubt should not every effort be made to sustain it until congress provides a tribunal which can grant adequate relief? That the court of claims is not such a tribunal is manifest. In any view its jurisdiction is limited to a recovery upon the theory of an implied contract and even this shred of remedy seems never to have been confirmed by the supreme court. It is true that the court of claims has taken cognizance of several cases which the supreme court has disposed of on the merits. *Hubbell v. U. S.*, 179 U. S. 77, 21 Sup. Ct. 24, 45 L. Ed. 95; *Solomons v. U. S.*, 137 U. S. 342, 11 Sup. Ct. 88, 34 L. Ed. 667. In only one instance was the jurisdiction under discussion and there it was upheld because the patentee had given his consent to the use of the invention and it was held that the claim was not one for infringement but a claim of compensation for an authorized use. *U. S. v. Palmer*, 128 U. S. 262, 9 Sup. Ct. 104, 32 L. Ed. 442. Mr. Justice Bradley, speaking for the court, says:

"It is objected that an action cannot be brought in the court of claims on a patent, the circuit court having exclusive jurisdiction of this subject. But whilst that objection may be available as to actions for infringement of a patent, in which its validity may be put in issue, and in which the peculiar defenses authorized by the patent laws in Rev. St. § 4920, may be set up, it is not valid as against actions founded on contracts for the use of patented inventions."

Upon principle and authority, therefore, the court would have little hesitation in overruling the plea were it not for the decision of the supreme court in *Belknap and Schild*. This decision is relied on by the defendant as a definitive determination of the questions in issue. The patent in that case was granted to Schild for an improvement in caisson gates. The caisson gate alleged to infringe was constructed by the United States and was in its possession and control at the dry dock in the navy yard at Mare Island. This dry dock was

used for naval purposes and the public defense in the building and repairing of ships for the navy of the United States. A plea was interposed alleging these facts and stating further "that the defendants, and each of them, never had anything to do with the construction, use or operation of the gate, or made any claim of right, title, possession, control or use of it other than as officers and agents of the United States, and in obedience to orders of the naval department of the government." The circuit court overruled this plea and the ruling was sustained, the supreme court using the following language:

"The fact so pleaded and suggested could not, consistently with the previous decisions, above cited, prevent the defendants from being held liable to the patentee for their own infringement of the patent. There was no error, therefore, in overruling the plea of the defendants and the suggestion of the attorney general."

As the plea set up the official character of the defendants it is urged that this ruling makes it incumbent upon this court to overrule the plea at bar, but in view of the opinion expressed in the latter part of the decision it is thought that the paragraph above quoted must have reference to some averments of the bill or plea not fully disclosed by the record. The court proceeds to point out that the caisson gate, though made in infringement of the patent, was nevertheless the property of the United States. Both the title and the possession vested in the United States. The opinion says:

"The entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; the United States were the only real party, against whom alone in fact the relief was asked, and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official capacity, and in the exercise of their official functions, as representatives and agents of the United States, and thereby to defeat the use by the United States of property owned and used by the United States for the common defense and general welfare; and therefore the United States were an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought; and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this court, above cited."

It was also decided that there could be no decree for profits awarded against the defendants and that whatever profits accrued inured to the benefit of the United States.

"The necessary result is," says the opinion, "that even if the validity of the patent and its infringement by the defendants are assumed, the plaintiff, upon this record, is not entitled to an injunction, to profits or to damages."

The points of difference upon the facts between that case and the case in hand are First: The machines at use in the Syracuse post office are not owned by the United States but are leased by the post office department for the term of one year. Second: The complainant is prepared to substitute other machines for the two infringing machines on similar terms so that the substitution can be effected without loss to the government or inconvenience to the public. Third: The *quia timet* feature of the present bill. Since the decision in *Belknap* and *Schild* the supreme court entertained jurisdiction of an equity suit for the infringement of a patent and affirmed a decree of the circuit court of appeals of the Fourth circuit dis-

missing the bill. *Dashiell v. Grosvenor*, 162 U. S. 425, 16 Sup. Ct. 805, 40 L. Ed. 1025. The action was in the ordinary form for the infringement of a patent for improvements in breach-loading cannon which were being made at the Washington navy yard. The circuit court, after a careful examination of the testimony, upheld the patent and directed an injunction to issue. *Grosvenor v. Dashiell* (C. C.) 62 Fed. 584. The circuit court of appeals reversed this judgment, holding that the circuit court was without jurisdiction and that the owners of the patent "can, recover just compensation for such use and infringement from the government by a suit in the court of claims, or by means of an appropriation for that purpose made by congress, on application made to that body." Although it appeared that the manufacture of the cannon complained of was by the authority and direction of the defendant and under a contract with him by which he was to receive \$125 for each cannon, the court of appeals decided that the suit was in substance and effect against the government and could not be maintained. The court also decided that complainant could not succeed for another reason to which it is unnecessary to refer. *Dashiell v. Grosvenor*, 13 C. C. A. 593, 66 Fed. 334, 27 L. R. A. 67. The supreme court does not discuss either of the propositions upon which the court of appeals bases its judgment, but affirms the decree dismissing the bill upon a ground not alluded to by the court of appeals, namely, that the patent was not infringed. The last sentence of the opinion is as follows:

"This conclusion also renders it unnecessary for us to consider the questions discussed by the court of appeals in its opinion, in respect to one of which see *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; but for reasons stated, its decree dismissing the bill, is affirmed."

As infringement was specifically found by the circuit court and as this finding was not criticised in the court of appeals it may be argued with some plausibility that the supreme court would not have deemed it necessary to examine and decide the difficult question of infringement if satisfied with the reasoning of the court of appeals upon the jurisdictional question. The *Belknap Case* had just been decided, the subject was fresh in the minds of the justices, and there is some force in the suggestion that they would not have gone so far afield to find another reason for sustaining the judgment if clearly convinced that the reason assigned by the court of appeals was a valid one. In other words, may it not, perhaps, be inferred that the supreme court intends to confine the ruling in the *Belknap Case* to situations precisely similar to the one there shown, where the decree reversed contemplated the destruction of property of the government and the serious interference with the work of the navy of the United States? Some additional light is thrown on the discussion by the decision in *November, 1898*, of the circuit court of appeals of the Sixth circuit in *Howell v. Miller*, 33 C. C. A. 407, 91 Fed. 129. This was a copyright case, and especial interest attaches to the decision from the fact that the opinion was written by Mr. Justice Harlan who dissented in *Belknap v. Schild*. After commenting at some length upon the law as there enunciated the learned justice says:

"It thus appears that the supreme court, in *Belknap v. Schild*, proceeded in its judgment upon the ground that the caisson gate used at the navy yard of the United States under the supervision of the officers of the government, had become its property, and that such use could not be enjoined because an injunction could not operate directly upon the government's use of its own property, when it was not a party to the suit and could not, without its consent be sued. * * * It may be observed that if, before the caisson gate in question had been constructed, the patentee had applied for the relief necessary to prevent such construction, a different case would be presented to the supreme court."

The court has been unable to discover any decision since *Howell* and *Miller* which contributes anything of importance to the discussion. The situation is a most perplexing one. What to do!

After the most careful consideration it is thought that the wisest disposition of the controversy is to sustain the plea. The reasons which induce to this conclusion may be briefly stated as follows: First: It cannot be pretended that the question of jurisdiction is so far free from doubt as to warrant the court in granting a preliminary injunction. This being so it is probable that the question raised by the plea can be determined on appeal before the record would be ready for final hearing were the plea overruled. If the decree dismissing the bill be affirmed the parties will be saved the expense and annoyance incident to taking the proofs and printing the testimony. Second: The question is an important one and the controversy regarding it should certainly be set at rest. If it be presented on a bill and plea it must be decided and no better case can be selected in which to raise the naked question of jurisdiction. Should it be finally determined that the circuit courts can no longer entertain cases where government agents, acting under instructions from the executive departments, use devices covered by patents, a strong appeal may be made to congress to grant some adequate relief to this large class of inventors. Third: If the complainant could obtain relief upon the *quia timet* clauses of the bill the court would be inclined to retain jurisdiction, but as no one appears but the defendant *Bruce* and he, upon the admitted facts, has nothing whatever to do with the making or renewal of contracts it is not easy to see how an injunction against him will prevent the makers and owners of the machines from entering into renewal agreements with the post office department. The defendant *Bruce* is not a party to these agreements and has no interest in or control over them. In other words, the parties against whom such an injunction should be aimed are not parties to the action. Fourth: Although the facts differ in the particulars above stated from the facts in the *Belknap* Case the court cannot resist the conclusion that the attempt to distinguish the two cases is not grounded upon substantial considerations. The court cannot ignore the fact that the supreme court has said that the owner of a patent cannot enjoin officers of the government from using the invention in their official capacity; neither can he recover profits when the only profits shown are made by the United States. The plea states specifically that the defendant is using the invention in his official capacity and that no profits have accrued to him individually. These facts are all admitted. Fifth: This suit is *not*

the complainant's only remedy; it may yet obtain relief, at least so far as future infringements are concerned, by bringing an action against the other defendants in the proper district. The question of jurisdiction here discussed could not be raised in such an action. The bill is dismissed.

BOYLE v. BOYLE.

(Circuit Court, E. D. Pennsylvania. March 25, 1902.)

No. 6.

PARTITION—RIGHTS OF PURCHASER AT SALE—RESCISSION FOR DEFECT OF TITLE.

Where real estate was sold in a partition suit between collateral heirs of the last owner, subject to the condition that a deposit should be made by the purchaser, which should be forfeited in case he failed to comply with his bid, the successful bidder cannot refuse to complete the purchase, and recover his deposit, on the ground that the title is unmarketable, because the evidence did not exclude the possibility of the existence of other heirs not before the court, when such evidence had been found sufficient by the master and the court, and was clearly so unless the recollection of the witnesses was at fault, and their testimony was unimpeached.

Partition. On petition for repayment of deposit money by bidder at sale.

Richard C. Dale, for petitioner.

H. W. Scarborough, for defendant.

J. B. McPHERSON, District Judge. As the result of this action of partition between the collateral heirs of the last owner of the real estate, a sale of the property was had, at which the petitioner was the successful bidder for the sum of \$4,965. He paid a deposit of \$497.50, but afterwards refused to complete the purchase, upon the ground that the title was not marketable. The conditions of the first sale provided that the deposit money should be forfeited if the purchaser failed to comply with his bid. Upon a second sale, only \$4,200 could be obtained. The petitioner requested the master to repay him the deposit of \$497.50, and upon the master's refusal now applies to the court. The sole ground upon which the petition is put is that the testimony taken by the master in order to ascertain who were the heirs is not sufficiently certain to preclude the possibility of there being other heirs than those who are parties to the action. Assuming that the finding of the master and the decree of the court upon this subject can be re-examined in this manner, I can only say that a consideration of the testimony has failed to convince me that the title can fairly be said to be unmarketable. If the recollection of the witnesses is accurate, all the heirs of the decedent have been accounted for and have been made parties, and nothing whatever is shown to impeach the memory or the good faith of the witnesses that have testified concerning his family connection. It is merely a possibility, with no testimony to support it, upon which the petitioner relies. When it is consid-

ered, also, that the decedent has been dead for nearly 21 years, I think it is highly probable that all persons interested in his estate have presented themselves, or have been brought, before the court.

The petition is refused.

COFFIN et al. v. BOARD OF COM'RS OF KEARNEY COUNTY.

(Circuit Court, D. Kansas, First Division. April 18, 1902.)

No. 7,893.

1. SUBROGATION—HOLDERS OF INVALID BONDS.

Where a county undertakes to fund its outstanding indebtedness into bonds, and on issuing such bonds, payable to bearer, takes up, cancels, and destroys the warrants evidencing such indebtedness, and the bonds are bought in the open market, and are afterwards repudiated by the county, and are held by the court to be void, for want of power at the time in the county to issue them, the purchaser of the bonds for a valuable consideration, on offering to surrender them to the county, is entitled to be subrogated to the rights of the original warrant holders, and to recover from the county the amount of the warrants. *Irvine v. Commissioners* (C. C.) 75 Fed. 765, followed.

2. STATUTE OF LIMITATIONS—INVALID BONDS—ACTION ON ORIGINAL CONSIDERATION.

The statute of limitations does not begin to run against such suit until denial by the county of its obligation on such bonds; and the action of the county commissioners of such county in adopting a resolution recognizing the obligation of the county on the warrants, and directing the funding of the debt into bonds, is tantamount to a new acknowledgment, and stopped the running of the statute of limitations.

3. ACTION ON COUNTY BONDS—BURDEN OF PROOF.

Where the defendant county undertakes to defeat recovery on such warrants on the ground that they were fraudulently issued or were a nudum pactum, the burden of proof rests upon the county to establish such facts. It is not sufficient to defeat a recovery that the evidence should show, in a general way, that the county commissioners were recklessly extravagant, or that they issued warrants for questionable purposes, or even in greater amounts than were honestly owing by the county; but the proof must go further, and identify the particular warrants in suit with such illegal transactions.

4. SAME—EVIDENCE.

Where the defendant county offers in evidence its county record for the purpose of identifying the warrants in suit, with the numbers entered in such record, and it appears on the face thereof that there have been erasures and substitutions of certain numbers, and additions of other numbers on the outside of the marginal lines of the record, to make out the correspondence of such numbers with those of the warrants in suit, and such tampering with the record is unexplained by the official custodian of such record, and other entries in such record, to eke out the essential identity, are carried forward, out of consecutive order, many hundred pages, to the latter part of the record, not signed by the proper officers of the county as by statute required, such part of the record should be excluded.

5. SAME—COUNTY WARRANTS.

What purports to be a "stub book" of the county, introduced by the defendant for the purpose of identifying by the stubs some of the warrants in suit (such book not being required by the statute to be kept by the county, and it appearing that such book had for a considerable time been in the possession of a person other than the official custodian

of the county records and files, and by him carried about over the country, and not identified by the proper officer of the county as of the records or files of his office), is incompetent evidence on behalf of the county.

6. SAME—DEFENSES.

The defense to such warrants that they had been issued in excess of the statutory limitations of the amount of debts for current expenses of the county for the given year, based upon the assessed valuation of the taxable property of the county, is not maintainable as a complete defense to all the warrants in suit, in the face of the agreed statement of facts that in the county, newly organized, there had been no assessment of the property for purposes of taxation anterior to the issue of the warrants. *Held*, further, that inasmuch as the law contemplates that in the administration of a territory, like a township, preliminary to its organization into a county, special, extraordinary expenses, distinguished from "current expenses" in the conduct of an organized county, are legally permissible, it devolves upon the defendant county to show affirmatively what particular warrant in suit was issued on account of such current expenses, and what particular warrant is in excess of the statutory limitation.

7. EVIDENCE—OFFICIAL CERTIFICATES.

A certificate made by a person designated as an "enumerator" appointed by the governor of the state to report to him the minimum number of inhabitants and the taxable property in the county, for the information of the governor preparatory to the issue of a proclamation by him designating the given territory as an organized county, is inadmissible in evidence to show the assessed valuation of the taxable property of the county in this suit.

8. SAME.

Equally incompetent for such purpose is a compilation of the taxable property of the county found in the published reports of the state auditor; likewise a certificate of the clerk of the county, found in the state auditor's office, giving the valuation of property in the county, claimed to have been furnished when said bonds of the county were presented to the state auditor for registration; there being no statute of the state then in force authorizing such registration or certificate, and no evidence that the original warrant holders or bondholders, or purchasers of the bonds, presented such certificate to the state auditor, or had any knowledge thereof. There can be no presumption that such certificate was presented by either of such persons, in the absence of a statute requiring its presentation.

(Syllabus by the Court.)

In Equity.

Rossington, Smith & Histed and F. P. Lindsay, for complainants.
Milton Brown, for defendant.

PHILIPS, District Judge. It is strenuously urged by defendant's counsel that the complainants are not entitled to the relief sought by their bill, as the doctrine of the right of substitution forbids it. This question was passed upon by Judge Foster, the then presiding judge of this district, on a demurrer interposed by the defendant to the bill of L. M. Irvine, similar to the complainants'. His opinion is reported at page 765, 75 Fed. On coming into this jurisdiction under assignment, it is a part of the unwritten law that I should not overrule that ruling, unless it be so clearly erroneous as to appeal to my sense of judicial duty. It is to be confessed that looking to the broad language of Mr. Justice Miller in *Ætna Life Ins. Co. v. Town of Middleport*,

124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537, the proposition might be upheld that inasmuch as the purchasers of the bonds bought them on the open market, on speculation, or as an investment, they stand in the relation to the debtor county as mere volunteers, to whom equity does not extend its arm of protection by substituting them to the rights of the original warrant holders. And unless the language of his postulates can be "restrained to the fitness of the matter," it would preclude recovery in this case. The facts of that case can be differentiated from these at bar. The statute under which the appropriation was voted by the town of Middleport to the railroad company provided as the means for its payment a tax on the property of the inhabitants, and not otherwise. No power was given to the municipality to issue bonds therefor. The contract was not an unconditional obligation of the municipality to pay. The railroad company, as the beneficiary of the appropriation, could look alone for payment to taxes to be collected annually from the inhabitants. No other judgment could have gone against the municipality, as such, to enforce this obligation, than of a mandatory character against its governing body to proceed to assess and collect the necessary taxes, sub modo. So when the railroad company took the bonds it paid to the city nothing nor surrendered to it therefor anything of value. Neither was the debt thereby attempted to be extinguished or altered, or the mode of its enforcement in anywise affected. Therefore, even as between the railroad company, to whom the bonds were issued, and the city, no equity was evoked to entitle the railroad company to appeal to a court of equity for relief. Not so in the case at bar. The debt was the direct obligation of the county. The warrants presumptively represented value received and enjoyed directly by the county. The taker of the bonds did surrender something of value to the county,—the warrants, the written evidence of the undertaking of the county. The warrants the county canceled and burned, and undertook thereby to wipe out the written evidence of its original debts. The bonds being void, the warrants, although physically destroyed, remained the obligations of the county; and, on repudiation by the county of the bonds, if then owned by the warrant holders, the latter, beyond question, could have maintained action to recover the amount thereof from the county. By issuing the bonds the county put it in the power of the taker of the bonds to transfer them by delivery, and obtain the amount of his debt against the county. The purchasers of the bonds have no recourse on the person from whom they purchased, as he transferred them simply for what they appeared on their face to be,—commercial paper,—without any guaranty. *Otis v. Cullum*, 92 U. S. 447, 23 L. Ed. 496. The warrant holders, having realized their money by the sale of the bonds, have no occasion to go on the county for pay of the warrants. Therefore, if the defendant's contention is to prevail, that the complainants are not entitled to be subrogated, the situation presents this anomaly: The county, by the trick or scheme of issuing the bonds, and having the warrants surrendered for cancellation, and then repudiating the bonds, is to be forever discharged from its debts represented by the warrants, aggregating about \$35,000 and interest. The complainants, whose money the warrant holders were thus, by the

act of the county, enabled to obtain, have no standing in court to compel the original warrant holders to pursue the county for their use and benefit. So the county is to go free. It is difficult for the human mind to conceive of a situation more rank with injustice; and, if the courts cannot afford relief to these complainants, it must be said that justice no longer, in American jurisprudence, has a "forum of conscience." As said by that other great jurist, Mr. Justice Field, in *Marsh v. Fulton Co.*, 10 Wall. 676-684, 19 L. Ed. 1040:

"The obligation to do justice rests upon all persons, natural and artificial; and, if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

In the face of such a contingency as this case presents, the very instinct of justice should compel a chancellor to make a precedent. The motto of the device of the pickax on the dial, "Find a way or make one," should be applied at times by the courts.

The fact that the money paid by the complainants for the bonds to the original bondholders did not pass directly into the treasury of the county cannot avail the defendant as a defense. As said by the court of appeals of this circuit in *Geer v. School Dist.*, 49 C. C. A. 539, 548, 111 Fed. 682-690:

"The case of *City of Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238, is authority for his [complainant's] recovery, notwithstanding the fact that his assignor actually paid the money to the school district for the bonds in question. The court holds in the last-cited case that the holder of the bonds, who purchased them from the original taker, succeeds to the same right of recovery on the implied obligation which the original purchaser from the municipality enjoyed."

This ought the more especially to obtain under circumstances like these at bar, where the bonds were exchanged by the county in an attempted liquidation of its outstanding warrants, which it had authority to issue, and were issued, presumptively, for valid obligations of the county, and, after obtaining them under agreement, canceled and destroyed them.

The Statute of Limitations. It is conceded that under the Kansas statute this cause of action would not be barred until after the lapse of five years. When did the cause of action as to these complainants arise? The contention of the defendant is that the statute began to run the moment the funding bonds were issued. It is then assumed that the bonds were issued August 1, 1888; and as this suit was not instituted until August 14, 1893, the limitation had expired. But the agreed statement is that on August 27, 1888, the board of county commissioners of Kearny county, at a regular meeting of said board, passed the resolution acknowledging the indebtedness on the warrants, and ordering the bonds to be issued in exchange therefor, whereupon the county treasurer should cause the surrender of the evidence of indebtedness to be marked "Paid in full" across the face. The bonds were to be accompanied with a certificate from the county clerk under his seal, "that the indebtedness of Kearny county in registered warrants equal to the sum of such bond or bonds has been surrendered to the board of county commissioners for cancellation, and canceled." Paragraph 2 of the agreed statement of facts recites that "subsequent-

ly, and in pursuance of the order set forth in paragraph No. 1, the chairman of the board of county commissioners and the county clerk executed refunding bonds of said county of Kearny." The bonds necessarily were issued after the date of the funding order. Defendant's counsel has fallen into error respecting the date of the issue, by reason of the recitation that the bonds should be dated back to August 1, 1888, to bear interest therefrom. The taker of the bonds could have had no action growing out of or dependent thereon until after the issue and delivery of the bonds. The correct rule is that until the county repudiated the bonds, by denying liability thereon, the statute of limitations would not begin to run against the bondholder to recover from the county the value of the warrants exchanged therefor, and destroyed by the county. *Cowper v. Godmond*, 9 Bing. 748; *Merrill v. Town of Monticello*, 72 Fed. 462-464, 18 C. C. A. 636. As said by the court of appeals in *Geer v. School Dist.*, 49 C. C. A. 549, 111 Fed. 691:

"As long as the district so recognized the same, and elected to treat them as legal obligations, we know of no reason requiring the plaintiff to take any steps to rescind the contract, or obligating him to resort to the courts to enforce the implied obligation. It would be a harsh and thoroughly impracticable rule to establish that the holder of a claim against a municipality is bound by any consideration of statutes of limitations to take steps to rescind an express contract to pay the same, as long as the municipality itself recognizes such express contract as a valid and binding obligation. The effect of such a rule would be to permit the municipality to lull the holders of its obligations into inaction, and thereby, taking advantage of its own wrong, deprive them of a valuable right. It results, in our opinion, that the plaintiff in error had a lawful right to institute suit to recover upon the implied obligation at any time within six years [which was the limitation under the Colorado statute] after the district repudiated the express obligation. As the agreed statement recites that the suit was brought on the bonds July 5, 1890, when payment was resisted, in the absence of any evidence showing an earlier denial by the county of liability the presumption must obtain that the answer to that suit marks the initial period for the running of the statute of limitations. Furthermore, by resolution of the board of county commissioners of August 27, 1888, they acknowledged the existence of the debt,—that they owed the sum of the warrants,—and proceeded to discharge the warrants by thereafter issuing said bonds. Under statutes of limitation in no material respect different from that of Kansas (Gen. St. Kan. 1897, p. 90, § 18), it has been held (and such is the trend of the adjudications) that it is sufficient if the party acknowledge that he owed the debt, to stop the running of the statute of limitations, even though unaccompanied by any promise to pay. *Chidsey v. Powell*, 91 Mo. 622, 4 S. W. 446, 60 Am. Rep. 267; *Elder v. Dyer*, 26 Kan. 604, 40 Am. Rep. 320; *Rolfe v. Pilloud* (Neb.) 19 N. W. 615, 970; *Sluby v. Champlin*, 4 Johns. 402; *Patterson v. Choate*, 7 Wend. 441; *Whitney v. Reese*, 11 Minn. 138 (Gil. 87); *Palmer v. Gillespie*, 95 Pa. 340, 40 Am. Rep. 657; *De Forest v. Hunt*, 8 Conn. 180. So, in this view of the law, this acknowledgment of the debt having been made by the defendant on the 27th day of August, 1888, and the suit having been instituted on August 14, 1893, the period of limitation had not run."

At the hearing of this case, at the conclusion of the oral argument then presented by counsel it was suggested by the court to defendant's counsel that: Conceding there was some irregularity and fraud in the issue of the warrants in question, the practical and essential question is, has the defendant traced such fraud or want of consideration into any of the warrants involved in this suit? and

suggested to counsel for defendant that he present, in some tangible, intelligible form, a statement pointing out this required identity. This he has attempted to do in subsequent briefs. But I confess my inability to find the satisfactory proofs, outside of the mere assertions and cunning arrangement of figures by counsel. It stands alike to authority and to a sense of justice that, before the defendant can avoid a single warrant sued on, the burden rests upon it to show, by intelligible and honest testimony, that the particular warrant is vitiated by fraud in its issue, or that it is a nudum pactum. *Board of Com'rs of Lake Co. v. Keene Five Cents Sav. Bank*, 108 Fed. 505, 47 C. C. A. 464.

The defendant has sought to identify some of these warrants, and the purposes for which they were issued, by offering in evidence certain pages of the commissioners' journal, No. 1, of Kearny county. To the admission of this journal for such proof, complainants' counsel objected, for the reason, *inter alia*, that the material pages of this record bear upon their face unmistakable evidence of having been tampered with. It must be admitted that it is quite apparent on the face of this record that there have been material erasures and substitutions of figures denoting the number of the warrants, evidently made since the original record was made up. It is also apparent (particularly so on pages 53 and 58 of this journal, which purports to contain a list of the county warrants ordered destroyed and refunded into bonds) that not only have the numbers of the original writing thereon been changed, but that after the entries were made there have been added two columns of figures on the left-hand margin, and one column of figures on the right-hand margin, outside of the lines which separate the margins from the usual place for making record entries. Superadded to this is the fact that this enumeration of numbers of warrants was wholly insufficient to indicate either their amounts, or names of the payees, or the purposes for which they were entered; and after their entry, and apparently in fresher ink, occur the words, written in, "See commissioners' journal, page 605, for full description." Why, if this entry was ordered made at the time of the purported transaction, it was not made in consecutive order on the record, but had to be carried over 547 pages to the back of the book, is not explained. And even then all the entries necessary to make out the numbers of the warrants canceled and destroyed were not entered on page 605, but a part of them were entered on page 604, bearing unmistakable evidence of not having been entered at the time; and these later pages are not signed, as required by the statute, by the officers of the court, or officially attested. No sufficient evidence is offered by the defendant in explanation of the evident tampering with this record.

Aside from this criticism, there is nothing in this record proper to identify any warrant in question with any fraud in its issue, or to show what the original consideration therefor was. Encountering this obstacle in the defense, recourse was sought by defendant to the testimony of one Waterman, and a certain stub book presented by him, known as "Exhibit Y," purporting to have contained

scrip or warrants issued by Kearny township; the stubs in some instances indicating to whom issued. No chancellor, who distrusts a self-seeking hypocrite, can place any reliance upon the uncorroborated word of this witness. From statements made by defendant's counsel in open court, it appears that this man, in other litigation between this county and other creditors, involving questions as to the issue of county warrants and county indebtedness, gave his deposition or depositions, not making the developments he undertakes to disclose in this case in respect to said stub book and other matters. And counsel assigned as a reason for asking for a delay to take further depositions that this witness had of late, at a religious revival, experienced a change of heart. But when on the hearing of this case it was developed that this witness had entered into a solemn compact, of record, with the defendant county, to assist it in getting up evidence in this case, in consideration of \$600 to him since paid, the conclusion is enforced that his confession is merely a needful exhibition of that unselfishness "which is but a lively sense of favors yet to come." It is by this witness that the defendant must rely for the identification of this stub book as of the files of Kearny township. The objection by complainants' counsel to the admissibility of this book in evidence is well taken. In the first place, there was no statute of the state requiring such a book to be kept by the township or county officials; second, no officer of the township or of the county who would have been the official custodian of this book has sufficiently identified it as of the records or files of the township or county; and, third, it appears from Waterman's testimony that, for a long period of time after this book is claimed to have been used by the officers of Kearny township, it was in his private possession, carried about by him outside of the state, and at other places in the state, hundreds of miles away from Kearny county. From every consideration of sound policy, such a book cannot be introduced by the county as evidence in its behalf. *Board of Com'rs of Lake Co. v. Keene Five Cents Sav. Bank*, supra; *State v. Cook*, 30 Kan. 82, 1 Pac. 32; *State v. Nye*, 32 Kan. 201, 4 Pac. 134; *Phelps v. Hunt*, 43 Conn. 194; *White v. Fitler*, 2 Pa. Law J. 302; *Hardin v. Blackshear*, 60 Tex. 132; *Alexander v. Campbell*, 74 Mo. 142; *Roberts v. Wilson*, 1 Utah, 292; *Noble v. Douglass*, 56 Kan. 92-95, 42 Pac. 328. The defendant cannot eke out the omissions, imperfections, and want of identity between the numbers of the warrants and the parties to whom issued, not shown by the stub book, by the testimony of Waterman in pais. If the book, indeed, be a record or file of the county proper, it must speak for itself. This rule is inflexible when such evidence is produced for the purpose of carrying home notice as to the character and consideration of warrants of a county to the payee or the purchaser. *Rollins v. Board*, 90 Fed. 575, 33 C. C. A. 181. Sending Waterman and his "stub book" out of court, as in law and good conscience ought to be done, the defense should go with them.

The remaining defense worthy of consideration is that the warrants sued on were an overissue, beyond the debt-making power

of the county, and are therefore invalid. The statute relied upon is section 1853, Gen. St. Kan. 1901, in force at the period in question:

"The board of county commissioners of any county shall not levy upon the taxable property of such county a tax for current expenses of said county of any one year in excess of the following amounts: Upon a valuation of five million dollars and under, one per cent.; over five millions and under six millions, eight and one-half mills; over six millions and under seven millions, seven and one-half mills; over seven millions and under eight millions, six and one-half mills; over eight millions and under nine millions, five and three-fourths mills; over nine millions, one-half of one per cent.; provided, that the electors of the county, by a direct vote, may order an increase in such levies."

The succeeding section (1854) limits the power of issuing warrants within the prescribed limit of section 1853.

It hardly admits of debate that the evidence of the assessed valuation of the property of the county contemplated by this statute is that made by the proper county officers, made and extended upon the tax books of the county for the purpose of collecting taxes. No taker or purchaser of the issued obligations of a county, acknowledging an indebtedness, has ever been held, to my knowledge, to the duty of looking further than the record books of the county containing the assessment and tax levy. Aside from this, however, by paragraph No. 12 of the defendant's answer herein it is expressly admitted:

"That said warrants referred to in complainants' bill, if issued at all, were made and issued against the county fund of said county, and as a charge against the county fund, before there had been any assessment of taxable property of said county for the purpose of taxation, and before there had been any levy of taxes for county purposes in said county."

No matter what other allegations the answer may contain respecting the present assessments on the valuation of the county property, the foregoing admission of the answer should preclude all attempts made by the defendant to show aliunde that there had been such an assessment and valuation on the property of the county prior to the issue of these warrants. "A party should be bound by the allegations of his pleadings, deliberately made, and cannot be allowed to obtain benefits from contradictory and inconsistent allegations therein, even if made in separate counts." *Losch v. Pickett*, 36 Kan. 216, 12 Pac. 822. This rule is aptly stated in *Savings & Trust Co. v. Bear Valley Irr. Co. (C. C.)* 112 Fed. 694-704: "A party is not permitted to assume inconsistent positions in the same litigation." It should also be a sufficient answer to the attempts, by extraneous matters, to show what the assessed valuation of the taxable property of the county was, to say that all of these should be supplemented by evidence showing that either all of the warrants, or some of the particular warrants in suit, were issued "for current expenses of said county of any one year" in excess of the statutory limitation. As warrants issued by the county for special and extraordinary expenses of the municipality (especially those incident to the administration of the affairs of a new township and the organization of a new county) are not within the inhibited limitation of the statute (*Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060; *Childs v. City of Anacortes (Wash.)*

32 Pac. 217; *State v. Cornwell*, 18 S. E. 184, 40 S. C. 26; *Germania Sav. Bank v. Town of Darlington*, 27 S. E. 846, 50 S. C. 337; *State v. Common Council of City of Tomahawk*, 71 N. W. 86, 96 Wis. 73), it devolved upon the defendant to show not only that the particular warrants in suit were issued for current expenses of the county, but also that at the time of their issue the statutory limit had been passed. This the evidence fails to sufficiently point out and fix with any degree of certainty. The state of the proof in this case defies any mental effort, pursuing permissible legal lines, to ascertain this required quantity.

The astute and industrious counsel for defendant has sought in many ways to supply this needed and indispensable proof. His first effort was to introduce in evidence the contents of a report made by one Prouty, as the enumerator designated by the governor of the state under the state statute (Sess. Laws 1887, c. 128), made for the purpose of enabling the governor of the state, preliminary to issuing the proclamation declaring the new county organized, to determine whether the county contained the minimum population and taxable property. Neither the original nor a certified copy of this report was offered in evidence, but the defendant's counsel claimed that it was in his possession, and had been lost. Waiving, however, any question about this proof, how can it be judicially maintained that such certificate by such enumerator, made for a limited and single purpose, can be used by the county, in a suit against it by a third party, to show what the assessed valuation of the property of the county was? At common law it would be the merest hearsay evidence, and as there is no statute of the state making such report evidence for any purpose, except for the information of the governor before issuing his proclamation declaring the county organized, this paper is clearly inadmissible.

The next evidence, and of like character, offered by the defendant, is a certified copy made by the auditor of state of what purports to be a certificate filed in his office by the county clerk of Kearney county in November, 1888, to secure the registration of the bonds. It is conceded that at the time of making this certificate to the state auditor there was no statute of the state requiring the registration of bonds issued by counties, and consequently no statute authorizing or requiring such certificate by the clerk. And consequently it could not be evidence of notice of its contents to the holders of county warrants. The contention, however, of counsel, is that, inasmuch as the holder of the bonds presented such certificate to the auditor, he is bound by its recitals. In the first place, there is no evidence before this court that such certificate was presented to the auditor by the then holder of the bonds; and, in addition to this, the proof fails to connect the complainants with said certificate. If, as counsel contends, such certificate was presented to the auditor by the then holder of the bonds, they were presumably in the hands of the party who exchanged the warrants therefor; and, as the alleged object of the registration of the bonds was to qualify them for circulation upon the markets as commercial paper, not only would the further presumption arise that they had passed out of the hands "of the holder" onto the market, but this presumption ripens into an admitted and indisputable fact by the

agreed statement of facts filed herein by the parties. By the fourth paragraph of this agreed statement it is stipulated:

"That the complainant, subsequent to the issuance and delivery of the bonds described in paragraph No. 2, to wit, on January 10, 1889, bought the same upon the market, in good faith, paying par therefor, without notice of any irregularities or defect, or claim of illegality, save and except such as might be imparted from the face of the bonds themselves, and the public records and laws of Kansas; and complainant has continued to be, and is now, the owner and holder of said bonds."

The clear import of this statement is that the complainants bought the bonds after they had gone through the office of the auditor, as they would not go "upon the market" until after the holder of them had thus, according to his notion, qualified them for the public market. This is confirmed by the express stipulation that the complainants took the bonds without notice of any irregularities or defect or claim of illegality, "save and except such as might be imparted from the face of the bonds and the public records and laws of Kansas." As there was no law of Kansas authorizing or requiring such registration or such certificate, the contents of such paper is but hearsay, inadmissible against a third party in a suit against the county. Authorities *supra*. It was an unauthorized, superserviceable preparation of the clerk, and as such it is in no sense such a record of the county as a taker or purchaser of its obligations should take notice of. There is no evidence in this case that said certificate was presented to the auditor by any warrant holder. And even if this certificate were competent evidence, it would leave the defendant's cause precisely where all of its other evidence stops,—short of pointing out which warrant is bad by reason of being an overissue. Counsel for defendant contents himself with the bald statement that "it is easily ascertainable that there was an overissue of warrants, and it is easily computable as to the amount thereof." Yet notwithstanding he has been industriously engaged for the past year in this task, he finds it easier to leave the court to work it out, or guess at it, than furnish the demonstration.

In its last extremity the defendant has offered in evidence, on page 350 of a bound book labeled on the back, "Sixth Biennial Report, Auditor State, 1888, Kansas," which purports to give the valuation of properties returned by the county clerks, and the total valuation of the property fixed by the state board, and the per centum to be collected. And in the same connection he offered by his testimony to show what was a copy of a certain certificate found in the printed record of another case (*Speer v. Board*, 32 C. C. A. 101, 88 Fed. 749), from which it appears that the valuation of the railroad property had not been changed by the board of equalization, but remained as originally assessed by the state board of railroad assessors. So that this evidence, even if competent, would not show what was the assessed valuation of the railroad property admitted to then be in the county, and would therefore leave the court to presume something which the evidence does not show. I undertake to say that no well-considered adjudication can be found holding that in determining the question of whether or not there was an overvaluation of property for assessment purposes,

when the county issued certain evidences of indebtedness, such proof could be made by recourse to the state auditor's report, made up by him from sources and papers themselves not in evidence. It is not such a record as the law contemplates that the taker of the county's obligations should examine before taking or purchasing its warrants.

Other defenses interposed by the defendant in this case are precluded by the rulings of the court of appeals in the case of *Speer v. Board*, *supra*, and therefore need not be reviewed.

While the court, from all the facts and circumstances connected with the history of Kearny township, cannot escape the conviction that there was in the administration of its affairs by the township officers wanton extravagance, fraud, and speculation, and while the court would cheerfully see the county relieved of the great burden of debts placed upon it by improvident, if not dishonest, officials, it cannot do so against established rules of evidence and of law. There are facts and circumstances presented by the evidence on behalf of the defendant, for instance, which point pretty directly to fraud on the part of the township board, and their aiders and abettors, in employing a large number of men to work upon the construction of a public road through the township, with the ulterior purpose of colonizing such employes in the township to vote at an election for the location of a county seat for the new county. But as the evidence shows such employes did much and valuable work in the construction of this road, which the statute of the state authorized the township board, in its discretion, to have done, even if the evidence in this case showed that the sum of the warrants issued for such services was excessive, and that some of the warrants could on such account be defeated for want of consideration, or because of fraud in their issue, the defendant's evidence again falls short of identifying any particular warrant in controversy with such fraud or overissue. The same may be said respecting the large amount of fees for attorneys' services for which warrants were issued. While the defendant's testimony raises a reasonable doubt as to the value of such services being equal to the amount of compensation allowed by the governing board, I am unable, from the evidence presented, to identify such warrant or warrants with those in suit; and, if I could, it would be mere guesswork for this court, on the evidence before it, to undertake to determine what amount of such warrant was honest, and how much was dishonest, or reasonable or unreasonable. The board had authority to employ counsel, which it did; and, as such counsel unquestionably rendered some professional service, the presumption obtains that every warrant issued therefor was not voidable for total failure of consideration.

Decree will go for the complainants.

FIRST NAT. BANK OF SEATTLE v. CITY TRUST, SAFE DEPOSIT & SURETY CO. OF PHILADELPHIA et al.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1902.)

No. 719.

1. PRINCIPAL AND SURETY—RIGHTS OF SURETY—SUBROGATION.

A surety on the bond of a contractor with a city for public work, who assumes and completes the work after its abandonment by his principal, is subrogated, so far as necessary to protect him from loss, to all rights which the city might have enforced against the contractor if it had declared the contract forfeited, and completed the work itself.

2. SAME—COMPLETION OF CONTRACT BY SURETY—EFFECT OF ASSIGNMENT OF PROCEEDS BY PRINCIPAL.

The bond of a contractor with a city for paving was conditioned for the completion of the contract and the payment of all claims against the contractor for labor and materials. The contract provided for monthly payments of 70 per cent. of the estimates as the work progressed, and the retention by the city of 30 per cent. until after completion of the contract, to secure the payment of laborers and material men. The contractor abandoned the work, having earned about \$3,900, which was unpaid, and leaving outstanding claims for labor and material amounting to \$3,100. The city called upon the surety, which assumed and completed the contract, paying all claims against the contractor for labor and materials. Prior to the abandonment of the work, the contractor had borrowed money from a bank, and assigned to it all sums to become due from the city during certain months, and the bank had notified the city of the assignment. *Held*, that the surety was subrogated, to the extent necessary to protect it from loss, to all the rights which the city might have asserted against the fund in its hands, and that such rights were not limited to the 30 per cent. reserved under the contract, but extended to the entire fund, which the city might, notwithstanding the assignment, have declared forfeited, and applied in reduction of its damages, if it had been compelled to complete the work, which it must have done but for the action of the surety; that the surety's right was superior in law and equity to that of the bank under its assignment, by which it took no greater rights than those of the contractor, as against either the city or surety.

McKenna, Circuit Justice, dissenting.

Appeal from and in Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

The appeal in this case is taken from an order dismissing the bill of intervention of the appellant, the First National Bank of Seattle, in a suit begun by the City Trust, Safe Deposit & Surety Company of Philadelphia against Frank H. Paul, as comptroller of the city of Seattle, to compel the issuance of city warrants to the complainant in the bill for work done upon a contract for a city improvement, which contract had been made between McCauley & Delaney, contractors, and the city of Seattle, and which, upon the abandonment thereof by said contractors, had been completed by the complainant, who was their surety. The intervener denied the right of the surety company to the warrants, and asserted its own right thereto upon the ground that the contractors had, in consideration of moneys to be advanced by the intervener, assigned to it certain moneys to be earned by them under said contract. The facts of the case, as alleged in the two bills, are these: On or about August 2, 1900, McCauley & Delaney entered into a paving contract with the city of Seattle. They applied to the First National Bank of Seattle for a loan of money to enable them to carry out their contract, and accompanied their application with a promise to provide a reliable surety company bond to the city, and to assign to the bank all moneys,

bonds, and warrants that should become due from the city under the contract for the months of August, September, October, and November, 1900. Upon those conditions the bank promised to loan and advance the necessary money. The contract for the street improvement provided that on or before the 20th day of each month bonds or warrants should be issued for 70 per cent. of the contract price of the estimated amount of the work returned by the city engineer as having been performed during the preceding month. The remaining 30 per cent. was to be retained to secure the payment of laborers and material men until 30 days after the completion of the work. The City Trust, Safe Deposit & Surety Company of Philadelphia became the surety on the bond which was entered into with the city for its own use and for the use of all persons who should perform work or labor in the execution of the contract. On August 2, 1900, the contractors, in writing, assigned to the bank the proceeds of the contract for the months of August, September, October, and November. The consideration of the assignment was the sum of \$2,000, then advanced, and other moneys thereafter to be advanced, including the money to be paid to procure a surety company's bond. The bank subsequently, as the work progressed, advanced \$5,000, making a total of \$7,000, which was intended to be secured by the assignment, no part of which has been repaid. The bank, upon obtaining the assignment, served upon the comptroller, and caused to be filed in his office, a written notice that it held the assignment, and that it would present an order for the warrants to be issued in payment of the amount so assigned and so to become due. The notice was written on an official blank furnished by the comptroller for the use of banks and others who advanced money under like circumstances. The city engineer subsequently estimated that the work done on the contract for the months mentioned in the assignment amounted to \$12,619.14. But in the meantime, early in October, the contractors discontinued the work, and shortly thereafter the city called upon the surety company to complete the same, to which it assented. Before it assumed the contract of its principals, it had notice of the assignment to the bank. At the time when the contractors abandoned their contract there had been earned thereunder \$3,924.31, as shown by the estimates made by the city engineer. The surety company completed the contract, and paid the expenses thereof, and all the unpaid bills incurred by the original contractors. The bank, in its bill of intervention, alleged that when the contractors abandoned the contract there was due to certain laborers and material men sums of money, the amount of which was unknown to the bank, but which sums would have been liens upon no more than 30 per cent. of said sum of \$3,924.31 so earned by the contractors according to the terms of the contract. To the bill of intervention the trust company and the comptroller of the city of Seattle each demurred for want of equity. The demurrers were sustained, and the bill of intervention was dismissed.

Walker & Munn, for appellant.

John P. Hartman, for City Trust, Safe Deposit & Surety Co.

W. E. Humphrey and Edward Von Tobel, for appellee.

Before McKENNA, Circuit Justice, and GILBERT and ROSS, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The appellant earnestly contends that its bill of intervention presents ground for equitable relief at least as to \$2,747, or 70 per cent. of \$3,924.31, the amount which the city admitted to have been the value of the work done by the contractors at the time when they abandoned their contract; and it insists that the sum of \$2,747 is beyond any doubt payable to it under its assignment; that that sum was earned by the contractors by work done in a public improve-

ment which was accepted by the city, and for which the city stood ready to pay, notwithstanding that claims and liens for work done and material furnished in said improvement to the amount of \$3,168.38 were outstanding and unpaid; that the city never declared a forfeiture of the contract, and that in fact the contract never was forfeited, but that the surety company had simply undertaken and completed the work, which it was bound to do under its bond; that the appellant's equities are prior to those of the surety company and to those of the unpaid claimants and lienholders, for the reason that the arrangement to obtain money from the bank was entered into by the contractors before they had obtained the bond from the surety company, and that when the surety company took up the contract it did so with knowledge of the assignment to the bank, and subject thereto.

The doctrine announced in *Prairie State Nat. Bank v. U. S.*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, must control the decision of these questions. The controversy in that case was between a bank which had advanced money to Sundberg & Co., the contractors who had undertaken to erect a custom house for the United States, and Hitchcock, the surety on the contractors' bond, and it concerned the 10 per cent. of the contract price, which, by the terms of the contract, had been reserved by the government from the current payments until after the completion of the contract. The bank based its claim to the fund upon advances which it had made to the contractors in consideration of a power of attorney from the latter authorizing it to receive from the United States the final payment. Some three months after the execution of this power of attorney, the contractors defaulted, and Hitchcock, the surety, thereupon completed the contract, and disbursed therein about \$15,000 in excess of the current payments from the government. The bank asserted an equitable lien upon the deferred payment, which it claimed was prior and paramount to the lien of the surety, since the claim of the latter arose only at the date when he undertook the completion of the contract. The court held, however, that the claim and equity of the surety arose when he entered into the contract of suretyship, and that his right to the reserve fund was prior and paramount to that of the bank, and said that the stipulation in the building contract for the retention until the completion of the work of a certain portion of the consideration "is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed; that it raises an equity in the surety in the fund to be created." The court further said:

"If the United States had been compelled to complete the work, its right to forfeit the 10 per cent. and apply the accumulation in reduction of the damage sustained remained. The right of Hitchcock to subrogation, therefore, would clearly entitle him when, as surety, he fulfilled the obligation of Sundberg & Co., to the government to be substituted to the rights which the United States might have asserted against the fund."

In so ruling, the controlling consideration was, not that the deferred payment had been, by the words of the contract, reserved, but that the money in controversy was still in the hands of the gov-

ernment, subject to its power to apply the same upon the unfinished contract if it had undertaken the completion thereof.

Applying these principles to the present case, it is clear that the lien of the surety company upon all funds now retained in the possession of the city, and applicable upon the contract, had its inception at the time when it entered into the contract of suretyship, and that subsequent to that date the contractors, McCauley & Delaney, had no power to create a lien upon the payments to be made by the city, and make it paramount to the lien of the surety. That the right of the bank in this instance is subsequent to the surety's lien is not to be questioned. The arrangement which is said to have been made between the bank and the contractors just prior to the execution of the bond cannot affect the rights of the surety. That arrangement, so far as the pleadings inform us, was not in the form of a binding agreement, and was not obligatory upon either party thereto; and, if it were, it could not take precedence of the lien of the surety by virtue of the bond which it entered into simultaneously with the execution of the contract, unless it was known and assented to by the surety. There is no intimation that the surety assented to or had notice of such an agreement. One who becomes a surety for the principal upon such a contract as is disclosed in this case may not be deprived of his lien by the secret contract or agreement into which his principal may have entered. By abandoning the contract the contractors lost the right to compel the city to pay them any sum whatever on account of the work which they had done. Their assignee, the bank, stood in no better position than they. The city undoubtedly had the right to declare the contract and all unpaid sums which it had promised to pay thereunder forfeited. That it had this right is not disputed, but it is said that the city has not exercised it, and that, therefore, the right cannot avail the surety. But the true inquiry is, not what has the city done, but what had it the right to do? It had the right, if it had itself assumed the completion of the abandoned work, to retain for its own protection not only the stipulated 30 per cent., but all sums then due or earned under the contract, and no assignment by the contractors could defeat that right. Among the obligations of the contractors was included the duty to pay all claims for work, labor, and material. The surety, by the terms of its bond, had guaranteed that the contractors would pay "all just claims for work, labor, or material furnished in the execution of the contract." The surety's obligation to pay liens and claims outstanding when the contract was abandoned was not limited in extent to the reserved 30 per cent. of the money then earned by the contractors, but it included the full sum of the unpaid claims, amounting to \$3,161.38. In the *Prairie State Nat. Bank Case* the court expressly declared that the right of Hitchcock, the surety, was not limited to the 10 per cent. reserved, but that it was a right to "resort to the securities and remedies which the creditor, the United States, was capable of asserting against the debtor, Sundberg & Co." So, in the case before the court, when the surety assumed the burden of the contract, it stood in the position of the city, so far as the unpaid stipulated sums under the contract were concerned, and it

acquired the city's right so far as it might be necessary to resort to the same to reimburse it for all its outlay in completing the work. We think the right of the surety company went that far, and no farther; and if it appeared upon its own bill herein, or in that of the intervener that the money of the latter so advanced to the contractors under its agreement went into the improvement, so that the surety company acquired the benefit thereof, and availed itself of the same, and thereby acquired, on the completion of the contract, a profit,—or, in other words, if the moneys which are now retained by the city, if paid to the surety company would more than repay it the total amount of its expense incurred in completing the contract,—equity would require that the excess be paid to the bank, rather than to the surety. The right of subrogation has its origin not in contract, but in equity, and it goes no farther than the strict demands of equity and justice demand. The equitable lien of the surety company extends only so far as may be necessary for its reimbursement. The remainder of the fund, if any there were, would belong to the bank by virtue of its assignment. In 24 Am. & Eng. Enc. Law, p. 191, of the nature of the right of subrogation, it is said: "Being a creature of equity, it will not be enforced where it will work injustice to the rights of those having equal equities;" and on page 192 it is said that subrogation will not be permitted "in favor of one who will thereby be permitted to derive an advantage therefrom, or to establish his claim through his own wrong or negligence, or inequitable or illegal taking." It appears from the bill of the surety company that the amount of the unpaid labor and the unpaid liens for material which had been incurred by the contractors at the time when they abandoned the contract was \$3,161.38. The difference between that unpaid sum and \$3,924.31, the amount which the city admitted to be the value of the improvement which had been made at the time of the abandonment of the contract, is \$762.93, which latter sum represents the amount of the money advanced so by the bank which actually went into the improvement over and above the unpaid expense thereof at the time of the abandonment of the contract; but there is no averment and no facts are pleaded in either bill from which it may be deduced that the deferred payments on the contracts will be more than sufficient to make the surety company whole, and repay all its outlay in completing the total work. We find no equity, therefore, in the intervener's bill.

Counsel for the appellant cite and rely upon the decision of the supreme court of the state of Washington in *Dowling v. City of Seattle*, 22 Wash. 592, 61 Pac. 709,—a decision which it may be conceded announces a doctrine directly at variance with that of *Prairie State Nat. Bank v. U. S.* In the *Dowling Case* it was held that orders drawn by a contractor on sums to become due on a contract with the city carried an equitable assignment of the fund, and, being valid when made, they were not rendered invalid by the default of the contractor, or by the assumption of the contract by the surety. The argument of the court was that, inasmuch as the city asserted no claim of right in the fund, there existed no right to which the

surety could be subrogated; and that, as the contractor could not justly claim that his own assignments were invalid, neither could his bondsmen, who had assumed the performance of the contract, so claim. The decision in that case does not involve, and neither does the present case, so far as the foregoing discussion goes, involve, any question of the construction of a provision of the charter of the city of Seattle, or of the constitution or the statutory law of Washington. That decision, therefore, does not become a precedent which we are bound to follow. We find no error in the decision of the circuit court sustaining the demurrers and dismissing the bill of intervention.

The decree will be affirmed.

MCKENNA, Circuit Justice (dissenting). I am unable to concur in the conclusion of the court. I think the bill of intervention states a cause of action for at least \$2,747. There was due the contractors, McCauley & Delaney, when they abandoned their contract, the sum of \$3,924.31. Thirty per cent. of that sum the city had a right to retain, and to that 30 per cent. only—to the rights of the city in that 30 per cent.—was the surety company subrogated. Seventy per cent. of the sum was a vested substantive right of the contractors, and passed by their assignment to the bank. This view is sustained, in my opinion, not opposed, by the case of *Prairie State Nat. Bank v. U. S.*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412. In that case, as in this, the controversy was between assignees of a contractor and a surety on the bond of such contractor, and the surety prevailed. But the assignment in that case was void because given in violation of section 3477 of the Revised Statutes of the United States. In the case at bar the assignment was and is valid. In that case, therefore, the rights of the parties were held to be equitable only, and that of the surety was held to be the superior. What was the equity of the surety? A right to the 10 per cent. in subrogation to the rights of the United States in that percentage. In the case at bar the surety company is not only subrogated to the right of the city to the 30 per cent. which the city had a right to reserve, but to the 70 per cent. of the sums due which the city had no right to reserve, and which could be and was legally assigned.

The demurrer to the bill of complaint should have been overruled.

THE SEA KING.

THE BUFFALO.

(Circuit Court of Appeals, Second Circuit. February 7, 1902.)

No. 98.

COLLISION—STEAMSHIP AND BARGE IN TOW—FAULT OF TUG.

The tug Sea King was coming up the lower New York Bay, having two barges in tow tandem, in all about 1,200 feet long, when the second barge came in collision with the steamship Buffalo, outward bound, and was sunk. The collision occurred from 250 to 300 feet to the westward of the center of the channel. After signals for passing port and port were exchanged between the Buffalo and the Sea King, the latter ported her helm two points, and continued on such course until she had passed, and then at once resumed her former course. *Held*, that the Sea King was in fault for failing to take proper measures to counteract the effect of the flood tide, which drifted her and her tow into the westward side of the channel, contrary to rule 25, and also in resuming her course before her tow had passed the Buffalo. *Held*, also, under the evidence, that neither the barge nor the Buffalo was in fault; that, while the latter was aware that the tow was drifting nearer her course, after the tug ported both she and the first tow drew away and passed at a safe distance, and had she continued on such course, as the Buffalo had reason to expect, the second tow would also have been drawn out of danger, and that after the danger became apparent she made all proper efforts to avoid collision.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Suit for collision.

The following is the opinion of the district court, by BROWN, District Judge:

At about 5:30 p. m. of October 1, 1898, as the three-masted coal barge Samuel E. Spring was going up the Lower Bay in tow of the tug Sea King, with the tide about two hours' flood, she came in collision below the Narrows with the steamship Buffalo outward bound, some 100 or 200 yards above black buoy No. 9, and was sunk in three or four minutes afterwards. The above libel was filed to recover for the loss of the barge and her cargo.

The Spring was the hindmost of two similar barges each about 135 feet long, forming a tandem tow in all about 1,200 feet long. Each barge was on a hawser, which at the Scotland lightship had been shortened to about 70 fathoms. The tug and tow came up through the Swash Channel, rounded within 50 or 100 feet of the bell buoy, as their witnesses say, at the exit of that channel, and took a course, according to her master, of N. x E. $\frac{1}{2}$ E., going through the water at the rate of about 4 to 5 knots. When about one-quarter of a mile above the bell buoy, with the tow directly astern, a signal of one whistle was exchanged between the Sea King and the Buffalo, which was seen coming down about three-fourths of a mile or a mile distant, and a very little on the tug's port hand at the rate of about nine knots. Soon after, according to the Sea King's testimony, her wheel was gradually ported until at the time the Buffalo was abreast of her, her heading was N. E. $\frac{1}{2}$ N., and the Buffalo passed her at the distance of 200 or 300 feet. The first barge, the Carleton, passed the Buffalo only a little nearer; but the Buffalo's stem struck the port quarter of the second barge abreast of the mizzen rigging at an angle of about two or three points, breaking in that part of her side and causing her, as above stated, to sink almost immediately. Each side contends that the vessels would have cleared except for a sheer which each insists was given by the other at about the time when the Buffalo was

abreast of the Carleton. The witnesses for the tug testify that the Buffalo at that time gave a rank sheer to the eastward; and several witnesses from the Buffalo say that the Spring, by a hard a-port wheel, swung her stern across the Buffalo's stem.

The greatest draft of the tug and tow was 19½ feet. They had sufficient water in any part of the buoyed channel, which was there about 2,000 feet wide. The Buffalo was an iron steamer 400 feet long, and drew 27.1 feet. She came down the usual course of deep draft vessels, in the westerly half of the buoyed channel, a little to the east of the line of the Chapel Hill range prolonged, which is much to the west of mid channel. When she signaled the Sea King, she was overtaking and a little lapping the stern of the still larger steamer Pretoria, drawing 31½ feet and about 200 feet to the westward of her and going through the water at the rate of about eight knots on a parallel course with the Buffalo. The latter, previously going about nine knots at half speed, after signaling, slowed, but still gained on the Pretoria until her bows came abreast of the Pretoria's bridge. She stopped her engines before coming abreast of the Sea King, and when abreast of the first barge reversed, but too late to avoid the Spring.

As respects the sheer described to each vessel, I am quite satisfied that no such sheer was the proper cause of the collision on either side. There is not the least probability that any sheer to the eastward was made by the Buffalo. It is testified to by the three witnesses on the Sea King alone, who were not in a position for most correct observation on this point; no such sheer was seen by the two witnesses on the Spring, who were in the best position to see it, if made; nor by the pilot of the Pretoria, who was nearest to her at the time; it is denied by all of the Buffalo's officers; there was no possible motive for such a sheer; and as the Buffalo was reversing at that time and was a right-handed propeller, any change of her heading must have been to the westward rather than to the eastward.

As respects the sheer of the Spring's stern to the westward, her two witnesses admit that her helm was put hard a-port at about the time the Buffalo was abreast of the Carleton, the barge ahead; but this would not have been material had not the barge and the steamer already come into very dangerous proximity. The tug and the Carleton were headed at that time at least two points off to the eastward of the channel course and were therefore pulling the Spring off in that direction, though that effort was soon relaxed, as hereafter explained. The port wheel in directing the stern of the Spring more to port would doubtless tend to throw her stern towards the Buffalo, while her bow would run to starboard; but the Spring's witnesses say that this set of the stern to port would be offset by the forward motion in turning off two points to the eastward; no other experts testify directly to the contrary; and although I have not sufficient data for making any exact theoretical computation not knowing the rate of rotation of a loaded barge in tow on a hawser under a port wheel, such analogies as I know forbid the conclusion that there would result any material net westward swing of the stern from a port wheel under such circumstances as here exist. The tow's heading two points to the eastward would itself and independently of any port helm carry her stern more than fifty feet to the eastward with every advance of a length; and this rate would be increased after the heading of the stem was brought more to the eastward by the port helm. This rate of drawing off is greater, I think, than any probable swing towards the Buffalo; so that although I cannot find positively on this point, I think the port wheel by the barge was probably a proper maneuver, in no way contributing to the collision.

All the witnesses, moreover, agree that the Carleton was from 150 to 200 feet distant when she passed abreast of the Buffalo, and no swing to that extent could possibly have been caused by a port wheel in advancing only about 100 yards. I have no doubt, therefore, that at least the Carleton's hawser, like the Carleton herself, was tacking two or three points towards the westward of the Buffalo's heading, as, indeed, most of the witnesses testify; so that, whether the Spring had already swung in line or not, the Buffalo's heading, when abreast of the Carleton, was very nearly directly upon the Spring. This is the positive testimony of the Spring's two wit-

nesses, and is the reason they give for their hard a-port wheel. This testimony is further confirmed by one or two passages in the testimony of McDonald, the Buffalo's pilot.

"Q. When you gave the order to stop and hard a-port where was the barge Spring? A. She was about ahead of me then.

"Q. What do you mean by ahead of you? A. I could see both sides of the Spring, her stern on one side and her bows on the other; that is, just overlapping.

"Q. Was the Spring ahead of your course? A. Yes; her bow was."

Other passages in this witness' testimony are inconsistent with this situation; and there are so many inconsistencies in his testimony that I cannot rely much upon it.

The master of the Buffalo says that the Spring, before her "sheer," was heading about on a parallel line with the Buffalo's heading; but he does not say how much, if any, to the eastward of his course the Spring was at that time. The Buffalo's witnesses in general say that the Spring, prior to her sheer, had not ported to go off to the eastward, as the tug and Carleton had done. The pilot says:

"Q. Did they keep going to port? A. They kept going to port; that is, the first barge and the towboat; not the second one.

"Q. The second one did not go? A. No, he did not go to port."

Upon this testimony of the master and pilot of the Buffalo, the situation would be such that while the Spring was heading more nearly up the channel course than the Carleton and tug were heading, her hawser would be leading about 2-3 points to the eastward of the Buffalo's course to the stern of the Carleton. This lead of the hawser would necessarily result from the Carleton's previous turn eastward, following the tug; and if the Carleton was but 170 feet distant from the Buffalo when abreast of her, the Spring's stem, 70 fathoms behind the Carleton, would be directly ahead of the Buffalo and her stern overlapping, as the pilot states. The Buffalo was heading, however, like the Pretoria (S. x W.) at one-quarter of a point to the eastward of the exact range course, which, according to the chart is S. x W. $\frac{1}{4}$ W. Her heading may have been in fact a little more than one-quarter of a point to the eastward as immediately after collision it was noticed to be S. $\frac{3}{4}$ W., i. e., half a point more to the southward, notwithstanding her prior reversing and westward sheer. Some easterly heading from the exact range course was necessary, in order to counteract the westerly set of the tide. This easterly heading, whatever it was, would increase the angle of the crossing courses, and the consequent rate of approach of the barge and steamer, even if the situation were that contended for by the steamer, as above stated; although, as I have said, the opposing witnesses testify that the Spring was tailing directly astern of the Carleton and the tug at the time when she ported.

The situation, on either contention, therefore, was in my opinion such as needs no sheer by either vessel to account for the collision. There was a westward set of the tide, which, not being sufficiently counteracted by the Sea King, had gradually set the tug and tow to the westward from the time they left the Swash Channel, two-thirds of a mile below, until the Spring had sagged over to the line of the Buffalo's course (the latter being necessarily headed a little to the eastward), and the Buffalo did not fully stop before the Sea King had pulled the barge away.

1. The Sea King is in my judgment primarily to blame for this result; because she did not keep her tow in the easterly half of the channel, as required by rule 25. The place of collision in the channel is indeed controverted; but the weight of evidence on that point seems to me clearly against the Sea King. The place of the wreck was exactly marked by triangulation, under the direction of the lighthouse board, as having Norton's Point light bearing N. E. $\frac{1}{4}$ N.; the Elm Tree beacon, N. W. $\frac{1}{4}$ N.; and Old Orchard Shoal light W. x S. $\frac{3}{4}$ S. These bearings were sworn to by Capt. Matthews, who took them. I have carefully compared them with the chart and find that they show the wreck to have been very nearly as marked on the Buffalo's Exhibit A, viz., about 400 feet east of the line connecting black buoy No. 9 with the bell buoy next above, on the west bank. The government chart with a star

added upon it, marking the place of the wreck, is not verified by any witness; and as there are no other data for placing the star than the triangulation above stated, the star can only be regarded as designed to conform to that. On trial, however, I find that the two northerly bearings from the star are erroneous by from one-eighth to three-sixteenths of a point, making the star too much to the eastward by about 400 feet. The libellant's witness Beebe, moreover, places the wreck only 150 feet easterly from the line of the Chapel Hill range course; whereas the star is from 500 to 600 feet easterly of it. That range course prolonged runs about 350 feet east of the black buoys on the westerly side of the channel; so that Beebe's location of the wreck agrees very nearly with the results of the triangulation, making it only 400 to 500 feet easterly from the line of the black buoys on the westerly side of the channel. In that position vessels of 29 feet draft could go west of it in the flood tide, as Beebe states.

The collision itself must have been but very little to the eastward of the wreck. The witnesses who speak of it say the Spring sank very near the place of collision, and within three or four minutes afterwards. It was directly astern of the Buffalo, as she drew to the southward. The Spring at collision was heading nearly N. E. and was going about 4 or 5 knots. Her stern was doubtless turned somewhat to the southward by the collision; but she could not at first have got headed much to the westward, inasmuch as she passed for 400 feet along the easterly side of the Buffalo, which must have been fully stopped before the Spring reached her stern; and when sunk the wreck headed only $1\frac{1}{2}$ points west of north. An allowance of a change of 200 feet to the westward between the place of collision and the place of the wreck, would be considerably more than anything in the testimony would warrant; so that I cannot place the collision over 700 feet at most (agreeing with Wall's estimate) from the line of the black buoys on the westerly side of the channel. The whole width of the 24 feet channel from the westerly to the easterly line is about 2,000 feet. The Spring was, therefore, at least 250 or 300 feet to the westward of the extreme limit of her rightful water under rule 25.

There were no circumstances to excuse the Sea King from keeping the tow on the right-hand side of mid channel. The greatest draft of the tug and tow was $19\frac{1}{2}$ feet. They had about 1,000 feet in width in the easterly half of the buoyed channel way of 24 feet depth, and a considerable additional space of available water to the eastward of over 19 feet. There were no other vessels in the way. The only explanation that can be surmised of the Sea King's course is, as above observed, that sufficient account was not taken of the westward set of the tide, proper observation employed, nor timely means to avert, the westward drift. Her witnesses say that they rounded the red bell buoy at the upper end of the Swash Channel within 50 or 100 feet of it; and if so, their westward drift was all the more noticeable in getting 1,000 feet to the westward and beyond mid channel in going about two-thirds of a mile beyond that buoy. The course which the master says he took on rounding the buoy was N. x E. $\frac{1}{2}$ E. This was but a quarter of a point east of the direct course up the channel. That was perhaps enough for a tow or vessel going 8 or 10 knots through the water, but not enough for one going but 4 to 5 knots.

The master says that on signaling, he ported two points; but the wheelman on cross-examination says that porting was not commenced until the Buffalo was within one-fourth of a mile, and was so gradually done that the tug was not headed two points to the eastward until the Buffalo was abreast of the tug; and that after she had passed the tug, he hauled again to his former course, though the master, who at that time was aft, denies this. However it occurred, this sagging to the westward was the fault of the Sea King, as she had ample means to prevent it.

2. At the porting of the Spring the Buffalo was no doubt moving at the rate of 3 or 4 knots; both were within 200 or 300 feet of the point of collision, which must have occurred within one-half minute after. The Buffalo appeared to be heading straight for the Spring. The situation had become critical; and if porting was an error, which I doubt for the reasons above stated, it was not a legal fault. The blame is in bringing about that situa-

tion. Nor do I see how porting earlier, which must have caused similar changes of position in the Spring, whatever these changes were, could have made any material difference to the Buffalo. I hold the Spring, therefore, not to blame.

8. The chief embarrassment in the case I find, as usual, as respects the alleged fault of the other vessel. All agree that fault in vessel A. does not justify vessel B. though she has the right of way, in running into A. when B. might avoid her by reasonable prudence and skill. The difficulty is in the application of this principle. Here the Buffalo was in her proper part of the channel. She had the right of way there, and she had the right to expect that the Sea King would keep her tow in her own half of the water. The Spring was in effect negligently allowed to drift under the Buffalo's bows, while the Buffalo did not in fact stop, as she might doubtless have done, in time to avoid the Spring, which had sagged in her way. It is a question of the Buffalo's notice of danger; and of what she had a reasonable right to expect that the Sea King could and would do to keep the Spring away. If there was no reasonable ground of apprehension, or if she had the right to expect that the Sea King would draw the tow away, up to the time when collision could no longer be avoided by the Buffalo, then she is not to blame. *The Mary Powell*, 34 C. C. A. 421, 92 Fed. 408.

There is no doubt that the Buffalo had notice of whatever danger there was, up to the time she came abreast of the tug. The tow had been plainly sagging to the westward. Instead of keeping its distance and gradually broadening off as it approached, the tow, as the Buffalo's pilot says, "kept all the time closing in on us, until the Spring was about ahead." The Buffalo had added to the danger by running up partly abreast of the Pretoria, so that she could not turn to the right or left except for a few feet. The Buffalo had, however, previously slowed for one or two minutes, turned towards the Pretoria as near as was safe, and then stopped her engines, so that the Pretoria was slowly drawing past her. The Sea King, a tug of ample power, was seen to be turning more to the eastward, and would naturally soon pull the Spring out of the way. In that situation it was the Buffalo's duty to give the Sea King reasonable time to do so by reversing as soon as it was apparently necessary. Contrary to my first impressions, I must find upon the evidence that the Buffalo did so.

All agree that the tug and first barge passed the Buffalo at a reasonable and safe distance, estimated variously at from 200 to 400 feet, giving rise to no apprehension whatever. All also agree that the distance of the first barge on passing was about the same as that of the tug, or only a little nearer. From the latter fact, which is nowhere disputed, it necessarily follows, that while the Buffalo was moving from abreast of the tug to abreast of the first barge, the latter was pulled over to the eastward nearly as much as her previous tailing to the westward; and as the Buffalo was moving forwards, this could only have been done through a more easterly sheer of the tug about that time, which agrees with the wheelsman's testimony; so that the line of the whole tug and tow was probably somewhat convex on the side of the Buffalo. The evidence on this point is not as explicit or consistent as could have been desired.

But if the tug in the interval between her and the first barge almost wholly overcame that barge's westerly tailing towards the Buffalo by her hauling to the eastward, so that the first barge was 150 or 200 feet distant on passing, the Buffalo had a right to expect that the same easterly pull would be continued by the tug, and that the Spring, which was astern of the Carleton by a similar interval, would pass at nearly the same distance as the Carleton. The time available for hauling the Spring off to the eastward was greater, since the Buffalo's forward motion, with her engines stopped, was constantly diminishing; and this additional time was in fact considerably further increased by the Buffalo's reversal when abreast of the Carleton, in consequence, it is said, of seeing the Spring port her wheel. Why the Spring was not hauled away as the Carleton had been, is explained by the wheelsman of the tug, who testifies that while the master was aft he starboarded, and resumed the former course of N. x E. $\frac{1}{2}$ E. after passing the Buffalo and before collision, without the master's knowledge.

"Q. How long did you carry the wheel apart, until you came back to the old course? A. Till she [the Buffalo] had just passed us. Her stern was abreast of us, thereabouts; then we starboarded, and put her on her course again * * * her old course, N. x E. $\frac{1}{2}$ E. * * * The captain was aft then. He did not tell me. I knew enough for that myself. We were just about on that course at the time the collision occurred * * * steadied before collision."

Thus the tug's pull to the eastward was prematurely stopped, and the Spring's stern, which was "overlapping" to the starboard side of the Buffalo when 500 feet away, was not hauled clear, as it doubtless would have been had the tug's course two points to the eastward been continued as it ought to have been. The Buffalo could not have foreseen or anticipated this last false maneuver of the tug, and the Buffalo in no way induced this false maneuver. But for that, the Buffalo's measures would have been sufficient to avoid the Spring, and the whole blame must, therefore, rest upon the Sea King.

Decree accordingly.

Le Roy S. Gove, for the Sea King.

James E. Carpenter, for libellant.

Harrington Putnam, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Affirmed, with interest and costs, on opinion of court below.

GREAT NORTHERN RY. CO. v. BRUYERE.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1902.)

No. 1,587.

1. RAILROADS—REMOVAL OF TRESPASSERS—PERSONAL INJURIES.

Plaintiff boarded a caboose on defendant's freight train to make inquiries from the conductor concerning his wife, having expected her on that train, and while he was still in the caboose, and waiting for the conductor, the train started. When the conductor came, he demanded that plaintiff pay his fare or get off, but refused to stop the train. Plaintiff stepped out onto the platform, and the conductor locked the door, leaving him outside, and he was thrown from the train by the sudden lurching of the caboose, after having attempted to re-enter. Held wrongful conduct on the part of the conductor, for which the company was liable if it was the proximate cause of the injury.

2. SAME—PROXIMATE CAUSE OF INJURY—QUESTION FOR JURY.

The question whether the wrongful conduct of the conductor was the proximate cause of the injury was for the jury.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of North Dakota.

W. E. Dodge (C. Wellington and C. J. Murphy, on the brief), for plaintiff in error.

James H. Bosard (R. H. Bosard, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a suit for personal injuries brought by Richard N. Bruyere, the defendant in error and the plaintiff below, against the Great Northern Railway Company, the plaintiff in error. The plaintiff below gave evidence tending to show the following facts, which, in view of the verdict below, must be regarded by this court as having been established to the satisfaction of the jury: That he resided about six miles from Larimore in North Dakota; that on the evening of August 8, 1898, he went to the station of the defendant company, in Larimore, with a view of meeting his wife, who had been at Grand Forks, and was expecting to return on defendant's freight train No. 15; that before that train arrived he heard that it had been taken possession of by a crowd of rioters, whom he termed "hoboes," at an intermediate station; that when the train arrived at Larimore he was on the platform of the station, expecting his wife, and that considerable excitement ensued, upon the arrival of the train, which attended the arrest of the rioters; that his wife did not get off the train, and, as he did not see the conductor, he went to the rear end of the train and boarded the caboose, with a view of interviewing the conductor and obtaining information concerning his wife; that, as the conductor was not in the caboose, he supposed that he was out making his report to the superintendent, and would return shortly, and that he accordingly remained in the caboose awaiting his return, and that while he was waiting the train started unexpectedly.

The plaintiff below further testified that when the train started he supposed it would stop very shortly at the coal shed to coal up, and that in the meantime he could see the conductor and inquire about his wife; that when the train reached the coal shed, which was not far from the station, it was going faster, and did not stop, and that the conductor came in about that time; that he explained to him why he was on the train, told him that he expected his wife was coming on that train, and that he was looking after her, and that he also inquired of the conductor if she had started from Grand Forks on the train; that the conductor told him that no lady had started on the train with him that night from Grand Forks, and then told the plaintiff that he must get off of the train; that at that time the train was going pretty fast, and that he told the conductor it was going too fast to get off with safety; that the conductor then said he must pay his fare; that he told the conductor there was no place he wanted to go to, and that he asked him to slack up; that the conductor replied that he would not do so, and told him he must get off; that he, the plaintiff, thereupon stepped outside of the door, to the rear platform, whereupon the conductor followed him and immediately closed the door and fastened it; that he first went to the left-hand side of the train and looked along the side thereof and could see the train bending as though going round a curve; that he then went back to the door and tried it and shook it, but that it was fastened, so that he could not get in; that he thereupon went to the right-hand side of the platform, and was going to sit down there, when the caboose lurched and threw him to the ground, injuring him seriously, where he lay unconscious until

near daylight, when he was revived by a shower and managed to get to a house which was about half a mile distant from the track. The plaintiff testified further, and in substance, on his cross-examination, that when the train started unexpectedly he intended to get off at the coal shed, where he supposed that the train would stop; that he didn't want to go anywhere as a passenger, his purpose being simply to see the conductor and obtain information about his wife; that the coal sheds were about half a mile from the station, and that when the train reached that point it was going pretty fast; that he wanted to get off there; that when the conductor demanded his fare he refused to pay it, telling him he didn't want to go anywhere; that he, in fact, wanted the conductor to stop the train; that when he went out on the platform he went there "to show the conductor that the train was going too fast for any man to get off safely"; and that the conductor followed him to the door, and, immediately after he had passed through it onto the platform, closed it and fastened it.

The trial court instructed the jury, in substance, that the plaintiff below was wrongfully upon the train, even though he boarded it for the purpose above stated; that he had no right to ride upon the train for the purpose of meeting the conductor and making inquiries about his wife; that he had no right to insist that the train should be stopped, after it had started, to let him off; and that it was his duty to have paid his fare when it was demanded and to have ridden until the train reached a regular station where he could get off. No exception could well be taken to this part of the charge by the defendant company, and none was taken. But the court proceeded to say:

"The plaintiff being wrongfully upon the train, the conductor had a perfect right, under the law, to remove him from the train, but in the exercise of that right he was charged with the duty not to unnecessarily expose the plaintiff to danger. The fact that the plaintiff was wrongfully upon the train would give the conductor no right either to injure him or expose him to danger. He, therefore, had no right to insist upon the plaintiff's leaving the train while it was in motion. His duty was either to stop the train and put the plaintiff off, if he decided that the plaintiff must leave the train, or to carry the plaintiff to the nearest station. This brings us to the issue of fact in the case upon which there is a conflict of evidence. Plaintiff says, in substance, that the conductor ordered him to leave the train, and that he stepped to the door for the purpose of pointing out that the train was going so fast that he could not leave it, and that the conductor shut the door, and locked it, thus fastening him out upon the platform. If you believe that is a true statement of the occurrence, the conduct of the conductor was wrongful, and if that wrongful conduct was the proximate cause of the plaintiff's injuries he is entitled to recover, unless he himself was guilty of contributory negligence, which I will presently explain to you more fully. Shutting the plaintiff out on the platform, if you find that he was shut out upon the platform, would be the proximate cause of plaintiff's injuries, if those injuries were the natural and probable result of that act, and such as a reasonable and prudent man would have foreseen as likely to result therefrom."

It is urged that error inheres in this portion of the charge, and the exception thereto raises the only question to be determined, namely, whether the act of the conductor in locking the door and compelling the plaintiff to ride on the platform, instead of on the inside of the

caboose, was a wrongful act, for which the defendant company can be held liable, assuming, as the lower court held, that the plaintiff was wrongfully on the train, and not entitled to the rights of a passenger.

In view of all the circumstances of the case, we entertain no doubt that the question last stated should be answered in the affirmative. It was obviously more dangerous to ride on the platform, where one standing or sitting was liable to be thrown off by the lurching of the car, than to ride on the inside. We may well take judicial notice of the fact that the platform of a car is not as safe a place to ride as the inside, because it is a common practice of railroad companies to place notices on the doors of their cars warning people not to ride on the platform because of the enhanced danger. Nor do we find any evidence in this record which furnishes a reasonable excuse for the conduct of the conductor in locking the plaintiff out on the platform and compelling him to ride there and incur the unnecessary risk of being thrown off. He had boarded the train for a laudable purpose, and it had started unexpectedly, and had not stopped at the coal sheds, where he supposed it would stop, according to the usual custom. Moreover, the car, on the inside, does not seem to have been overcrowded, and the plaintiff was making no unseemly noise or disturbance to annoy other passengers in the caboose, if there were any. The fact, therefore, that he refused to pay his fare, did not warrant the conductor in locking him out on the platform, when the train was going at such speed that the plaintiff did not dare to jump off. The conductor's action in that matter must be pronounced wrongful and wanton, in that, without any sufficient cause or excuse, he willfully exposed the plaintiff to unnecessary danger.

The charge of the lower court is further criticised because it permitted the jury to determine, as a question of fact, whether the wrongful act of the conductor in locking the plaintiff out on the platform was the proximate cause of the injury, but in view of the plaintiff's own testimony, showing his attempt to get on the inside of the car after the locking of the door, and how he happened to be thrown off by the lurching of the car, we do not well see how the lower court could have acted differently. The question of proximate cause is usually one for the jury, as it certainly was in this case. *Railway Co. v. Yeargin*, 48 C. C. A. 497, 109 Fed. 436, 439; *Railway Co. v. Kellogg*, 94 U. S. 469, 474, 24 L. Ed. 256.

The question whether the plaintiff, after he was locked out on the platform, conducted himself as a prudent man should have done in his situation, or contributed to his own hurt by a want of ordinary care, was also submitted to the jury under proper instructions, and was decided adversely to the defendant company.

We find no error in the record, and the judgment below is accordingly affirmed.

SANBORN, Circuit Judge. I dissent in this case, because, in my opinion, the closing and locking of the door of a moving car against a trespasser upon the platform is not, as a matter of law, conclusive

evidence of a willful or reckless intent to injure him, and this was the legal effect of the charge of the court below. It charged the jury that the act of the conductor in closing and fastening the door was a wrongful act, and that if this act was the proximate cause of the injury the company was liable for it. This charge took from the jury the question whether or not this act evidenced a willful or reckless intent to injure the plaintiff, and prevented their consideration of this question. The plaintiff was a trespasser upon the train. The only duty of the company or of the conductor of the train to him was to abstain from wanton or reckless injury to him. *Purple v. Railroad Co.* (C. C. A.) 114 Fed. 123; *Condran v. Railroad Co.*, 67 Fed. 522, 523, 14 C. C. A. 506, 508; *McVeety v. Railway Co.*, 45 Minn. 269, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728; *Way v. Railroad Co.*, 64 Iowa, 48, 19 N. W. 828, 52 Am. Rep. 431. In *Trumbull v. Erickson*, 97 Fed. 891, 893, 38 C. C. A. 536, 538, this court held that it was not, as a matter of law, conclusive evidence of even ordinary negligence for a passenger to ride upon the platform of a moving car when he could have occupied standing room within the car. If it is not conclusive evidence of ordinary negligence for one to ride upon the platform of a moving car, it cannot be conclusive evidence of a willful or reckless intent to injure a tramp or a trespasser to close the doors of the car against him when he is riding upon its platform. It may be that such an act under some circumstances would be evidence from which a jury might infer a malicious or reckless intent to injure, but I cannot persuade myself that it is conclusive evidence of such an intent, because it does not seem to me doubtful that all reasonable men would not agree that such an act indicates any willful or reckless intent on the part of the conductor who closes the door to injure the trespasser, and this is the test by which the question should be answered. *Speer v. Board*, 88 Fed. 749, 754, 32 C. C. A. 101, 107; *Railroad Co. v. Jarvi*, 53 Fed. 65, 70, 3 C. C. A. 433, 438. For this reason I think the judgment below should be reversed, and a new trial should be granted.

MEXICAN CENT. RY. CO., Limited, v. SPRAGUE.

(Circuit Court of Appeals, Fifth Circuit. March 4, 1902.)

No. 1,072.

MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANT—LAWS OF MEXICO.

The common-law doctrine as to the nonliability of employers to an employé for the negligence of a fellow servant is not in force in the republic of Mexico; and under the laws of that country a railroad company is liable for all faults or accidents which may occur through the negligence, imprudence, or want of capacity of its employés, whether the person injured be an employé or a stranger.

In Error to the Circuit Court of the United States for the Western District of Texas.

T. A. Falvey and Waters Davis, for plaintiff in error.

Millard Patterson and C. N. Buckler, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The defendant in error, W. B. Sprague, plaintiff below, brought suit against the Mexican Central Railway Company, Limited, to recover damages for personal injuries sustained by him September 20, 1899, at or near Cardenas, republic of Mexico, while engaged in his duties as engineer and road master of the railway company, in riding on one of said company's cars which was wrecked. This case grew out of the same accident which resulted in the injury of E. S. Conway, who had a suit here on writ of error at the last term of this court. *Railway Co. v. Conway*, 48 C. C. A. 147, 108 Fed. 932. The issues in this case, however, are different from those in the Conway Case. In both cases the ground of recovery is upon two allegations of negligence, namely: First, the negligence of P. T. Lavelle, the engineer in charge of the engine, in running his engine recklessly; and, second, negligence in having a defective triple valve on the caboose on which plaintiff and Conway were riding. In the Conway Case it was contended that the company was negligent in retaining Lavelle in its service, he being incompetent on account of drunkenness, which incompetency was brought to the notice of defendant railway company through Lavelle's general reputation. In the present case, however, it is not contended that Lavelle was incompetent, or that the defendant had any notice of his incompetency, but it is insisted that he was negligent upon this particular occasion. In the Conway Case defendant failed to present any proof as to the condition of the triple valve on the caboose, and Conway's statement that it was out of order was not in said former case controverted. On the other hand, Conway's statement was strenuously denied in the present case, and defendant produced proof to show that the triple valve was in good condition. The proof in the present case establishes the negligence of Lavelle in the operation of his engine, but may be said to leave in doubt the question of the condition of the triple valve, upon which question the testimony was conflicting. The court upon this statement of the evidence, nevertheless, charged the jury to find a verdict for the plaintiff. In view of the conflicting evidence as to whether or not the triple valve was really defective, the action of the court in instructing to find for plaintiff is erroneous, unless defendant is liable in this suit for the negligence on the part of Lavelle.

The plaintiff, an engineer and road master of the railway company, was at the time of his injury, and while riding on the train of which Lavelle was the engineer, a fellow servant with Lavelle (see *Railroad Co. v. Stuber*, 48 C. C. A. 149, 108 Fed. 934; *Railroad Co. v. Smith*, 14 C. C. A. 509, 67 Fed. 524, 31 L. R. A. 321; *Tomlinson v. Railroad Co.*, 38 C. C. A. 148, 97 Fed. 252); and thus the question before us, shortly stated, is whether the court below erred in holding that, under the pleadings and proof in this case and the legal presumptions applying in such cases, the common-law doctrine denying the

liability of employers to an employé for the negligence of a fellow servant is not in force in the republic of Mexico.

The plaintiff pleaded and proved the following laws from the Codes of the republic of Mexico:

"Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses."

"Art. 304. Reparation comprehends: The payment of all the damages caused to the injured party, to his family or to a third person, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable consequence."

"Art. 326. No person can be charged with civil liability upon an act or omission contrary to a penal law, unless it be proven that the party sought to be charged usurped the property of another; that without right he caused, by himself, or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority."

"Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable without regard to whether he be absolved or condemned to criminal liability."

"Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the act or omission of the clerks or servants causing the liability shall occur in the service for which they were employed."

"Art. 331. Under the condition of the preceding article, those liable are
• • • railroad companies."

Transitory Law, Penal Code:

"Art. 26. Until it is determined in the new code of procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: • • • (5) Actions to enforce the civil liability may be brought before a court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending, the proceeding in the former shall be stayed."

"Art. 184. Companies [railway] are liable for all faults or accidents which may occur through tardiness, negligence, imprudence or want of capacity of their employés."

The following is from the statement of Lic. Andres Horcasitas, one of the judges of the supreme court of the republic of Mexico, which was introduced in evidence without objection:

"In answer to the question as to whether or not under the laws of Mexico, where two men are employed by the same employer or by the same railroad, and are engaged in the same common service, and through the negligence or carelessness of one of the men so employed the other receives an injury without any fault upon his part, the courts of the republic of Mexico hold the master or railroad company liable for such injury, I will state that, although it would not be easy to designate any sentence in which such a case has been decided, I certainly can assert that, according to the articles of the Penal Code before mentioned, the liability of the railroad company for compensation for loss and damage caused by the negligence of its employés is clearly shown, whether the injured party is a stranger to the company or whether he bears the character of an employé of the same company; as a philosophical study of the law will at once show that the liability of the company cannot be altered by the character of the injured party, unless in the case where he himself is the person to be held liable. In my opinion, there can be no doubt that articles 326, 327, 330, and 331, and others of the

same character, in the Penal Code of the Federal District, establish the liability of the railroad companies for the personal injuries that are caused through the negligence of one of their employés, and suffered by another employé of the same company, and that the same rules are laid down in the penal legislatures of the States of the Federation, which, as already, have almost all adopted the same penal code, while those which have enacted different penal laws did not make any provision on this point different to those of the Federal District."

Under our construction of these articles in the codes of Mexico, in connection with the evidence of Judge Horcasitas, the common-law doctrine as to the nonliability of employers to an employé for the negligence of a fellow servant does not exist in Mexico, but, on the contrary, railway companies in the republic of Mexico are liable for all faults or accidents growing out of the negligence, imprudence, or want of capacity of their employés, and the employé of a railroad corporation does not assume as one of the risks of his employment the negligence of his co-employé to the exclusion of the employer's liability.

This construction of the laws of Mexico proved in this case is supported by the fact that in the republic of Mexico the common law never did prevail, but the prevailing system was that of the civil law, under which, as we understand, the fellow-servant doctrine as known in the common law never was recognized. This construction is also supported by the following: *Railroad Co. v. McDuffey*, 25 C. C. A. 247, 79 Fed. 934; *Railway Co. v. Robinson*, 14 Can. Sup. Ct. 105; *Barksdale v. City of Laurens (S. C.)* 36 S. E. 661; *Pol. Torts*, 85.

Entertaining these views, we find no error in the record of this case warranting a reversal of the same, and the judgment of the circuit court is therefore affirmed.

CITY OF ELIZABETH v. FITZGERALD.

(Circuit Court of Appeals, Third Circuit. February 26, 1902.)

No. 25.

1. TRIAL—SPECIAL SUBMISSIONS TO JURY—POWER OF COURT.

A circuit court has power in a proper case to make a special submission of questions of fact to the jury as a preliminary to the general submission of the case or the direction of a verdict.

2. SAME—QUESTION FOR JURY.

The questions whether a contractor with a city had performed the work in substantial compliance with the contract, and whether the refusal of the city's officers to certify that it had been so done, and to approve the same, was unreasonable, are questions of fact, and, where material, and the evidence is conflicting, are proper questions for submission to a jury.

3. CONTRACTS—RIGHT OF RECOVERY—SUBSTANTIAL PERFORMANCE.

A substantial performance of a contract is sufficient to entitle the party so performing to recover thereon.

4. SAME—ARBITRARY OR UNREASONABLE REFUSAL TO APPROVE WORK.

A provision of a contract to perform work for a city requiring the contractor to obtain the certificate of the city engineer that the work

has been done in accordance with the contract, and the approval of such work by certain boards or committees before he is entitled to payment therefor, does not deprive him of the right to recover for the work, where it has been done in substantial conformity to the contract, because the city's officers arbitrarily or unreasonably refuse the certificate and approval called for.¹

In Error to the Circuit Court of the United States for the District of New Jersey.

James C. Connolly, for plaintiff in error.

Henry B. Twombly, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. Michael Fitzgerald, the defendant in error, brought an action against the city of Elizabeth, the plaintiff in error, to recover for work done by him under a contract for paving one of the streets of that city. It was defended upon the ground that the work had not been done in accordance with the contract, nor certified, approved and accepted in conformity with its terms; and upon its appearing that a portion of it did not literally and exactly conform to the specifications, and that the certificates, approval and acceptance referred to had in fact been withheld, the court was asked to direct a verdict for the defendant. Instead of doing this, the learned judge submitted to the jury the following questions:

"First. Did the plaintiff do the work of paving South Park street substantially according to his contract and specifications? Second. (a) The city surveyor having refused to certify that the work had been done in accordance with the contract and specifications, was that certificate unreasonably refused? (b) The committee on streets and parks, as well as the street commissioner and the inspector, having severally refused to approve and accept the plaintiff's work, was that approval unreasonably refused?"

Each of these questions was affirmatively answered, and thereupon the jury was instructed to render a general verdict for the plaintiff in such sum as, upon the evidence, might appear to be due to him; and this it accordingly did. This mode of procedure, though exceptional, was by no means unprecedented, and it was, we think, properly resorted to in this instance. By the answers of the jury to the specific interrogatories propounded, the questions of fact which the court deemed material were distinctly resolved, and by the "general verdict" the damages to which (if to any sum) the plaintiff was entitled were duly assessed. We are therefore to decide: (1) Whether the questions submitted were, if material, properly for determination by the jury; and, if they were, then (2) whether a substantial performance of the contract on the plaintiff's part was sufficient to support his right of action thereon; and (3) whether, if it was, an unreasonable refusal to certify, approve and accept his work precluded him from recovery.

1. The first of these points presents no difficulty. Whether the plaintiff's work had been done substantially according to the contract,

¹ See Contracts, vol. 11, Cent. Dig. §§ 1308 [l, ll, n, vvv, w], 1310; 1897 Dig. § 113 [j]; 1898 Dig. § 126 [d]; 1899B Dig. § 159 [d]; 1900A Dig. § 150 [b]; 1901A Dig. § 111 [e].

and whether the refusals of the city's officers to certify that it had been so done, and to approve and accept it, were unreasonable, were questions of fact; and, as the evidence respecting them was conflicting, the court was unquestionably right in referring them (their relevancy being assumed) to the jury for determination. The extent to which the work done was not in exact conformity with the specifications was itself a subject of controversy. It was not conclusively shown, on the one hand, that the variances were so trivial as to warrant a binding ruling that they were unsubstantial, or, on the other hand, that they were so obviously important as to require the court to charge that they must be regarded as substantial. Therefore the question of substantial performance, if legally pertinent, was necessarily for the jury; and that the reasonableness of the refusals to certify and approve, if at all open to inquiry, was for decision by it, and not by the court, is, upon familiar principles, indubitable.

2. The jury having found that the plaintiff did his work substantially according to the contract, a sufficient compliance therewith on his part was competently ascertained. "The rule is that a substantial performance must be established to entitle the party claiming the benefit to recover, but this does not mean a literal compliance as to all details." *Desmond-Dunne Co. v. Friedman-Doscher Co.*, 162 N. Y. 486, 56 N. E. 995; *McCartan v. Inhabitants of Trenton*, 57 N. J. Eq. 571, 41 Atl. 830. "Whether * * * alleged defects are substantial or unimportant is a question of fact for the jury. Substantial performance of the entire contract is sufficient, and the jury may properly so find." *Pitcairn v. Philip Hiss Co.*, 113 Fed. 493.

3. The second question propounded to the jury correctly assumed that the contract provided for certification of the work by the city surveyor, and for its approval and acceptance by the committee on streets and parks as well as by the street commissioner and the inspector, and also that such certification, approval and acceptance had been severally refused; so that the only question submitted was, were they unreasonably refused? We have already said that this question, if legally pertinent, was properly referred to the jury, and we now add that, in our opinion, it was a material and important question in the cause. As was said by the learned trial judge, the plaintiff could not, by unreasonable refusals to certify and approve his work, "be deprived of the fruits of his labor." The jury was not left without guidance as to what would constitute an unreasonable refusal. Upon that subject the court said to them:

"Some courts have gone so far as to say that, where a man had substantially, in good faith, complied with the contract, and a certificate was distinctly refused him, without any reason given, or without any reason existing, then that would be unreasonable, and the certificate could be dispensed with. But what have we here? Do you consider that these men are acting whimsically; that they are not acting with good judgment; and, because they honestly believe, and have reason to believe, that this work has not been done according to the contract and specification, that it is not a good job? They tell you what they have seen there, and what defects there are in it; and certainly, if what they say is true, they are far from acting unreasonably in the matter. And as a part of what you can judge as to whether they are acting unreasonably is their very appearance here,

and the way in which they gave their testimony, and all that has occurred about these meetings, with the parties to it, and what has passed back and forth between them."

Hence it must be understood that, by answering the second question affirmatively, the jury found that the officers of the city, in refusing the certification and approval in question, had acted, not upon honest belief that the work had not been done according to the contract, but whimsically, and without cause; and surely such conduct may, without exaggeration, be characterized as unreasonable. Had, then, the defendant's officers the right to arbitrarily refuse the certificates and approval called for by the contract? Both in reason and upon authority it is clear that they had not. "When the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies, of the interested party. In doubtful cases courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant." *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; *Welch v. Woodworking Co.*, 61 N. J. Law, 57, 38 Atl. 824; *Elevator Co. v. Clark*, 26 C. C. A. 100, 80 Fed. 705; *Mitchell v. Dougherty*, 33 C. C. A. 205, 90 Fed. 639.

All of the 12 specifications, except the eleventh, have been covered by what has been said, and that one is without merit. The only specific objection which was made upon the trial to the admission of the certificates, which it is now contended should have been excluded, was that they were "objected to until the execution of the same has been proven." Thereupon the required proof was made, and then followed a general objection, the ground of which was not stated, but which, from the argument in this court, appears to be that there was not "proper proof of their having been executed or properly filed." As we have said, the proof of execution demanded by the objection as first made was in fact supplied, and we would not be disposed to hold that the court erred in failing to observe, without having its attention directed to the matter, that they had not been shown to have been also "properly filed," even if there had been no evidence that they had been. But inspection of the record has satisfied us that the proof of filing, as well as of the execution of the papers, was amply sufficient to warrant their reception in evidence; and therefore, apart from the consideration just suggested, the eleventh specification of error cannot be sustained.

The judgment of the circuit court is affirmed.

In re CELESTINE.

(District Court, D. Washington, N. D. March 25, 1902.)

1. FEDERAL COURTS—JURISDICTION—SUITS BY INDIANS.

The circuit and district courts of the United States have no jurisdiction except such as congress has given them by law, and there is no law conferring jurisdiction upon either of a suit merely because an Indian, who is a ward of the government, is a party, or his personal rights are involved.

2. SAME—AUTHORITY OF INDIAN AGENT TO SUE.

There is no statute authorizing an Indian agent to sue for the benefit or protection of the Indians under his charge, so as to bring such a suit within the provision of Rev. St. § 563, which gives the district court jurisdiction "of all suits at common law brought by the United States, or by any officer thereof authorized by law to sue." On the contrary, it is the right and duty of the government itself to maintain such suits as are necessary to protect the rights of tribal Indians.

3. HABEAS CORPUS—PARTIES—SUBSTITUTION OF UNITED STATES AS PETITIONER.

A district court will not make an order permitting the United States to be substituted as petitioner for a writ of habeas corpus in a proceeding of which, as instituted, the court is without jurisdiction, at least unless such anomalous action is shown to be necessary to prevent a failure of justice.

4. INDIANS—STATUS OF ALLOTTEE OF LANDS IN SEVERALTY.

An Indian born within the United States, to whom an allotment of land in severalty has been made pursuant to law, becomes, under Act Feb. 8, 1887 (1 Supp. Rev. St. [2d Ed.] p. 536), a citizen of the United States, with all the rights, privileges, and immunities of such, among which is the right to sue in any proper forum, federal or state, and thereafter the government is relieved from the duty of representing him in suits involving his personal or domestic rights.

Application by Josie Celestine for a writ of habeas corpus. On return challenging the jurisdiction of the court.

E. E. Cushman, Asst. U. S. Atty., for petitioners.
Richard Osborne, for respondents.

HANFORD, District Judge. Upon the petition of Mrs. Josie Celestine, an Indian woman residing on the Tulalip Indian reservation, and Dr. Buchanan, United States Indian agent in charge of said reservation, this court granted a writ of habeas corpus against George Sidwall and his wife, who are Indians residing near Seattle, and not upon an Indian reservation, for the purpose of inquiring into the cause of the alleged detention of Annie George, an infant child of the petitioner, Mrs. Josie Celestine. The object of the proceeding is to restore to Mrs. Celestine the custody and control of her child. By their return to the writ, the respondents admit the parentage of the child, admit that she has been in their care since the death of her father, and admit that they have refused to give up the child to her mother; but they urge that they have become attached to the child, and that they are willing and anxious to keep and provide for her as their own child, which they are able to do. They also deny the jurisdiction of the court to interfere in the matter.

The question of jurisdiction is serious, and must be decided before the court can give consideration to the merits of the controversy.

The case was instituted and has been conducted by the United States district attorney upon the theory that the Indians are wards of the national government, that congress has plenary power to make laws for their protection and affecting their rights, that the executive department of the government exercises authority over the Indians, and that the federal courts should hear their complaints and adjudicate questions affecting their rights. This theory has a plausible sound, but it is erroneous in assuming that the courts may exercise jurisdiction in cases properly cognizable therein on that ground alone. Congress has power to define the jurisdiction of the courts inferior to the supreme court, and from the beginning the rule has been steadily adhered to that these courts have no jurisdiction except that which congress has conferred by law. Authority is given by law to this court to issue writs of habeas corpus, but this authority can only be exercised in cases of which the court has jurisdiction. In *re Burrus*, 136 U. S. 586, 10 Sup. Ct. 850, 34 L. Ed. 1500. The right to invoke the jurisdiction of the federal courts has not been given to the Indians, nor is jurisdiction given to the courts to adjudicate questions with respect to the domestic relations of the Indians or other people. The general jurisdiction of the district court is conferred and defined by the acts of congress now included in section 563, Rev. St., and in the enumeration of the powers therein conferred the nearest approach to this case is in the fourth subdivision, by which jurisdiction is given "of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue."

Therefore our inquiry is narrowed down to the question whether an Indian agent of the United States is authorized by law to sue for the benefit or protection of Indians, and my attention has not been directed to any statute giving to such officer any such authority. On the contrary, it has been decided in several cases that it is the right and duty of the government itself to maintain such suits as may be necessary for the protection of the rights of the Indians. 16 Am. & Eng. Enc. Law (2d Ed.) 226; *U. S. v. Boyd* (C. C.) 68 Fed. 577; *U. S. v. Flournoy Live Stock Co.* (C. C.) 69 Fed. 886; *Id.*, 71 Fed. 576; *U. S. v. Winans* (C. C.) 73 Fed. 72. The reasons above given lead me to the conclusion that whilst the government may, in performance of the paternal functions which it has assumed with respect to Indians who are neither aliens nor citizens, maintain suits and actions in any form when necessary for their protection, Indian agents cannot of their own volition assume like authority. They must show authority conferred by law, or else this court cannot take jurisdiction. Congress can confer the necessary authority upon those officers, but it has not done so, and therefore this court does not have jurisdiction of this case.

The district attorney, in behalf of the United States, has asked for leave to intervene and carry the case through as if the government had appeared as a party of record at the commencement of the case, but it would be an irregular proceeding for a new party to intervene in a case of which the court has no jurisdiction. I believe that there is no precedent for a proceeding so extraordinary as this would become if the national government should now appear in the role of a petitioner for a writ of habeas corpus. I am not prepared to say that the gov-

ernment cannot do such a thing if it should be necessary in any case in order to prevent a failure of justice, but it is not necessary in this instance. I say that it is not necessary, because the evidence shows that the mother of this child is now married to an Indian to whom an allotment of land has been made pursuant to a law of the United States, and, being a Tulalip Indian, I have a right to infer that he was born within the United States. Such an Indian is a citizen of the United States, and entitled to all the rights, privileges, and immunities of other citizens, including the right to sue in the proper forum. Congress has relieved the government of responsibility in such cases as this by conferring the rights of citizenship upon Indians to whom allotments of land have been made. 1 Supp. Rev. St. (2d Ed.) p. 536; U. S. v. Kopp (D. C.) 110 Fed. 160. Equality of rights and of responsibilities is an incident of citizenship, and those Indians who have become citizens may be likened to the negroes in this country since their enfranchisement by the fifteenth amendment to the constitution, of whom the supreme court, in an opinion written by Mr. Justice Bradley, has said:

"When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected." Civil Rights Cases, 109 U. S. 25, 8 Sup. Ct. 31, 27 L. Ed. 844.

In view of their status as citizens, I consider that the mother and stepfather of this child should be permitted to seek an adjudication of their controversy with respect to her in the state court which has jurisdiction of such causes.

A judgment of dismissal for want of jurisdiction will be entered.

MARTIN v. BERWIND-WHITE COAL MIN. CO.

(Circuit Court, D. Pennsylvania. March 21, 1902.)

DAMAGES—BREACH OF CONTRACT—STIPULATED DAMAGES IN COAL LEASE.

A coal lease provided that the lessee should mine not less than a stated number of tons per year during the term, and should pay royalty on such number of tons, whether mined or not. *Held*, that such provision was one for liquidated damages in case of nonperformance by the lessee in whole or in part, and not for a penalty, and that, where he abandoned the lease before the end of the term without good cause, he was liable for damages in the sum so stipulated, without regard to the value to the lessor of the coal remaining in place.

At Law. Trial to the court.

R. M. Schick and Austin O. Furst, for plaintiff.
David L. Krebs, for defendant.

J. B. McPHERSON, District Judge. By agreement of the parties, this suit was tried before the court without a jury, and it now becomes my duty to state the conclusions of fact to which I have

been brought by a consideration of the evidence. The action is brought to recover damages for the breach of a mining contract, by which the plaintiff leased to the defendant a seam of coal under a tract of land in the county of Cambria, state of Pennsylvania, with the right to mine, transport, and sell, and the defendant agreed to mine and ship not less than 75,000 tons annually after the first year, and to pay a royalty of 10 cents for each ton of this quantity, whether mined or not, and for each ton mined and shipped in excess of such quantity. The contract was to run for 10 years from January 5, 1891, and this period had expired when the suit was begun. The defendant began to mine the coal, but in a few months reached a part of the seam in which the coal was so inferior in quality as to be unmarketable. The opening was driven into this material for some distance, and the defendant then ceased to mine. Thereupon the plaintiff, with the defendant's consent, drove the mine still further, in order to determine whether the trouble was merely local, and, after some months of work, passed through this inferior section of the seam, and came to marketable coal. Nevertheless the defendant refused to go on with the operation, and did nothing more during the term of the lease. The plaintiff's claim is for the sum of \$7,500 a year, being the royalty of 10 cents upon the minimum quantity that the defendant had agreed to take out during the last nine years of the lease.

Two defenses are set up, each raising a question of fact. The first is that the seam contained nothing that could be properly called coal,—nothing but an unmerchantable compound of slate, sulphur, clay, and coal,—and therefore that the consideration for the lease had wholly failed. To this the plaintiff replied, that, while it is true that unmerchantable coal rendered the seam valueless for a short distance, he had opened the mine beyond that section, and had come upon good coal, fit for the market, which the defendant nevertheless refused to take out. The second defense is that possession of the leased premises was surrendered by the defendant and accepted by the plaintiff, and that the contract was thus brought to an end. The plaintiff declared this defense to be unfounded, and both parties have offered evidence in support of their respective contentions. I have examined with care the evidence concerning both defenses, and am clearly of opinion that the weight of the evidence is with the plaintiff upon both. I shall not discuss the testimony, nor find the facts specially, believing such a course to be unnecessary, but I shall confine myself to the general finding that upon the whole case the plaintiff is entitled to a verdict.

The remaining question is, what is the measure of damages? Upon this point I regard the following clauses in the lease as controlling:

"And the said lessee covenants and agrees to mine and ship from the premises aforesaid not less than 75,000 gross tons of coal per year (after the first year of this lease), and to pay royalty on 75,000 gross tons per year, whether mined or not, and as much more as is practicable, unless prevented by strikes, riots, or any other unforeseen calamity, or by fire or water, or by troubles or faults in the coal seams. And the said lessee agrees to pay to the said lessor a royalty of ten cents per gross ton on all said coal

mined and shipped. Settlements to be made for said royalty on or before the 20th day of each and every month during the continuance of this lease for each and every ton of coal, of 2,240 lbs., mined and taken away from the said premises during the preceding month.

"And it is further understood and agreed between the parties hereto that all royalties which may be paid upon any coal not mined or taken away from said premises during any current year shall be credited upon any coal mined and taken away in excess of the minimum herein provided for in any future or past years."

The defendant contends that the sum thus provided for is not liquidated damages, but a mere penalty, and that, if the plaintiff is entitled to recover at all, he must make an allowance for the present value of the coal that is still in place, and therefore remains at the plaintiff's command. If this position is sound, it follows that, as the royalty now paid in that region is as large as the royalty reserved by the lease, the defendant's breach of contract has entailed a very limited liability. The case of *Lyon v. Miller*, 24 Pa. 392, is cited in support of this contention. The facts there, however, were very different from the facts now before the court. No minimum quantity was provided for, but the lessee simply undertook to mine coal from the lessor's land, and to pay a certain sum for every bushel mined during the year. Upon the breach of that contract it was held (and, no doubt, properly held) that, in computing the amount of damage that the lessor had suffered, the value of the coal still in his land must be taken into account, and that the measure of damage was the difference between the stipulated rate of compensation and the value of the coal in the mine. This case is referred to with approval in a dictum of Judge Thayer, of the common pleas of Philadelphia county, who tried the comparatively recent case of *Kille v. Iron Works*, 141 Pa. 451, 21 Atl. 666; but it is distinctly stated by the learned trial judge that the contract then before him contained "no language which by any ingenuity can be tortured into an agreement for liquidated damages." In the case now being considered, however, the parties have stipulated upon the minimum sum to be paid each year for the right to mine; and this sum is, in my opinion, so clearly and distinctly liquidated damages, and not a penalty, that I shall not take time to discuss it. It is, I think, an annual rent, distinctly agreed upon, and must be paid, if, as I have found, the coal is merchantable, although no coal is actually mined. I am unable to distinguish the case from *Powell v. Burroughs*, 54 Pa. 329, in which the supreme court of Pennsylvania, while considering a similar agreement, used the following language:

"The tenth and eleventh assignments may be considered together. The one is an amplification of the other, or, rather, the latter is an explanation of the former, and is that, if the jury believe that the coal in the mine was worth a greater rent at the termination of the defendant's lease than the defendant stipulated to pay, then there can be no recovery beyond nominal damages."

"Had this instruction been granted, it would have directly sustained the defendant's tenth plea. We are therefore to determine whether it was error to refuse it or not.

"It can hardly be said that this plea was a ground of defense at law for a breach of the covenants sued on. It does not aver performance in any

shape, nor does it show that it was contrary to law that it should be performed. If it be a plea at all, it is an equitable plea or defense. It says to the plaintiff: 'True it is, I entered into the covenants for the breach of which I am sued, and did commit the breaches charged, but it was better for you that I did. You now get more for your coal than I agreed to give you. You are therefore entitled to nominal damages only.' Such equity, it is apparent, rests not on any merit in the party claiming it, but arises exclusively in his bad faith in not regarding his covenants. There is no such principle in equity as this. If sanctioned, it would be a panacea to heal every broken covenant where performance was stipulated for. The defendant had three alternatives, either of two of which would have relieved him from all damages, namely, the performance of his covenants as they were written, or showing that they were dispensed with by some inability to perform provided against in the lease; the third, to terminate the lease at the end of any year, on giving the notice required, and this would have released him from liability for any breach but for the past year. He chose to do neither, and now claims to show that he has done better for the plaintiffs by keeping their coal in place for a higher price. This policy, if taken in time and extended, might have covered the entire coal region, and but a single mine might have been worked. Competition thus set at defiance would undoubtedly be profitable to such a lessee, if, when called on to answer in damages to other lessors for broken covenants, he might successfully defend himself by showing that there were parties who had given or were willing to give higher prices for the unmined coal than he had contracted to give. If he could do this, he might be fairly entitled to stand acquitted of damages, and to have the credit of a discovery.

"The defendant covenanted to take out of the Burroughs mine, leased in 1862, without any reference to any other mine or lease, so many tons per year, while the term lasted, and, on failure to take them out, to pay for the stipulated number taken or not taken. The number of tons to be taken or paid for was the moving consideration for the lease, and must be so regarded. It was therefore a clear case of stipulated damages in case of non-performance, or nonperformance pro tanto. The parties fixed it as the true measure of damages in case of failure, 'without reference to the extent of the injury that might ensue by nonperformance,' and, so far as the covenant is concerned, are bound by it. The uncertainty as to the extent of the injury which may ensue is a criterion by which to determine whether it is a case of liquidated damages or a penalty. *Ohlt. Cont.* 763, 764."

See, also, *Coal Co. v. Schultz*, 71 Pa. 180.

The statute of limitations was not set up as a partial defense, and I express no opinion, therefore, concerning its applicability: *Heath v. Page*, 48 Pa. 130; *Peck v. Whitaker*, 103 Pa. 297. It follows that the plaintiff is entitled to recover the annual sum of \$7,500 for each of the last nine years of the lease, with interest from the end of the respective years to December 11, 1901, the day when the trial was concluded,—a total of \$87,525,—less a credit of \$938.66 which the plaintiff concedes to be due from him to the defendant.

I therefore find in favor of the plaintiff for the sum of \$86,586.34.

CHICAGO UNION TRACTION CO. v. STATE BOARD OF EQUALIZATION
et al. CHICAGO CONSOL. TRACTION CO. v. SAME.

(Circuit Court, S. D. Illinois. April 4, 1902.)

SOUTH CHICAGO CITY RY. CO. v. BAIRD, et al., County Collectors.
CHICAGO EDISON CO. v. RAYMOND et al., County Collectors.
CHICAGO CITY RY. CO. v. SAME. PEOPLE'S GAS LIGHT
& COKE CO. v. SAME. CHICAGO TEL. CO. v. SAME.

(Circuit Court, N. D. Illinois, N. D. April 4, 1902.)

1. TAXATION—ASSESSMENT—CORPORATIONS—VALUATION OF CAPITAL STOCK—METHOD OF ASCERTAINMENT.

The value of the capital stock of a corporation and its franchise for the purpose of taxation is determined by ascertaining the true net earnings, which is the gross earnings reduced by the annual expenditures, increased debts, and the current depreciation in its tangible property, and by capitalizing such net earnings at the ratio of 6 per cent., and equalized to the assessment of the other property of the state.

2. SAME—STATE BOARD OF EQUALIZATION—ASSESSMENT OF CAPITAL STOCK—EQUALIZATION.

Const. Ill. art. 9, § 1, which provides that the value of the taxable property shall be ascertained by persons elected or appointed as directed by law, and which confers upon the general assembly the power to tax corporations owning or using franchises, with the limitation that the tax shall be uniform as to the class on which it operates; and Hurd's Rev. St. 1899, c. 120, §§ 3, 4, which require that real property shall be valued at its fair cash value, and that personalty, except as otherwise provided, shall be valued at its fair cash value, and which direct that the state board of equalization shall determine the fair cash value of the capital stock of corporations,—establish uniformity in taxation, and make the state board of equalization the original body to assess corporate capital stock, as well as the body which must equalize the assessment of all property, including such capital stock.

3. SAME—REASSESSMENT FOR 1900—RESULT OF FICTITIOUS JUDGMENT—WRONG METHOD—RIGHTS OF PARTIES ASSESSED.

The Illinois state board of equalization, pursuant to the mandate of the state courts, reassessed the capital stock of certain corporations and their franchises for the year 1900. Such reassessments were from 30 to 47 per cent. higher than the assessments for 1901. The board endeavored to approximate the aggregate indebtedness of the corporations and their capital stock as measured by the stock market quotations for April 1, 1900. The reassessments, if made upon the basis of a capitalization of the net earnings by 6 per cent., would approximate the assessments for the year 1901. *Held*, that the reassessments did not express the result of the board's independent quasi judicial judgment, but were in fact fictitious, involving mistake, fraud, or coercion, threatening to deprive the corporations of their property without due process of law and of the equal protection of the law, entitling such corporations to equitable relief.

4. SAME—EQUITABLE RELIEF—INJUNCTION.

Equity will enjoin the collection of the taxes levied on such assessments, for the constitutional guaranties that one shall not be deprived of his property without due process of law, and shall be entitled to the equal protection of the laws, does not merely authorize a suit for the recovery of the payment of the illegal taxes.

5. SAME—CONDITION OF GRANTING INJUNCTION—PAYMENT OF TAXES LEVIED ON A PROPER ASSESSMENT.

Since the issuance of an injunction is a matter of discretion and right, the court will require that the corporations shall pay the taxes for the year 1900 on the basis of their net earnings capitalized at a ratio of 6

per cent. and equalized by the reduction of 30 per cent., and then divided by 5, as a condition precedent for the granting of the injunction restraining the collection of the taxes levied on the state board's reassessments for the year 1900.

John S. Miller, J. P. Wilson, E. R. Bliss, Holt, Wheeler & Sidley, Sears, Meagher & Whitney, W. W. Gurley, Henry Crawford, and W. R. Crawford, for complainants.

Frank L. Shepard, Edwin W. Sims, and Wm. F. Struckman, for defendant S. B. Raymond, county collector, etc.

H. J. Hamlin, Atty. Gen., and E. S. Smith, Asst. Atty. Gen., for defendant state board of equalization.

Charles M. Walker, Corp. Counsel, and Henry Scholfeld, Asst. Corp. Counsel, for defendant city of Chicago.

Before GROSSCUP, Circuit Judge, and HUMPHREY, District Judge.

GROSSCUP, Circuit Judge. The complainants are utility corporations organized under the laws of Illinois, and operating in Cook county, Illinois. The defendants are the County Treasurer of Cook county, the local Town Collectors, and, in the first two cases, the State Board of Equalization. There exists in none of the cases, therefore, the diversity of citizenship that confers jurisdiction on the Federal court.

The substance of the bill in each case is as follows:

That at the annual meeting of the State Board of Equalization for 1900, the capital stock of the complainant corporations, including their franchises, was assessed according to law; that on the basis of such assessments the taxes for the year 1900 were paid; that, subsequently, upon the relation of certain citizens of Illinois, mandamus proceedings were instituted in the Circuit Court for Sangamon County against the State Board of Equalization, charging that the board had, in respect of these assessments, illegally neglected and refused to discharge its duty, in that such assessments fell far below the real value of capital stock of the complainant companies; that on or about the first day of May, 1901, final judgment was rendered in said cause, directing a writ of mandamus to issue against the members of the State Board, requiring it to convene forthwith to reassess such capital stock, including the franchises, at their fair cash value, as of the first of April, 1900, "arriving at such valuation from the best information obtainable, taking into consideration, among other things, the market value of the shares of stock of each corporation and the total amount of its indebtedness, except for current expenses." Upon appeal to the Supreme Court of Illinois this decree was affirmed. 61 N. E. 339. But in neither the Circuit Court nor the Supreme Court were the complainant corporations parties to the suit.

In pursuance of this mandate, the State Board of Equalization for the year 1901, successor in office to the board of 1900, but largely changed in individual membership, at its regular meeting for the year 1901 purported to re-assess the capital stock, including franchises, of the complainant corporations; and it is to restrain the

collection of additional taxes on the basis of these re-assessments that these suits are brought.

In substance, it is averred that such re-assessments, if enforced, would deprive the complainant corporations of their property without due process of law, and deny to the complainant corporations the equal protection of the laws. Upon these provisions of the Constitution of the United States the jurisdiction of the Federal courts is predicated—the contention being that the cases arise, within the meaning of the Judiciary Act, under the Constitution and laws of the United States.

Upon a previous motion, in the traction company cases pending in the Southern District (112 Fed. 607), we held that stock market quotations, though significant indicia of the value of capital stock, are not the absolute, ultimate measure of such value; that the real purpose of the Illinois statute is to reach capital stock subject to taxation, in accordance, not with the stock market quotation upon segregated shares of stock upon a single day in the year, but according to its stable value as an entirety; that such was the real purpose and judgment of the Supreme Court of the State in the mandamus case; whence, it followed, that the said board, itself an independent tribunal, was not shorn by the decision of the State Court of its right and duty, upon its own judgment, to ascertain the real value of the property to be assessed.

The fundamental question of fact involved in the present hearing in each of these cases is this: Did the State Board of Equalization, without fraud or mistake, and free from coercion, exercise its judgment in the making of the re-assessments complained of? In solving this question we have looked into, not only the re-assessments complained of, but also the assessments for the year 1901. A comparison between these records of the State Board is significant. In the case of the Chicago Union Traction Company, the assessment for the year 1901—capital stock and tangible property aggregated—falls from a little over fourteen millions of dollars (the re-assessment for 1900) to about eight millions, two hundred and fifty thousand dollars—a loss of about forty per cent.

In the case of the Chicago Consolidated Traction Company, the depreciation is from a little over three millions, seven hundred and fifty thousand dollars to about two millions of dollars, or about forty-seven per cent.

In the case of the People's Gas Company, the depreciation is from over twelve millions and a half to about eight millions and a half, or about thirty-two per cent.

In the case of the Chicago City Railway, the depreciation is from a little over six millions to a little over four millions and a quarter, or about thirty per cent.

In the case of the Chicago Telephone Company, the depreciation is from a little less than two millions, six hundred thousand dollars to a little over one million, seven hundred thousand dollars, or about thirty-four and one-half per cent.

In the case of the Chicago Edison Company, the depreciation is from a little over two millions, four hundred thousand dollars, to a

little over one million, three hundred thousand dollars, or about forty-six per cent.

In the case of the South Chicago City Railway, the depreciation is from nearly five hundred seventy thousand dollars to a little less than three hundred thousand dollars, or about forty-seven per cent.

These assessments, so widely divergent, were upon the same properties, by the same board, entered almost on the same day. The dates as of which they spoke were, it is true, a year apart; the one being of the first of April, 1900, the other of the first of April, 1901. But the tide of stock quotations, and the tide of current values, were higher on the latter day than the former. If, between these two assessments, a considerable disparity should exist, the increase ought to be found in the assessment for 1901, and not in that for 1900.

We can comprehend a possible state of facts showing that neither of these assessments embodied the real judgment of the State Board. We can comprehend, also, a state of facts showing that either one or the other may have embodied the board's real judgment. But both can not be vindicated. In the very nature of things, one or the other has been made up under some species of fraud, mistake or coercion; and a few pregnant circumstances convince us that whatever may be said of the assessment for 1901, the re-assessment for 1900 can not be accepted as the independent judgment of the State Board.

One of these is this: The re-assessment of each of the complainant corporations for 1900 is a close approximation to the aggregate of its indebtedness and its stock value, as measured by the stock market quotations for April 1, 1900. The board seems to have adopted as its own standard in the making of these re-assessments the stock exchange record of that one day of the three hundred and sixty-five, and to have restricted its function to the mere arithmetic of adding up the figures of that day's record. In so doing the board followed, possibly, the interpretation put upon the mandate by the State circuit judge; or, the board may, in the exercise of its own judgment, have so interpreted the mandate; or, it may have felt that, under all the circumstances, an assessment according to that standard was the safer course for the members personally. But, on either supposition, the significance of the fact is not lessened. It goes far toward convincing us that the objective of the board was not the real value of the properties as entireties, but simply what the stock market for one day indicated the value to have been.

What was the real value, in fact, of the property re-assessed? A determination, approximately, of this fact will aid materially in determining whether the board, in the adoption of the standard referred to, exercised its real judgment as an independent tribunal in search of the value of the stock as an entirety. To arrive at such value we have looked into the earnings of the several complainants for the year 1900. The disclosures are made from the books of the company kept for the information of the stockholders. They seem to have been kept with no reference, prospectively, to tax valuations. In the absence of better data, we feel justified in accepting them for the purposes of this motion—subject, of course, to any inquiry that may

affect their accuracy. Except in the case of the Union Traction Company, it is not shown whether the net earnings thus reported have made allowance for current depreciation in the tangible property. In the case of the Union Traction Company, by our direction, an annual reduction, equal to six per cent of the current value of cars, tracks and machinery has been allowed. This is not, in our judgment, an excessive allowance. Railway companies make such reduction each year on the book value of their cars; and it is the rate for depreciation adopted by the Tax Commissions of some of the States.

Nor do the net earnings reported take into account the increase of tax for the year 1900, occasioned by the re-assessments as they may be finally modified. It is only fair that the earnings should be reduced by such increase—itsself an omitted fixed expenditure—before they are used as the basis for capitalization.

Several other elements in a fair calculation, based on net earnings, have raised questions to which we have given careful consideration. The first of these is upon what rate of the true net earnings the aggregate value of the property should be capitalized. We have fixed the rate at six per cent. That is the rate adopted in states where assessments are made upon the basis of net earnings. It is less than the rate that some advanced advocates of municipal ownership are willing to guarantee to investors in securities of this character. The rate adopted, is, we think, justified by the considerations that usually attend the real investors' purchase of stock. Commonly, net earnings are applicable, first, to preferred securities, such as bonds or preferred stock. We may assume that the preferred half of a capitalization that earns as an entirety, six per cent may be considered worth par upon the basis of five per cent. But when it comes to second half, involving as it does, much more the uncertainties of the future, the security will not commonly be regarded as good at par upon the basis of even six per cent, unless there is a margin of earnings over and above the dividends paid; for no investor feels secure of a dividend at six per cent next year, simply because the company has earned it this. It is probably fair to say that net earnings, accruing through several years, at the rate of five per cent upon the preferred half of the securities, and of seven per cent upon the remaining half, would make both securities worth their par value; and this would be equivalent to six per cent upon the whole.

Another element entering into the calculation is this: Should the capitalization, thus arrived at, be equalized to the assessment of the other property of the State? The record convinces us that the assessment of other property throughout the State, including railroad, for the year 1900, as finally equalized by the State Board of Equalization, did not exceed seventy per cent of the cash value; and that such standard was not adopted by the State Board unintentionally or through inadvertence, but deliberately, as a means of arriving at an equalization of taxable values generally throughout the State. May the board now, or the court in review of the board, upon these re-assessments disregard this standard? We think not, and to that question have given careful inquiry.

The Illinois law, constitutional and statutory, upon the subject is substantially the following:

"The general assembly shall provide such revenues as may be needful by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct and not otherwise; but the general assembly shall have power to tax * * * insurance, telegraph and express interests or business, venders of patents and persons or corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates." Const. 1870, art. 9, § 1.

"Real property shall be valued as follows: First, each tract or lot of real property shall be valued at its fair cash value estimated at the price it would bring at a fair voluntary sale." Hurd's Rev. St. 1899, c. 120, § 4.

"Personal property shall be valued as follows: First, all personal property, except as herein otherwise directed, shall be valued at its fair cash value. * * * Fourth, the capital stock of all companies or associations now or hereafter created under the laws of this State, except those required to be assessed by the local assessors and hereinafter provided, shall be so valued by the State Board of Equalization as to ascertain and determine respectively the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association," arriving at such valuation from the best information obtainable, taking into consideration, among other things, the market value of their shares of stock and the total amount of their indebtedness. Hurd's Rev. St. 1899, c. 120, § 3; State v. State Board of Equalization (Ill.) 61 N. E. 339.

These provisions, read together, disclose plainly enough the policy of the State respecting the listing of property for taxation. The General Assembly is given power, it is true, to set, as a class apart, persons or corporations owning or using franchises and privileges, and, so doing, to tax them either upon a valuation, or at a ratio, different from the other classes of property of the State. But until the legislative will is thus exercised all the property of the State is to bear uniformly the burdens of taxation. Uniformity is the dominating mandate of the Constitution. It is the prime maxim in almost every system of taxation, where justice and fair play are sought. It will not be interpreted out of the State's policy unless a clear legislative intention to that end is evinced.

Has the General Assembly in any of the acts referred to evinced an intention to depart from this general mandate of the Constitution and this general maxim of taxation generally? In this connection, two features of the revenue law are pointed out to us. It is said that by section three, above quoted, the capital stock of persons and corporations, such as complainants, are to be so valued by the State Board as to ascertain their fair "cash value;" also that the provisions relating to the listing of railroad rolling stock, tracks, etc., in the several taxing districts show that railroads, at least, are to be regarded as a class apart. But neither of these features of the revenue law prove the point claimed. The second relates plainly, not to standards of valuation, or to uniformity or want of uniformity therein, but to the distribution among the districts of the fruits of taxation by whatever standard laid. The first—the cash value clause—is equally inconclusive when a comprehensive view of the entire taxing machinery of the State is taken.

That machinery begins with the listing of the property subject to taxation. This ordinarily is done by the local assessors, and extends to all classes of real property, moneys, credits, stocks and personal property generally. It is the first step towards ascertaining each citizen's rightful proportion of contribution due to the State under the constitutional provision already quoted.

But this assessment is made by different men in different districts. They may entertain divergent conceptions respecting the value of the same kinds of property; they may be unfairly prejudiced against individual tax-payers and unfairly inclined to favor others. To counteract the unequal conditions thus made possible, County Boards, or Boards of Review, have been created. It is the function of these boards to examine the assessments as of individuals, with a view to the correction of errors and inequalities, and to examine them as a whole with a view to determine their relative equality as between the different primary taxing districts. This is the first process of equalization, and its prime purpose is to insure uniformity as between people of the same general taxing district.

But these local reviewing boards may themselves have divergent views respecting the values of the same kind of property, and thus, unless there be a central Board of Equalization, there might creep in, as between the different general taxing districts of the State, inequalities in taxation. Hence, a final reviewing board—the State Board of Equalization. It is elected, one member from each congressional district, and its general function is to bring the assessments of the several districts to the same relative standard, so that no district of the State may be compelled to pay a disproportionate part of the State's taxes. It has no power to pass over the heads of the local equalizing boards to reach or change individual assessments. Its sole function is to bring about, as nearly as possible, a common level in the valuations throughout the State. Here, again, the prime purpose of the provision is uniformity.

Now, when the General Assembly came to laying a tax upon the capital stock of franchise corporations, there arose the necessity of lodging the power of initial assessments somewhere in the States' machinery. The assessment initially of the tangible property of these franchise corporations was left with the local assessors. But in the assessment of the capital stock, as an entirety, a difficulty appeared not present in the assessment of local properties. The franchise corporations, in great part, are the railways of the State. They cross her entire area—north and south, east and west—running in and out of taxing districts. The capital stock of each, as distinguished from its tangible property, is in its nature an entirety, and its valuation for taxing purposes could not, therefore, in the very nature of things, be cut up into taxing districts. For the assessment of the capital stock of such corporations the initial assessor must necessarily be one whose jurisdiction comprehends the entire line within the State.

But though the section in question made the State Board, in this class of properties, the initial assessor, and charged it with assessing such capital stock at its fair cash value, nothing, either in terms or by inference, is, by the section, taken from the board's general func-

tion and duty as an equalizer. There is in the section no evidence that the general assembly intended to deprive the board of this duty of equalization respecting capital stock. The employment of the words "cash value" is not in point; for cash value is made the primary basis of the valuation of other properties—properties finally equalized below such value—as well. Plainly, the one thought in the mind of the general assembly in enacting section three was, in addition to laying such tax, to find a place where the power of initial assessment could be lodged so as to be effectively used; not intending thereby to throw out of adjustment the equalizing functions of the taxing machinery. In our opinion, uniformity is still the statutory policy of the State in the levying of taxes, with respect of franchise corporations, as well as of other properties. Accordingly, it was imperative, that before the re-assessments for 1900 were entered there should have been such deductions as would have equalized the valuation adopted with the valuations placed upon the other properties of the State. This can not be questioned, on any view, to the extent that such deduction was necessary to equalize the assessment of the complainant corporations with the assessments of railroad corporations for the same year.

Now, if we take the net earnings for 1900 (and this year does not appear to have been an exceptional one) as the basis of valuation, capitalize them at the ratio named—six per cent—equalize this with the other property of the State by deducting thirty per cent, and then divide by five, according to the law in force, adding thereto the tangible property, we will arrive approximately at the real figures at which the re-assessments, including tangible property, should have been entered. Allowance, however, in these net earnings must be first made for the payment of the increased taxes, for, to that extent, the net earnings reported do not disclose a fixed expenditure of the company for that year. The result in round figures can be stated as follows:

The re-assessment for the Chicago Union Traction Company should have been about seven millions seven hundred and sixty-three thousand dollars, or about six millions two hundred and fifty thousand dollars less than the re-assessment complained of, and within four and one-half per cent of the assessment of 1901.

That of the Chicago Consolidated Traction Company should have been about six hundred and twenty-one thousand dollars, or about three millions two hundred thousand dollars less than the re-assessment complained of.

That of the People's Gas Company should have been about eight millions five hundred and one thousand dollars, or about four millions one hundred and thirty thousand dollars less than the re-assessment complained of, and within two per cent of the assessment for 1901.

That of the Chicago City Railway Company should have been about four millions and fifteen thousand dollars, or about two millions one hundred and eight thousand dollars less than the re-assessment complained of, and within five per cent of the assessment for 1901.

That of the Chicago Telephone Company should have been about one million eight hundred and fifty thousand dollars, or about seven hundred and fifty thousand dollars less than the re-assessment complained of, and within seven per cent of the assessment for 1901.

That of the Chicago Edison Company should have been not to exceed one million eight hundred thousand dollars, or more than six hundred thousand dollars less than the re-assessment complained of.

The South Chicago City Railway Company shows no net earnings; indeed, it seems to have been operated at a loss. There is no basis, therefore, upon which to assess the capital stock over and above tangible property.

Now, what do these comparisons show. The disparity between the re-assessments complained of and the figures at which they should have been entered, upon the basis of net earnings, runs from thirty to forty-seven per cent. In cases where the disparity is about thirty per cent we might entertain the explanation that the board felt itself under no obligation to equalize the re-assessments with the property of the other State, hence the disparity. But, considered in connection with the other facts disclosed, the explanation is untenable. It does not explain the action of the board in cases where the disparity runs as high as forty-seven per cent; and it is contradicted by the view of the board, entertained three weeks later, in the assessment for the year 1901 when equalization was allowed. A significant circumstance, too, tending to show what was the real judgment of the board as between the re-assessments complained of and the assessments for 1901, is the fact that except in the case of the Edison Company the assessments for 1901 run only from two to seven per cent apart from our calculation of assessments based upon earning power.

The sum of it all is, that by whatsoever causes brought about, the re-assessments complained of did not, in our opinion, express the real judgment of the State Board as an independent tribunal, and were, therefore, in effect, fictitious judgments, for the impeachment of which, somewhere, the law holds out opportunity to the parties injured. Is the remedy prayed for in the bills within the complainants' legal opportunities?

Taxes are enforced contributions, levied by the State upon the property of individuals, by virtue of its sovereignty, for the support of government, and for the public needs. The money thus taken, until taken, is, as much as real estate or chattels, property within the meaning of the Constitution of the United States; and the taking of such money is a taking of property, as much so, for instance, as the taking of private land for some public work authorized by some law of the State or of Congress.

Due process of law, as applied to the cases under consideration, is the authorized procedure whereby the property of the individual can be taken by the State; it includes the initial authority to levy taxes; the purpose to which money thus raised is to be devoted; and the instrumentalities that distribute the burden upon the citizens. Ours is a government of laws, and not of individual officers, or of boards, or of men.

Any substantial departure, therefore, in the collection of taxes, from the law, either as to the authority for a tax, or its purpose, or the provisions for the just distribution of its burdens, is a departure from due process of law; and the enforced collection of taxes, in the laying and distributing of which there is a substantial departure from law, is the depriving of a citizen of his property without due process of law.

A substantial step in the taxing process as fixed by the law of Illinois; a step essential to the equal distribution of the burdens of taxation; is the decision and judgment of the State Board of Equalization. The Board's place in the taxing system is that of a quasi judicial body. Its judgment affects, as keenly as that of any court, the property interests collectively, of the several districts of the State, and, directly and individually, of the persons and corporations owning franchises. No court can by its judgment grasp more completely what would otherwise remain the property of the individual. In no other tribunal can there be found apter illustration of the power of the State to compel the individual to deliver up his property under the stress of law. It needs no argument to show that power, such as this, is only exercised rightly when exercised judicially.

The prime quality of every judgment, without which it is no judgment, is, that it is the final thought of the judge on the subject submitted, unaffected by extrinsic influences. This implies freedom of mind—not merely theoretically, but practically—the freedom of a mind that does not fear, that has no wish of its own, that sees nothing not seen through the lenses of the law. Judgments honestly made up in such an atmosphere, though subject to review for error, are due process of law; judgments affected by fraud or fear, however, solemnly entered, are as nothing, when weighed by the constitutional guaranties thrown around liberty and property.

The sum of all this, as applied to the cases under consideration, is that the reassessments complained of do not embody the real judgment of the board, in either the assessment or the equalization of the capital stock of complainants for the year 1900; and that in the absence of such real judgment, the threatened collection of taxes on the basis of the fictitious entry, would be to deprive complainants of their property without due process of law.

We have no doubt that complainants may intrench themselves against this invasion by the writ of injunction. One of the primary grounds of equity jurisdiction is to reach cases involving mistake, fraud or coercion, and the relief necessary to their correction. The cases under consideration come clearly within this jurisdiction. It is incomprehensible that the complainants may not avert this threatened invasion of their rights—that they must first yield and then turn prosecutors in a court of law to recover their loss. The fundamental guarantees of the Constitution must not be thus emasculated.

But injunctions issue as a matter of discretion and conscience, not of right. The court may always attach equitable conditions, and the cases under consideration present to our minds a situation where conditions should be required.

We are not unmindful of the fact that the original assessments for 1900 were much less than any fair administration of the law would have made them; and that complainants can not justly escape responsibility for this evasion of their just share of the burdens of taxation. Nor may we shut our eyes to a fact known to all others, that the school funds of the county—the first and most needful outlay for our rising citizenship—are running low, partly in consequence of the taxes withheld. Before the injunction issues, therefore, we shall require the payment to the proper officers by the complainants of their taxes for the year 1900, according to the following rule:

The basis shall be the true net earnings of the several complainants for the year covering April 1, 1900, proper allowance being made for depreciation and replacement, but not for extensions; and reduced further by the amount of additional taxes that the enforcement of this rule produces. Upon this basis the value of complainants' capital stock, including franchises and tangible property, shall be capitalized on a ratio of six per cent; this equalized by reduction of thirty per cent; and then divided by five. The sums thus produced will be regarded as the true re-assessments for the year 1900. Upon this the tax will be extended at the true rate for 1900, exclusive of interest and penalties; not to exceed eight and thirty-seven hundredths per cent from which will be subtracted the taxes already paid, and the balance will be the sum required. We allow no penalties, for the reason that the re-assessments complained of are void, and complainants could not reasonably pay until a proper basis was fixed, either by the board or the courts.

When the cases come to final decree, we will require, before entering such decree, the payment by complainants of the costs of the suit.

The cases in the Southern District will be referred to Walter W. Allen, and those in the Northern District to Henry W. Bishop, masters, to make the calculations indicated, with power to employ such experts or actuaries as they may deem needful.

HALE v. COFFIN.

(Circuit Court, D. Maine. March 5, 1902.)

No. 524.

1. CORPORATIONS—STATUTORY LIABILITY OF STOCKHOLDERS—RIGHT OF ACTION TO ENFORCE UNDER LAWS OF MINNESOTA.

Under the statutes of Minnesota relating to creditors' suits for enforcing the liability of stockholders, which provide that when there is found to remain corporate property the court shall appoint one or more receivers, but that otherwise it may proceed without a receiver, the right to proceed against stockholders is vested in the creditors, and not in any officer to be appointed by the court; and the appointment of a receiver in such a suit, after all the property of the corporation has been administered in a previous suit, confers upon such receiver no legal right of action in his own name against a stockholder in a state where the common-law rule prevails which requires the plaintiff to have the title. But under the decision of the circuit court of appeals for the First circuit in *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747, that such a receiver is vested with sufficient

title to maintain an action at law in Massachusetts, a circuit court in such circuit is not justified in dismissing a suit in equity brought by him, on the ground alone of his incapacity to sue.

2. WILLS—LIABILITY OF LEGATEE FOR DEBTS OF TESTATOR—ENFORCEMENT.

Assets distributed to legatees may, under special circumstances, remain impressed with a trust in favor of unpaid creditors of the estate, and may be subjected to administration by a suit in equity.

3. JURISDICTION OF FEDERAL COURTS—SUIT TO CHARGE LEGATEE.

Where the administration of an estate has been completed by the probate court of a state, and the property has been distributed, and has passed out of its control and beyond its jurisdiction, a federal court has jurisdiction of a proceeding in equity to subject such property in the hands of a distributee to a debt of the decedent.

4. LIMITATION—SUIT IN EQUITY.

Where such a suit in equity is based on a legal demand, the court is bound by the statute of limitations which would govern a special statutory action at law thereon.

5. CORPORATIONS—NATURE OF STOCKHOLDER'S LIABILITY.

A proceeding to enforce the statutory liability of a stockholder, whether at law or in equity, is based on a common-law, and not an equitable, right.¹

6. LIMITATION—ACTION TO CHARGE LEGATEE—MAINE STATUTE.

Rev. St. Me. c. 87, provides that, where a right of action on a demand against a decedent does not accrue within the period limited by statute for bringing suits against the executor or administrator, the claimant may file his demand in the probate office, in which case, unless a bond is given, sufficient assets to meet the claim shall be retained, but, if the claim is not so filed, "the claimant may have remedy against the heirs or devisees of the estate within one year after it becomes due." *Held*, that such provision gives no new right, but merely a specific remedy for the enforcement of a right existing independently of statute, and therefore the limitation of one year is not merely a condition inhering in the special remedy, but declares the policy of the state, and is applicable to all analogous proceedings, whether brought in a state or a federal court.

7. SAME—CONSTRUCTION OF STATUTE—"HEIRS AND DEVISEES."

The provision of Rev. St. Me. c. 87, § 16, giving a remedy against the "heirs and devisees" of a decedent on a demand against the estate accruing after the time limited for bringing an action against the executor or administrator, is not restricted in its application to those who are technically "heirs and devisees," but such words must be construed, in view of the context, and the law of the state making the personal estate primarily liable for debts in case of intestacy, and equally chargeable in case of testacy, to include next of kin or legatees.

8. SAME—SHOWING TO AVOID BAR.

A decree was entered by a court of Minnesota laying an assessment upon the stockholders of an insolvent corporation. A stockholder domiciled in Maine had previously died, and, at the time of the entry of such decree, her estate had been closed. Nearly three years after such decree the receiver brought a suit in equity in the circuit court for the district of Maine to charge a legatee of such stockholder for such assessment. *Held*, that under the statutes of Maine the right of action accrued at once on the making of the assessment, and was barred in one year thereafter. *Held*, also, that the suit, being based on a legal demand, was governed by such limitation, although in equity and in a federal court, in the absence of a sufficient showing in excuse to remove the bar; and that allegations that complainant was a resident of Minnesota, and

¹ Stockholder's liability to creditors of corporation, see note to *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 23 O. C. A. 315, and *Scott v. Latimer*, 38 C. O. A. 23.

had no knowledge of the death of the stockholder, were not sufficient without specific facts showing diligence on the part of complainant.

In Equity. Suit to subject assets of the estate of a deceased stockholder of an insolvent Minnesota corporation, in the hands of a legatee, to an assessment made against such stockholder under the statute of Minnesota.

M. H. Boutelle and Eben Winthrop Freeman, for complainant.
Locke & Locke, for respondent.

PUTNAM, Circuit Judge. This is one of the group of cases growing out of the same receivership, and having its origin in the same circumstances as those shown in *Hale v. Hardon* (C. C.) 89 Fed. 283; *Id.*, 37 C. C. A. 240, 95 Fed. 747; and in *Hale v. Tyler* (C. C.) 104 Fed. 757. The present case, however, is in equity, in order to reach the assets of the estate of a deceased stockholder which have been distributed to one of the legatees. *Hale v. Hardon* was at law, in the district of Massachusetts, and, of course, so far as parties were concerned, governed by sections 721 and 914 of the Revised Statutes. Therefore the result of that case can be accepted as in all respects authoritative within the district of Massachusetts only. The case at bar arose in the district of Maine, and therefore, for at least some purposes, may be governed by the peculiar laws of that state. Although in equity, it is based, as we will see, on a common-law right.

The complainant sues, in his capacity as so-called receiver,—constituted as such by one of the courts of the state of Minnesota,—on a certain proceeding brought by a judgment creditor of the Northwestern Guaranty Loan Company, a corporation organized under the laws of Minnesota, in behalf of himself and other creditors, solely for the purpose of enforcing against the stockholders thereof a peculiar liability imposed by the constitution of that state. The corporation became insolvent, and, in a proceeding in one of the courts of Minnesota prior to that in which the present complainant was appointed receiver, all its assets were sequestered and administered for the benefit of its creditors, so that in the proceeding in which the complainant was appointed receiver there were no remaining assets to be administered. The statutes of Minnesota provide that when, in a suit for enforcing the liability of a stockholder, there is found to remain corporate property, the court shall appoint one or more receivers, but that, if it appears that the corporation has no property, the court may proceed without appointing any receiver.

Therefore, under the constitution and laws of Minnesota, so far at least as this case is concerned, the mere right to proceed against stockholders originates and vests in the creditors, and not in any officer or other person appointed or to be appointed, or authorized or to be authorized by force of any statute or by any executive or judicial proceeding. Consequently no right of action against any stockholder of the corporation in question ever arose or vested in the complainant; and he has no title by virtue of any assignment,

sequestration, executive or judicial action, or in any other way, and he is in fact only a master in chancery, appointed by the court to assist it in effectuating its decrees. Under these circumstances, if this were a suit at common law, brought within the district of Maine, where the rule has always prevailed, by virtue of which no action can be brought except by some party having a title, no suit could be maintained by the complainant in his own name, although, under the statutes of this state, if he were an assignee, an action might lie, and although, also, according to the rules of the common law, an action would lie in his name if the right of proceeding against the stockholders originated in him, instead of in the creditors. Moreover, although the right of action arose in another state, the courts in Maine would be compelled to enforce them, not on the ground of comity, which word can be properly used and applied by courts of common law only in its conventional and limited sense (Dicey, *Confl. Laws*, 14, 15), but because the constitution of the United States requires it (*Stewart v. Railroad Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; *Whitman v. Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587; *Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619). So if, on any account, a failure of remedy is at any time threatened, it is for the courts to await the action of the legislature. That the remedy involves a matter of absolute law, not reached by any international rules, is illustrated by following to its conclusion *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184. That suit was brought by an assignee in a jurisdiction where an assignee may bring any action in his own name, but as soon as the same assignee attempted to proceed in a jurisdiction where the common law prevailed the supreme court refused him relief. *Glenn v. Marbury*, 145 U. S. 499, 508, 12 Sup. Ct. 914, 36 L. Ed. 790.

Childs v. Cleaves, 95 Me. 498, 50 Atl. 714, is understood to assert in this district a different rule with reference to parties plaintiff; but, if so, it would be so clearly contrary to the law of Maine as it has existed from the origin of the state, adduced from the common law of England through the common law of Massachusetts, that it could not receive the assent of this court, and could not bind it. If it were of the character claimed for it in this particular, we would be obliged to stand to the uniformity of the law, regarding *Childs v. Cleaves* as concerning some oversight which the court at some future time would remedy. That such is the rule which governs us, even with reference to the construction of statutes, was made especially clear by *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359. But *Childs v. Cleaves* does not necessarily go to the extent claimed for it. It is apparent that the court proceeded with reference to a receiver who was supposed to be of a different class from the one at bar. It is to be borne in mind that, while we take judicial notice of the statutes of Minnesota, they are made known to the courts of Maine only as pleaded or proven. *Childs v. Cleaves* went to the court in bench on a demurrer, and in what way the court was advised or ascertained with regard to the laws of Minnesota, and how fully it was advised, the case does not clearly show.

The judicial proceedings in Minnesota resulting in *Childs v. Cleaves* were of an apparently different character from those out of which grew the case at bar. With reference to the latter, the assets of the corporation had been sequestered and administered in a prior proceeding in Minnesota, and the present suit arose out of a subsequent proceeding, in which no remedy was sought except the enforcement of the stockholders' liability. It appears, however, from the opinion in *Childs v. Cleaves*, at page 502, 95 Me., and page 714, 50 Atl., that the receiver, who was the then plaintiff, was appointed in the same case in which the assets of the corporation were administered. In that proceeding, as there were assets, the statute required the appointment of a receiver, as we have already shown. The statutory provision applicable thereto was peremptory: "and shall appoint one or more receivers." *Childs v. Cleaves*, 95 Me. 505, 50 Atl. 715. It is stated at page 502, 95 Me., and page 714, 50 Atl., that the administration of the estate by the receiver first appointed was completed in July, 1897, but that meanwhile, and pending that administration, an order was issued by the court in the same case, on the intervention of creditors, for the enforcement of the stockholders' liability, and that thereupon, in the same month of July, a decree was entered against the stockholders in favor of the interveners, and *Childs* was appointed receiver for enforcing against stockholders the judgment rendered for the net balance of indebtedness. Whether he was appointed such by virtue of the powers vesting on the ordinary rules of equity, or as the successor of the receiver expressly required by statute, is not clear.

In any event, the court appears to have assumed that the right to sue stockholders originated, or at least vested, in *Childs*, as receiver, and not in the creditors. Indeed, this follows, apparently, from the reliance it placed on *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337,—a case of very narrow application. It involved the rights of the superintendent of insurance for Missouri, who was as said at page 225, 103 U. S., 26 L. Ed. 337, "the statutory successor of the corporation for the purpose of winding up its affairs." The opinion was careful to observe that his authority did not come from the decree of the court, but from the statute, and it added, "He was in fact the corporation itself, for all the purposes of winding up its affairs." Indeed, so far as the law is concerned, he stood the same as a corporation created by the legislature, as the successor of one or more old corporations, receiving the assets and charged with the liabilities, as in the case of *Maine Cent. R. Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836. Under such circumstances, no foreign tribunal has ever questioned the proper joinder of the new corporation as a party, either plaintiff or defendant, with reference to the transactions of its statutory predecessor. Thus the reliance placed on *Relfe v. Rundle* in *Childs v. Cleaves* leads to the belief that the court did not intend to subvert the common law with reference to parties and rights as always known in Maine, and that therefore that decision has no necessary application to the case at bar.

Childs v. Cleaves emphasizes, at pages 508 and 509, 95 Me., and page 717, 50 Atl., *Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506,

44 L. Ed. 619, and *Whitman v. Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587; but those cases touch no question involved here, as there was nothing in them regarding parties or title. They only went to the effect that, where a right of this general nature is given by the statutes of one state, it is effective in another state, not as a matter of comity, but of absolute, constitutional obligation. Indeed, the expressions of the court in *Childs v. Cleaves*, at page 512, 95 Me., and page 718, 50 Atl., and elsewhere, apparently show quite clearly that it regarded the then plaintiff as fully within the distinction made by us in *Avery v. Trust Co.* (C. C.) 72 Fed. 700, applied by Judge Coxe in *Howarth v. Ellwanger* (C. C.) 86 Fed. 54. On the whole, we are led to the conclusion that *Childs v. Cleaves*, as the court understood it, lies outside of a case where no title originated, or at least vested by statutory succession, in the nominal plaintiff.

Therefore, as this bill is not founded on a merely equitable right, but was filed to enforce one arising at common law, and therefore concerns only the remedy, we would be compelled to give force to these views, and dismiss the suit, if the subject-matter out of which it arose had had its origin within this district. The fact is, however, that the cause of action arose in another state; and it was, of course, necessary to the conclusions of the circuit court of appeals in *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747, by which we are bound, that under the laws of that state there was something which vested in the plaintiff as receiver, sufficient to enable him to become an actor in a suit at common law in the district of Massachusetts. While this would not meet the conditions in Maine in the event this were a common-law action, it is sufficient to control us in a proceeding in equity, although pending in this district, inasmuch as in equity we have no concern with the local practice as to parties. Therefore, it having been determined by the circuit court of appeals that the laws of Minnesota give the complainant something which is sufficient to make him an actor in a judicial tribunal, and as the rules of equity as administered in the federal courts are broad enough to protect a proceeding in the name of such a complainant, we cannot dismiss this bill on the mere question of parties, and we are compelled to look at the facts of the case.

It has been stated in regard to this receiver that the decree establishing the amount of the corporation's deficiency, and adjudicating that it was necessary to assess the stockholders the entire par of their stock to make good such deficiency, and appointing the complainant a receiver to enforce the same, was entered in February, 1897. This was erroneous, because the proceeding of that date was merely a finding of facts, and a statement of conclusions of law, with an entry of an order for judgment. The judgment itself bears date of November 3, 1897.

It is necessary to assume, and we understand, that the result reached by the circuit court of appeals in *Hale v. Hardon* accepted this judgment as conclusive on all stockholders, domestic and foreign, so far as the amount assessed is concerned, so that the relations of the parties to this bill date from the day of the judgment; that is, November 3, 1897. This cannot, for present purposes, be questioned, because oth-

erwise, in view of the fact that the corporation never was dissolved, and is not made a party (*Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577), the absence of any qualification by the supreme court would compel a dismissal. Consequently the well-known rule applies that the right of proceeding against the respondent accrued on November 3, 1897, and that all computations under any statute of limitations or otherwise must be made from that date. *McDonald v. Thompson*, 184 U. S. 71, 22 Sup. Ct. 297, 46 L. Ed. —.

The stockholder out of whose holdings this bill arose was the owner of 22 shares of the stock of the corporation in question, of the par of \$2,200. She deceased on March 14, 1895, at Portland, in the county of Cumberland and state of Maine, where she was resident at that time, leaving a will which was duly probated in that county. Hon. Joseph A. Locke duly qualified as executor thereof on April 16, 1895, and promptly gave proper notice of his appointment. He finally settled the estate in August, 1897, and was discharged as executor before the present bill was filed. At the time of the filing of the bill no legal representative of the estate existed, and there were no assets aside from those in the hands of the legatees.

It is not necessary to detail the laws of Maine with reference to the period of limitation for proceedings against the estates of deceased persons, or the steps necessary to be taken within that period by those holding claims which have not matured, in order that rights may be preserved against the executor or administrator. It is plain that in this case no rights continue against any official representative of the estate, and that none were preserved; this coming, presumably, from the fact that there was no person in existence until the judgment in Minnesota of November 3, 1897, which was after the estate was closed and the executor discharged, who would take any proceedings in that direction. Consequently there is no remedy at law against the estate in the local tribunals, and therefore there can be none in the federal courts,—a proposition which it is not necessary to elaborate. *Morgan v. Hamlet*, 113 U. S. 449, 5 Sup. Ct. 583, 28 L. Ed. 1043. This does not, however, bar a remedy in equity according to the fundamental principles applicable to chancery courts.

The estate was distributed to two legatees,—the respondent, who received \$4,174.90, and Thomas Fairbrother, a resident of Vermont, and therefore not made a party. The distribution was made in July, 1897. The amount received by Fairbrother is not disclosed. Whether the inability to make Fairbrother a party would affect the jurisdiction, or whether the entire claim of the complainant could be liquidated from the amount received by the respondent, or only proportionately, we will not have occasion to consider.

This bill was not filed until June 27, 1900, which was about two years and ten months after the distribution to the legatees. It alleges that at the time of the decease of Mary A. Ripley, and ever since, the complainant was a nonresident of Maine, and had neither knowledge nor notice of her death, or of the pendency of administrative proceedings until after their close, nor until shortly before this suit was commenced. No demand was made on the respondent for payment within one year after the complainant was appointed receiver; that is to say,

within one year after November 3, 1897, when the claim in suit ripened, as we have seen. In pursuance of these allegations, it is agreed that the general solicitor of the complainant, which solicitor resided in Minnesota, on July 12, 1899, first sent to a solicitor within this state, whom the complainant had already employed, the claim now in suit, with other claims against other stockholders, in a letter which was received by the Maine solicitor on July 15th; that on July 22d the Maine solicitor wrote the general solicitor, informing him of the death of Mary A. Ripley, and that her estate had been settled; and that this was the "first information, knowledge, or notice" which the complainant or his general solicitor received of either of these facts. How long the solicitor in Maine had been employed does not appear, nor the extent and nature of his employment, nor in what part of the state he resided.

Under these circumstances, there can be no question that, aside from whatever provisions exist in the statutes of Maine, and aside from the questions of jurisdiction and apportionment to which we have referred, the complainant had a remedy in equity in this court against legatees when his bill was filed. This is such a well-settled principle that it needs no citation of authorities to support it. It is, however, put in a very positive manner in *Borer v. Chapman*, 119 U. S. 587, 599, 600, 603, 7 Sup. Ct. 342, 30 L. Ed. 532, where even assets distributed to legatees under an ancillary executorship are declared to be impressed ordinarily with a trust in behalf of creditors, even within the country of domicile, under circumstances where a creditor has had no method or opportunity of pursuing his claim through the ordinary channels. Mr. Justice Nelson, in *Williams v. Gibbs*, 17 How. 239, 254, 15 L. Ed. 135, pointed out that this was inherent in the broad rule applicable to every case where there is a common fund, in the distribution of which several parties are interested.

Neither is there any difficulty, so far as the present bill is concerned, arising from the fact that the administration of the estate was through the probate courts of Maine. It can hardly be said that it is not within the power of congress to devolve on the federal courts some jurisdiction even with reference to the probate of wills, because it would not now be maintained that any expression in section 2 of article 3 of the constitution, defining the judicial power of the United States, is to be construed in that narrow way. *Ellis v. Davis*, 109 U. S. 485, 497, 3 Sup. Ct. 327, 27 L. Ed. 1006; *La Abra Silver Min. Co. v. U. S.*, 175 U. S. 423, 455, 20 Sup. Ct. 168, 44 L. Ed. 223; *King v. Asylum*, 12 C. C. A. 145, 64 Fed. 331, 335, et seq. Nevertheless, either because the matter of probate of wills belongs to the administrative side of the jurisdiction of special tribunals akin to the doctrine of *parens patriæ* (*Fontain v. Ravenel*, 17 How. 369, 384, 15 L. Ed. 80; *King v. Asylum*, 12 C. C. A. 145, 64 Fed. 331, 349), or because congress has not seen fit to confer on the circuit courts any powers in reference thereto, it has been held, ever since the case of *Kosciusko's will*, that the circuit court has no jurisdiction to grant or refuse probates. It has been also held, ever since *Tarver v. Tarver*, 9 Pet. 174, 9 L. Ed. 91, that the circuit courts

have ordinarily no power to declare probate proceedings void. This has not been based on any rule peculiar to the federal courts, but on the general proposition that courts of equity, whether in England or in this country, have ordinarily no jurisdiction of that character. In *re Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599. Consequently there are some exceptions to the rule. In *re Broderick's Will*, 21 Wall. 517, 22 L. Ed. 599 et seq.; *Ellis v. Davis*, 109 U. S. 485, 496, 503, 3 Sup. Ct. 327, 27 L. Ed. 1006.

It is also well settled that the circuit court cannot interfere with the ordinary course of the administration of an estate of a deceased person, over which administration the local courts have already assumed jurisdiction. This might be put on the ground that the machinery for exercising a jurisdiction of that character has never been given any of the federal courts; but it is usually rested on the general rule which bars those courts from interfering with the res of which the state courts have taken control, and vice versa, within *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660, and *Farmers' Loan & Trust Co. v. Lake St. El. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667, and other well-known cases of that character. *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. It is also clear that, wherever the probate court has done any act in the ordinary course of the administration of an estate, or with reference to any matter within its jurisdiction, the federal courts are barred on the usual rule of *res adjudicata*. *Simmons v. Saul*, 138 U. S. 439, 458, 11 Sup. Ct. 369, 34 L. Ed. 1054; *Sherman v. Association* (decided by the circuit court of appeals for this circuit January 24, 1902) 113 Fed. 609. Where, however, the administration has been completed, so far as any particular branch of it is concerned, and the property has passed out of the control of the probate court, and beyond its jurisdiction, the federal courts are free to avail themselves of all the ordinary proceedings in law and in equity with reference thereto, as was fully demonstrated in the case which we have just cited (*Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. 342, 30 L. Ed. 532). There it was said (at page 601, 119 U. S., and page 349, 7 Sup. Ct., 30 L. Ed. 532) that the powers which this court is asked to exercise in the case at bar are "a part of the ancient and original jurisdiction of the courts of equity," which is vested "by the constitution of the United States, and the laws of congress in pursuance thereof, in the federal courts," and which is "independent of that conferred by the states upon their own courts, and cannot be affected by any legislation except that of the United States." The rule is stated broadly in *Byers v. McAuley*, 149 U. S. 608, 620, 13 Sup. Ct. 906, 37 L. Ed. 867. Therefore there is no difficulty in taking jurisdiction of the case at bar, unless on account of some peculiarity which we have yet to consider.

The complainant has a serious difficulty to meet in the defense of limitation. We have already said that the basis of this bill is not an equitable right, but merely the seeking of a remedy in equity to enforce a right at common law. In construing rule 90 of rules of practice in equity, the supreme court has referred us to the prac-

tice as it existed in England when that rule was adopted. *Thomson v. Wooster*, 114 U. S. 104, 112, note, 5 Sup. Ct. 788, 29 L. Ed. 105. Volume 2 of the edition of *Daniell's Chancery Practice* there referred to was published in 1840. Its notes were written by the author, and are therefore of the same force as the text. There it is said that courts of equity have held themselves bound by the statute of limitations of James I. in respect of all legal titles and demands. This rule is expressly so restated in *Metropolitan Nat. Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 448, 13 Sup. Ct. 944, 37 L. Ed. 799, as follows: "Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern actions at law." This is restated as late as *Willard v. Wood*, 164 U. S. 502, 520, 17 Sup. Ct. 176, 41 L. Ed. 531, and *Baker v. Cummings*, 169 U. S. 189, 206, 18 Sup. Ct. 367, 42 L. Ed. 711.

At the time the judgment of November 3, 1897, was entered, the complainant had a perfect remedy under chapter 87 of the Revised Statutes of Maine (section 16). A previous section provides that, when an action on a covenant or contract does not accrue within the period limited by statute for bringing suits against the executor or administrator, the claimant may file his demand in the probate office, and thus, unless a bond is given, secure the retention of a part of the estate to meet his claim when it comes due, with some other incidental provisions to which we need not refer. Section 16 reads as follows:

"When such claim has not been filed in the probate office within said two years, the claimant may have remedy against the heirs or devisees of the estate within one year after it becomes due, and not against the executor or administrator."

The liability in this case is contractual, as has been stated by the supreme court several times, but the right of action did not accrue till the period provided by statute for suing the executor had expired. Therefore the subject-matter of this proceeding falls within all branches of the provisions of the Maine statute referred to. Under the circumstances, there was plainly, for the full period of a year after the judgment of November 3, 1897, a complete statutory remedy, and also, as we have shown, a concurrent remedy in equity in this court. *Borer v. Chapman*, 119 U. S. 587, 600, 7 Sup. Ct. 342, 30 L. Ed. 532, is directly to the point that the statute cited could not contravene the broader right of the creditor to proceed in equity in the federal courts.

It may be observed that proceedings under this legislation, which originated in provincial times, have in Maine always been by common-law actions; yet the frame of the statute is broad enough to permit a remedy in equity where circumstances require it. Therefore the statute may well be held to insure relief in equity or at law, as the case may be, but, whether under one procedure or the other, always subject to the limitation of one year. The federal courts certainly can afford the common-law relief under the statute, as well as the equitable relief originally vesting in them. In any view, we thus have concurrent remedies, both based on contract, arising from the acquirement by the

testatrix of her shares of stock, and from the ripening by the entry of the judgment of November 3, 1897, into a complete statutory and contractual obligation, ordinarily enforceable in the common-law courts, and always so when, as in the case at bar, it extends to the full par value of the shares. *Kennedy v. Gibson*, 8 Wall. 498, 505, 19 L. Ed. 476, and subsequent decisions to the same effect.

The general rule that under such circumstances chancery is bound by the statutes of limitations was precisely determined in *McDonald v. Thompson*, 184 U. S. 71, 22 Sup. Ct. 297, 46 L. Ed. —, already referred to. That was a suit in equity brought by the receiver of an insolvent national bank to enforce the double liability of a stockholder therein. So far as the liability is concerned, it is precisely the same as that at bar; arising under the application of exactly the same principles of law. The court laid aside the question whether the complainant should not have sued at law, and, assuming that he rightly proceeded in equity, held him absolutely bound by the statute of limitations of the state forming the district where the suit was brought, applicable to common-law proceedings with reference to actions on contracts and statutory liabilities. The court, as we have said, applied the rule that the cause of action accrued when the assessment was made,—in this case, November 3, 1897,—and added that at that time the statute of limitations began to run. The court assumed unhesitatingly that although the proceeding was in equity, inasmuch as it was based on a common-law right, the statute of limitations was to be implicitly obeyed. The whole reasoning of the court assumed this to be an undoubted proposition, so that the discussion in the opinion related only to the question which particular provision of the statute reached the case. Therefore, as we have said, the circumstances make *McDonald v. Thompson* conclusive on the case at bar, so far as the general propositions as to the effect of statutes of limitations are concerned.

In reply, the complainant urges his nonresidence and the lack of notice which we have stated; but, as against statutes of limitations, mere nonresidence, unless "beyond the seas," or out of the United States, is ordinarily disregarded. Undoubtedly equity sometimes excuses the bar of statutes of limitations when the law would not, although, with reference to the administration of estates, such an excuse was refused, even in equity, in *Morgan v. Hamlet*, 113 U. S. 449, 5 Sup. Ct. 583, 28 L. Ed. 1043, already cited. However this may be, no case is shown us where such an excuse arises from mere nonresidence, though accompanied with lack of knowledge, with reference to a fact so easily ascertained as the decease of one whose will is publicly exposed in a probate court. For a complainant to avail himself of this rule of equity, he must set out all the facts, so that the court may clearly see that he has exercised due diligence. *Hardt v. Heidweyer*, 152 U. S. 547, 558, 559, 14 Sup. Ct. 671, 38 L. Ed. 548. Among other things, in the present case, the complainant should have negatived any presumption arising from the fact that he had under employment, though for a time not stated, a local solicitor, and have shown that he made prompt inquiries, and that by some strange coincidences he failed to learn of the death of the shareholder. The pre-

sumption that if he had made early inquiries he would have learned the facts in season to have proceeded against legatees within the year provided by statute is so strong as to require clear proof to overcome it. Indeed, we are bound by the practical rule applicable hereto laid down in *Re Broderick's Will*, 21 Wall. 503, 519, 22 L. Ed. 599, already referred to. There it was claimed that the bar of the statute with reference to the alleged forgery of the will in question was met because the complainant resided in a secluded part of the United States, and was ignorant, not only of the fraud, but even of Broderick's death. Although that was a case of fraud, as to which courts are most liberal with reference to allowing exceptions to any bar arising from the lapse of time, yet the excuse offered was not accepted. The opinion rendered in behalf of the court says that the delay was due only to ignorance of Broderick's death, and of the open and public facts of the case, and that the plea is that the complainants "lived in a remote and secluded region, far from means of information." It adds:

"Parties cannot thus, by their seclusion from the means of information, claim an exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with a knowledge of their status and conditions, and of the vicissitudes to which they are subject."

The court then adds that this is the foundation of all judicial proceedings in rem; but this was not particularly applicable to that case, as distinguished from the case at bar, and it could not limit the principles involved in the citations which we have made from the opinion, nor can it be accepted as intended to do so. As we have already said, independently of the case of *In re Broderick's Will*, and on the general principles which we have stated, everywhere applicable to questions of limitations and laches, the mere nonresidence in Minnesota, under the circumstances of this case, does not establish an exception to the general rule.

The complainant also says that the Maine statute which we have cited affords no sufficient analogy with reference to the matter of limitations, because it is restricted to remedies against "heirs and devisees," and that therefore its remedy is not concurrent with that based on the broad rules of equity. It is to be regretted that as this proposition involves the construction of a statute which has existed, in one form and another, for over a century, and has passed through several phases, it is merely insisted on in such manner that we must notice it, without our being afforded the aid of the history of the legislation, or of the decisions of the courts in Massachusetts and Maine in reference thereto. Originally the Massachusetts statute used, instead of the words "heirs and devisees," the words "those who inherit the estate of such person, or devisees thereof." It came into Maine in that form. Laws Me. 1821, c. 52, § 28. As there found, the context shows that it was not intended to be limited to those who, in a technical sense, are "heirs and devisees," because the proviso which forms a part of the same section concerns legacies and bequests. The form of expression found in the act of 1821 continued through the Revised Statutes of 1840, and the present condensed form of expression, "heirs

or devisees," first occurs in the Revised Statutes of 1871. The provisions of the statute covering this topic were codified anew in 1872. Chapter 85. This statute needs no particular observation. In Massachusetts the legislation has been amended so as to expressly include legatees and next of kin.

The construction which the complainant puts on this provision of law would result in throwing its entire burden on those who take the real estate, either by will or inheritance, leaving those who take personalty, whether by will or on distribution, exempt. At the common law, by virtue of which realty bore no burden of debts unless expressly charged, this conclusion would be absurd. It is none the less so under the systems so long established in Maine and Massachusetts, by virtue of which, with reference to intestate estates, liabilities are charged on the personal property before the realty can be reached, and where, even in case of testacy, the entire estate, both realty and personalty, if all covered by specific gifts, contributes proportionately. It is not to be forgotten that the popular confusion between "devisees" and "legatees" has crept into the law books, and that many authorities have recognized the fact that they are sometimes used in legal instruments interchangeably. Stroud, Jud. Dict., and Bouv. Law Dict., "Devise." Even in *Baker v. Bean*, 74 Me. 17, 20, the court, in discussing the liability under this very statute, uses the phrase "bequeathing his property" to the person who was claimed to be liable, although the word "bequeath" is as remote from the word "devisee" as is the word "legatee."

But the construction of the precise section of chapter 87 of the Revised Statutes of Maine under consideration is easily determined by the context. Sections 14 and 15, to which we have already referred, provide that, if the demand is seasonably filed in the probate office, sufficient assets must be retained by the executor or administrator to meet it, unless a bond is given to pay whatever may be found due. Section 15 provides that, "when a bond is given, assets shall not be reserved, but the estate is liable in the hands of the heirs or devisees, or those claiming under them, and an action may be brought on such bond." Then follows section 16. There can be no question that all these sections go *pari passu*, and are to be construed on parallel lines. It is clearly the intention that the "assets" in the hands of the executor or administrator shall always remain liable, wherever they may be found. Primarily these "assets" are personal property, although under certain proceedings, the personal property being exhausted, the real estate may, by leave of the probate court, be converted into "assets" for the payment of debts. It is unreasonable to ask the courts to hold that what is primarily liable in the hands of the executor or administrator for debts is, by a continuous line of statutory provisions, all relating to the same topic, and intended to work out the same subject-matter, absolutely relieved when it comes into the hands of the next of kin or legatees. It is impossible, on any just rule of construction, to give effect to this proposition of the complainant, and he does not support it by the citation of any judicial authority indicating that we should. Our own search has also disclosed none.

As we wish to dispose of the entire topic on broad principles, and by a thorough application of them, we call attention to one fact in this connection which has not been brought before the court by the complainant. Although, under the rule of *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. 342, 30 L. Ed. 532, which we have already explained, assets coming into this jurisdiction from an ancillary administration can be reached through the equity side of the circuit court, yet, under the decisions in Massachusetts, they apparently cannot be reached by virtue of the class of statutes which we have been discussing; and there is no reason to doubt that the Maine courts would implicitly follow the decisions of its sister state, where this legislation had its origin. This is a more serious proposition with reference to the complainant's claim that the remedies are not parallel, and therefore not concurrent, than that on which he rested, and which we have discussed; but the whole topic will be disposed of when we come to state the law of Maine with reference to the question of public policy underlying the statutory limitation.

The complainant makes a further answer to the claim that he is barred by the one-year limitation to which we have referred by the proposition that this does not come from any general statute declaring a general policy, but is simply one of the conditions inherent in the special remedy given by the Maine legislation, and not inherent in the remedy in equity which this court can offer. The decisions cited by the complainant do not assist us on this proposition. They involve the question which was under consideration by the circuit court of appeals for the First circuit in *Railroad v. Hurd*, 47 C. C. A. 615, 108 Fed. 116, where not a new remedy was given, but a new right. This class of cases is illustrated by *The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140, 30 L. Ed. 358, cited by the complainant. It is more specifically illustrated by *Theroux v. Railroad Co.*, 12 C. C. A. 52, 64 Fed. 84, 85, also cited by the complainant, and *Railroad v. Hurd*, to which we have referred. These cases lay down the rule that where a right is thus originated by a statute the period of limitation imposed as a condition in the statute follows the right wherever it is enforced, either in any domestic or foreign tribunal. It is well known that such is not the law where the limitation relates only to the remedy. With reference to the present claim against a legatee there was undoubtedly a right in equity which both the federal courts and those of Maine would recognize anterior to, and independent of, any legislation. The statute cited merely gives a specific remedy. As, therefore, it affords only a new remedy, and not a new right, it is not cognizable in foreign courts, and much less so the conditions which it contains. Therefore it falls within the principles of the ordinary statutes of limitations, and we are compelled to look deeper into the matter.

In doing this we are met by *Hall v. Bumstead*, 20 Pick. 2, 8, showing that the limitations in this class of statutes are based so deeply on grounds of public policy that even the disabilities which are allowed as exceptions in the ordinary statutes of limitations are

not allowed here. In *Fowler v. True*, 76 Me. 43, 46, we are told, by citation from Massachusetts decisions, that by the policy of the laws of Maine "the remedy of a creditor upon the heirs or devisees of a deceased person is extremely limited," and that "every demand which can be made and enforced against the estate of a deceased person is to be pursued against the administrator, where it can be done." It adds:

"This object is one of great importance, by securing as far as practicable an early and final settlement of estates, so that the residuum may be distributed among those entitled, free from incumbrances and charges which would lead to protracted litigation."

It is a well-known fact that the policy of the legislation of Maine and of Massachusetts is, as thus stated, to transfer the succession as soon as it can reasonably be ascertained to whom it shall come, under such circumstances that the recipient shall not be harassed in reference thereto, nor build on it hopes which may long afterwards prove to have been without foundation. The law in this respect in Massachusetts, and successively in Maine, has been very scrupulous. The limitation contained in the extract which we have made from the Revised Statutes of Maine was not merely an arbitrary condition imposed in granting a new statute right, but it was undoubtedly framed in pursuance of a general purpose, which should not be disregarded, either by the courts of that state, or by federal tribunals enforcing the law within the territorial limits of her jurisdiction. If a rule was in fact given in *Chewett v. Moran* (C. C.) 17 Fed. 820, as broadly as the complainant maintains, it was negatived by the supreme court, two years afterwards, in *Morgan v. Hamlet*, 113 U. S. 449, 5 Sup. Ct. 583, 28 L. Ed. 1043. Indeed, the carrying of *Morgan v. Hamlet* to its legitimate conclusion would seem to be decisive of the pending case in favor of the respondent, in any view of it. That the federal courts, even when proceeding in equity, will insist with rigor on a reasonable compliance with local policy as to the administration and distribution of estates, and will decline to interfere by giving relief beyond the statutory limitations, except under very special circumstances, is strictly insisted on in *Board of Public Works v. Columbia College*, 17 Wall. 521, 530, 21 L. Ed. 687.

We are therefore compelled to hold that the claim is barred, by analogy, by the one-year limitation contained in Rev. St. Me. c. 87, § 16.

Let there be a decree dismissing the bill, with costs for the respondent.

UNITED STATES v. BUTLER.

(Circuit Court, D. Maine. March 26, 1902.)

No. 115.

1. UNITED STATES—LIABILITY OF OFFICER FOR FUNDS STOLEN—INTEREST.

The rule applied that in an action by the United States against a disbursing officer to recover public funds which were abstracted from defendant's possession without his knowledge, and from which he received no benefit, where no demand is proved, interest is not recoverable prior to the date of the writ.

2. SAME—BURDEN OF PROOF.

Where the accounts of a disbursing officer of the army, which were duly audited and allowed, were restated by the treasury department nearly 10 years later, and a claim made against the officer for a sum shown to be due from him by the restatement, the burden rests upon the United States to falsify the accounts previously allowed by clear and satisfactory proof.

3. SAME—ACTION AGAINST DISBURSING OFFICER—SUFFICIENCY OF PROOF.

Defendant was acting paymaster in the army at the Rock Island arsenal. The pay rolls were made up by a clerk appointed by the commanding officer, and, after being approved by such officer, were delivered to defendant for payment. His accounts for disbursements on account of such payments were allowed by the department, but it was subsequently discovered that the clerk, in making up the pay-rolls, had entered after the names of certain workmen, as due them for wages, larger sums than were actually due, and by some means had secured for himself the excess payments. After such discovery, and the trial and conviction of the clerk, defendant's accounts were, after 10 years' delay, restated, and suit was brought against him to recover the amount of the alleged shortage thereby shown. He was ignorant of the frauds, and received no benefit from the same. The evidence did not show with any certainty whether the clerk abstracted the money from the pay envelopes before it had been disbursed by defendant, or secured it after its disbursement in accordance with the pay rolls as approved, through collusion with the workmen or otherwise. *Held*, that the case was insufficient to charge defendant with liability.

At Law. Action to charge defendant with liability as a disbursing officer of the army.

Isaac W. Dyer, U. S. Atty.
Richard Webb, for defendant.

PUTNAM, Circuit Judge. In this case the writ bears date March 6, 1899, and the declaration contains two counts,—the first one for \$524.40, money had and received to the plaintiffs' use; and the second one for interest on the same.

Inasmuch as the suit is to recover public funds, which it is claimed were abstracted from the possession of the defendant as a disbursing officer without his knowledge, and while he was innocent in reference thereto, and, as the defendant had no use thereof, and no demand is proven, the interest charged in the declaration cannot be recovered. This has been so held, not only in behalf of sureties, but in the opinion of Mr. Justice Miller in *U. S. v. Denvir*, 106 U. S. 538, 1 Sup. Ct. 481, 27 L. Ed. 264, it was stated to apply in behalf of the officer himself. Moreover, while ordinarily laches does not apply as against the United

States, it does apply against them so far as interest is concerned. *U. S. v. Sanborn*, 135 U. S. 271, 281, 10 Sup. Ct. 812, 34 L. Ed. 112. There is enough in this case on either rule thus stated by the supreme court to bar the United States from recovering any interest accruing prior to the date of the writ.

The defendant, from some period in 1883 to some period in 1886, was a commissioned officer of the United States in the ordnance corps, and during a portion or the whole of that period he was acting paymaster, as provided in section 1161 of the Revised Statutes. The transactions involved ended in 1886, and at some time previous to November 25, 1889, the defendant's accounts as such paymaster were duly allowed. This so stood until they were restated by the accounting officers of the treasury under date of November 22, 1898. As originally allowed, they showed nothing due from him on account of the present claim, but, as restated, they show the amount covered in the first count of the declaration.

This restatement is found at length in the record. It refers to certain items of disbursement, which it states had been allowed in prior settlements, and which it states had been charged back to the defendant in a settlement No. 8,942, of November 25, 1889. That settlement we do not find in the record. Therefore we are compelled to reject it from our consideration, and the dates stand as follows: The defendant's accounts were settled and allowed by the proper accounting officers of the treasury some time prior to November 25, 1889, and on November 22, 1898, they were restated, and a balance declared, corresponding to the amount demanded in the first count of the declaration.

That under section 886 of the Revised Statutes a disbursing officer's accounts may, under some circumstances, and with reference to certain matters, be restated by the treasury, and that, when so restated, they may be used to make a *prima facie* case against him, cannot be questioned, in view of *Soule v. U. S.*, 100 U. S. 8, 11, 25 L. Ed. 536, and *Moses v. U. S.*, 166 U. S. 571, 594, 599, 17 Sup. Ct. 682, 41 L. Ed. 1119. In the present case the restatement apparently arises largely, if not entirely, out of alleged forgeries and alterations in the defendant's vouchers, by which the person who is charged with making the forgeries and alterations was enabled to cover up thefts of the public moneys in the hands of the defendant. Whether, in view of *U. S. v. Jones*, 8 Pet. 375, 8 L. Ed. 979, and *Bruce v. U. S.*, 17 How. 437, 15 L. Ed. 129, such alleged forgeries and alterations are so far within the cognizance of the officers of the treasury that a restatement of an account growing out of the same is effective, or whether the accounts were restated and certified in accordance with the statutes and the regulations of the treasury, and how far such restatements are affected by the act of July 31, 1894 (28 Stat. 162, 168), we are not called on to consider, because we are not called on to give statutory effect to the restatement found in the record. The United States rest their case on the claim that the defendant did not conform to the army rules and regulations, and especially to those concerning the ordnance corps, by virtue of which neglect he hazarded the public moneys in question; and also on their offer to show by primary proofs that the sums dis-

allowed by the treasury were part of the moneys which came into the hands of the defendant, and were never disbursed at all.

As to the first proposition of the United States, the rules and regulations referred to are, in some respects, too obscure to justify us in holding the defendant responsible for public funds by reason of not complying with them. The various steps necessary to show that the loss of the public moneys arose through their violation do not all clearly appear. What is more important, these rules and regulations for the most part, if not entirely, concern the personal conduct of the officer, so that the violation of them subjects him to proceedings before a military tribunal, and not to a liability to be charged in damages by a civil tribunal; and, on the whole, there is not enough here, in connection with whatever else appears in the case, to change the burden which rests on the United States, which we will explain.

The defendant's accounts having been allowed, they stand like an account stated, and the burden is on the United States to show them erroneous. This burden, under the circumstances of the long delay, before, so far as the record shows, the claim was made on the defendant, necessarily, to such an extent, obscures the facts, and adds to the difficulty which the defendant would have in ascertaining and proving them, that this burden is thereby very much increased. The hardship growing out of reopening the accounts of a disbursing officer of the army of the United States, where the facts are so complicated and doubtful as it will appear they are at bar, is especially great in view of the fact that military orders issued at comparatively short intervals take such officers from point to point, and often long distances, and thus leave them where it is impracticable for them to investigate, or direct an investigation of, matters which can be supported or overthrown only by proofs derived from the immediate locality of the transactions involved. Therefore, under the peculiar circumstances of this case, we do not hesitate to say that the burden rests on the United States to falsify the accounts of the defendant, which they once allowed, by clear and satisfactory proofs. In view of this, what is the record which we have before us?

It consists largely of an agreed statement, which is substantially as follows: The defendant was on duty at the Rock Island arsenal, where the commanding officer hired the workmen, and, among the rest, the clerk, one Mr. Warren, who is charged with the theft or fraud out of which the present claim arises. This clerk made up the pay rolls, which were submitted to the commanding officer for his approval, and which, after being certified by him as correct, were delivered to the defendant with a written order for their payment. While, on the one hand, there can be no question that the defendant falls within the great class of United States disbursing officers who are chargeable with public funds received by them, except as against the acts of God or of the public enemy, or that, also, he did receive the sums covering the amount now demanded of him, yet, on the other hand, it cannot be questioned that, under the law and the regulations, it was his duty to pay, and he was justified in paying, and entitled to be allowed the amounts required in paying, the rolls thus certified to him, even if they had been fraudulently drawn up, or altered or

falsified in any manner before they received the approval of the commanding officer. The agreed case then proceeds as follows:

"It subsequently appeared that the said Richard O. Warren, whose duty it had been to make up these pay rolls as aforesaid, had, from time to time, entered after the names of certain workmen, as due them for wages, larger sums than were actually due, and then, by further acts of dishonesty, the said Warren had arranged to secure for himself the excess payments. By means of these frauds, extending over a long period of time, there was improperly paid out upon these pay rolls the sum of \$524.40. Upon said frauds being discovered, said Warren was indicted, tried, convicted, and punished therefor. The said defendant was at all times and in all things ignorant of said frauds, and innocent of any intention or desire to defraud the government or any of its employes, and from said frauds he derived no benefit, directly or indirectly, pecuniary or otherwise."

It was also agreed that the United States might, as a part of their case, introduce, and it did introduce, the reports of certain officers of the ordnance corps, who made certain investigations with reference to the matters in question; that those officers, if present, would testify as stated in those reports, and that, also, the United States might introduce the treasury transcript to which we have referred. These reports were made in 1888, but whether before or after the defendant's accounts were settled as stated the record does not show. The difficulty with them is that they do not contain matters within the personal knowledge of either of the officers who made the reports, which would aid the court, if proven by their testimony in open court. Among other things, so far as they are specific even in matters of information, they mainly relate to the transactions of an officer of the ordnance corps who had been acting as paymaster either before or after the defendant so acted. No better exposition of the lack of any practical use as evidence, under the fundamental rules of law, to which the court can put these reports, or any part of them, can be given than is shown by the following extract from one of them:

"The whole system of stating the accounts of the employes at this arsenal for the period included in our investigation was so generally irregular as to place us frequently in doubt as to whether or not any particular irregularity covered a fraud. The absence of the responsible officer, or of any one who had a knowledge of the circumstances and facts at the time, rendered the uncertainty greater, and the task more difficult. Mr. Warren's opportunities and methods were such that it was possible for him to so alter the accounts that at this late period detection in every instance would be impossible, and therefore it is not claimed that the foregoing statement covers all the irregularities through which fraud was committed; neither is it claimed that each of the irregularities noted covers a fraud. They are irregularities for which no explanation was given or could be found, and most of them certainly cover frauds."

It appears, from a statement made by the defendant and put into the case, that he was accustomed to make up envelopes containing the several amounts to be paid to the several persons whose names appeared on the pay rolls certified to him, and that these envelopes, or a portion of them, were deposited at times in a safe in the office of the commanding officer of the arsenal, to which safe Clerk Warren had access. He also states that the United States claim that the wrongs were accomplished through thefts made by Clerk Warren by abstracting from these envelopes certain amounts corresponding in

the whole to the sum now demanded, so that those amounts never came to the hands of the persons named on the pay rolls; and that he covered up these thefts by falsifications of the rolls after they had been certified by the commanding officer. Of course, if the United States clearly proved such to be the fact, the defendant would stand liable for the amounts so abstracted, because, as maintained by the second proposition of the United States, it would then be the fact that he never disbursed them. If, on the other hand, the moneys were taken from the envelopes after they had been disbursed by the defendant, either by fraudulent arrangements between Clerk Warren and the workmen whose names were on the pay rolls, or in any other manner; or if the actual payments corresponded to the pay rolls as certified by the commanding officer, and the pay rolls were afterwards falsified; or if, in any way, the defendant paid into the hands of the workmen the amounts called for by the pay rolls as they stood when certified by the commanding officer,—he would stand relieved. As we have said, it rests on the United States, under the circumstances, to show clearly and satisfactorily how the wrongs occurred. So far from doing this, the record shows only that the officers who were especially sent to investigate the alleged wrongs were unable to discover the methods in which they were effected, the conclusion being, as stated in the report which we have cited, that, for at least a portion of the irregularities, if not for all of them, “no explanation was given or could be found.” The United States gave no clear explanation then and give us none now; and therefore, for the reasons we have stated, their case fails.

The court finds in favor of the defendant, without costs.

EDGAR v. CITY OF PITTSBURG.

(Circuit Court, W. D. Pennsylvania. March 13, 1902.)

MUNICIPAL CORPORATIONS—POWER TO CONTRACT FOR PUBLIC IMPROVEMENTS— LIMITATION BY PENNSYLVANIA STATUTE.

Act Pa. March 7, 1901, for the government of cities of the second class, with the supplemental act of June 20, 1901, which together constitute the governing law of cities of such class, vests the power to make contracts in the councils, providing that “no contract shall be let until councils shall have passed an ordinance providing for the letting of the same by the city recorder and head of the proper department.” The power of councils with respect to contracts, however, is limited by other provisions, among which is one that “every contract for public improvements shall be based upon estimate of the whole cost, furnished by the proper officer through the department having charge of the improvement and no bid in excess of such estimate shall be accepted.” *Held*, that the obtaining of such estimate by councils covering the whole cost of a proposed public improvement was a condition precedent to the exercise of the power to contract for such improvement, or any part of it, the clear purpose of the act being that the entire probable cost of an improvement should be taken into consideration and deliberated upon before any contract with reference thereto should be made; and that a city had no power to contract for the construction of a part of a filtration plant, in

connection with the extension and improvement of water supply and distribution, where no estimate had been obtained from the proper department of the cost of the improvement when completed, including such accessories and additions to the existing system as the use of such filtration plant proper would render necessary.

In Equity. On final hearing on bill, answer, and replication.

Geo. W. Guthrie and W. B. Rodgers, for complainant.

Clarence Burleigh and Thos. D. Carnahan, for defendant.

BUFFINGTON, District Judge. This is a bill in equity filed by one Edgar, a citizen of Ohio and a property owner in Pittsburg, against said city, to enjoin the letting of a contract for the construction of a portion of a city water filtration plant. The case involves no question as to the wisdom of the city constructing a filtration plant as a whole, nor is issue raised as to the contract price of this particular part thereof, or to the qualification of the proposed bidder. The underlying question is one of law, namely, whether the statutory provisions prerequisite to the city contracting for a public improvement have been complied with. The statute under which the city acts in this regard was but lately passed; and, as new laws suggest new questions, different views exist as to its proper construction. It is to the interest of the contracting parties and a protection to the city's executive officers that the status of the proposed contract should be judicially passed upon before liabilities are incurred thereunder. It is fortunate, moreover, that the case is undisputed as to facts, raises no partisan question, and involves nothing but the purely legal question of such construction. It will be conceded by all that the power of the city of Pittsburg to make a contract—such as here in question—rests upon the act of March 7, 1901, entitled "An act for the government of cities of the second class," and the supplement thereto, approved June 20, 1901. To ascertain the true construction of a law, regard must be had to the object and purpose of its enactment, and, in considering questions of municipal contracting power, the fundamental truth borne in mind that the real principal in a municipal contract is not the city, but the people of the city. As it would be impracticable for them to assemble, deliberate, and contract for municipal work themselves, they cause a corporation—a municipal corporation—to be constituted, in order that their municipal affairs may be transacted through the medium of corporate agency. That such corporate creature is a mere means, and not an end, is shown by the fact that in state and national affairs the state and nation, which are the people, contract without such agency. There is no such corporation as the United States or the commonwealth of Pennsylvania. It will, therefore, be seen that a city, legally and politically considered, is but a corporate agency, created to conveniently transact the municipal affairs of the people who compose it. It therefore follows that, just as in the case of other corporations, the power and authority of the municipal corporation to contract depends on the statutory, charter, or common-law powers thereto enabling it. In transacting municipal affairs, the city necessarily acts by agents, who, with reference to contracts made by the

city, perform legislative or executive duties. As a contract, when made, is an agreement to do a particular thing, the law ascribes to a contracting party knowledge of the subject-matter thereof, deliberation as to the wisdom of making it, and assent to being legally bound by it, and on such basis enforces it. Knowledge, deliberation, and assumption are all implied from the fact that it is an agreement to do a particular thing. It is evident, therefore, that the agent exercising the contracting power of a municipality acts in a legislative capacity. After such legislative agent causes the city to contract, the duty of the executive agent to fulfill such contract attaches. Now, in the delegation of powers to officers of cities of the second class, the act in question vests legislative power in and restricts it to councils, and such power must be exercised by ordinance or resolution. Article 14 provides:

"The legislative power shall be vested in two bodies to be designated as the select and common council. Every legislative act of the councils shall be by resolution or ordinance and every ordinance or resolution, except as hereinafter provided, shall, before it takes effect, be presented, duly engrossed and certified, to the city recorder for his approval. The city recorder shall sign the said resolution or ordinance, if he approves it, or return the same to the branch of council wherein such resolution or ordinance originated within ten days; or at the next meeting of councils after ten days have expired, if he do not approve it, with the reasons therefor; and if, thereupon, each branch of councils pass the same, within five days of such veto, by a vote of three-fifths of all the members elected to each branch, it shall become effective as though the city recorder had signed the same. It shall equally become effective if he should neglect to return the same within such ten days."

Councils, then, being vested with final municipal legislative power (for they can enact over the recorder's veto), it follows they have a right to call on the executive officers of the city to render such aid as shall enable them to properly perform their legislative duties; for the grant of a power carries with it the power to exercise rights necessary to its execution. Such power of councils to call for the aid of executive officers is not dependent on implication. Article 2 provides:

"Each department shall furnish to the * * * councils or either branch of the councils such information as * * * they may at any time demand in relation to its affairs."

Now, while the act makes the recorder and the head of the proper department the signatory officers in behalf of the city to all its contracts, and prohibits the councils from executing the same, stating "No contracts shall be entered into or executed directly by the councils or any committee thereof," yet the fact remains that councils are expressly vested with the sole power to authorize the letting of a contract, the act providing: "No contract shall be let until councils shall have passed an ordinance providing for the letting of the same to the city recorder and head of the proper department." In view of these provisions, it is clear that the exercise of the contracting power of the city is vested solely in city councils. But the power thus vested is not unlimited. It is coupled with conditions, both as to the scope of the contract and the mode of exercising it within such scope.

the case of public improvements,—and such description would include an extensive filtration system,—the act provides:

“Every contract for public improvements shall be based upon estimate of the whole cost, furnished by the proper officer through the department having charge of the improvement, and no bid in excess of such estimate shall be accepted. Every such contract shall contain a clause that it is subject to the provisions of this act, and the liability of the city thereon shall be limited to the amount which shall have been or may be, from time to time, appropriated for the same.”

As councils are the sole agents to authorize a contract, and as their power to contract for a public improvement is limited to the estimate furnished, it is clear that they are the bodies to which the departmental officer is to furnish the estimate. And as the contract authorized by councils “shall be based upon estimate of the whole cost furnished by the proper officer through the department having charge of the improvement,” it is equally clear that, in the absence of such basis for contracting, an attempted contract has no foundation. It must be presumed that the legislature intended a preliminary estimate of cost should be considered by councils before they contracted for a work large enough to be deemed a public improvement. Such course is only to apply to municipal transactions the practice of common business forethought,—a practice so ancient as to have long since been confidently appealed to in the inquiry:

“For which of you, intending to build a tower, sitteth not down first, and counteth the cost, whether he have sufficient to finish it?”

An estimate, then, being the basis on which the contract rests, it would seem that the estimated cost, not of a part, but of the whole proposed improvement, should be submitted to councils. Such, indeed, it appears to us, is the provision of the statute. The estimate is to be made by the department having charge of “the improvement,” and “the improvement” is certainly the whole improvement,—is the sum of all the parts necessary to its use as an improvement; less is not “the improvement”; there is to be an estimate of the “whole cost,” and the clause has for its subject-matter contracts for “public improvements.” Such construction is in accord with the general purpose of the act to vest the exercise of municipal contracting power for public improvements solely in councils. An estimate in accord with this construction enables councils to intelligently pass upon and commit the city to the improvement as a whole, and to outline a systematic and continuous policy in making it. By making such estimate the executive officer places on record the basis of cost on which the councils are induced to contract,—a safeguarding provision which must lead to deliberate and well-considered action on his part; and, councils being restricted in the extent of their contracts to the basis estimate, assume the responsibility of undertaking the improvement on such basis of cost. Under any other construction a department could furnish an estimate of the cost of a part only of some public improvement, and councils, by the adoption of such part, useless in itself without other additions, would place the city in the alternative of spending large sums to make the work undertaken of

any practical use or lose the isolated part unwisely begun. In the absence of express language necessitating such view, we cannot accede to a construction that would sanction a procedure so unbusiness-like and fraught with the possibility of ill-considered expenditure. Indeed it is evident that section 15 was designed as a safeguard against such dangers by subjecting a proposed improvement, in the light of its probable cost, to the light of publicity and the test of general civic opinion. Section 4 provides, "All sessions of council * * * shall be public," and "no ordinance * * * shall be passed finally on the day of its introduction,"—measures which provide time for public opinion to influence councilmanic action. An estimate of the whole cost made to council thus causes the people to face the city's undertaking a public improvement in its entirety. It will then be for the people, who, as we have seen, are the principals in the contract, to determine, through the councils, whether the city shall embark in the undertaking and shall contract. The facts in this case show that the contract in question was not authorized in accordance with the construction here given the act. On December 13, 1901, an ordinance, which is the sole basis of such contract, was enacted, as follows:

"An ordinance—providing for the letting of a contract or contracts for the work necessary to be done for the purpose of the extension and improvement of water supply and distribution, and including the filtration of such water supply.

"Section 1. Be it ordained and enacted by the city of Pittsburg, in select and common councils assembled, and it is hereby ordained and enacted by the authority of the same. That the city recorder and the director of the department of public works shall be and are hereby authorized and directed to let a contract or contracts for the work necessary to be done for the purpose of the extension and improvement of water supply and distribution, and including the filtration of such water supply, for a sum not to exceed one million five hundred thousand dollars (\$1,500,000.00) or so much thereof as may be necessary to construct so much of the filtration plant for the city of Pittsburg as is shown upon the drawings and description in the specifications as and to be known as contract No. 1 to the lowest responsible bidder or bidders, and enter into a contract or contracts with the successful bidder or bidders for the performance of the work, in accordance with an act of assembly entitled, 'An act for the government of cities of the second class,' approved the 7th day of March A. D. 1901, and the different supplements and amendments thereto, and the ordinances of councils in such cases made and provided.

"Sec. 2. That any ordinance or part of ordinance, conflicting with the provisions of this ordinance, be and the same is hereby repealed, so far as the same affects this ordinance."

It is contended that the report of the filtration commission constituted such an estimate as the act required. In 1896 that commission was created to examine and report on the subject of a water supply for Pittsburg. The commission called to its aid competent experts, examined plants here and abroad, and subsequently made an exhaustive report to councils, recommending the construction of a filtration plant, the adoption of a meter system therewith, and gave estimates of cost. The report evidences a systematic and intelligent consideration of the subject and its conclusions and recommendation deserve high regard. But we cannot overlook the fact that this

report, in existence when the act was passed, is not made by such act the basis upon which the city may contract, and, highly as we personally regard it, we cannot judicially adjudge it an "estimate of the whole cost, furnished by the proper officer through the department having charge of the improvement." Other than this report it is not proved that any estimate of the cost of the whole of the proposed improvement was furnished councils by the department director, or was any estimate made by him of the part of the improvement included in the present contract and submitted to councils. It is true the engineers furnished to the director estimates of the parts of the work embraced in this contract, but they were furnished after the ordinance was passed. It will be noted that the present contract provides for the construction of sedimentation basin, filters, force main, and conduits, or the filtration plant proper. The intake pumping machinery to carry the water to such plant and the tunnel to carry the filtered product under the river to the Brilliant pumping station have not been estimated to councils, and, of course, no estimate of their cost has been considered by councils and made the basis of future contracting for their construction. So, also, no estimate has been made to councils of the land upon which the plant will be located. These elements are, singly and collectively, absolutely necessary to the use of the filtration section, and they, as well as the land, must, under any view, be deemed parts of the filtration plant, and, as such, regarded as proper subjects of estimate and consideration at the same time. But, apart from these elements, which are physically connected with and a part of the filtration plant, the necessity for an estimate of the cost of the filtration improvement or system as a whole, and the adoption of the estimate of the whole as the subject of and basis for future contracts, is strikingly illustrated by the facts disclosed in the report of the filtration commission in reference to an accompanying meter system. Such meter system, though not physically connected with the filtration plant, is by such report deemed a necessary and indispensable factor to the practical use of a filtration plant. That such is the case is shown by the report. To illustrate: It is therein shown that in 1883 the quantity of city water used averaged 157 gallons daily per person. This amount, certainly ample in quantity, has steadily increased, owing to uncontrolled waste, until in 1897 it reached 233 gallons daily per person. If the past is an index of the future, it is evident that this waste will continue to increase in quantity; and the water wasted will be more costly to the city, because it will be a waste of filtered instead of unfiltered water, as at present. In view of this the commission say, and their words should command grave consideration:

"Should the present unrestricted use of water be allowed to continue, a filter plant as proposed will have been outgrown almost before it is completed, and additions will require to follow each other on a scale, and with the frequency, which can hardly be estimated."

If this reasoning be correct, and no one who has made a study of public water supply can question the general principle here stated, the construction of a filtration plant on the scale proposed in the

present contract must be followed by others, unless the meter system is employed. When, then, the city contracts for a filtration plant, it faces the alternative of adding additional filter plants hereafter or of restricting consumption by a meter system. The present contract provides for a filtration system, but by the action of the councils there is nothing to show, either in plan or estimate, which course is to be followed,—whether these filtration plants are the forerunners of others, or whether the meter system shall be adopted. The statement of these facts, based wholly on the report of the commission, is a demonstration of the correctness of the construction we place upon the act; namely, that the estimate on which any part of a proposed public improvement is based should be an estimate of cost, based on the whole improvement. In the absence of such estimate as a foundation for the present contract, no one can say whether the city, in contracting for the filtration plant provided in Contract No. 1, is beginning a public improvement consisting of this filtration plant alone, with a meter system that will render it ample for the city's needs, or whether this filtration plant, without a meter system, is to be outgrown before it is completed, and is, therefore, but the first of a series. We deem it proper to say we understand from the statements made at the hearing that the intention is to supplement the filtration plant with the meter system, which the report of the commission shows can be gradually added, and with the result of lowering present water rates, and not to embark the city in the construction of a series of such filtration plants without the meter system. If such be the case there should be no uncertainty as to the scope of the improvement the city is undertaking, and there will be none if its contracts are based "upon estimate of the whole cost, furnished by the proper officers through the department having charge of the improvement." That these provisions are obligatory, basic to the city's contractive power, and mandatory, we have no hesitation in holding; and this view finds support in *Hepburn v. City of Philadelphia*, 149 Pa. 340, 24 Atl. 279; *Malone v. Same*, 147 Pa. 420, 23 Atl. 628; *City of Pittsburg v. Walter*, 69 Pa. 365, and *Reading City v. O'Reilly*, 169 Pa. 369, 32 Atl. 420. If the improvement is such that the statutory estimate of the whole cost can be made, the legislature has said it must be made, and it alone shall be the basis of contract. If the improvement is such that no estimate can be made, then the legislature has not given the city the power to contract. As the contract before us was not based on the statutory estimate, the legal question involved must be decided against the city. Let a decree be prepared enjoining the letting of the contract.

THE JAMESTOWN.

THE NORFOLK.

(District Court, E. D. Virginia. February 18, 1902.)

1. COLLISION—STEAMSHIP AND TUG WITH TOW—PRESUMPTION OF FAULT.

A tug with a vessel in tow occupies the position of an encumbered vessel, and it is the duty of a steamship approaching it, unencumbered, to keep out of the way. Its action, under any circumstances, should be on the safe side, taking no chance of collision which can be avoided, and it will be presumed to have been in fault for a collision unless fault of the tug or tow is shown.

2. SAME—DUTY OF TUG WITH TOW—NAVIGATING CHANNEL.

While a tug with a tow has the right of way over an unencumbered vessel, it has no right to unduly or unnecessarily obstruct the pathway of other vessels, and in navigating a channel known to be constantly used by other vessels it is its duty to take all proper and reasonable measures to have its tow under control, and to lessen the danger of collisions.

3. SAME—EVIDENCE CONSIDERED.

A large steel barge, laden with freight cars, while passing up the Elizabeth river to Norfolk at about 5 in the evening, in tow of an ocean tug came into collision with the steamship Jamestown, which was passing down. The barge was on a hawser of 70 to 100 fathoms, the tide was flood, and a gale from the northwest made it difficult to control the tow, so that the two vessels occupied the greater part of the channel. This fact was known, or should have been, to the Jamestown, which saw the tug and tow when $2\frac{1}{2}$ mile away, but kept its speed of 14 or 15 miles an hour until opposite the tug, when its effort to avoid collision by stopping and reversing came too late. *Held*, that both the steamship and the tug and tow were in fault, the former for approaching at too high a speed and failing to stop before there was danger of collision, and the latter because it was negligence, under the circumstances, to enter the channel, at a time of day when outgoing steamers were known to be coming down, without shortening the hawser, or taking other measures to bring the barge under closer control, she having been to the east of the center of the channel at the time of collision.

In Admiralty. Libel and cross libel for collision.

Thomas H. Willcox and Whitehurst & Hughes, for the barge.

Frank D. Sturgiss and Hughes & Little, for the Jamestown.

WADDILL, District Judge. This is the case of a libel and cross libel arising out of a collision between the Old Dominion Steamship Company's ship the Jamestown and Barge No. 5 of the New York, Philadelphia & Norfolk Railroad Company, on the evening of February 8, 1899, in the Elizabeth river, between Boush's Bluff and Sewell's Point, the barge, in tow of the tug Norfolk, coming up the river, on her way from Cape Charles to Port Norfolk, and the steamer going down, on her way from Norfolk to Newport News. The tide at the time was flood, with a heavy northwesterly gale prevailing.

The charges of fault alleged against the Jamestown are: (1) That she was proceeding at too rapid a rate of speed; (2) that she did not have a proper lookout; (3) that she changed her course from the eastern side of the channel; and (4) that she did not stop and reverse in time.

The charges against the tug and tow are: (1) That they were wrongly navigating on the east side of the channel; (2) that they did not obey the law, and go to the right; and, (3) as one reason for their omission to obey the law, that the barge could not be properly handled, because of the undue length of the hawser by which she was being towed.

The evidence, as viewed by the court in this case, establishes quite clearly two facts, one of which is most earnestly contested by the libellant, and the other by the respondent, viz.: First, that the tug and tow, at the time of the collision, as they had been for some time prior thereto, were occupying practically the whole channel, and certainly that the stern of the barge was considerably east of the midway of the channel; and, second, that this position of the tug and tow ought to have been seen and was observed by the navigators of the Jamestown a sufficient length of time ahead to have avoided the collision by the exercise of proper care on their part.

It is necessary to ascertain the liability of the parties, respectively, in the collision with these two facts established. The tug with the tow occupied the position of an encumbered vessel, and the Jamestown was free, and, under the circumstances, should have been navigated with caution; and, unless it appears that the encumbered vessel was at fault, it will be presumed that the collision was the result of the Jamestown's negligence. An unencumbered vessel approaching a tug with tow should keep out of the way. *The Mayumba* (D. C.) 21 Fed. 476; *The B. B. Saunders* (C. C.) 25 Fed. 727; *The Lucy*, 20 C. C. A. 660, 74 Fed. 572; *Spencer*, Mar. Coll., 264, 275, 276.

In *The Syracuse*, 9 Wall. 672, 675, 19 L. Ed. 783, 784, Mr. Justice Swayne, speaking for the supreme court, said:

"A tug with a vessel in tow is in a very different position from one unencumbered. She is not mistress of her motions. She cannot advance, retreat, or turn either way at discretion. She is bound to consult their safety as well as her own. She must see that what clears her of danger does not put them in peril. For many purposes it may be regarded as a part of herself. They have the benefit of her traction, and she the burden of their inertia."

The tug *Norfolk* was a large ocean-going tug, and had in tow a steel barge of large dimensions, loaded with 28 freight cars, with a hawser variously estimated from 70 to 100 fathoms in length, and was at the time of collision ascending the Elizabeth river, with a flood tide, and a strong northwesterly wind prevailing, which tended to make the barge trail across the channel, and made the control of the tow a matter of more or less difficulty. The steamship, under these circumstances, was descending the river, with wind and tide against it, which enabled it more easily to control its movements. *The Galatea*, 92 U. S. 439, 23 L. Ed. 727; *The Henry Clay* (D. C.) 72 Fed. 1021.

While the libellant insists that the tug and tow were to the westward side of mid-channel, and that the tug was well to the westward side at the time Sewell's Point was passed, a distance of some mile and three quarters below the scene of collision, which was agreed to be about 3,600 feet below, or north, of Boush's Bluff, still the evidence

does not sustain, in my judgment, this contention of the libellant, certainly as to the position of the tug and tow when the collision occurred, though the tug may have been in the position claimed for it at the time it passed Sewell's Point. The navigators of the steamship admit having observed the tug and tow after passing Lambert's Point, and from thence for a distance of some $2\frac{1}{2}$ miles, and that they slowed down while making the turn at the piers at Lambert's Point, and thence straightened out on the course down to Boush's Bluff lightship, there made a close haul to the eastward, and proceeded, according to their testimony, down the eastern side of the channel of the Elizabeth river, under one bell, until within a short distance of the scene of the collision, when the steamer, under her port helm, applied for the purpose of passing to the eastward of the barge, "smelt bottom," and took a sudden sheer, coming into collision with the barge, and that the steamer at that time stopped and reversed, and did all in its power to avert the disaster. The libellant's contention, on the other hand, is that the Jamestown ran at a high rate of speed, from 14 to 15 miles an hour, from Craney Island down until when, abreast of the tug, it slackened its speed, and attempted to stop and reverse, but too late to avoid the collision. The evidence tends strongly to support the position taken by the tug and tow as to the speed of the steamer, when it attempted to stop and reverse, and at least establishes the fact of the steamer's failure to take the proper precautions to avoid collision with the tug and tow, then virtually across its pathway. Indeed, it seems quite evident that, until practically in collision, the steamer proceeded upon the theory that it could pass clear of the barge with safety.

There was nothing in the existing conditions to prevent the steamship's keeping out of the way of the tug and tow; and having seen the same the distance it admits it was observed, at that hour of the evening, about dark, knowing that the tow was moving with the wind and tide, it should have exercised a greater degree of care and caution than it did in approaching the tow. Any error should have been on the safe side. It was not enough to have so acted or changed its course as possibly, or even probably, to have avoided a collision. No such chances need or should have been taken. *The Wilkesbarre* (D. C.) 50 Fed. 582; *The Chatham*, 3 C. C. A. 161, 52 Fed. 396, 399; *The Owego* (D. C.) 71 Fed. 537; *Mars. Mar. Coll.* 377.

Coming to the faults alleged against the tug and tow, while it seems quite evident that the Jamestown should have exercised a greater degree of care to avert the collision than it did, it cannot be said that the tow was free from fault, and that its neglect did not, in part, bring about the collision. For a distance of some two miles during the hour of the evening that steamers leave Norfolk on their outward trips practically the entire channel was taken up by this tug and tow, and while other steamers passed it further down the channel with safety, one barely escaped having the same misfortune overtake it that befell the Jamestown. The condition of the wind and tide was well known to those in charge of the tug and tow, and there was no difficulty in so managing the same as to prevent the obstruction of the entire fair-

way to others entitled to the like right. The tug was admitted to be sufficiently powerful to have carried two barges like the one in tow; and if the hawser as used, whether 70 or 100 fathoms, was too long to keep the barge, under the then existing conditions of the weather, under proper management and control, it could easily have been shortened, and should have been. While it is true that the tug and tow occupied the position of an encumbered vessel, and to that extent had the right of way, still corresponding obligations rested upon it, not unduly and unnecessarily to obstruct the pathway of commerce, as it did on this occasion, and particularly in this narrow, busy, and much frequented channel. *The Mary McWilliams* (D. C.) 47 Fed. 333; *The Plover* (D. C.) 100 Fed. 883.

Counsel for libellant has made reference to the case of *The Westhall*, recently decided by this court, and unreported, as sustaining the contention made in behalf of the tug and tow on this occasion. A careful examination of that decision will fail to show anything inconsistent with the views herein expressed. In that case the tug, with several barges in tow, on passing down the eastern side of the channel of the Elizabeth river, crossed to the western side, with a view of proceeding to an anchorage ground, and in so doing the steamship, in broad daylight, passing up the western side of the channel, came into collision with the rear barge in tow, the tug and other barges having passed out of the channel. No excuse could properly have been made for this conduct on the part of the steamer, as the position of the tug and tow was obvious, and only one barge was in the track of the steamer, with ample room for it to have passed clear on the other side and avoided the collision.

It follows from what has been said that both the steamship and tug and tow were at fault in the collision, and as a result the damage caused thereby should be divided, and a decree may be accordingly so entered.

In re R. T. ERVIN & CO.

(District Court, E. D. Pennsylvania. March 12, 1902.)

No. 809.

BANKRUPTCY—PROVABLE DEBTS.

The fact that a corporation entered into an ultra vires contract, by which it became a de facto partner in an existing firm, does not affect its rights as a creditor of such firm upon a debt previously contracted: and where, through a mutual mistake, the indebtedness was overlooked, and remained unpaid until the firm became bankrupt, the corporation may prove the same in bankruptcy upon an equality with the claims of other creditors.

In Bankruptcy. On certificate of referee and exceptions to referee's decision allowing claim of Ervin, Page & Co., Incorporated. Following is the report of the referee, Edward F. Hoffman:

The referee certifies to the court the following question as to the allowance of a claim of Ervin, Page & Co., in the amount of \$2,000, which claim, it is

alleged by the claimant, is not covered by the decision of the referee confirmed by the district court and circuit court, disallowing a claim in excess of \$17,000 filed by this claimant.

The facts are, briefly, as follows:

Prior to January 1, 1900, Benjamin S. Fagan and Russel T. Ervin, under the firm name of Barnes & Co., were engaged, in the city of Philadelphia, in the business of keeping a restaurant and selling teas and coffees. Ervin, Page & Co., Incorporated, a corporation organized under charter in the state of New Jersey, were engaged in the city of Philadelphia in the business of importing teas and coffees. In 1899 this corporation made sales of teas and coffees to Barnes & Co. in the amount of \$2,000, which amount (\$2,000) is the subject of this claim.

On December 15, 1899, subsequent to the sales mentioned, the corporation of Ervin, Page & Co. entered into a written agreement of partnership with Benjamin S. Fagan and Russel T. Ervin, hitherto trading as Barnes & Co., by the terms of which agreement the firm name of the partnership was changed to that of Russel T. Ervin & Co., and the partnership was to commence January 1, 1900. By this agreement the corporation agreed to contribute \$15,000 to the enlargement of the business of the new firm of Russel T. Ervin & Co., as reorganized under said agreement, and provided for a partnership participation in the profits and management of the business by the corporate partner.

At the time that this new partnership was entered into it was supposed by the parties thereto that there was no indebtedness then existing from the firm of Barnes & Co. to Ervin, Page & Co.; but it subsequently developed, and is an admitted fact, that through a mistake in bookkeeping the before-mentioned debt of \$2,000 was, on January 1, 1900, due by Barnes & Co. to Ervin, Page & Co., but this fact was not discovered until the latter part of October or early part of November, 1900, when the books of the corporation were examined by an expert accountant.

The original claim filed presented two items,—\$10,773.83 "for cash loaned," describing the claim as "balance of cash loaned after deducting the amount of \$15,000 invested at the risk of the business," and an item of \$7,565.78 for "merchandise sold and delivered." It appears of this amount \$2,000 was for sales made by Ervin, Page & Co. to Barnes & Co.

In passing upon this claim the referee found that as to money contributed by virtue of a partnership agreement the claimant could not recover, as it has sought to obtain the benefits of a partner, and could not defend on the ground of "*ultra vires*" to the detriment of creditors after the contract had been executed.

As to the sale of goods made prior to the partnership agreement, the referee found as follows:

"As to a portion of the claim, the amount of indebtedness contracted before the execution of the agreement, if it can be shown that there was no arrangement by which this debt was merged into the indebtedness created under the agreement, a proof of claim for that amount should be admitted. The claim as presented is disallowed, with leave to the claimant to offer proof of claim of money due prior to the agreement and not arising from any transaction connected with said agreement."

The claimant now makes demand for \$2,000, admitted to be due by R. T. Ervin & Co., successors to Barnes & Co., if the said debt of \$2,000 is not to be considered as a contribution under the partnership agreement, and therefore controlled by the decision of this court confirmed by the circuit court of appeals.

It is claimed by the trustee that the corporation, having allowed this money to remain uncollected, must be considered to have done so for the purpose of adding that much to its cash contribution under the partnership agreement, and that it therefore forms part of the fund covered by said agreement, and as to which the corporation are not protected by the doctrine of *ultra vires*.

The referee's understanding of the opinions of the district court and circuit court of appeals is that the reasoning of these opinions only applies to the

moneys contributed after the date of the partnership agreement. To hold otherwise would submit the corporation to the full liabilities of partnership.

The stockholders of the corporation are fairly chargeable with the consequences of the illegal acts of the directors, but should not suffer loss of a legal debt because of subsequent misconduct. The doctrine of *ultra vires* is of comparatively modern origin, and its purpose is to protect stockholders from entering into business relations foreign to the purposes of the corporate grant. The public is also to be protected, but the loss of the right to recover affords sufficient protection. If directors of corporations could involve the stockholders in full partnership liabilities, the consequences would be most unjust and disastrous.

The illegal conduct of the directors of the corporation in this case did not begin until after the so-called articles of partnership had been entered into. The directors have a right to enforce contracts entered into before that date.

Amounts involved do not affect legal principles, but may serve to illustrate results. Suppose that the figures in the case in hand were reversed, and that \$17,000 was due from the bankrupt's estate for sales legally made prior to the partnership agreement, and that only \$2,000 had been contributed under the partnership agreement, it would seem to be an extreme view to hold, for instance, that \$2,000, contributed after the partnership agreement had been entered into, controlled all debts previously contracted. It would be, in effect, holding that after the mere execution of a partnership agreement by a corporation, though the agreement be *ultra vires*, no claim could be made by the corporation for sales previously made. It cannot be disputed that the partnership agreement was an *ultra vires* act. The stockholders, on discovering that the corporation organized for the sales of teas and coffees had entered into an agreement for the conduct of restaurants, could have enjoined further proceedings and obtained relief from the courts against their directors. Therefore it would appear clear that if the bankrupts, in the proper course of business, were indebted to Ervin, Page & Co., Incorporated, the right to recover this indebtedness should not be lost to the stockholders of the corporation, because articles of partnership, not within the limit of the corporate powers, had been entered into.

The agreement between Ervin, Page & Co. and R. T. Ervin & Co. does not mention prior indebtedness. It stipulates that the \$15,000 mentioned therein was contributed for the enlargement of Ervin, Page & Co.'s business on lines therein stated, the opening of new restaurants, and under joint management. All moneys embarked by Ervin, Page & Co. in this new enterprise, whether in the form of sales on credit, cash contributed, and loans made, cannot be recovered by the corporation claimant, because it is, on the ground of estoppel, estopped from making the defense of *ultra vires* to the illegal transactions of its directors resulting in detriment to other creditors. Sales made previous to the agreement, and not in contemplation of it, cannot be affected by it, unless the agreement be construed to involve the parties thereto in the full liabilities of partnership. All the cases cited are of contracts entered into in pursuance of agreements *ultra vires* in character, where the corporate creditor seeks to recover the debt arising under the agreement, and escape liability on the ground of *ultra vires*.

In *Bank v. Gray*, 14 Barb. 471, the claim is on notes given in pursuance of an *ultra vires* partnership agreement. Indebtedness in *Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. 160, and *Wright v. Pipe Line Co.*, 101 Pa. 204, 47 Am. Rep. 701, arises from *ultra vires* contracts sought to be avoided. The claim for \$2,000 in the case in hand does not arise under the agreement. If the trustee in bankruptcy can enforce this agreement against the corporation as to this indebtedness arising on book accounts two years prior to the agreement, then this agreement must be construed to establish not a quasi partnership, but an "actual" partnership." To decide this would abolish the doctrine of *ultra vires*.

The creditor is estopped from making the defense of *ultra vires* to transactions arising under the partnership agreement.

The trustee cannot enforce the partnership agreement as to transactions not entered into in pursuance of it.

In passing upon the claim first filed, the circuit court says, opinion by Dallas, J.:

"The trustee in bankruptcy did not seek to enforce an ultra vires contract, nor to compel the performance of any of its provisions. He simply insisted that a status which had been created by what had actually occurred should not, at the instance of a party to its creation, and to the prejudice of innocent third parties, be utterly ignored."

This dictum appears to be in accord with the views expressed by the referee. For the reasons stated, the claim in the amount of \$2,000 is allowed.

Reath & Reath and Albert B. Weimer, for trustee.

N. Dubois Miller, for claimants Ervin, Page & Co.

J. B. McPHERSON, District Judge. I think the referee was right in allowing this claim. The argument of the exceptant is based upon the proposition that the money in dispute was "left in the business" of the bankrupt by the claimant,—carelessly, it may be, and not by design, but left there at all events,—thus swelling the apparent assets of the enterprise. From this proposition the conclusion is said to follow that the claim of the corporation partner must be postponed to the claims of the general creditors. This conclusion, in my opinion, is not sound, and finds no support in *Wallerstein v. Ervin* (C. C. A.) 112 Fed. 124. Indeed, the sum now in dispute was expressly declared by the court of appeals to be outside the scope of that decision; and I am in a position to say with confidence that the district court, in deciding the case below (109 Fed. 135), gave the matter no consideration. The facts necessary now to be taken into account are these: When the illegal partnership was formed between Barnes & Co. and Ervin, Page & Co., Incorporated, under the firm name of R. T. Ervin & Co., Barnes & Co. owed the claimant Ervin, Page & Co., Incorporated, a valid debt of \$2,000, but by some mistake this debt was overlooked, and it was not provided for by the settlement that preceded the formation of the partnership. The oversight did not obliterate the debt, however, nor did the formation of the partnership transform the debt automatically into a virtual advance toward the partnership business. It is true that, if the debt had been known and had been paid, the partnership would have been \$2,000 poorer, and it may be conceded that its apparent assets and its credit were therefore larger by that sum; but this was an inevitable incident of an innocent mistake. The corporation was decided to be a de facto partner, and its claim upon advances to the partnership was postponed to the claims of general creditors; but its disability as a partner does not prevent it from prosecuting a valid claim against the other partner, contracted before the illegal partnership was formed, and never intentionally used for the benefit of the partnership business. The claim does not grow out of the partnership relation, but out of an independent and antecedent transaction.

The allowance of the claim is approved.

In re MAYS.

(District Court, S. D. West Virginia. April 21, 1902.)

1. BANKRUPTCY—GENERAL ASSIGNMENT—ALLOWANCE TO ASSIGNEE.

An assignee under a general assignment for the benefit of creditors, where the assignor is adjudged bankrupt within four months after the assignment, is not entitled to any allowance for his services in the care and preservation of the property, since the assignment, being an act in violation of the bankruptcy law, to which he was a party, he becomes merely the agent of the bankrupt.

2. SAME.

Such assignee is entitled to an allowance from the estate for the actual and necessary expenses incurred in preserving the property while in his possession, since such expenses would have been provable debts of the estate had they been incurred as such by the bankrupt.

(Syllabus by the Court.)

In Bankruptcy. On application of Jean F. Smith, assignee of the bankrupt under the state insolvency laws, for allowance for compensation, attorney's fees, and expenses.

John T. Graham, for assignee.

KELLER, District Judge. On January 1, 1902, J. W. Mays and S. B. Mays, his wife, made a voluntary assignment of their property in the state to Jean F. Smith, Esq., for the benefit of their creditors. The assignee qualified as such in the state court, took possession of the property thus assigned, protected the same by insurance against loss by fire, and took personal charge of the same. Within a few days after the making of this assignment an involuntary petition in bankruptcy was filed against J. W. Mays by certain of his creditors, and T. A. Null was, by order of this court, appointed special receiver to take charge of the property and effects of said bankrupt; and on January 10, 1902, said Smith, assignee, delivered the property and effects of said Mays and wife into the hands of said special receiver. The said S. B. Mays, wife of J. W. Mays, also filed a voluntary petition in bankruptcy. The case was referred to R. M. Baker, one of the referees in bankruptcy of this court, and a trustee was duly appointed by the creditors of the bankrupts. In the course of the proceedings the assignee named in the voluntary deed of assignment filed a claim for \$100 for his services, \$50 as a fee to his attorney, and \$12 for various expenses paid by him in connection with the assignment; making in all \$162. The allowance of the claim for services and attorney fees was resisted by the creditors, and the referee held that "he cannot allow the said assignee or his attorney anything for services rendered under and by virtue of said deed of assignment, as such claims are not provable debts of the bankrupt, not having been incurred by him, but by the assignee himself in an attempt to prevent the administration of the estate in the bankruptcy courts, such assignment being an act of bankruptcy in itself, and in contravention of the policy of the bankrupt law, which is to draw to the bankruptcy courts the administration of the estates of all insol-

vents; but that said Smith, assignee, is entitled to an allowance from the estate for the actual and necessary expenses incurred in the administration and preservation thereof, which, from the proof of claim filed by said Smith, is \$12; and this amount is allowed, it appearing that he had actually expended that amount in good faith prior to the institution of the bankruptcy proceedings." The assignee, claiming to be aggrieved by the action of the referee in refusing to allow the claim as filed by him, prays that the order of the said referee be set aside, and the proceedings, so far as they relate to his claim, be reviewed; and the referee thereupon certified the question to the court as follows:

"Whether an assignee for the benefit of the creditors, under an assignment made under the state laws, prior to the filing of an involuntary petition against the bankrupt, is entitled to compensation, as such assignee, for his services rendered prior to the adjudication and prior to the appointment of a trustee in the bankruptcy proceedings?"

In the case of *West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, it was held by the supreme court of the United States, in construing the present bankruptcy act, that:

"A deed of general assignment for the benefit of creditors constitutes in itself an act of bankruptcy, which per se authorizes an adjudication of involuntary bankruptcy under section 3 of the act of congress of 1898, entirely irrespective of actual insolvency."

In the case of *Stearns v. Flick* (D. C.) 103 Fed. 919, it was held by Judge Thompson that:

"A claim by an assignee under the state insolvency laws for his compensation and expenditures in administering the estate prior to the filing of a petition in bankruptcy against the assignor was not a provable debt of the bankrupt, not having been incurred by him, but by the assignee himself in an attempt to prevent the administration of the estate in the bankruptcy courts; and that it was immaterial that he acted in good faith, and in conformity to the insolvency laws of the state."

In a case decided by Judge Purnell (*In re Tatum* [D. C.] 112 Fed. 50) a precisely similar question to the one here presented arose, and the judge there held that:

"A trustee under a general assignment for the benefit of creditors, where the assignor is adjudged bankrupt within four months after the assignment, is entitled to an allowance from the estate for the actual and necessary expenses incurred in preserving the property while in his possession, but not to any allowance for his services, since the assignment was an act in violation of the bankruptcy law, to which he was a party."

In that case the court said:

"Taking the inventory and preserving the estate being for the benefit of creditors, equity, which governs, when not otherwise provided, in the administration of bankruptcy estates, would justify and require that a trustee or assignee under a general assignment should be allowed actual expenses incurred. This he should itemize, and, if required, verify under oath, producing proper vouchers for money expended or expenses incurred. Such assignee is the agent for the bankrupt, and the estate may be taken from him by a summary proceeding in the bankruptcy court. *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814. The assignment being an act of bankruptcy (*West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098), and a fraud on the bankruptcy act, as contemplated therein, the as-

signee is a party to the wrongful act. An allowance for services rendered in furtherance of such wrongful act would be a violation of the spirit, if not the letter, of the bankruptcy law. The assignment is void, and acts done in pursuance thereof confer no rights when the proceedings in bankruptcy are instituted within four months of the date of such assignment. An assignee or trustee under such assignment is a party to the wrongful act, and cannot be allowed for services rendered in this behalf, out of the estate, in the court of bankruptcy. Such assignments are contemplated and allowed under the state law (Laws N. C. 1893, c. 453), but are acts of bankruptcy under the act of congress."

This case appears to me to be absolutely similar to the one certified to me for opinion, and to correctly propound the law. So far as the courts of bankruptcy are concerned, the assignee of a debtor under a general deed of assignment must be considered as the agent of the bankrupt, and entitled, therefore, to no more compensation out of the estate of the bankrupt in the administration thereof in the bankruptcy court than the bankrupt would be entitled to had he performed these services himself. So far as actual and necessary expenses incident to the care and preservation of the property are concerned, I regard these as provable debts of the estate, because, had they been incurred by the bankrupt as debts, they would have been so provable by the creditors. They are not preferred claims. *Stearns v. Flick* (D. C.) 103 Fed. 919.

For the foregoing reasons the order of the referee made on the 12th day of April, 1902, upon the hearing of the petition of Jean F. Smith, assignee, is approved in full.

CORBITT v. FARMERS' BANK OF DELAWARE et al.

(Circuit Court, E. D. Virginia. March 19, 1902.)

1. REMOVAL OF CAUSES—PROCEEDINGS AFTER REMOVAL.

The removal of a cause from a state to a federal court does not admit that it was rightfully pending in the state court, nor deprive the defendant of the right to move for the abatement of an attachment by which that court acquired jurisdiction.

2. ATTACHMENT—PROPERTY SUBJECT TO ATTACHMENT—MONEY IN REGISTRY OF ANOTHER COURT.

Moneys paid into a federal court pending litigation in regard thereto, and placed in its registry, remain in its custody until paid out, pursuant to law, by its order, and are not subject to attachment by any other court; the jurisdiction of the court over such funds is not extinguished by the entry of a final decree or order for their disbursement, but continues until such decree or order has been executed.

In Equity. On motion to abate attachment.

McLemore & Corbitt, for complainant.

Heath & Heath, for defendants.

WADDILL, District Judge. By decree entered in the United States district court for the Eastern district of Virginia, on the 23d day of December, 1901, in the matter of the West Norfolk Lumber Company, in bankruptcy, a check was directed to be drawn in favor

of the defendant the Farmers' Bank of Delaware, or Heath & Heath, its counsel, on the funds to the credit of the court, in its registry in the City National Bank of Norfolk, Va., for the sum of \$12,316.49. On the 27th of December a check pursuant to such order was duly issued and delivered to the defendant bank's counsel. On the 26th of December this suit was instituted in the court of law and chancery of the city of Norfolk, by the trustee of the bankrupt company, asserting certain preferences claimed to have been made to the defendant bank within four months of the bankruptcy, in which suit an attachment was sued out, and on the morning of the 27th served upon the president of the City National Bank of Norfolk, and Heath & Heath, attorneys, before the payment of the check was demanded of the bank. By proper proceedings in the state court the cause was regularly removed to this court, and is pending therein, and is now before the court upon a motion to abate the attachment, sued out and executed, as aforesaid, upon the officers of the registry of the court and the attorneys of the defendant company.

The removal of the cause from the state court to this court does not disentitle the defendant bank to move to abate the attachment sued out, nor does it admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein; and in this court the defendant can avail itself of any and every defense, duly and seasonably reserved and pleaded, to this action, in the same manner as if the suit had been originally commenced therein *Goldney v. Morning News*, 156 U. S. 523, 525, 15 Sup. Ct. 559, 39 L. Ed. 517; *Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431.

The question presented by the motion to abate the attachment in this cause is whether moneys paid into court pending litigation in regard thereto, and placed by order of the court in its registry or some other designated depository, pursuant to law, are the subject of attachment emanating from another court. This question is one of importance, as it not only affects the orderly administration of justice in the several courts, but goes further, and tends, as in this case, to thwart and annul the carrying out of the court's judgment, in a case fully litigated, with the parties in interest all before it. Money paid into the registry of the court, pursuant to law, can only be withdrawn therefrom, by the very terms of the act of congress providing for the deposit, "by the order of the judge, or the judges of said court, respectively, to be signed by such judge, or judges, and to be entered and certified of record by the clerk." When a court causes funds to be so placed in its registry, they are to the credit of the court itself, there placed and held, to the end that its decrees and orders in respect thereto may be obeyed and carried out in accordance with its judgment rendered; and no court, other than one having a supervisory power over the acts of such court, can by any act of its own, or any decree, order, or process emanating from it, except with its leave, assert any claim to, or secure any right in or lien upon, such funds, so long as the same remain under its control. To entertain a contrary doctrine to this would not only work untold mischief and delay in legal proceed-

ings, but would result in innumerable conflicts between the courts themselves; and the consequence would be that funds once paid into court, with a view of having the rights of parties litigant thereto adjusted and determined, instead of being disposed of by the termination of the particular controversy, would be involved in an endless chain of litigation. This subject has been before the courts, state and federal, too frequently to now admit of serious cavil or doubt. *Wallace v. McConnell*, 13 Pet. 136, 150, 151, 10 L. Ed. 95; *The Lottawana*, 20 Wall. 201, 22 L. Ed. 259; *Jones v. Bank*, 22 C. C. A. 483, 76 Fed. 683, 686, 687, 35 L. R. A. 698; *In re Forsyth* (D. C.) 78 Fed. 296, 302-304; *In re Cunningham*, Fed. Cas. No. 3,478; *Tuck v. Manning*, 150 Mass. 211, 22 N. E. 1001, 5 L. R. A. 666; *Curtis v. Ford*, 78 Tex. 262, 14 S. W. 614, 10 L. R. A. 529; *Holker v. Hennessey*, 143 Mo. 80, 44 S. W. 794, 65 Am. St. Rep. 642; *Allen v. Gerard*, 21 R. I. 467, 44 Atl. 592, 49 L. R. A. 351, 79 Am. St. Rep. 816.

The position taken by counsel for complainant, that the court, having entered its final order in respect to the money in question, had exhausted its jurisdiction over the same, and that such funds then remain subject to seizure by attachment or other legal process, as any other property belonging to the defendant bank, is equally fallacious. A conclusion in favor of parties litigant to any controversy would be barren of good, if the court rendering the decision was powerless to cause its decrees and orders to be put into operation and duly executed; and such a result, as to moneys in the court's own registry, would, indeed, leave it in a helpless and pitiable plight.

In *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253, Chief Justice Marshall said:

"The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised."

In *Osborn v. U. S.*, 91 U. S. 474, 479, 23 L. Ed. 390, Mr. Justice Field, speaking for the supreme court, said:

"The power of the court over moneys belonging to its registry continues until they are distributed pursuant to final decrees in the cases in which the moneys are paid. If from any cause they are previously withdrawn from the registry without authority of law, the court can, by summary proceedings, compel their restitution."

Reference has been made by complainant's counsel to the cases of *Gumbel v. Pitkin*, 124 U. S. 131, 154, 8 Sup. Ct. 379, 31 L. Ed. 374; *Earle v. Conway*, 178 U. S. 456, 20 Sup. Ct. 918, 44 L. Ed. 1149; *Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855. Upon a careful examination of these cases, nothing will be found inconsistent with the views herein expressed; and the several state court authorities cited holding a contrary doctrine, notably *Weaver v. Davis*, 47 Ill. 235, and *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 26 Pac. 518, 12 L. R. A. 508, 22 Am. St. Rep. 331, are not in accord with the preponderance of authorities, state and national.

It follows from what has been said that the attachment should be abated, and a decree may be accordingly so entered.

SWIFT & CO. v. GROFF et al.

(Circuit Court, D. Minnesota, Third Division. February 12, 1902.)

UNFAIR COMPETITION—USE OF TRADE-NAMES—"SWIFT."

The word "Swift," adopted and long used by Swift & Co., meat packers, etc., as a name for the various products of the company, has become known to the public as denoting the origin of such products; and the company is entitled to an injunction, on the ground of unfair competition, to restrain a manufacturer of like products from designating them by such name, where there is no apparent reason or appropriateness in such use, but it appears, rather, to have been adopted for the purpose of deceiving purchasers.¹

In Equity. Suit to restrain unfair competition in trade. On motion for preliminary injunction.

Bond, Adams, Pickard & Jackson, for complainant.
John W. Willis and John E. Stryker, for defendants.

LOCHREN, District Judge (orally). The law recognizes that where a manufacturer has acquired popularity for his manufactured articles by reason of their excellence and satisfaction to purchasers, and has adopted a name by which they are designated, so as to refer to the origin of the articles of the manufacturer, he has such property in the name so adopted that no other person will be allowed to pirate it and use it for his advantage, and to the detriment of the person originally using the name to designate his own manufacture. This is so for the reason, first, that it is an injury to the person who has got a good name for his articles to deprive him of that advantage by deceiving persons who desire to buy articles of him, thus causing to him the loss of the sale of the articles; and also because it is a fraud upon the purchaser, who is prevented in that way from purchasing the articles he may desire to purchase. Now it is true, as stated by counsel, that nobody can adopt as a trade-mark or acquire a monopoly of a family name, so as to prevent another person to whom that name appertains from using it as his own name and marking his goods with it, if he does so in a way which is not calculated to represent them as the goods of another. But there may be some restriction on the use of one's own name, and he cannot use it in connection with other words in such a way that it will be likely to mislead intending purchasers, and cause them to purchase goods of his manufacture, mistakingly, as the goods for another person of the same name, who has an established reputation for his goods, and whose goods are desired by the purchaser. In this case it appears that the complainants adopted the name "Swift" for their various products, and that was the name of the person who originated the Swift Company, and properly used his own name to designate the various marketable products that were produced in the business of the company,—meats, mainly, but also such other articles as came

¹ Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper*, 30 C. C. A. 376.

from the stock yard and slaughtering business as well. Among other things, they have used it for articles which they call "stock food" and "poultry food." They have never manufactured nor placed their trade-mark on the other articles which are stated here to have been manufactured by the defendants. Why the defendants adopted that name, or used the name "Swift" in their business, does not very satisfactorily appear. It appears that none of them were of that name. It is said that they used the name with reference to the rapidity or quickness with which the articles would operate; and while there might be some propriety or aptness with reference to some of these articles, such as lice killer and vermifuge or worm exterminator, it is difficult to see the aptness of applying it to lemon extract or lemon juice, or to the different kinds of food. It does not occur to me that there is any particular aptness in applying it to such articles. Its use in connection with the name adopted as the name of the company cannot have that particular idea connected with it; and it would seem that its use with reference to the articles would be to refer to their origin, or the place where they were manufactured, or to the persons who manufactured them. As far as defendant company is concerned, it does not seem to matter whether it was the name "Swift" or "Swift's," that was used. "Swift Packing Company" or "Swift's Union Stock Company" would not be particularly different from "Swift's Packing Company" or "Swift Union Stock Company." It would be still generally understood, I think, as taken from a proper name. And my impression is that, in the general apprehension, it would be so regarded in respect to these articles. "Swift" is not a very apt adjective to apply to any of them. The word goes further than "quick" or "rapid." It gives the idea of continuance of a very rapid motion. I am not impressed with the good faith of the use of that name in this case, and I am rather inclined to the impression that the name was used with the idea of taking advantage of the fact that the complainant company was a well-known company and largely engaged in business, and therefore it was an improper appropriation of the name of that concern. But I think there can be no complaint made where the name is used to designate goods that are not manufactured, or analogous to goods which are manufactured, by the complainant. The complainant does not make any lemon juice, or several of the other articles that are mentioned in the bill, and the complainant is not defrauded by the use of that name by the defendant, or by the sale of any such articles; and, as to the making of such articles, the public has no reason to expect that any articles that they buy of such kinds are the manufacture of the complainant.

I think that, as far as the stock food and poultry food are concerned, the writ of injunction should issue, and that as to the others it should not issue. An order may be drawn accordingly.

In re TAYLOR.

(District Court, D. Colorado. August 1, 1901.)

1. BANKRUPTS—CONCEALED ASSETS—IMPRISONMENT.

A bankrupt cannot be imprisoned indefinitely on the ground that he has concealed assets, especially when it is not known certainly that he has the assets which he is called on to surrender, and where he has been kept in jail for something over a month he ought not to be confined longer.

2. SAME—EXEMPTIONS.

A bankrupt who has made way with the greater part of his assets, and gotten them out of the jurisdiction, cannot ask to have an exemption set apart to him out of what is in the court's possession.

In Bankruptcy. On exceptions to rulings of referee.

John T. Bottom and Frank E. Carstarphen, for bankrupt.
Bicksler, McLean & Bennett, for creditors.

HALLETT, District Judge (orally). There is no doubt whatever that this man is a swindler, and a very bold and unscrupulous one. It has been apparent at all times that he either gave the money which he drew from the bank to the woman he calls his wife or kept it himself. The story that he put it in a cupboard under a stairway is incredible. That he drew the money from the bank and put it in such a place as that is too absurd for belief. If his wife was a concubine, and not his wife, she has probably made off with it, and is indifferent to his fate. In that view, he cannot return the money. Upon the hypothesis that he has possibly concealed the money, or at least \$1,700 of the amount, and knew where he could get it, we have kept him in jail for something over a month. In a proceeding of this kind the court is not authorized to imprison a bankrupt indefinitely, especially when it is not certainly known that he has the money which he is called upon to surrender; and upon the ground that the bankrupt has been kept a sufficient time, probably, to induce him to surrender the money if he has it, I suppose he must now be discharged. In making such an order I would not have it understood that I am at all convinced that he has not this money in some place of concealment. He is a man of low order,—so low that it is most extraordinary that merchants should have given him credit. I do not think the merchants are entitled to very much sympathy in a case of this kind,—to pick up an adventurer of this sort and sell him goods. They ought to expect to be swindled. We will discharge the bankrupt from imprisonment upon the ground that it seems to be useless to keep him longer imprisoned in order to recover this money.

As to the exception to the report of the referee in disallowing the exemption, that will be overruled. It would be most extraordinary if a man of this kind, after making away with a great part of his stock, and getting it out of the jurisdiction, could come into court and ask that he have an exemption from the remainder of the stock. The statute of exemptions is made for honest debtors, and not for men like this one. The ruling of the referee in that respect is sustained.

KELLER et al. v. PIESEN et al.

(Circuit Court, S. D. New York. February 20, 1902.)

PATENTS—INFRINGEMENT—CABINET AND CUTTER'S SIZE TICKET.

The Keller patent, No. 403,939, for a combination of garment cutter's size tickets, with a cabinet for holding the same, *held valid and infringed.*

In Equity. Suit for infringement of letters patent No. 403,939, for a combined cabinet and cutter's size ticket, issued to John Keller May 28, 1889. On final hearing.

Walter D. Edmonds, for plaintiffs.

Eugene Cohn, for defendants.

WHEELER, District Judge. This patent, No. 403,939, dated May 28, 1889, and granted to John Keller, is for a combination of garment cutter's size tickets in rolls, with a cabinet for holding them in tiers, to be drawn out through apertures as the sizes are wanted for use. The specification is meager, but it seems to describe the parts sufficiently to be understood by those skilled in that art, which is all that is required. The description does not mention a back to the cabinet, and the perspective of the drawing is such that it does not show any, but one would be implied in the former and suggested by the latter. The evidence was admissible to make this plain, and properly shows how the cabinet, which is the principal part, would be understood to be used. *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177. The specific infringement complained of is a box holding the rolls of tickets to be drawn out through a long aperture extending in front of all the rolls. This variation seems to be immaterial. The rolls and box were furnished to an agent of the plaintiffs by one of the defendants at their place of business, who testifies that the agent requested the arrangement of the partitions for holding the rolls in the box and the aperture. This is denied by the agent, and the circumstances, together with the letter of the defendants to a customer as to furnishing cabinets, show that as to this the agent is most probably right.

Decree for plaintiff.

COLER v. ALLEN et al.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1902.)

No. 713.

1. APPEAL—PARTIES.

On an appeal to the circuit court of appeals, citation need be served only on those parties whose interests are affected by the decree or order appealed from.

2. CORPORATIONS—VALIDITY OF MORTGAGE—EFFECT OF INSOLVENCY.

A corporation, so long as it is a going concern and engaged in the active prosecution of its business, may lawfully execute a mortgage on its property, if done in good faith, to secure an extension of a prior indebtedness and further advances to be used in its business, although it is at the time financially embarrassed, or even insolvent; and there is nothing in the law of Washington, as established by the decisions of its supreme court, which renders such a mortgage invalid as against other creditors.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

The appellant, F. W. Coler, appeals from a decree of the circuit court dismissing his bill of intervention after the court had sustained a demurrer thereto and he had refused to further plead. The appellant was a judgment creditor of the Pacific Northwest Packing Company, a corporation, and by his bill of intervention he sought to annul and set aside a mortgage which had been executed by the corporation to Henry F. Allen, and which was in the progress of foreclosure at the suit of said Allen. The mortgage had been executed on May 11, 1900, to secure the sum of \$25,734 and advances to be made by the mortgagee not to exceed \$10,000. In the bill brought to foreclose the mortgage it was alleged that after the execution of the mortgage, and in the months of May and June, 1900, the mortgagee had made advances under said agreement to said corporation in excess of said sum of \$10,000. The complainant in the foreclosure sought to enforce his mortgage lien to the full amount of the said sum so owing on May 11, 1900, and the subsequent advances. From the pleadings it appears that the mortgagor was engaged in the business of catching and canning salmon, and was possessed of various kinds of property, which it used in connection with its business. All of its property was included in the mortgage to Allen, and in its answer to the bill of complaint in the foreclosure suit it alleged that its indebtedness to the complainant therein arose out of an arrangement which he had with the complainant by virtue of which the latter was to advance and did advance divers sums of money from time to time to the corporation, and was to receive, and did receive, in return the total output of the corporation's cannery for his reimbursement. In the foreclosure suit a receiver was appointed, and all the mortgaged property passed into his possession. The appellant in his bill of intervention alleged that by reason of the receivership all the property of his judgment debtor had been placed beyond the reach of execution, and he prayed the court to set aside the mortgage, and permit him to share equally with the mortgagee in the assets of the corporation. He further alleged in his bill that he had "no knowledge or information concerning the averments" of the mortgagee's bill relating to the consideration of the mortgage or the advances made or to be made thereunder, and he made denial of the legal conclusion that the mortgage was valid. This matter so set forth in the intervener's bill was clearly insufficient to impeach the mortgage or to raise an issue as to any of the facts pleaded in the mortgagee's bill. The appellant impliedly admits that such is the case, for he rests his cause upon the appeal solely upon the ground that he has shown that he is entitled to equitable relief upon his allegation that the corporation was insolvent at all times in the month of May, 1900, and at the time of the giving of the mortgage to the complainant Allen, and that its liabilities

grossly exceeded its assets, and "that at the time of giving the mortgage the defendant the Pacific Northwest Packing Company had reached a point where its debts were greater than its property, where it could not pay in the ordinary course, where its business was no longer profitable, and when it ought to be wound up and its assets distributed." The allegations of fact in this charge against the validity of the mortgage are that the corporation was insolvent; that it had reached a point where it could not pay in the ordinary course, and where its business was no longer profitable. The remainder of the allegation states the remedy which the pleader averred was appropriate to its condition.

Bausman & Kelleher, for appellant.

Harold Preston, E. M. Carr, and L. C. Gilman, for appellees.

Before McKENNA, Circuit Justice, and GILBERT and ROSS, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

A motion is made to dismiss the appeal, on the ground that neither the corporation which executed the mortgage, nor its predecessor in interest, nor Austin Claiborne, W. M. Williams, or W. A. Keene, who were parties to the foreclosure suit by reason of having been made trustees of certain of the mortgaged property, were served with the citation on the appeal. In the suit of foreclosure the appellant was permitted by the court to intervene. To his bill of intervention but one of the parties to the suit appeared. Allen, the complainant in the suit, filed a demurrer. The order which was appealed from was that the complaint in intervention be dismissed, and "that the complainant be not required to further answer the said complaint." This order affected none of the parties to the suit except Allen, and afforded none of them the right to appeal or to be heard in the appellate court. The appellees rely upon the case of *Davis v. Trust Co.*, 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563, in which it was said "that all the parties to the record who appear to have an interest in the order or ruling challenged must be given an opportunity to be heard." But in what way are any of the other parties to the record interested in the order which is appealed from? The insolvent mortgagor can have no interest in the determination of the legal question which is presented upon this appeal, and certainly none of the other parties to the suit are in any way affected thereby. It is sufficient if the case is so presented on the appeal "that the appellate tribunal shall not be required to decide a second or third time the same question on the same record." *Masterson v. Herndon*, 10 Wall. 416, 19 L. Ed. 953.

Does the bill of intervention present a state of facts such as to entitle the intervener to equitable relief? The courts of the United States in dealing with the question of the right of an insolvent corporation to prefer a creditor have in all cases, except where the matter is the subject of statutory regulation, held that the corporation had the same right and authority to make such preference that an individual would have. In *Fogg v. Blair*, 133 U. S. 534, 10 Sup. Ct. 338, 33 L. Ed. 721, referring to the doctrine that the assets of an insolvent corporation are a trust fund for its creditors, Mr. Justice Field said:

"That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

In *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, the court said:

"A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien."

See, also, *Sanford Fork & Tool Co. v. Howe, Brown & Co.*, 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713.

But it is said that a different rule has been established in the state of Washington by the decisions of the supreme court of that state in *Thompson v. Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. Rep. 810, and *Biddle Purchasing Co. v. Port Townsend Steel Wire & Nail Co.*, 16 Wash. 681, 48 Pac. 407. In the first of these cases a mortgage to secure demand notes was given on all the property and assets of a corporation. No time for payment was mentioned in the mortgage, but it was stipulated that until default the mortgagor should remain in possession. The debt which the mortgage was given to secure had long been overdue. For many months the corporation had been embarrassed, and could pay nothing on its debts, but was merely using up its property, and its business was practically closed, of all of which facts the court found that the mortgagee was informed. The court remarked of this mortgage that "it was designed to act as a shield between the corporation and its other creditors * * *"; and that "no device can receive the countenance of the court which provides for an indefinite continuance of its corporate life under the protection of a mortgage against the protest of those who are entitled to share in its property." In *Conover v. Hull* the court denied the right of the corporation to prefer an antecedent debt upon the ground that the corporation was not only insolvent, but that there was collusion between its officers and the preferred creditor, all of which was known to the latter. In *Biddle Purchasing Co. v. Port Townsend Steel Wire & Nail Co.* the insolvent corporation simultaneously executed several mortgages to creditors to secure prior indebtedness. The corporation was seriously embarrassed, and at the date of giving the mortgage and for some time prior thereto had been unable to operate its works and plant, and they were idle, and "for a long time prior thereto" it had been insolvent. Its purpose in giving the mortgage was to prefer the secured creditors and to hinder and delay the others. Under these circumstances, the court applied the doctrine of the trust fund and set aside the preference. In the case before the court the facts differ widely from the facts in the cases so cited. It must be borne in mind that this is not the ordinary case of an insolvent corporation selecting one creditor to whom it owed an antecedent debt and securing the same to the exclusion of others. The mortgage in the case at bar

was taken not only to secure a prior indebtedness, but a large proportion of the amount secured was a new consideration, money to be advanced for the use of the corporation in its business to the amount of \$10,000. The corporation had not to any extent closed its business, nor is it alleged that it was embarrassed further than that it was insolvent. Its business was not brought to a close until several months later. Even if the decisions of the supreme court of the state of Washington are held to sanction the general doctrine that an insolvent corporation cannot prefer one of its creditors, the doctrine has not been held applicable to a mortgage given in whole or in part for a valuable consideration moving at the time of its execution. The mortgagee in this instance, according to the pleadings, furnished the corporation funds for its use in the course of its business. His mortgage was taken for money already advanced and for money thereafter to be advanced. It is not alleged that he had any knowledge of the insolvency of the corporation or that the officers of the latter intended to give him a preference or to hinder or delay other creditors. The corporation was a going concern. At the time of giving the mortgage and receiving the advances it was apparently preparing for the annual run of salmon which might be expected to furnish it the means of discharging or reducing its liabilities. The supreme court of Washington, in adopting the doctrine of the decisions above noted, was guided largely by the case of *Rouse v. Bank*, 46 Ohio St. 493, 22 N. E. 293, 5 L. R. A. 378, 15 Am. St. Rep. 644. But the supreme court of Ohio in a later case (*Damarin v. Iron Co.*, 47 Ohio St. 581, 26 N. E. 37) held that a mortgage executed by a corporation to secure a pre-existing debt is not necessarily invalid for the reason that the company was known to be insolvent, where the company was at the time in the possession of its property and in the active prosecution of its business, and intended to continue therein unless prevented by other creditors; and the object of the mortgage was not to prefer the creditor, but to obtain an extension of credit. Said the court:

"The right of a company, though embarrassed, to continue its business and retrieve its fortunes, if possible, must be conceded to it as well as to natural persons, and this right necessarily carries with it the power to obtain an extension of credit by giving a mortgage upon its property to such of its creditors as are unwilling to give further time unless so secured. When this power is fairly and honestly exercised, with no purpose at the time of immediately abandoning business or making an assignment, the validity of a security so obtained cannot be questioned."

We think, in view of all the facts set forth in the bill of intervention and the law applicable thereto, that the appellant has shown no ground sufficient to justify a decree setting aside the mortgage.

The decree of the circuit court is affirmed.

FOSTER v. PORTLAND GOLD MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1902.)

No. 1,634.

1. NEGLIGENCE—DANGEROUS CONDITION OF PRIVATE PROPERTY— IMPLIED INVITATION TO VISIT—CARE REQUIRED.

A mining corporation which erects dwelling houses on a tract of land owned by it, and operated for mining purposes, extends an implied invitation to the public to treat the tract as a residence tract, and to enter and depart therefrom for all proper purposes incident to its use as such, and must therefore exercise reasonable care to have the premises in safe condition; and where it omits to open streets or highways, but requires persons desiring to visit the residences to cross the tract "at any point most convenient," and leaves unguarded a deep and abandoned shaft alongside one of the paths leading thereto, into which a person returning from one of the residences falls and is injured, it is guilty of negligence; the injured party not being, in such case, a mere trespasser or licensee.

2. SAME—PLEADING.

The complaint in an action for such injuries need not aver that plaintiff went onto the premises for a lawful purpose.

3. SAME.

The complaint need not aver, in terms, that defendant invited plaintiff onto the premises, but is sufficient if it avers the facts disclosing the invitation.

In Error to the Circuit Court of the United States for the District of Colorado.

Robert Graham, L. G. Campbell, and D. V. Burns, for plaintiff in error.

H. N. Hawkins (A. T. Gunnell, T. M. Patterson, and E. F. Richardson, on the brief), for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge. The plaintiff below, who is plaintiff in error here, filed her complaint against the defendant corporation, alleging, in substance, that it was engaged in mining operations upon a large tract of land owned by it, adjoining the city of Victor, in the state of Colorado; that it had "erected, caused or permitted to be erected," upon this tract, "a large number of dwelling houses, which it permitted to be used and occupied by divers persons and families as residences"; that it opened or constructed no streets or highways for the use of the residents or persons desiring to visit the houses; that the tract was unfenced and open to the public; that defendant required persons visiting the houses to cross the tract at any point most convenient; that there was a path leading across to the residences; that close to this path was a deep, abandoned shaft, which defendant had previously dug, and which was on April 22, 1900, owned and controlled by defendant; that the shaft was then unfenced and uncovered, but, by reason of a deep snow which had recently

fallen upon two pieces of timber lying across the mouth of the shaft, the same was practically concealed, so that it could not be seen by plaintiff or other persons passing near it; that defendant "carelessly, negligently, willfully, and unlawfully" allowed this shaft to be and remain unfenced and uncovered; that on the evening of April 22, 1900, the plaintiff "went to one of the houses on defendant's said unfenced lands, and, in returning therefrom across said lands, she, without any fault or negligence (or conduct) on her part, fell into said abandoned, unfenced, and uncovered shaft, and was suddenly precipitated a distance of 29½ feet" into the shaft, whereby she sustained a severe injury. To this complaint the defendant demurred, alleging as ground therefor that the same did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the trial court, and, plaintiff declining to plead further, final judgment was entered in favor of the defendant.

The plaintiff brings the case here by writ of error, and assigns that the trial court erred in sustaining the demurrer to the complaint. Such being the facts, the only question presented for our consideration is whether the complaint states a cause of action.

The defendant contends that the allegations of the complaint make plaintiff a trespasser or bare licensee upon defendant's land, and that, such being the fact, the defendant owed her no duty, either of care or diligence, and therefore incurred no legal liability for failure to discharge any duty. It may be conceded that if plaintiff, a person of mature years and judgment, entered upon defendant's land without any right to do so, she was a trespasser, and, as such, could not have called into activity any obligation on the part of the owner to protect her against the perils incident to the place. So, too, if she were a bare licensee or volunteer (that is to say, if she went upon defendant's land by its mere sufferance or toleration, without its invitation or inducement, but solely for her own convenience or pleasure), she would be held to accept and enjoy the license, subject to all its concomitant risks and perils. *Sweeny v. Railroad Co.*, 10 Allen, 368, 87 Am. Dec. 644; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369; *Redigan v. Railroad Co.*, 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520; *Benson v. Traction Co.*, 77 Md. 535, 26 Atl. 973, 20 L. R. A. 714, 39 Am. St. Rep. 436.

Defendant's counsel, in order to maintain their proposition, that plaintiff was a mere trespasser or licensee, were called upon to meet the proposition advanced by plaintiff's counsel, that the case made by the complaint shows an implied invitation held out by defendant to any person to enter upon its lands for any purpose incident to the uses to which the defendant put the same. If there was such an invitation, plaintiff's acceptance thereof subjected the defendant to certain duties and obligations towards her, totally different from those towards a trespasser or mere licensee. The rule seems to be well settled that "when one expressly or by implication invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger; and, to that end, he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."

Cooley, Torts, p. 605; Carleton v. Franconia Steel Co., 99 Mass. 216; Sweeny v. Railroad Co., supra; Bennett v. Railroad Co., 102 U. S. 577, 26 L. Ed. 235.

The chief question for our consideration, therefore, is whether the complaint in this case discloses an invitation, within the meaning of the rule just stated, to the public to enter upon defendant's land for any purpose. In answering this question, we are disposed to adopt the test suggested by defendant's counsel, namely, that an invitation may be inferred where a common interest or mutual advantage prompts it. What, now, is the situation disclosed by the complaint? The defendant, for reasons satisfactory to itself, is maintaining upon its premises a large number of dwelling houses, and is using them, or permitting them to be used, as residences by divers persons and families. Whether defendant leases the houses to the residents for rent reserved, or whether it permits them to occupy the houses as incidental to its mining operations, does not distinctly appear; but it does appear that defendant, for some consideration deemed satisfactory to itself, is maintaining a settlement upon its premises, devoting its land to the uses of families for residence purposes. By so doing, defendant necessarily subjects the land to uses incident to family life, and among these, manifestly, is the right to entrance and exit, not only for the particular family occupying a given house, but for all others who in the usual and ordinary course of things have occasion to visit the occupier, either for pleasure or business. By maintaining this residence district, the defendant, in our opinion, must be held to have extended an invitation to the public to treat it as such, and to enter upon and depart from the district for any and all proper purposes incident to the use to which it was put. The interest and advantage of the owner, as well as its tenants and the public, obviously are subserved by such free access and egress. Without it, the residences would be unoccupied and profitless, and the entire purpose of their construction or maintenance thwarted. Plaintiff avers in her complaint that defendant never opened or constructed any streets or highways for the use of the public, but required persons desiring to visit any of the residences to approach the same across the tract of land at any point most convenient, and further alleges that the defendant "carelessly, negligently, willfully, and unlawfully" left a deep shaft, which it had previously dug near to one of the paths leading to and from the residences, to remain unguarded and unprotected, into which the plaintiff, "without any fault or negligence on her part," fell as she was returning from one of the residences to which she had been. We are of opinion that these averments, taken in connection with the invitation necessarily implied from defendant's maintaining the settlement, already pointed out, disclose a duty or obligation violated by defendant.

Defendant's counsel argues that plaintiff might have been upon defendant's premises for an unlawful purpose,—as, for instance, to commit a crime,—and that the complaint is defective in that such unlawful purpose is not negatived. We think the presumption should be indulged that plaintiff went upon the premises pursuant to the invitation held out, for a lawful and proper purpose, and that, if the

hypothesis suggested by counsel is correct, it may and should properly be urged as a defense.

The complaint, in our opinion, states facts which, if proved, would, with their reasonable and fair inferences, entitle plaintiff to recover, and this is the best test of the sufficiency of a complaint in a given case. It is true, as argued by counsel, that the complaint fails to aver in terms that the defendant invited the plaintiff upon the premises in question, but we think that such omission is not fatal to the complaint. In *Mine & Smelter Supply Co. v. Parke & Lacy Co.*, 47 C. C. A. 34, 107 Fed. 881, this court, having occasion to consider the sufficiency of complaints under the Code of Colorado, remarked as follows: "When from the facts stated the law implies a promise to pay, the promise the law implies from the facts stated need not be alleged." We think it is likewise true that, when facts are alleged disclosing an invitation to the public to visit the defendant's premises, it is not fatal to the complaint, if the plaintiff fails to state the legal conclusion flowing from such facts.

For the reasons stated, we are of opinion that the complaint stated a cause of action at common law, and that the trial court erred in sustaining the demurrer.

We do not deem it necessary to now pass upon the proposition argued at length, that the complaint stated a cause of action under the statute of Colorado. A determination of this question involves a consideration of the constitutionality of an act of the legislature, which may never become important, and we therefore refrain from entering upon it.

The judgment must be reversed, and the cause is remanded to the trial court for a new trial.

EVANS v. BLAIR.

(Circuit Court of Appeals, First Circuit. March 4, 1902.)

No. 420.

1. SHIPPING—CONSTRUCTION OF BILL OF LADING—RIGHT TO DISCHARGE IN TURN.

A bill of lading, besides the general provision fixing the lay days for discharging, contained a clause providing that the vessel should have precedence in discharging over all vessels arriving or giving notice after her arrival, and should be compensated in demurrage for any violation of such provision. *Held*, that the provision for demurrage for a delay caused by a failure to discharge the vessel in her turn controlled the provision fixing the time allowed for lay days.

2. SAME—PRIVILEGE OF DESIGNATING DOCK.

There being no provision in the bill of lading on the subject, the consignee had, under the custom of most or all of the Atlantic ports, and in view of the particular kind of cargo, the privilege of determining at which of its docks the vessel should discharge, and her right to her turn was limited to such dock. This privilege, however, was not absolute; and whether the assigning her to a particular dock, where she was delayed awaiting her turn, while other vessels arriving after her were discharging at the consignee's other docks, rendered the consignee liable to demurrage, depended on whether such assignment was just and reasonable, and based on some reasonable necessity.

3. SAME--PRECEDENCE IN DISCHARGING.

Under a provision of a bill of lading for a cargo consigned to a railroad company, giving the vessel the right to be discharged in her turn, the fact that such cargo is owned by the company, while that of another vessel arriving later is merely consigned to its care, to be shipped over its road, does not entitle the company to give the latter preference in discharging.

Appeal from the District Court of the United States for the District of Maine.

David W. Snow (Symonds, Snow, Cook & Hutchinson, on the brief), for appellant.

Benjamin Thompson, for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This appeal arises out of a libel for demurrage, filed by the owners of the schooner Augustus Hunt against a cargo of Cumberland coal, shipped from Philadelphia to Portland, Me., and claimed by Mr. Evans in behalf of the Maine Central Railroad Company, its owner, and the real party in interest. The decree of the district court was in favor of the vessel, and Mr. Evans appealed.

The bill of lading provided that the vessel should have a lien on the cargo for demurrage. The case turns on the application of the following provision contained in it:

"Said vessel shall have precedence in discharging over all vessels arriving or giving notice after her arrival, and for any violation of this provision she shall be compensated in demurrage as if, while delayed by such violation, her discharge had proceeded at the rate of three hundred tons per day."

The bill of lading also provided lay days, to be computed at the rate of one day for every one hundred and fifty tons of coal. The vessel was discharged within the lay days computed at that rate, but, of course, this provision was qualified, and in part overruled, by the stipulation giving her precedence. The vessel claims that the Lewis H. Goward and the John Twohey, which arrived and reported after her, were given before her berths at which she might and should have been discharged.

The three vessels were laden with bituminous coal, but from different mines, and therefore, perhaps, of different qualities and intended for different uses. The Lewis H. Goward was laden with George's Creek Big Vein Cumberland coal, as appears by her bill of lading. This coal did not belong to the Maine Central Railroad Company, and therefore it was consigned to it, to be unladen by it, and transhipped over its rails to its owners. The John Twohey was laden with New River steam coal, also shown by her bill of lading, and which the evidence proves was intended for the passenger locomotives of the Maine Central Railroad Company. The Augustus Hunt was laden with Davis bituminous coal, as also shown by her bill of lading.

The Maine Central Railroad Company controlled three wharves at which coal was discharged,—one its principal place of discharge,

at which about 90 per cent. of its coal was received, being the same at which the Augustus Hunt was unladen; and two others, which are described as "above the bridges," and one of which was used for discharging the Lewis H. Goward, and the other, the upper one, the John Twohey. Under these circumstances, the defenses set up in the answer were that the Augustus Hunt "had on board Davis bituminous coal, intended for the use of the railroad of said Maine Central Railroad Company, and that said Maine Central Railroad Company was then, and had been for a long time, in the habit of discharging coal of this description, intended for the use as aforesaid, upon its pile upon said lower wharf, and nowhere else, and that it had no facilities at any other wharf for discharging schooners loaded with coal as aforesaid; that, according to the terms of the bill of lading under which said cargo was brought, it was optional with said Maine Central Railroad Company to discharge said schooner at said lower wharf or at its wharf above the bridges; that exercising such option, and without delay, said Maine Central Railroad Company ordered said schooner to said lower wharf, and there discharged her;" that "the cargo upon said schooner John Twohey consisted of a different kind of coal from that on the schooner Augustus Hunt, and was not intended to be placed upon the pile at said lower wharf, or for use upon the railroad of said Maine Central Railroad Company in the same manner as the coal upon said schooner Augustus Hunt; and that the discharge of said schooner John Twohey did not in any way interfere with or delay the discharge of said schooner Augustus Hunt."

There is a further defense in connection with the Lewis H. Goward, to which we will refer in its proper connection.

The bill of lading in issue hardly sustains the allegation of the answer that, according to its "terms," it was optional with the consignee to discharge at its lower wharf or at a wharf above the bridges. It is true that, in accordance with the custom at most Atlantic ports, if not at all of them, and also in accordance with the necessities of the case (*Davis v. Wallace*, 3 Cliff. 123, 130, Fed. Cas. No. 3,657), the Maine Central Railroad Company had, in a general way, the privilege of determining at which of its wharves it should discharge the Augustus Hunt; but in view of the provision in the bill of lading securing to this vessel her turn, and, indeed, without it, it cannot properly be said that this option was an absolute and arbitrary one.

Both parties have cited judicial decisions supposed to elucidate the case; but an examination of them results in giving us no assistance, unless it be found in *Stephens v. Macleod*, 19 Sess. Cas. (4th Series) 38. Charter parties and bills of lading which provided for loading or discharging an entire cargo at ports where there were several berths for loading or discharging, and which have been under discussion in the English courts, contained the expression, "at any safe berth as ordered," or its equivalent. *Murphy v. Coffin*, 12 Q. B. Div. 87; *Copper Co. v. Morel* [1891] 2 Q. B. 647. The result of this class of cases, after some fluctuation, has been to leave the consignee a somewhat unlimited power in the matter of select-

ing the berth, regardless of its crowded state, provided, only, it is a safe one. This, however, comes from the fact that the charter party, or bill of lading, contained express language favorable to the consignee, and from the application of the well-known rule that where, in maritime contracts, parties have seen fit to choose fixed forms of expression, the great variety of contingencies incidental to maritime transactions disenable the courts from establishing any safe theory by which the letter can be modified to meet any supposed intent. In the case at bar, however, there is no such express phraseology, and we are left to work out the construction of the bill of lading as though it provided in effect, in general terms, for a specified number of lay days which the consignee could not exceed, but with also an obligation to give the vessel its turn, even though thereby she is the sooner discharged. Practically, therefore, this case comes down to the mere question whether or not the vessel was given her turn, subject to whatever customs or necessities existed at the port of discharge which might be fairly within the contemplation of both parties.

As we have already said, the custom at most Atlantic ports, including, undoubtedly, the port of Portland, gave the Maine Central Railroad Company, in a general way, the privilege of determining at which of its wharves it should discharge the Augustus Hunf, leaving the vessel to be satisfied if she received her turn at that wharf, provided the lay days expressly limited in the bill of lading were not exceeded. As we have already said, this privilege which the Maine Central Railroad Company had of selecting the berth at which the vessel should be discharged did not come from any express stipulation, as in the English cases to which we have referred, but from the general rules which necessarily govern the relations of the parties. When the law itself attaches to a contract conditions beyond those expressed by the parties, and attaches them because some conditions beyond those expressed are essential to practically work out what the parties have undertaken to accomplish, the conditions thus attached will be just and reasonable. This is a universal rule, applicable alike to contracts at the common law and to those relating to maritime affairs.

Therefore, in the present case, as the entire cargo belonged to the Maine Central Railroad Company, and was deliverable to it, and as the bill of lading failed to point out the specific wharf or berth at which it was to be discharged, the consignee had a privilege of selecting the place of discharge, and the vessel's right to precedence, or, what is the same thing, her turn, was subject thereto. Nevertheless, as we have already said, this did not give the Maine Central Railroad Company an arbitrary right, but only one which was just and reasonable. As well said by Lord Esher, the master of the rolls, in *Carlton S. S. Co. v. Castle Mail Packets Co.* [1897] 2 Q. B. 485, 490, although in a different connection, this "is a power given to the charterers for business reasons."

While the three vessels named in this case were each laden with bituminous coal, yet bituminous coal is of great varieties, and has so many different uses that the mere fact that they were all so

laden does not of itself fix their right to a turn at a particular wharf other than if one was laden with coal, the second with flour, and the third with sugar. The limitations of the rule applicable to this case are very well shadowed out, on the one hand, in *Stephens v. Macleod*, already referred to, which is well summed up in *Carv. Carr. by Sea* (3d Ed.) 708, 709, and by the observations of Chief Justice Jervis in *Leidemann v. Schultz*, found in the work entitled, with a certain degree of liberality, *Abbott's Merchant Ships and Seamen* (14th Ed.) 411. In *Stephens v. Macleod*, the *Cassia*, which was the vessel in question, having arrived at the port of Portugalete, and being thus outside of the words "as ordered," was entitled to be berthed in turn. There being several wharves for loading iron ore, which was to be her cargo, and the case showing no particular reason to the contrary, she was held to have been entitled to be berthed at the first wharf which was open for her. On the other hand, in the case in which Chief Justice Jervis made the remark referred to, it appeared that the delay arose from the vessel being directed, at Newcastle, to load coke at a particular spout. It was contended for her owner that she could have been loaded earlier at another spout. To this Chief Justice Jervis answered: "Yes; but with different coke and at a higher price. If the captain may choose at what spout he will load, he may next choose what articles he will load with." So far as we can discover, there are no authorities of weight inconsistent with these expressions on the one hand and on the other. They practically illustrate the remark of Lord Esher, that the power given charterers to select a berth is for business reasons. They, therefore, further illustrate that, where several vessels are to load or discharge cargoes of the same generic class, they are apparently entitled, in their turn, to the first berths available, but that it may be shown that the particular circumstances are such as reasonably justify the consignee in directing otherwise.

The result of all this is to sustain, as a mere matter of law, the defense set up in the answer, aside from its reference to the "terms" of the bill of lading of which we have spoken. Coming back to the pith of the answer, that, while the *Augustus Hunt* was laden with bituminous coal, yet it was of that character which could properly be discharged only at the wharf where the consignee's business was ordinarily transacted, and that the cargo per the *John Twohey* was of a different class of coal, which could not be availed of at the berth to which the *Augustus Hunt* was ordered: This is explained by some evidence tending to show that the cargo per the *Twohey* was exclusively for the use of passenger locomotives, and was discharged at the berth at which that class of coal, and only that class, was discharged, while the cargo of the *Hunt* was essentially of a different class, not used on passenger locomotives, but for general purposes, and therefore properly discharged at the wharf where the Maine Central Railroad Company discharged all its coal, aside, only, from a small percentage of an exceptional character. It would not be reasonable to so far limit the option which the consignee had with reference to the berth to which the *Augustus Hunt* was to be ordered as to compel a reversal of its order of business, regard-

less of the precise character of the cargo with which the vessel was laden. Therefore, the answer, in view of these suggestions, shadows out what would have been a proper and reasonable justification for all refusals to order the Augustus Hunt to the berth at which the John Twohey was discharged; but, in the view of the learned district judge, the proofs fail to come up to its allegations. He observed that there is nothing to indicate that it was impracticable to give the Hunt one of the vacant berths without so much delay, and "that the evidence does not show that there was anything in the character of her cargo which made it impracticable to put it upon those berths which were vacant." A careful examination of the record leaves us strongly of the opinion that, if we should announce a different result from that reached by the learned district judge, we could not satisfy ourselves that we were probably any more in the right than he. Only one witness was called for the claimant. At some points in his testimony he stated impressions that the cargo of the John Twohey was for passenger locomotives, and was discharged at the wharf where such coal, and only that class of coal, was discharged, while the cargo of the Augustus Hunt was of the character which we have stated. On the other hand, he also stated as follows:

"Q. What kind of coal did the Twohey have on board? A. New River coal. Q. For what was that coal intended? A. That went over to Thompson's Point. The passenger locomotives' coal is put over there. Q. That is a different purpose than what the cargo of the Augustus Hunt was intended for? A. No; practically the same purpose. It was for locomotive use; all of it. Q. It was your custom to keep separate the different kinds of coal? A. To a certain extent."

Again he said, replying to a question referring to the cargo of the Augustus Hunt:

"Q. Was any of it put into the same pile with the Twohey's coal? A. I cannot say; I do not recollect the whole distribution. There might possibly have been a few cars put in there."

Again he testified:

"Q. When you are rushed with vessels,—that is, when you have a large number,—you then discharge at both of those wharves without any regard to the class of coal? A. We do at times; yes, sir."

"Q. In discharging vessels with soft coal, do you never put different kinds of coal upon the same wharf,—the same pile? A. Yes, sir; I presume it is done at times. Q. You do sometimes? A. Yes, sir. Q. What I want to know is, if you sometimes mingle in piles, or in trains of cars, coal of different character, as, in this case, the Davis coal and Cumberland coal? A. Different kinds of coal go into piles; I don't know just how many different kinds. Q. If they were all steam coal, they would go in? A. Naturally. Some coal is better than others, and some, of course, is different from others, and used for different purposes."

Referring to the use of the lower wharf, he also testified:

"Q. Was that use influenced at all by its convenience and accessibility? A. That was why it was done,—on account of convenience. Q. And not on account of the character of the coal? A. Well, there is more or less difference in coal, as I said before, and it is kept separate to a certain extent. The passenger coal we send over to Thompson's Point. Q. Is the passenger coal of an entirely different character from either of these? A. I am not well enough acquainted with coal to tell."

Without commenting in detail on this evidence, it is entirely plain that it is not of a character which enables the court to determine that the burden of disclosing a reasonable business necessity for delaying the *Augustus Hunt*, which the answer properly assumes, has been sustained.

This leaves the matter of the *Lewis H. Goward*, which the answer puts in a somewhat different position. As to her, it says "that said schooner *L. H. Goward* was not consigned to these claimants or either of them; that she had on board George's Creek Big Vein Cumberland coal, intended for the Phillips & Rangeley Lakes Railroad Company and the Bates Manufacturing Company, and not intended for these claimants or either of them; and that said schooner *Augustus Hunt* was not delayed in any way by the discharge of said schooner *L. H. Goward*, as aforesaid." The answer is technically correct in alleging that this coal was not consigned to the Maine Central Railroad Company, as it was consigned only to its care, but it was to be discharged by it and shipped over its rails. The district court was entirely right in holding that the mere fact of the ultimate consignment of the cargo would not justify giving her a preference over the *Augustus Hunt*. By the bills of lading, all the vessels were to be discharged by the Maine Central Railroad Company, and the *Hunt* was therefore entitled to her turn accordingly, regardless of the ownership of the cargoes.

Some things in the proofs are explanatory of the precise defense intended. The *Lewis H. Goward* was discharged neither at the wharf at which the bulk of the business of the Maine Central Railroad Company was done, nor at the wharf at Thompson's Point, but at one intervening between them. If the case showed that this wharf was adapted only for coal intended for transshipment by rail to customers of the Maine Central Railroad Company away from the seaboard, and that there were no facilities at that berth for handling cargoes intended for use at Portland, further supplemented by evidence that the cargo of the *Augustus Hunt* was not intended for transshipment by rail, this, in accordance with the principles we have already stated, would have given the consignee a reasonable ground for sending the *Lewis H. Goward* there, and not the *Augustus Hunt*. Here, again, the proofs halt. The claimant's witness testified as follows:

"Q. Coal consigned to you by bill of lading for somebody else you deal with as you do your own coal, so far as discharging is concerned? A. Yes, sir; so far as discharging is concerned, after we get orders from the shippers where they wish it sent."

He also testified:

"Q. As I understand, so far as the wharves are concerned, or so far as the facilities were concerned, and the manner of discharging, it was purely optional with you whether those vessels should be discharged at one berth or the other; and when I say 'those vessels' I mean all three of the vessels,—the *Hunt*, the *Twohey*, and the *Goward*. A. No, sir; not always. Q. I say, so far as those vessels were concerned, in that particular case and time? A. Yes, sir; it was."

"Q. You had the right to assign berths? A. Yes, sir. Q. There was nothing in the condition of the berths which prevented you from assigning where you pleased? A. Not that I am aware of."

Then comes what we have already said as to the practice of discharging vessels at all the wharves, without regard to the classes of coal, when rushed with cargoes.

He also testified:

"Q. Where was the coal from the Augustus Hunt which was put onto cars carried? A. I think a portion of it went to Vanceboro. Q. Was any of it put into the same pile with the Twohey's coal? A. I cannot say. I do not recollect the whole distribution. There might possibly have been a few cars put in there."

This shows that coal from the Augustus Hunt was discharged upon cars, as was that from the Lewis H. Goward. How much was so discharged, whether a small or a large part, or the whole, is not made to appear; but this evidence certainly leaves a strong impression that not only a part of it was in fact discharged upon cars, but that the whole of it might have been, as was the cargo of the Goward. Here, again, as with reference to the precedence given to the Twohey, while there are, perhaps, expressions enough in the proofs, if they stood alone, to maintain such a distinction between the different classes of coal, constituting the cargoes of the three vessels, as would have justified discrimination in selecting the places of discharge, yet the whole leaves the case in a state of equilibrium, and fails to maintain, by a preponderance thereof, the defense set up in the answer.

The decree of the district court is affirmed, with interest, and the costs of appeal are awarded to the appellee.

DENNEE et al. v. CROMER.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1902.)

No. 1,604.

APPEALS FROM MAYORS.

Under Act Cong. June 28, 1898 (30 Stat. 499, c. 517, § 14), adopting and putting in force in the Indian Territory Mansf. Dig. Ark. c. 29, for the organization and government of cities and towns, and giving to mayors the same jurisdiction as United States commissioners have in such territory, which, under Act Cong. May 2, 1890 (26 Stat. 98, c. 182, § 39), is that of a justice of the peace under Mansf. Dig. Ark. c. 91, and declaring that for purpose of this section all laws of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory, appeals lie from the mayor in said Territory; Mansf. Dig. Ark. c. 29, § 797, providing appeals may be taken from a mayor as from a justice of the peace.

In Error to the United States Court of Appeals in the Indian Territory.

This action was brought by M. G. Cromer, the defendant in error, against Stewart Dennee and John S. Hammer, the plaintiffs in error, before the mayor of Ardmore, in the Indian Territory, on a promissory note for \$150. In that court the plaintiff recovered judgment for the amount of the note and interest, from which judgment the defendants appealed to the United States court for the Southern district of the Indian Territory, at Ardmore, where the like judgment was rendered, from which an appeal was taken by the defendants to the United States court of appeals for the Indian Territory, which court affirmed the judgment of the lower court, and thereupon the defendants sued out this writ of error. In the United States court the de-

endants filed what in the pleading itself is called a "demurrer to the proceedings" and in the record a "demurrer in the nature of a plea to the jurisdiction." The principal ground of this demurrer, and the only one necessary to notice, is "that the judgment appealed from is absolutely void, because the mayors of cities and towns in the Indian Territory are without jurisdiction to render judgment in civil cases." The court overruled the demurrer, and the exception to this ruling is the only question the record presents for our consideration.

Joseph G. Ralls, for plaintiffs in error.

W. A. Ledbetter and S. T. Bledsoe, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The contention of the plaintiffs in error is that the act of congress conferring on mayors of cities and towns in the Indian Territory jurisdiction to try civil actions at law where the amount in controversy exceeds \$20 makes no provision for allowing, and does not allow, an appeal in such cases to a court of record, and that, for this reason, it is unconstitutional, and mayors have no jurisdiction of such cases, and their judgments are void.

The action of the plaintiffs in error is not consistent with their contention; for, while contending the act of congress allows no appeal from the judgment of a mayor of a city or town, they have taken an appeal from the judgment of a mayor, and have prosecuted it through three courts. If the law allowed them no appeal, their appeal would give them no standing in an appellate court, which could do no more than dismiss the unauthorized appeal, not the suit, and leave the parties where they stood before such appeal was taken. If the law allowed them no appeal, they plainly mistook their remedy. Since the judgment of the supreme court in the case of *Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873, it must be accepted as law in the courts of the United States that under the seventh amendment to the constitution of the United States the parties to suits at common law, where the value in controversy exceeds \$20, are entitled to a trial by jury, and that a trial by jury, within the meaning of the constitution, is not merely a trial by a jury of 12 men before a justice of the peace "vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence." It is, nevertheless, competent for congress, when invested with the power of legislation over a district or territory, to provide for the trial of civil cases by a justice of the peace, or in his presence, by a jury of 12 or any less number, allowing to either party, where the value in controversy exceeds \$20, the right of appeal from the judgment of the justice of the peace to a court of record and to have a trial by jury in that court. While a trial

by jury of 12 or any less number before a justice of the peace is not, and a trial by jury in an appellate court is, a trial by jury, within the meaning of the common law and the seventh amendment to the constitution, the constitutional right of trial by jury is not infringed if only the right of appeal is allowed from the judgment of the justice of the peace to a court of record where such a trial by jury as the constitution contemplates can be had.

That the right of appeal from the judgments of mayors in the Indian Territory to the United States court is given in all civil cases cognizable before such magistrate where the amount in controversy exceeds \$20 will clearly appear by a brief reference to the acts of congress relating to the subject. There are no justices of the peace in the Indian Territory by that name. The Territory is not, however, without these important and indispensable officers. They are there under other names. In that Territory the United States commissioners and mayors of cities and towns are invested with the jurisdiction and powers of justices of the peace within their respective territorial jurisdictions. The act of congress approved May 2, 1890 (26 Stat. 98, c. 182, § 39), adopted and put in force in the Indian Territory chapter 91 of Mansfield's Digest of the Statutes of Arkansas defining and regulating the jurisdiction and powers of justices of the peace and the practice and mode of proceeding in justices' courts. This chapter confers jurisdiction on justices of the peace in matters of contract where the amount in controversy does not exceed \$300, and provides for appeals from their judgments to the circuit court and for a trial by jury on the merits in that court. The act of congress invested United States commissioners in the Indian Territory with all the powers and jurisdiction conferred on justices of the peace in Arkansas by this chapter, and provides that "appeals may be taken from the final judgment of said commissioners to the United States court in said Indian Territory in all cases and in the same manner that appeals may be taken from the final judgments of justices of the peace under the provisions of said chapter 91." By act of congress approved March 1, 1895 (28 Stat. 695, c. 145, § 4), this provision was, in substance, re-enacted, with a proviso that no appeal shall be allowed in civil cases where the amount of the judgment, exclusive of cost, does not exceed \$20. The act of congress approved June 28, 1898 (30 Stat. 499, c. 517, § 14), adopted and put in force in the Indian Territory chapter 29 of Mansfield's Digest of the Statutes of Arkansas relating to the incorporation of cities and towns, and provided that the cities and towns organized thereunder should possess all the powers and exercise all the rights of cities and towns in Arkansas, and in terms provides "that mayors of such cities and towns, in addition to their other powers, shall have the same jurisdiction in all civil and criminal cases arising within the corporate limits of such cities and towns as, and coextensive with, United States commissioners in the Indian Territory." Another clause of this same section declares, "For the purposes of this section all the laws of said state of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory."

Chapter 29 of Mansfield's Digest is not only referred to in "this section," but is actually adopted and put in force for the organization and government of cities and towns in the Indian Territory. Beyond question, this section adopted and put in force in the Indian Territory all the provisions of chapter 29 of Mansfield's Digest, "so far as applicable."

Now, among the provisions of chapter 29 of the Arkansas statute thus adopted is the following:

"Sec. 797. The mayor of the corporation shall be a conservator of the peace throughout its limits, and shall have within the same all the power and jurisdiction of a justice of the peace in all matters, civil or criminal, arising under the laws of the state, to all intents and purposes whatever; and appeals may be taken in the same manner as from decisions of justices of the peace."

Manifestly, the provision of this section allowing appeals from the judgments of mayors in the same manner as appeals from the justices of the peace is "applicable" to mayors in the Indian Territory, and was adopted by section 14 of the act of congress. It was the intention of the act of congress to adopt every provision of chapter 29 of the Arkansas statutes not locally inapplicable or inconsistent with the provisions of the act of congress. The provision allowing appeals from the judgments of mayors is in harmony with the whole scheme of congressional legislation for the administration of justice in the Indian Territory. At the very beginning of legislation establishing courts in that Territory, congress adopted and put in force in the Territory the laws of Arkansas relating to the jurisdiction, pleadings, practice, and modes of proceeding in the courts in that state, from those of justices of the peace up to the supreme court. Where any change in those laws was necessary to meet the different conditions existing in the Indian Territory it was usually made by express exception or addition.

It is inconceivable that congress intended to impair the harmony and symmetry of this system of laws by denying an appeal from the judgment of a mayor when exercising the jurisdiction of a justice of the peace and allowing an appeal from the judgment of a United States commissioner when exercising precisely the same jurisdiction. No reason can be suggested for allowing the right in one case and denying it in the other.

When chapter 29 of Mansfield's Digest was adopted and put in force in the Indian Territory the provision of that chapter allowing appeals from the judgments of mayors was adopted and made applicable to the judgments of mayors in that Territory.

The judgment of the United States court of appeals in the Indian Territory, and the judgment of the United States court for the Southern district of the Indian Territory, are each affirmed.

THOMAS LAUGHLIN CO. v. AMERICAN SURETY CO. OF NEW YORK.
BLAKE et al. v. SAME. BOYD v. SAME. CLEAVES v. SAME.
POST v. SAME. JOHNSON v. SAME.

(Circuit Court of Appeals, First Circuit. April 16, 1902.)

Nos. 405, 406, 407, 408, 409, 410.

1. SURETY—LIABILITY.

A surety's liability does not ordinarily extend beyond the penal sum of the bond,—as, for instance, to costs and interest,—unless he has in some way resisted or obstructed the recovery of the claim against him.

2. SAME—CONTRACTOR'S BOND—CLAIMS ACQUIRED BY THIRD PARTY CONTRACTING TO INDEMNIFY SURETY.

In computing the pro rata to be paid creditors of a defaulting contractor by the surety on his bond (the penalty of the bond being insufficient to satisfy the claims in full), claims which have been acquired by a third party, who has contracted to indemnify the surety, should be considered.

Appeals from the Circuit Court of the United States for the District of Maine.

Benjamin Thompson, for appellants.

Thomas L. Talbot (Henry C. Wilcox, on the brief), for appellee American Surety Co. of New York.

Harry R. Virgin (Franklin C. Payson, on the brief), for appellees Allen and Hutchinson.

Before COLT, Circuit Judge, and BROWN and LOWELL, District Judges.

LOWELL, District Judge. Morgan contracted to build for the United States a battery on Diamond Island. The American Surety Company was the surety furnished upon his bond in accordance with chapter 280 of Acts 1894 (28 Stat. 278). Morgan broke his contract, having become indebted to a considerable number of persons while engaged upon the contract work. Some of these persons brought suits against the surety company under chapter 280. The surety company filed a bill in equity, ancillary to these suits, for the purpose of settling its liability both to the plaintiffs in the suits mentioned and to other creditors of Morgan, so far as these creditors should come in. The penal sum of the bond is probably insufficient to pay the statutory claims in full. The claims against the surety company thus arising under chapter 280 were referred to a master. Exceptions were taken to his report, and were dealt with by the circuit court. The appellants now seek to reverse the action of that court in dealing with certain claims.

The circuit court disallowed certain claims for labor, tools, and other supplies, and for the transportation of material to Diamond Island. For the purposes of this case, it is not necessary to decide if the statute of 1894 should be held to cover more than is covered by the ordinary lien statutes of the states. However this may be, we are of opinion that the labor and materials here in controversy are plainly without the purview of the statute. All the appeals except that taken by the Laughlin Company are thus disposed of.

That company has contended that the surety company is liable, over and above the penal sum of the bond, for interest thereon, and for the costs of the suits brought against the surety company. A surety's liability does not ordinarily extend beyond the penal sum of the bond, unless he has in some way resisted or obstructed the recovery of the claim against him. No acts of resistance or obstruction have been shown in this case, other than those which have been already compensated by the allowance in the suits at law of costs accrued up to the time of the filing of this bill. This court is not now asked to decide if costs or interest should be allowed the claimants as against the fund arising from the penalty of the bond, but only if costs or interest should be allowed as against the surety company outside that fund. To some extent the former appear to have been allowed, and to some extent allowance has been suspended to await the further action of the circuit court.

The Laughlin Company further contended that in computing the claims which are to be satisfied by the surety company out of the penalty of the bond there should be excluded certain claims now held for the benefit of one Allen, who had contracted to indemnify the surety company from loss on its bond. The evidence does not show, as was contended, that Allen was a partner of Morgan, and so the claims are not to be excluded on that ground. It follows, therefore, as stated by the learned judge below, that in computing the pro rata to be paid the other creditors these claims must be taken into consideration, "as any other ruling would compel Allen to now reimburse the complainant the full penal amount of its bond, notwithstanding he had acquired these claims; and it would also give the other creditors a larger percentage than they are technically entitled to." If these claims—some purchased by Allen, and others already paid by the surety company, which has been reimbursed by Allen—be not reckoned among the liabilities of Morgan to be charged against the fund furnished by the penalty of the bond, Allen will be required under his guaranty to pay not only the penalty of the bond, but also an additional sum equal to the amount expended by him in this purchase and reimbursement.

In each case the decree of this court is as follows:

The decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellee.

DOUGLASS v. DAISLEY.

(Circuit Court of Appeals, First Circuit. April 16, 1902.)

No. 385.

1. MERCANTILE AGENCIES—COMMUNICATIONS—WHEN PRIVILEGED AS MATTER OF LAW.

A mercantile agency received a report from one of its agents that plaintiff had made an assignment. The report came in on a general assignment form; but, under a heading requiring the agent to furnish every possible particular, was a statement that it was made to secure the assignee for indorsing a note. The agency sent out a communica-

tion that plaintiff had assigned for the benefit of creditors. *Held* not a privileged communication, as matter of law, because of substantial departure from information received.

2. SAME—LOSS OF PRIVILEGE—NEGLIGENCE.

If the mistake was one which could not have been avoided by reasonable care, the privilege was not lost; but if the result of carelessness, the privilege failed.

3. SAME—QUESTION FOR JURY.

The question whether the mistake in the present case was due to carelessness, so as to destroy the privilege, was for the jury.

4. SAME—LOSS OF BUSINESS AND CREDIT—GENERAL ALLEGATION.

Plaintiff, where his complaint contained a general allegation of loss of business and credit, could recover by showing immediate diminution to business, etc., and was not required to connect the loss with the communication by evidence of particular instances.

In Error to the Circuit Court of the United States for the District of Massachusetts.

G. Philip Wardner and William W. MacFarland (Carver & Blodgett, on the brief), for plaintiff in error.

Charles F. Choate, Jr. (Josiah H. Benton, Jr., on the brief), for defendant in error.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

ALDRICH, District Judge. The defendant is a mercantile agency, known as the R. G. Dun & Co. agency; and on the 28th day of March, 1898, sent out a notice to its subscribers that the plaintiff had assigned for the benefit of his creditors; and the plaintiff brings his action in tort for libel. The defendant does not justify by showing that the communication sent was true, but claims that, by reason of the character of the business of the agency and of the occasion, the communication was privileged, in the sense that the occasion and the relations of the parties exempt the defendant from liability.

In jurisdictions where such communications are treated as privileged, the privilege is a qualified one, and when information is furnished under circumstances which give it a privileged character, though false, recovery cannot be had unless malice or bad faith is shown. In other jurisdictions, like Georgia, Texas, Missouri, Wisconsin, and in some of the cases in the federal circuits, like *Locke v. Bradstreet Co.* (C. C.) 22 Fed. 771, the privilege is made to depend somewhat upon the question of due care in the matter of selection of agents, and in respect to the means and manner of communication; and Mr. Francis Wharton, in his valuable note to *Trussell v. Scarlett* (C. C.) 18 Fed. 214, would seem to give some indorsement to the latter view. In New York and many other jurisdictions, if the requisite occasion and relations exist, such communications, speaking in general terms, are treated as privileged, and the doctrine of immunity from liability is recognized, except in cases where malice or bad faith is shown; and the doctrine is not made to depend much, if at all, upon the question of due care.

It is not necessary in this case that we should examine into the origin, the reason, or the wisdom of the rule of privilege and non-liability as it has been applied in the cases to which we have been referred.

Under the defendant's main contention here in respect to the question of privilege, they largely rely on *Ormsby v. Douglass*, 37 N. Y. 477, which is supplemented by numerous authorities sustaining the view of that case. *Ormsby v. Douglass* has been frequently referred to in decisions in jurisdictions where the rule of that case obtains, and the weight of authority, both English and American, would seem to be in accord with the principle of that case, and we may well enough, we think, without going into a history of these decisions, accept the rule of such cases as the law.

The rule of immunity from liability, in cases where it applies, results largely from the necessities of business and the strong presumption of absence of malice; and the rule of the New York cases unquestionably is that, in the absence of actual proof of malice or bad faith, the privilege justifies the agency in transmitting the information it receives. But, conceding the full force of the New York cases and those holding the same view, the defendant is not within the doctrine there established. The general information which it received upon the blank which it had furnished its agent at South Framingham, Mass., was that James Daisley, the plaintiff, had made an assignment to B. T. Thompson, of Framingham, and, under a heading upon the blank which required the agent to furnish any particulars possible, was an exact and particular statement of what the assignment was; namely, to secure the assignee for indorsing a note. Such was the information received at the office of the agency at Boston; but, instead of sending out the information received, they sent a communication saying, "James Daisley, of South Framingham, Massachusetts, has assigned to B. T. Thompson for the benefit of his creditors." This was a plain and substantial departure from the information received. Therefore, it was not sending information received or information accurate in substance. They were informed that the plaintiff had assigned to secure the indorser of a note, and the information was not that he had made a general assignment for the benefit of creditors. The first, in the ordinary acceptance, would not necessarily be injurious to the party's credit or business, while the other, in the ordinary acceptance, means a general failure, and would necessarily be injurious.

The case of *Ormsby v. Douglass*, supra, distinguishes itself at once from the situation here, for the rule is there distinctly stated that "so long as the defendant acted in good faith in reporting facts which came to his knowledge," etc. The later New York case of *Haft v. Bank*, 19 App. Div. 423, 46 N. Y. Supp. 481, on which the defendant largely relies, bases its decision upon the same ground; that is to say, that the bank, in the due course of its business, forwarded the precise information which it received from its messenger. The English case of *Lawless v. Oil Co.* (1869) L. R. 4 Q. B. 262, 267, is in the same line, and the decision is based, as in the other cases, upon the ground that "what the directors did was this: In

their report to a meeting of the shareholders they appended the statement which had been made to them by the auditors." The case of *Robinson v. Dun*, 24 Ont. App. 287, 289, treats a privileged communication as one made on a privileged occasion, and fairly warranted by it. It in no sense goes beyond the doctrine of the New York cases in respect to the idea that the communication is privileged, as a rule of law, when limited to the information received, but its reasoning would seem to tend somewhat in the direction of making the question whether the information was fairly warranted an element, or, in other words, in the direction of the other line of authorities, which make the privilege depend somewhat upon the question of due care.

We recognize the exigencies of business and the demands of public policy in respect to information as to the standing of business men in their trade and calling, and we carry to the defendant, for the purposes of this phase of the case, the full force of the authorities upon which it relies. But we are not inclined to extend the privilege, as a rule of law, beyond that of protection, so long as the agency acts in good faith in reporting, with substantial accuracy, information which comes to its knowledge; in other words, beyond the rule of the cases most favorable to the defendant, that the agency, in the absence of bad faith, is privileged in communicating information received, although it may prove to be false.

Where a false report originates in the office, and is not based upon information, the circumstances and the occasion do not necessarily involve a privilege. Carrying the qualified privilege to communications of the character in question, by rule of law, would be carrying the doctrine of immunity beyond the rule in respect to absolute privilege. Mr. Bigelow, in his work on Torts (7th Ed.) § 332, in treating of the higher privilege of the publication of court proceedings, and speaking of the report of such proceedings, says:

"If, however, the same should be so incomplete or so stated as to give a wrong impression, or, though full, if it is followed by comment containing defamatory matter, the privilege would fall."

The case of *King v. Patterson*, 49 N. J. Law, 417, 9 Atl. 705, 60 Am. Rep. 622, presents a careful review of the American and English cases, with reasoning which would seem to be sound, as to why the rule of privilege should not be extended beyond its present limit. In that case, the general rule is recognized; but, on the question of extending it further, and to include communications to those who are not subscribers, it is observed that "neither the welfare nor the convenience of society will be promoted by bringing the publication of matters, false in fact, injuriously affecting the credit and standing of merchants and traders, broadcast throughout the land, within the protection of privileged communications." In that case it is further suggested that, while the subject in relation to which the communication is made may be privileged, the communication may be unprivileged, and the matter of duty to send the information is made an important element of the question; and, though the doctrine of privilege was there recognized while communicating to its patrons information received, it was observed that

the agency, in its conduct and management, must be subjected to the ordinary rules of law, and the proprietors and managers held to the liability which the law attaches to like acts of others.

We think the privilege in a business situation like this, which results as matter of law, rests upon the right to send information received, and upon the duty to send with substantial accuracy such information as is received. The communication in question does not rest wholly or with substantial accuracy upon information received. How can it be said, as a matter of law, either that the agency was privileged to send something plainly and substantially different from what had been received, or that any duty rested upon it to send information substantially different from that which it had received? Neither the right nor the duty to send different information exists in this case; consequently there was no privilege which can be ruled as matter of law, and the defendant is liable unless, under proper instructions, facts necessary to clothe the transaction with the immunity of privilege shall be found by a jury. As said in *King v. Patterson*, supra (page 427, 49 N. J. Law, and page 710, 9 Atl., 60 Am. Rep. 622):

"A defendant intends to send a communication derogatory to the plaintiff's character or circumstances to A, where it would do no harm. By inadvertence he sends it to B, which produces the injury complained of. It is obvious that it would be a plain transgression of legal principles to excuse the act he did because he intended to do an act from which no injury to the plaintiff would have resulted."

We have seen that the communication in question was not based upon information received; neither was it based upon anything known at the home office. A communication cannot be accepted as privileged as a matter of law which is neither warranted by information received nor by facts known at the home office. It was neither the right nor the public or private duty of the agency to send a communication which was not based upon fact or information. The communication, therefore, not being based upon information from an agent whose business it was to gather information, or upon foundation of fact, it is not a privileged one in the sense of clothing the defendant with immunity from liability through an arbitrary rule of law. In short, we find no case which pretends, through a rule of law, to bring a communication like this within the domain of privilege; nor do we see any reason for carrying absolute privilege to such a communication.

The English case of *Tompson v. Dashwood*, 11 Q. B. Div. 43, was a case where a communication was intended to be made on a privileged occasion, but was sent to the wrong person; and, while the case is not like the one here, for there it was a mistake in sending to the wrong person rather than a mistake in sending wrong matter, the privilege was held to exist. This case is, perhaps, the most favorable to the defendant's position of any that has come to our attention. But this authority is criticised by Mr. Pollock in his treatise on Torts, as one not by any means universally accepted by the profession, and as contrary to the earlier decisions. Pol. Torts, 216, 234; Webb, Pol. Torts, 309. We are not disposed to adopt the doc-

trine of this case, and hold, as a matter of law, without regard to the question of due care, that the communication was privileged.

We think the circuit court was right in holding that the communication in question was so substantial a departure from the information received that it could not be accepted as privileged, as a matter of law, and that the defendant was not within the rule which gives immunity as a matter of law upon the ground of privilege. So, upon this phase of the case, we hold against the defendant, for the reason that the circumstances are not such as to bring it within the doctrine of the cases upon which the defendant relies.

This disposes of the first assignment of error, which, in substance, is that the defendant was entitled to a verdict as a matter of law, upon the ground of privilege.

Having considered the question whether immunity resulted by rule of law under the circumstances of this case, we come, at the next step, to the question whether, on the other hand, liability resulted by rule of law, and this is the precise question raised by assignments 2, 3, and 4; and we think there was error here, for the reason that the situation was one which, under the circumstances, involved a question of fact which should have been submitted to the jury. The occasion, which was that of receiving and communicating information relating to the subject-matter in question, was privileged; and, the occasion being privileged, the Boston agency, in the ordinary course of its business of receiving information and imparting it to its subscribers in the business world, was in the exercise of a privilege in the nature of a private right, or, as expressed by some of the authorities, a public right. Therefore, starting with this right, if unwarrantable and injurious consequences result, it cannot be said, except in a very clear case, that liability results as a matter of law from a variance between the information received and the communication sent.

No case like the one here presented has been called to our attention, and we do not find that the precise question has been passed upon either by the supreme court of the United States or by the courts of Massachusetts, nor do we find that the precise question has been dealt with elsewhere. We must, therefore, deal with it somewhat as a new question.

The occasion being privileged, we do not think the general rule of law that liability results from accidental or inadvertent slander, and that the accident or inadvertence only operates to remove malice and limit the damages, applies to this case, and it is for the reason that the occasion was privileged, and the defendant was in the exercise of a right. It being a business right, however, or a private right, to gather and impart information to such members of the business world as were its subscribers, it must exercise the right reasonably, to the end that unnecessary harm shall not come to business men about whom the information is furnished. It is not a right which can be exercised heedlessly or carelessly. It is difficult to find a principle of law which would justify the careless and wanton exercise of a right of this character, and afford immunity on the ground of privilege. It is equally difficult, starting with a privileged occasion, to find a principle which would justify an absolute ruling of law upon

the question of liability upon the ground of variance between the information received and that sent, and this is for the reason that the variance may be susceptible of explanation. Reasonable care and prudence with respect to forwarding information may, therefore, continue the privilege and clothe the acts of the agency with immunity, and, on the contrary, negligence may destroy the privilege and leave the parties responsible for acts which are culpable. Though the occasion is privileged, the privilege does not carry immunity to heedless and careless management in forwarding information. While the question whether an occasion is privileged is one of law, the ultimate question of privilege may become a mixed question of law and fact, through a variance between the information and the communication, and under such circumstances the question would be whether the privilege was carried to the communication through a reasonable and careful exercise of the right, or whether the privilege was lost by indifferent and careless management, or through inattention and want of due regard to the interests of others. If it was a pure mistake, involving no negligence or culpability, the privilege would not fail. On the other hand, if, by the exercise of such care as men ordinarily exercise in like business affairs, the true character of the information would have been discovered and correct information sent out, rather than that which was not warranted, then the privilege would fail. The communication sent being substantially different from the information received, the question whether it was libelous and injurious was quite likely one for the court; but the question whether it was a privileged communication, though different from the information, depended upon the question of fact whether the variance resulted from an excusable mistake, or from indifference or heedlessness.

Even the privilege of regular process does not protect against unreasonable and careless use. Any right or privilege may be so carelessly used as to lose the protection which it would otherwise afford. No privilege which affects the public at large grants immunity from negligent and careless acts. So, in the case under consideration, the question for the jury, under the circumstances, was not whether the communication was a libel,—not whether the variance was a substantial departure,—because such were questions of law, but whether the defendant's conduct was such as to give immunity, on the one hand, or so wanting in care, or so indifferent, as to make the privilege fail.

The contract between the agency and the subscribers contemplates verbal, written, and printed information, and provides that the agency shall not be responsible for neglect, unfaithfulness, or misconduct of agents; but this stipulation, of course, does not bind a member of the public who is not a party to it, and, as against such parties, to be within the privilege, the home office, in transmitting information, must be in the exercise of reasonable care. We do not look upon this holding as a departure from the principle which applies to reports of public proceedings, where the privilege is lost by an unreasonable exercise of the right, or by an unreasonable or unnecessary mode of communication, like sending a privileged com-

munication by telegraph or postal card, where the communication becomes unprivileged. Indeed the recognized and controlling general principle is that a report, in order to be privileged as a matter of law, whether it be a report of a judicial proceeding or of a commercial agency, shall be a fair report; and in cases where the report is not fairly warranted by the information, exemption from liability upon the ground of privilege, or, what would be a more exact expression, upon the ground of excusable libel, may and should depend upon reasonableness of skill and care in reporting, and the question of skill and care becomes a question of fact for the jury. See Paterson, *Liberty of the Press, Speech, and Public Worship*, 184, 185, 192, 193, 203, 204.

In the regular course of the business of the agency the report came in from the Framingham agent on a general assignment form; and the mistake, quite likely, although the question is one of fact, resulted from the assumption that the assignment was a general one. Still, while the general statement in the body of the form in a sense indicated a general assignment, under the head which calls for particulars the report was clear as to the nature of the assignment. So, under such a situation, we think the communication sent out was neither so clearly an excusable mistake that it can be ruled a privileged communication as a matter of law, nor so clearly a wanton and heedless variance between the information received and the communication sent as to justify a ruling that the privilege failed absolutely, and that the defendant was liable. While the variation was a substantial one, in the absence of malice the situation does not present a case where it can be said that it was "as completely an invention of an untruth by the defendant as though he had received no information whatever," and that "the information received afforded no justification, no palliation, no excuse," and "as though he had sent out this untrue statement without a shadow of any information on his records about James Daisley"; nor was it a situation which justified the assumption and instruction that "it was made out of whole cloth, and was a mere blunder." And, while the variance between the information and the communication was so substantial and so injurious as to render the communication actionable per se, in the absence of privilege, still there was a reasonable question for the jury as to whether it was a pure mistake, and one which could not have been avoided by careful business management, or, on the other hand, whether the privilege of furnishing information in the ordinary course of business was carelessly exercised. It was for the jury to say whether reasonable care required the home office to read the whole paper and gather all the information that it contained, and whether it was reasonable to act upon the general appearance of the assignment form, and send the information which it did. If it was carelessness, the privilege was lost. If it was a mistake which could not have been avoided by the exercise of reasonable care, privilege and immunity were not lost. In other words, if the home office was reasonably careful and prudent in respect to this transaction in the ordinary course of its business, the privilege continued, and would cover the mistake; but if

the departure from the information was the result of want of care and heedlessness, the privilege failed.

The erroneous communication did not originate with the agent furnishing the information, but resulted from an attempt in the home office to transmit information received; and there is no pretense that they acted upon information other than that received from the Framingham agent; therefore the erroneous communication resulted from the conduct of an agent for whose acts the defendant is responsible. Still, if the mistake was one which could not have been avoided by the exercise of reasonable care, the privilege of the occasion would afford immunity; while, on the other hand, if the mistake was the result of heedlessness and want of reasonable care, the privilege would fail, and immunity would not result from the privilege of the occasion. Neither the privilege of the occasion nor the privilege of sending in good faith information received, though false, furnishes immunity from careless management in the home office, or the careless exercise of the right; nor does the privilege arbitrarily fail by reason of a pure mistake of the home office involving no negligence or culpability. One may lose the protection of this privilege, like any other, through negligence, or he may safeguard himself by its protection through the exercise of such a degree of care at the home office as would be exercised by men of ordinary circumspection, care, and prudence in similar situations. If the privilege is lost through carelessness, then the defendant is answerable for the consequences of circulating injurious reports, and the rights would be determined regardless of the question of privilege, under the ordinary rules which obtain in libel cases.

In *Trussell v. Scarlett* (C. C.) 18 Fed. 214, 216, the privilege was made to depend upon reasonable caution, and in *Locke v. Bradstreet Co.* (C. C.) 22 Fed. 771, 774, in submitting the question to the jury, the question of privilege was made to depend upon the exercise of ordinary care and caution.

The error being in the home office, there is no question raised for us as to the responsibility of the defendant in respect to the care of the agent who furnished the information. When there is a departure at the home office from information received, as is often the case in business in condensing, summarizing, and forwarding the reports, management and superintendence are necessarily involved, and, as all this affects the standing and the interests of one who is a stranger to the contract between the agency and the subscriber about whom the report is made, why should not the immunity of privilege depend upon the exercise of reasonable care?

It is fully recognized and established by the authorities that sending out from the home office the report received, knowing it to be false, or sending a true report in bad faith, or sending a true report unnecessarily or maliciously, makes the privilege fail. Inquiries in respect to all these elements involve fact, and it is perfectly clear and logical that the same principle makes privilege depend upon the fact of careful and prudent conduct and management in the home office when there is a departure from the information sent and a misstatement like the one in question here. It is not the question

whether the communication was actionable under the general law of libel, but the question whether privilege exists as a protection to the defendant. That depends upon the rule of reasonableness in respect to the conduct and care of one who invokes the immunity of its protection. If the jury should find the necessary fact of careful and reasonable exercise of the right, then the privilege would exist, and the defendant would be within its protection and immunity, and, if not, it would be subject to the ordinary rules of law.

Making the question of privilege and immunity depend upon the question of fact as to the reasonable exercise of the right is not, in principle, altogether unlike, but is somewhat analogous to, the probable cause doctrine, which involves a question of fact for the jury in cases under circumstances where it is an admissible ground of defense (Folk. Starkie, Sland. & Lib. [6th Ed.] 34, 349-352), and in cases where it is received in mitigation of damages.

The very nature of the business of mercantile agencies makes it impracticable to apply the old rule as to presumption of malice from publication or from gross mismanagement. The reports are gathered from all parts of the country, and in the ordinary course of business there is no such thing as malice in the transaction. No one claims it in this case. Much of the confusion in the books results from attempts to apply ancient rules of presumption, and we have no hesitation in saying that we think the safer and the better rule, in a situation like this, where neither actual malice nor bad faith is suggested, is the ordinary rule that, in the exercise of the privilege or the right, one should be held to the ordinary rule of due care. Mr. Bigelow has aptly said:

"It is, indeed, common to say that malice is presumed or implied upon proof of the publication; but that means nothing, and is only misleading, for the presumption or implication cannot be overturned by evidence of want of malice. Malice, touching the making a *prima facie* case, is only a name arbitrarily applied; simply a fiction." Bigelow, Torts (7th Ed.) § 819.

In a case where malice is not an active question, why should not the existence or nonexistence of privilege be made to depend upon the existence or nonexistence of due care, and upon a reasonable exercise of the right, rather than upon illogical presumptions one way or the other as to malice, and, in a case where malice becomes an actual element, let the question of malice be tried like any other question of fact.

In this case all questions of malice and bad faith, and all questions as to vindictive damages, were properly eliminated by the position of the parties and by the court, and we are now brought to the questions raised by assignments 14, 15, and 16, which relate to the allegation of damages, to the sufficiency of proofs, and to the instructions upon the question of damages; and we find no error here. We do not understand that, in this class of cases, the general allegation of injury to business and credit is treated as an allegation of special damages, in the sense of requiring specific allegations of loss of particular customers in order to recover for general diminution. The proof was general as to the immediate diminution of business and loss of credit. There was no evidence of loss of par-

ticular customers or contracts, and the instructions distinctly eliminated all such considerations, and confined the jury to such injury by way of diminution of business and loss of credit as they should find from the general facts and the whole situation was caused by the publication.

No question is raised as to the sufficiency of the proofs, provided such damages are recoverable under the allegation set forth, nor as to the sufficiency of the instructions as to the measure of damages. The general rule of compensation for injury was given to the jury with a limitation in general terms that, in order to recover for diminution, the injury suffered must have resulted directly from the wrongful publication. No point was taken that the instructions were not sufficiently full or explicit upon the line that the injury must have been the natural consequence of the injurious publication, or such as naturally and proximately resulted; so there are no questions of that kind for us to consider.

The general rule in libel and slander cases is aptly stated in *Hamilton v. Walters*, 4 U. C. Q. B. (O. S.) 24, 27, that the plaintiff "may state his case in either of two ways. He may aver a general diminution of business, in consequence of the slander, relying upon his ability to make that appear to a jury, or he may aver a particular instance of damage, knowing that he can give evidence of loss in a specific case." The plaintiff in the case at bar, in his general allegation and proofs, proceeded in the first way. That a plaintiff may do this is, of course, not the result of a rule which is general in its application to all actions of tort, but of one which is, perhaps, peculiar to those of libel and slander. The reason for the rule may be that evil report is insidious, that it travels and does damage in the dark, meandering in ways whereof it is difficult for man to find out, or because, as said in *Bergmann v. Jones*, 94 N. Y. 51, cases may arise where, from the nature of the business in which the party is engaged, it would be almost impossible to prove the loss of trade by witnesses who had dealt with the party bringing the suit.

Such rule, in this class of cases, is probably limited to cases where the words are actionable per se, where the words, in their natural and ordinary meaning, import a crime, or such as are clearly injurious to one's business, profession, or trade. We do not find any express decision in Massachusetts upon this question, but it would seem to be the English rule, the rule in New York, and the rule quite generally adopted in this country. See cases in 18 Am. & Eng. Enc. Law (2d Ed.) 1084 (4), note 1; cases in 5 Enc. Pl. & Prac. 768d; *Associated Press v. Heath*, 49 App. Div. 247, 253, 254, 63 N. Y. Supp. 96; *Bergmann v. Jones*, 94 N. Y. 51, 60, 61; *Hale, Dam.* 226, and cases in note 23; *Folk. Starkie, Sland. & Lib.* (3d. Ed.) 347, 348.

Under the general allegation in this case, the plaintiff introduced evidence tending to show general loss of business and general loss of credit immediately following the publication complained of. In such a situation, under proper instructions (and no exceptions were taken to the instructions to the jury on the question of damages in this case), we think the jury were warranted, in view of all the evidence and under the circumstances disclosed, in estimating the damages to

determine what part, if any, of the loss was attributable to the publication, and that it was not necessary for the plaintiff to connect the loss with the publication by direct or positive evidence of particular instances.

The result is that the judgment should be set aside, upon the ground that the question of defendant's liability should not have been ruled as a matter of law under the circumstances.

The judgment of the circuit court is reversed, the verdict is set aside, the case is remanded to that court for further proceedings, and the plaintiff in error recovers costs in this court.

LAMSON CONSOL. STORE SERVICE CO. V. BOWLAND.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 990.

1. LEASE—RESUMPTION OF POSSESSION BY LESSOR—EFFECT.

Resumption of possession by the lessor of the thing leased operates as a surrender of the lease, and puts an end to the lessee's liability for future installments of rent, unless otherwise plainly provided.

2. SAME—CONSTRUCTION OF LEASE.

A lease of a store service apparatus reserved a stipulated annual rent, payable quarterly in advance, provided that, if any installment remained unpaid for 90 days, the rental for the entire term should become at once due, and declared that the lessee should make no alterations in the mechanism, or remove it or use it elsewhere than in the store, and should neither sell, assign, nor underlet the same. The agreement concluded "that in case of a breach of any of the covenants or agreements to be observed on the part of the lessee, or attached by process of law, by proceedings in bankruptcy, or insolvency, or otherwise, the lessor may * * * enter * * * and take possession of said system, * * * and thereby determine all right and interest the said lessee may have in such system. * * * No removal of said system made by the lessor during the term * * * on account of any determination of the lessee's tenancy, or on account of any default by the lessee, shall constitute a surrender of the lease." On November 30th, the day before an installment of rent became due, a petition in involuntary bankruptcy was filed against the lessees, and on December 6th an adjudication of bankruptcy was entered. The installment falling due December 1st was not paid in full, and the lessors retook possession. *Held*, that if the resumption of possession was for any reason other than the termination of "the lessee's tenancy," or "some default by the lessee," the lease would be determined, and the lessee would not be liable for future installments of rent.

3. SAME.

The reference to a removal "on account of any determination of the lessee's tenancy" referred to another paragraph in the lease, providing for notice to the lessor "of any determination of the lessee's tenancy in said store, so that the lessor may have the right to remove said system if necessary."

4. SAME.

If the lessor resumed possession because of the adjudication of bankruptcy against the lessee, the lease was determined, and no right to exact future rents would remain.

5. SAME—RIGHT TO RESUME POSSESSION—DEFAULT IN RENT.

Default in the installment of rent due December 1st would not justify the lessor in resuming possession at all, where it did not appear that any formal demand for the rent was made on the day it was due.

Appeal from the District Court of the United States for the Southern District of Ohio.

This is an appeal from a judgment disallowing a claim filed by the appellant against the estate of a bankrupt firm doing business as George G. Moler & Son. From the facts certified by the referee to the court below, it appears: (1) That the appellant constructed a store service apparatus in the store of the bankrupts under an agreement by which the bankrupts agreed to use same for a term of five years, and to pay "an annual rental in equal quarter-yearly installments, in advance, upon the first days of March, June, September, and December in each and every year during the term of this lease, or any extension hereof," at the rate of \$20 for each station. There being nine stations constructed, the yearly rental was \$180, and the quarterly installment payable in advance was \$45. It was further provided that, "if any installment of said rental shall remain unpaid for sixty days after it becomes due, the entire rental to the end of the lease shall become at once due and payable." It was further provided that the lessee should not, without the consent of the lessor, make alterations, or remove the apparatus, or use elsewhere than in said store, and that the whole mechanism should continue the sole and exclusive property of the lessor, the lessee "not to sell, assign, or underlet" said system, and that at the end of the lease same should be delivered up to the lessor in good order and condition. The lessor, on its part, agreed, at its own expense, "to supply all parts necessary to keep said Cable cash-carrier system in proper repair, excepting, also, when there is rental on said system overdue and unpaid." The rental agreement concluded with the provision that the contract was subject to the condition "that in case of a breach of any of the covenants or agreements to be observed on the part of the lessee, or attached by process of law, by proceedings in bankruptcy, or insolvency, or otherwise, the lessor may, while such default or neglect continues, or at any time after such attaching or taking by process of law, without any notice or demand, enter upon the said store premises, or wherever said system may be, and take possession of said system, or any part thereof, and thereby determine all right and interest the said lessee may have in said system; and may remove the same, forcibly, if necessary, without let or hindrance from the lessee. In case of removal of the system, the lessor shall not be required to put the store of the lessee in its former condition. No removal of said system made by the lessor during the term of this lease, or any extension hereof, on account of any determination of the lessee's tenancy, or on account of any default by the lessee, shall constitute a surrender of this lease." (2) On November 30, 1900, the day before an installment of rent fell due, a petition in involuntary bankruptcy was filed against the lessees; and on December 6, 1900, an adjudication of bankruptcy was entered. All installments of rent accruing prior to December 1, 1900, had been duly paid, and no default existed at the date of the filing of the petition in bankruptcy, on November 30, 1900. The installment which became due under the lease on December 1, 1900, was not paid, except in part, as hereinafter shown. The appellant filed a claim for the entire remaining term of the lease, claiming that the failure to pay the installment accruing December 1, 1900, precipitated the maturity of the entire rental to the end of the lease, in 1905. The claim filed is therefore for \$773.50, less a credit of \$12 for rent collected by the lessor for a part of the month of December. The referee certified that the lessors had taken possession of the store service apparatus, and had received rent from some one other than the lessees from December 1, 1900, to December 24, 1900, and had credited same on the account rendered. The referee disallowed the claim upon the ground that it was not a fixed liability, absolutely owing, at the time of the filing of the petition against the bankrupt. The district judge affirmed this judgment, without an opinion.

Lincoln Fritter, for appellant.
Charles I. Stauffer, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and WANTY, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

What are the rights of the lessor of this store service apparatus in respect to rents which had not accrued when the petition in bankruptcy was filed against the lessee company? The lessors invoke the third clause of the lease contract, which provides that, "if any installment of said rental shall remain unpaid for sixty days after it becomes due, the entire rental to the end of the lease shall become at once due and payable." It is entirely competent to contract that the consequence of a default in the payment of an installment of interest for the use of money, or of rent for the use of property, shall be the precipitancy of the maturity of the principal of the money loaned, or of future installments for the rental of the property in respect to which default has been made. Rent is the compensation for the use and enjoyment of the thing rented, and is ordinarily demandable whether the tenant actually enjoy the use and possession of the subject of the rent or not, unless the failure is due to some fault of the letter. But in this case the letter demands that the lessee shall continue to pay rent, although it has repossessed itself of the thing for the enjoyment of which the rent is to be paid. The resumption of possession by a lessor operates as a surrender of the lease, and puts an end to the liability of the lessee for future rents, unless otherwise provided. A covenant in a lease authorizing a landlord, on default in rent, to take possession, and relet, if possible, for the benefit of the tenant, and that in such case the tenant shall remain liable for the deficiency, or for the whole rent if a reletting is impossible, has been held valid. *Hall v. Gould*, 13 N. Y. 127. In case of a covenant such as that just mentioned, the lessor's possession would be as agent for the lessee; and the liability of the lessee would be contingent upon a deficiency, and clearly not such a fixed and absolute liability as would be provable in bankruptcy. In the lease here under consideration, the lessor has reserved the right to resume possession in quite a number of contingencies, the effect of which the contract declares shall be to "determine all right and interest the said lessee may have in said system." Without more, it cannot be that the lessee shall be liable for the future rents, when the effect of the act of the lessor has been to determine all of his right and interest in the subject of the lease. Forfeitures are never favored, and when it is claimed that the lessor of property may resume possession of the subject-matter of the lease, and continue to hold the lessee liable for future rents, although deprived of the use and enjoyment of the thing leased, the terms of the bond must be exceedingly plain. Liability under such circumstances for future rents would be in the nature of a penalty, and the covenant by which the lessor may have both the use of the thing rented, and the compensation which the lessee was to pay for its use, must be so specific as that no other reasonable interpretation can be placed upon it. *Hall v. Gould*, 13 N. Y. 127. We have heretofore set out the clause of the lease upon which the lessor's right to resume possession and exact future rents, also, must rest. The contention is that under the provision quoted the lessor may resume possession of the leased property upon the happening

of any one of the contingencies mentioned, without the surrender of the lease as a consequence. The catalogue of contingencies authorizing a resumption of possession and a removal of the leased mechanism is followed by a declaration as to the effect of the lessor's act, in these words: "And thereby determine all right and interest the said lessee may have in said system." The necessary consequence of a determination of the lessee's right and interest at the election of the landlord must be to put an end to the lessee's liability for future rents, in the absence of some specific agreement otherwise. That this was the intention of the parties seems very plain from the last sentence of the clause, which provides that "no removal of said system made by the lessor * * * on account of any determination of the lessee's tenancy, or on account of any default by the lessee, shall constitute a surrender of this lease." It is plain, then, that if the lessor has resumed possession and removed the system for any reason other than the termination of "the lessee's tenancy," or some "default by the lessee," the effect must be the usual and legal consequence of a resumption of possession by a lessor, the determination of the lease. The reference to a removal "on account of any determination of the lessee's tenancy" refers to the seventh paragraph of the lease, providing for notice to the lessor "of any determination of the lessee's tenancy in said store, so that the lessor may have the right to remove said system, if necessary, without hindrance on the part of the landlord." The only other case, then, in which a removal by the lessor of the system is not to constitute a surrender of the lease, is when the possession has been recovered in consequence of some "default by the lessee." On what authority has the lessor taken possession of the leased store service? That the lessor did take possession about the date of the adjudication in bankruptcy is reported by the referee. But on what ground is this justified? Unless the appellant can show that this conceded possession was taken upon some ground which kept the lease alive, the appeal must fail.

It was stated at the bar, and in the printed brief of counsel, that "the Lamson Consolidated Store Service Company, in accordance with its custom in case of bankruptcy, removed its system from the store of the bankrupt, as a protection to its own business, and to prevent such system from falling into the hands of persons unauthorized to use the same." An adjudication of bankruptcy against the lessee would seem to justify the lessor in recovering possession. But the result would be the surrender of the lease. Thereafter no right to exact future rents would remain. If this appellant has the right to collect future rents after recovering the possession and enjoyment of the leased property, it must make out a clear case. As we have seen, counsel have attempted to justify the possession upon a ground which leaves no foot to stand upon, when asserting a claim for future rents. But can the dispossession of the lessee be justified by the default in payment of the installment of rent due December 1, 1900? We think not, and for more than one reason. But it is sufficient to say that it does not appear that any formal demand was made for the rent on the pay day. Before a re-entry can be made

for default in rent, demand must be made for the precise dues at a convenient time before sunset on the day when the rent was due. *Connor v. Bradley*, 1 How. 217, 11 L. Ed. 105; *Prout v. Roby*, 15 Wall. 471, 476, 21 L. Ed. 58; *Henderson v. Coal Co.*, 140 U. S. 25, 33, 11 Sup. Ct. 691, 35 L. Ed. 332; *Parks v. Hays*, 92 Tenn. 161, 22 S. W. 3; *Smith v. Whitbeck*, 13 Ohio St. 471; 18 Am. & Eng. Enc. Law, p. 375. Of course, it was competent to provide for a forfeiture without demand, but the contract in question contains no stipulation to that effect. Inasmuch as the agreement does not provide in express terms that the liability of the lessee should continue after the re-entry of the lessor, we must conclude that no liability for future rents was intended. There was no liability for past rents, for the lessor has either enjoyed the rents, or the use of the system, since December 1, 1900.

The judgment of the court below is accordingly affirmed.

SWIFT V. BANK OF WASHINGTON.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1902.)

No. 1,578.

1. CHATTEL MORTGAGE—ASSIGNMENT OF NOTE—RIGHTS OF ASSIGNEE—PAYMENT TO ORIGINAL MORTGAGEE—EFFECT.

Assignment of a note before maturity to a bona fide holder carried with it a chattel mortgage executed as security therefor, and the assignee alone could thereafter discharge the mortgage lien; payment of the indebtedness to the original mortgagee by a purchaser of the mortgaged property being insufficient, though the latter had no notice of the assignment.

2. SAME—CONSTRUCTION OF MORTGAGE.

A provision in a chattel mortgage that when the mortgaged property was ready for market it would be consigned to the mortgagee, and the proceeds applied on the mortgage debt, did not authorize payment of the indebtedness to the mortgagee after the note had been assigned by him to some one else.

3. SAME.

A provision in the mortgage that it was intended as security for the mortgagee as long as he was "in any manner interested in the payment of the indebtedness, * * * whether as payee, indorser, or guarantor, or otherwise, as well as for the security of the assignee or indorsee, and such transfer or assignment shall not carry with it the sole right to enforce the mortgage, but the same shall be vested severally in said second party [mortgagee] concurrently with said assignee or transferee," did not authorize payment to the mortgagee after the note had been assigned to some one else.

4. SAME—ANSWER—PLEADING NONJOINDER OF PARTIES—SUFFICIENCY.

A clause in the answer in replevin by the assignee of the note to recover the mortgaged property, averring that, by reason of the stipulation last quoted, the mortgagor had the right to pay and the mortgagee a right to receive payment of the mortgaged debt and discharge the mortgage lien, was insufficient as a plea in abatement for nonjoinder of proper parties.

In Error to the Circuit Court of the United States for the District of Kansas.

On the 31st day of July, 1899, F. M. Overlees executed and delivered to W. B. McAllister & Co. his negotiable promissory note for \$2,264.53, payable at their office at Kansas City Stock Yards, Kansas City, Kan., 10 months after date. For a valuable consideration McAllister & Co. indorsed and delivered the note before its maturity to the Bank of Washington, the defendant in error and plaintiff below. Of even date with the note, the maker thereof executed a chattel mortgage on certain cattle to secure its payment. In the month of November, 1899, C. W. Swift, Jr., the plaintiff in error and defendant below, without notice that the note the mortgage was given to secure had been assigned to the plaintiff, purchased the mortgaged cattle from Overlees, the mortgagor, and in December, 1899, paid or caused to be paid to McAllister & Co., the mortgagees, the full amount of the mortgage debt, and received from them a release and discharge of the mortgage. Afterwards the plaintiff, the Bank of Washington, brought this action of replevin against the defendant Swift to recover the cattle. The court sustained a demurrer to the defendant's answer, and, the defendant declining to plead further, final judgment was rendered for the plaintiff, and the defendant sued out this writ of error.

A. L. Redden (H. M. Beardsley, on the brief), for plaintiff in error.

J. D. McCue (L. C. Boyle, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first and principal question raised by the demurrer to the answer is: Who has the better right to the cattle, the plaintiff, which purchased the note secured by the mortgage for value before maturity, relying on the mortgage as security for its payment, or the defendant, who purchased the cattle from the mortgagor, and paid or caused to be paid to the mortgagees the amount of the mortgage debt, without notice of the previous sale and transfer to the plaintiff of the note the mortgage was given to secure? This is no longer a debatable question in the federal courts. In *Carpenter v. Longan*, 83 U. S. 271, 21 L. Ed. 313, the supreme court, after reviewing the cases and admitting "there is considerable discrepancy in the authorities on the question," declared the sound doctrine to be that the note and the mortgage given to secure it are inseparable; the former as essential, the latter as an incident. "An assignment of the note," says the supreme court, "carries the mortgage with it, while an assignment of the latter alone is a nullity. * * *" "The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. * * * All the authorities agree that the debt is the principal thing, and the mortgage an accessory." This case is cited and its doctrine affirmed in later cases in that court. In *Kenicott v. Supervisors*, 83 U. S. 452, 469, 21 L. Ed. 319, the court says "that where a note secured by a mortgage is transferred to a bona fide holder for value before maturity, and a bill is filed to foreclose the mortgage, no other or further defenses are allowed as against the mortgage than would be allowed were the action brought in a court of law upon the note." And this doctrine is reaffirmed in *Sawyer v. Prickett*, 86 U. S. 146, 166, 22 L. Ed. 105, where the court say: "We have recently decided that the rule of bona fide holding applies to a case where the proceeding is to foreclose a mortgage accompanying a note with the same force as when the suit is brought upon the

note itself." In *Banking Co. v. Montgomery*, 95 U. S. 16, 24 L. Ed. 346, the court said: "The deed of trust securing the payment of the notes was an incident, and accessory to them. The transfer of the notes carried with it to the transferees the benefit of the security." This is also the doctrine in many of the states. *Burhans v. Hutcherson*, 25 Kan. 625, 37 Am. Rep. 274; *Williams v. Keyes*, 90 Mich. 290, 51 N. W. 520, 30 Am. St. Rep. 438; *Lee v. Clark*, 89 Mo. 553, 558, 1 S. W. 142; *Cummings v. Hurd*, 49 Mo. App. 139, 147; *Gabbert v. Schwartz*, 69 Ind. 452; *Preston v. Case*, 42 Iowa, 551; *Logan v. Smith*, 62 Mo. 459; *Hagerman v. Sutton*, 91 Mo. 532, 4 S. W. 73; *Webb v. Hoselton*, 4 Neb. 318, 19 Am. Rep. 638; *Paige v. Chapman*, 58 N. H. 334; *Bamberger v. Geiser*, 24 Or. 207, 33 Pac. 609; *Weldon v. Tollman*, 15 C. C. A. 138, 67 Fed. 986.

It is the debt that imparts vitality to the lien. The payment of the debt extinguishes the lien. There can be no lien separate from the debt. The owner of the mortgage debt owns the lien as an incident to the ownership of the mortgage debt, and he alone can discharge the lien. This was the law, which the defendant was bound to know.

Moreover, the mortgage in terms declared that it "is intended for the security of any assignee or indorsee" of the mortgage debt. The answer alleges that the defendant purchased the cattle from Overlees, the mortgagor, in November, 1899, "and that at the request of said Overlees he agreed to remit the purchase price thereof to said W. B. McAllister & Co. to pay and discharge said mortgage, * * *" and that "in pursuance of the request of said Overlees, so as aforesaid made, there was transmitted and forwarded to said McAllister & Co., about the 8th day of December, 1899, an amount and sum of money sufficient to pay said mortgage, and for the purpose of payment of said mortgage, which said money was received by said McAllister & Co. for said purpose and as payment of said mortgage, and said McAllister & Co. in consideration of said payment, then and there duly executed a release and discharge of said mortgage. * * *" It thus appears from the defendant's answer that he knew when he purchased the cattle that the mortgage was of record, unsatisfied, and the mortgage debt unpaid. If the defendant desired to have the cattle released from the lien of the mortgage, he should have required the production and cancellation of the note the mortgage was given to secure. Instead of doing this, he remitted the money to pay the mortgage debt to McAllister & Co., in the confidence that they would apply it to that purpose. His confidence was misplaced. They had before that sold and transferred the note to the plaintiff. They did not apply the money to its payment, but instead applied it to their own use, and wrongfully executed a release of the mortgage, that is of no value against the plaintiff.

It is said that by the terms of the mortgage McAllister & Co. were made agents of the holder of the note, and were authorized to receive payment thereof. The mortgage contains no such provision, either in terms or by implication. On the contrary, the rights of the "holders" and "assignee or indorsee" of the mortgage indebtedness is expressly recognized, secured, and protected by numerous provisions of the mortgage. There is nowhere in the instrument any hint that after

the mortgagees have assigned and transferred the mortgage debt they can act as agents of the holder to receive payment.

The mortgage contains this provision:

"When marketed, the consent of the second party having been first obtained, said property shall be consigned to the second party at the Kansas City Stock Yards, Kansas City, Kansas, or Kansas City, Missouri, and the proceeds applied to the payment of the above-mentioned indebtedness, the surplus being paid to the first party."

This provision is commonly found in mortgages taken by commission merchants. It is designed to secure to them the commissions on the sale of the property. To this end, the mortgagor in this case covenanted that when the cattle were ready for market he would consign them to the mortgagees, and apply the proceeds of the sales to the payment of the mortgage indebtedness. There is no intimation here that the mortgage debt is to be paid to any one but the lawful holder thereof. Another and conclusive answer to the defendant's contention is that the cattle were not disposed of in the manner contemplated by this clause. They were not consigned to the mortgagees for sale, but purchased by the defendant of the mortgagor at his farm in the Indian Territory, in express violation of the terms of the mortgage. By its terms the mortgage was intended to secure, in addition to the note, any sums advanced and expended for the care and transportation of the cattle, commissions, and any indebtedness afterwards contracted. The mortgage contains this further provision:

"This mortgage is intended and shall be held and construed to be as and for the security of said second party, so long as said second party may be in any manner interested in the payment of the indebtedness hereby secured, or any part thereof, whether as payee, indorser, or guarantor or otherwise, as well as for the security of any assignee or indorsee of said notes or any of them, or of said indebtedness or any part thereof; and, in the absence of any express agreement between said second party and any assignee or transferee of any part of said indebtedness or notes, such transfer or assignment shall not carry with it the sole right to enforce this mortgage, but the same shall be vested severally in said second party concurrently with said assignee or transferee."

The defendant's answer, after quoting this provision of the mortgage, avers:

"That, by reason of such stipulation and condition, said Overlees had the right to pay, and said McAllister & Co. had the right to receive payment of, said mortgage, and to release and satisfy and discharge the same, and to release and discharge the lien of said mortgage made upon the cattle that were described therein."

There is nothing in this clause of the mortgage which lends any support to the contention that McAllister & Co. had authority to receive payment of the mortgage debt after they had sold and transferred it, and the answer does not allege that they had.

Nor can this clause of the answer be treated as an answer in the nature of a plea in abatement setting up the nonjoinder of proper parties. It complies with none of the requirements of such a plea. This stipulation contemplates that the mortgagor may become indebted to the mortgagees for advances for the purposes we have mentioned after the execution of the mortgage, and in that event, in the absence of any agreement to the contrary, the assignment of a

part of the mortgage indebtedness shall not carry with it the sole right to enforce the mortgage. Whether this would have been the rule independent of this stipulation we need not inquire. It is enough to say that the defendant is not prejudiced by it because it is not alleged in the answer, and it does not appear elsewhere in the record that there ever was, or is now, any debt secured by the mortgage other than the note held by the plaintiff. A thing neither alleged nor proved for any legal purpose is nonexistent.

As we construe the defendant's answer, it raised no material issue of fact to go to the jury, and set up no legal defense to the action.

The judgment of the circuit court is affirmed.

BOYD et al. v. LEMON & GALE CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 4, 1902.)

No. 1,025.

BANKRUPTCY—ACTS OF BANKRUPTCY—TRANSFER TO PREFER CREDITORS.

It is an act of bankruptcy for an insolvent debtor to sell all of his property to one not a creditor, and then to apply the proceeds to the full payment of a part of his creditors, leaving others unpaid; the transaction being a transfer of property with intent to prefer certain creditors, within the intent and meaning of Bankr. Act 1898, § 8, par. a, cl. 2.

Appeal from the District Court of the United States for the Northern District of Mississippi.

Boyd & Baker, the appellants, were adjudicated involuntary bankrupts by the United States district court for the Northern district of Mississippi, from which judgment they prosecute this appeal. The petition seeks to charge them with the first and second acts of bankruptcy, as laid down in paragraph a, § 3, Bankr. Act 1898. That part of the petition is in the following language: "The said Boyd & Baker committed an act of bankruptcy in that they did heretofore, to wit, on the 8th day of January, 1900, convey and transfer their entire property, consisting of a stock of goods, wares, and merchandise, with intent to hinder, delay, or defraud their creditors, or a part of them; and that they did on the 8th day of January, 1900, while insolvent, sell and convey their entire property, consisting of a stock of goods, wares, and merchandise, and applied the proceeds arising from said sale to the payment of their indebtedness to the Bank of Pontotoc and to the Bank of Tupelo, with intent to prefer said creditors over their other creditors, all of which was known to said Bank of Pontotoc and Bank of Tupelo." Boyd & Baker interposed a demurrer to "all that part of the petition in the following language, to wit: 'And that they did on the 8th day of January, 1900, while insolvent, sell and convey their entire property, consisting of a stock of goods, wares, and merchandise, and applied the proceeds arising from said sale to the payment of their indebtedness to the Bank of Pontotoc and to the Bank of Tupelo, with intent to prefer said creditors over their other creditors, all of which was known to said Bank of Pontotoc and Bank of Tupelo,'—(1) because it does not constitute an act of bankruptcy; (2) because the transfer of their property by said Boyd & Baker to a person not a creditor, and the payment of the proceeds to their creditors, is not an act of bankruptcy; (3) because under the law the payment in money by a debtor of one or more creditors, to the exclusion of others, is not an act of bankruptcy." This demurrer was overruled by the court, and leave given Boyd & Baker to answer the petition filed against them to have them declared involuntary bankrupts, and thereupon they filed their answer denying the material allegations of the petition. There was then a trial of the issues raised by the petition and answer, on an agreed

state of facts between the petitioning creditors and Boyd & Baker. The court adjudicated them bankrupts. The agreed facts are recited in the judgment of the court in the following language, to wit: "That on the 8th day of January, 1900, said Boyd & Baker, a firm of merchants composed of E. R. Boyd and W. E. Baker, doing business in Pontotoc, Miss., sold their entire stock of goods, wares, and merchandise for cash to Knox Bros., and took the proceeds of such sale, and applied a sufficiency of the same to the debts due by them to the Bank of Tupelo and the Bank of Pontotoc and Clark, Hood & Co., and left petitioners unpaid, not having paid them anything; that at the time of filing the petition in this cause, and at the time of said sale, and now, they were and are insolvent." Appellants' assignment of errors is as follows: "First. The court erred in overruling appellants' demurrer to appellees' petition to have appellants declared involuntary bankrupts. Second. The court erred in adjudging appellants involuntary bankrupts, because the sale by them of their goods, wares, and merchandise, while insolvent, to a party not a creditor, for cash, and the application of a part of such proceeds of sale to the payment of a part of their creditors, and leaving others unpaid, was not, under the law, an act of bankruptcy."

W. D. Anderson, for appellants.

J. D. Fontaine, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The same question was raised by the demurrer as is involved on the merits, and it is this: Whether it is an act of bankruptcy, under the bankruptcy act of 1898, for an insolvent debtor to sell all of his property to one not a debtor, for cash, and then apply the proceeds to the full payment of part of his creditors to the exclusion of others. Counsel for appellants contends that it is not an act of bankruptcy for an insolvent debtor to sell all of his property for cash, nor is it an act of bankruptcy for an insolvent debtor to fully pay off some of his creditors in money, and leave the balance of his creditors unpaid; and he apparently concedes that under the present bankruptcy law it is an act of bankruptcy for an insolvent debtor to transfer his property to some of his creditors in full payment, and leave others unpaid, but he denies that money is property, within the meaning of the bankrupt law. He argues very plausibly upon his separate propositions, supporting the same by authorities, but he does not answer the proposition that the sale of property for money, and then the payment of the money to creditors, produces the same result as if the property is transferred directly to the creditors; and we do not think that the insolvents in this case, in taking two steps to avoid the effect of the bankrupt act, advanced any further, or secured any other result, than if they had taken the one full step.

But it is not necessary to elaborate our views in this direction; for we are clear that as the agreed statement of facts shows that Boyd & Baker, while insolvent, took the money proceeds of the sale of all their property, and applied the same to the full payment of the debts due by them to several of their creditors, leaving others unpaid, it is sufficiently proved that they thereby made a transfer of their property while insolvent to one or more of their creditors with intent to prefer such creditors over their other creditors, within the intent and meaning of Bankr. Law, § 3, par. a, cl. 2.

There can be no doubt the insolvents transferred money to some of their creditors with intent to prefer them, and money is property, as the term "property" is used in defining the word "transfer," in clause 25, § 1, Bankr. Act. And this has been distinctly held by the supreme court in *Pirie v. Trust Co.*, 182 U. S. 438, 443, 21 Sup. Ct. 906, 45 L. Ed. 1171, in which case the court say:

"It will be observed that payments in money are not expressly mentioned. Transfers of property are, and one of the contentions of appellants is that by 'transfers of property' payments in money are not intended. The contention is easily disposed of. It is answered by the definitions contained in section 1. It is there provided that 'transfer' shall include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolute or conditional, as a payment, pledge, mortgage, gift, or security.' It seems necessarily to mean that a transfer of property includes the giving or conveying anything of value,—anything which has debt-paying or debt-securing power. We are not unaware that a distinction between money and other property is sometimes made, but it would be anomalous in the extreme that in a statute which is concerned with the obligations of debtors and the prevention of preferences to creditors the readiest and most potent instrumentality to give a preference should have been omitted. Money is certainly property, whether we regard any of its forms or any of its theories. It may be composed of a precious metal, and hence valuable of itself, gaining little or no addition of value from the attributes which give it its ready exchangeability and currency. And its other forms are immediately convertible into the same precious metal, and even without such conversion have at times even greater commercial efficacy than it. It would be very strange, indeed, if such forms of property, with all their sanctions and powers, should be excluded from the statute, and the representatives of private debts which we denominate by the general term 'securities' should be included. We certainly cannot so declare upon one meaning of the word 'transfer.' If the word itself permitted such declaration,—which we do not admit,—the definition in the statute forbids it. 'Transfer' is defined to be not only the sale of property, but 'every other mode of disposing or parting with property.' All technicalities and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished,—a preference enabling a creditor to obtain a greater percentage of his debt than any other creditors of the same class.' But it is said 'that congress in passing the law had in mind the distinction between the payments of money and the transferring of property, otherwise they indulged in tautology,' in subdivision d, § 60. By this it is provided: 'If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty, for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.' That all the words of a statute should, if possible, be given effect we concede, but tautology sometimes occurs. Is there not an example in subdivision 'e' of section 67 (which, by the way, and notwithstanding, is relied on by the appellants)? It provides that 'all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt,' in fraud of creditors, shall be null and void as to them. Manifest tautology, but certainly not used to detract from the definition of 'transfer' in section 1, or to exclude application of that section in proper cases. Conveyances, assignments, and incumbrances of property are but modes of its absolute or conditional disposition (transfer), as payment of money is a mode of its disposition (transfer), and there was a particular expression of each mode on account of the primary purpose to be secured in

each case,—the purpose being in 60d to control payments to attorneys; in 67e the purpose being to prohibit the disposition of property by the debtor to persons other than creditors in fraud of the act."

And so we hold that when the insolvents in this case paid some of their creditors in full they committed an act of bankruptcy.

The judgment of the district court is affirmed.

In re HOLDEN et ux.

(Circuit Court of Appeals, Ninth Circuit. January 16, 1902.)

No. 729.

1. BANKRUPTCY—EXEMPTIONS—LIFE INSURANCE POLICIES.

The provision of Bankr. Act 1898, § 6, giving the bankrupt the benefit of the exemptions prescribed by the state laws, does not pervade the entire act, and as to life insurance is controlled by the proviso to section 70a, cl. 5, under which title to all policies having a cash surrender value payable to him, his estate or personal representative, vests in his trustees for the benefit of his creditors.

2. SAME.—PROPERTY PASSING TO TRUSTEE—INTEREST IN LIFE INSURANCE POLICY.

Where a husband and wife were each adjudged bankrupt, policies of insurance on the life of the husband, having a cash surrender value and payable to the wife if she survived him, and to his personal representatives if he survived her, passed to the trustees under Bankr. Act 1898, § 70a, cl. 5, as assets of their respective estates, each having an interest therein which amounted to an insurance policy within the meaning of such provision, the wife's being payable to herself, and assignable by her under the laws of the state, which made it her separate property, and the remaining contingent interest being payable to the husband's estate.

Petition for Revision of Proceedings of the District Court of the United States for the Northern Division of the District of Washington, in Bankruptcy.

Bausman & Kelleher, for appellant.

J. A. Stratton and Carroll & Carroll, for appellees D. N. & Lizzie Holden.

Before McKENNA, Circuit Justice, and GILBERT and ROSS, Circuit Judges.

McKENNA, Circuit Justice. This is a petition filed under section 24b of the bankruptcy law of 1898 to review an order of the district court for the district of Washington, Northern division, made and entered in the above-entitled cause. The said D. N. Holden and Lizzie Holden were separately proceeded against in bankruptcy by their creditors. The causes were consolidated by consent, and "one and the same answer" filed to the petitions. Subsequently it was adjudged that the "respondents and each of them are bankrupts within the true intent and meaning of the acts of congress relating to bankruptcy." The respondents then prayed exemption from the claims of creditors of two life insurance policies. The claim was disallowed by the referee, who made due report of his action to the court. The re-

spondents filed exceptions to the report, and, after hearing, the court, by an order duly entered on the 16th of July, 1901, vacated the report, and adjudged the policies to be exempt. To review this order of the district court the present petition was filed by J. A. Stratton, the duly appointed trustee of the estates of said bankrupts. No answer has been filed to the petition, and the question is whether upon the facts stated the order in the district court should be revised.

The policies in question were issued on the 15th of June, 1894, by the Northwestern Life Insurance Company of Milwaukee, Wis., and were respectively numbered 206,383 and 303,921, and were, respectively, for the amounts of \$5,000 and \$2,000. Daniel N. Holden was the insured in both, and Lizzie Holden was the beneficiary in both, with the provision, however, that if she should not survive him payment should be made to his executors, administrators, and assigns. It was provided in the policy No. 206,383 that it is "issued on the semitontine plan, and its tontine dividend period is twenty years," and the following is indorsed on the policy:

"Upon surrender by the insured and beneficiary of a policy of \$10,000. of like number and kind, dated May 2, 1890, this policy for \$5,000 is issued at their request in lieu of one-half of the former policy. In all other respects this policy is made and accepted pursuant and subject to the application upon which the original policy was issued. A full-paid life non-participating policy, No. 303,921, for \$2,000, is issued in consideration of the surrender of one-half of the original policy."

It is alleged in the petition that the policies have a present cash surrender value combined of about \$2,200, and it was stated on the argument that the creditors of each of the bankrupts are the same.

It is provided by the laws of the state of Washington "that the proceeds or avails of all life insurance shall be exempt from all liability for any debt." Laws 1895, p. 336. By section 70a of the bankrupt law of 1898 it is provided that:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment or qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests and patents, patent rights, copy rights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Section 6 of the bankrupt law is as follows:

"Exemptions of Bankrupts.—(a) This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force

at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

The effect and extent of section 6 was considered by this court in *Re Scheld*, 44 C. C. A. 233, 104 Fed. 870, 52 L. R. A. 188, and it was said that the purpose of the section did not pervade the whole act, but was controlled by section 70a; and that under the latter section policies of insurance payable to the bankrupt himself, his estate or personal representatives, passed to the trustee of the estate. But we also said:

"It will be seen that the clause of section 70, above quoted, does not include policies of insurance payable to the wife, children, or other kin of the bankrupt, but is limited to policies the proceeds of which are payable to the bankrupt himself, his estate or personal representatives. The enactment does not deprive the family of a debtor of the protection which he may have secured to them in taking out policies for their benefit payable at his death, but it does prevent debtors from availing themselves of the opportunity of making investments for their own benefit in the form of endowment policies, or policies payable to themselves, and holding the same, while seeking a discharge from their debts through the bankruptcy act."

What is the character of the policies in the case at bar? Are they covered by the proviso of section 70? It will be observed that the policies were not payable to either Holden or his wife absolutely, but to her only if she survived him, and to his personal representatives if he survived her. Subject to such contingent interest in him, the policies and the money to become due under them belong to her, and it is beyond his power to transfer them to any other person or to surrender them. In *re Heilbron's Estate*, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602, citing *Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370, and other cases. Under the laws of Washington her interest in the policies became her separate property, and was assignable by her. 2 May, Ins. 399q, and cases cited. Each, therefore, has an interest in the policies, and each must be held to have an insurance policy which has a cash surrender value payable to him or to her, his or her estate or personal estate or personal representatives, and subject, therefore, to the provisions of section 70; in other words, passed to their respective trustees as assets of their respective estates. It may be that neither could surrender the policies without the consent of the other, but such right of surrender passed with the policies to their respective trustees. In *Steele v. Buel*, 44 C. C. A. 287, 104 Fed. 968, the circuit court of appeals of the Eighth circuit has decided that the rule of exemption of section 6 pervades the whole act, and is to be read into every other section and provision of the act. The difference of opinion between that learned court and this court demonstrates the ambiguity of the bankrupt act, and, while not insensible to the necessity of harmony in the decisions of the courts of appeal, we are not disposed to depart from the ruling in *Re Scheld*. There is a way open to respondents for a further review of the questions involved.

It follows that the order of the district court should be revised in accordance with this opinion; and it is so ordered.

PYNCHON v. DE BLOIS et al.

(Circuit Court, D. Connecticut. March 12, 1902.)

PATENTS—INFRINGEMENT—TROUSERS HANGER.

The Pynchon patent, No. 662,656, for a trousers hanger, claims 1 and 5, construed; and held not infringed.

In Equity. Suit for infringement of letters patent No. 662,656, granted to L. F. L. Pynchon November 27, 1900, for a trousers hanger. On final hearing.

Charles L. Burdett, for complainant.

Gross, Hyde & Shipman, for defendants.

TOWNSEND, District Judge. Final hearing on bill and answer raising questions of validity and infringement of complainant's patent, No. 662,656, granted him November 27, 1900, for a trousers hanger. The complainant, Pynchon, has made a cheap, strong, light, simple, and efficient trousers hanger, and patented it as his invention. It found a ready market; some seventy or eighty thousand having been sold in the space of about fifteen months, without special advertising. One of the defendants (Lester), taking advantage of his acquaintance with Pynchon, learned from him all the details of his business, got a sample for the ostensible purpose of acting as Pynchon's selling agent, and shortly after appeared as one of the defendants, selling the hanger alleged to infringe, known as the "Delespo Hanger," and which is manufactured under a design patent granted July 31, 1900, to H. R. Williams. In general appearance and function, the two devices very nearly resemble each other. The first and fifth claims, only, are in issue, and are as follows:

"(1) In combination, a supporting bracket member, a frame-like member composed of branches extending back and forth, providing jaws opening alternately at opposite ends thereof; said frame-like member being supported at one end by the bracket member, whereby, beginning at the bracket member, each successive branch of the frame-like member is located farther from the support than the preceding branch."

"(5) As an improved article of manufacture, a trousers hanger, comprising a bracket having a socket and a clamp, the latter formed of a rod of spring metal, one end of which is bent at an angle to the plane of the clamp, and fits said socket, and the rest of the rod being bent back and forth to form substantially parallel jaws opening on opposite ends of the clamp."

The defense of lack of invention is chiefly supported by patent No. 242,225, granted to Sampson, May 31, 1881, for a rein holder; patent No. 399,552, granted to Patton, March 12, 1889, for an appliance for hanging and exhibiting boot and shoe laces; and patent No. 617,130, granted to Skinner, January 3, 1899, for a trousers hanger. As the Skinner patent alone is a sufficient defense, the others will not be discussed. The Skinner trousers hanger consists of a continuous piece of wire bent backward and forward in a horizontal plane like the trousers hanger in suit, except that the wires contiguous to each other, instead of being parallel, are so bent as to come together at the ends, and thus form a series of resilient clamps to hold the trouser ends in place. But the patentee says:

"The remainder of said spaces, which tapers to said openings, is yielding to a degree necessary to allow the said sides to become parallel when the said trousers bottoms are between them," etc.

Thus, when the Skinner hanger is in use, the location and relation of the branches or wires are identical with those of the hanger in suit; or, if the wire of which the Skinner branches are composed were of inferior steel, the branches, after use, would become parallel. The hook by which the hanger is suspended is shown as placed in the center of the device, while in the patent in suit it is at one end. But as to his hook, Skinner says:

"It is evident I may place said hook upon one of the outmost sides, 1 or 5, for that purpose [to suspend it], in which case the device, when so suspended, hangs vertically."

The construction shown by this suggested change in the location of the hook, or by cutting off one-half of the hanger shown in the drawing, is the defendants' construction, except that, in order to substitute horizontal suspension for vertical suspension, the hook is bent at right angles to the branches of the hanging arms. In these circumstances, the complainant is forced to rely on the contention that Pynchon's inventive idea was that of a supporting bracket member, having a socket and clamp, all being integral. But it is admitted that the original application described the hanger "as composed of two members, a 'bracket' * * * and 'a clamp or holder,'" and the file wrapper shows this idea of separableness maintained during the proceedings in the patent office until the amendments of August 18, 1900, after defendants had begun to put their hanger on the market. It is true that the fifth claim, now in suit, was one of the original claims, and it may be that its language, "a trousers hanger comprising a bracket having a socket and clamp, the latter formed of a rod of spring metal, one end of which is bent at an angle to the plane of the clamp, and fits said socket," etc., does not necessarily negative separableness; but the drawing shows and the specifications forcibly suggest that the clamp member is distinct from and fitted into the bracket member. In the defendants' hanger the hook and clamp are made of a single piece of wire. The plate by means of which the screw holds the hook is not a bracket. This construction, therefore, does not infringe. The same result could be obtained by a hook with a smaller eye, and a screw with a larger head. These conclusions dispense with the necessity of considering the other alleged anticipations,—the further limitations shown by the file wrapper, or the contention of lack of novelty in the bracket member.

Let the bill be dismissed.

HUTTER v. BROOME.

(Circuit Court, D. New Jersey. March 4, 1902.)

1. PATENTS—INFRINGEMENT—BOTTLE STOPPERS.

The Hutter patent, No. 491,113, for a bottle stopper, construed, and *held* not anticipated, and to disclose patentable invention. Also *held* infringed.

2. SAME—DESIGNS.

In considering the question of infringement of a design patent, the article of the patent and that alleged to infringe must be viewed as wholes, and infringement may be found if they are so similar that one would readily be mistaken for the other by an ordinarily intelligent observer, notwithstanding real, but minute, differences which may be discovered by expert examiners.

3. SAME—DESIGN FOR BOTTLE STOPPER.

The Hutter design patent, No. 25,435, for a design for a bottle stopper *held* valid and infringed.

In Equity. Suit for the conjoint infringement of letters patent No. 491,113 for a bottle stopper, issued to Karl Hutter February 7, 1893, and design patent No. 25,435 for a design for a bottle stopper issued to the same patentee April 28, 1896. On final hearing.

Arthur v. Briesen and Hans v. Briesen, for complainant.
George H. Fletcher, for defendant.

GRAY, Circuit Judge. This is a suit in the usual form for an injunction and accounting, brought by Karl Hutter against Lewis H. Broome, doing business under the name and style of the Victor Bottle Stopper Company, for the conjoint infringement of letters patent No. 491,113, of February 7, 1893, and of design patent No. 25,435, of April 28, 1896. Both of these patents relate to bottle stoppers, and both were issued to Karl Hutter, the complainant. The defenses are a denial of infringement, an alleged want of novelty or invention, and of consequent patentability in the mechanical patent, and of want of similarity between the design described in the design patent and that of defendant's structure.

The object of the invention, as stated in the specifications of the letters patent No. 491,113, is as follows:

"The chief object of the invention is to provide a bottle stopper with a plug so constructed that the bent ends of the ball can be passed through it, and also to provide such a plug with means for hermetically sealing the bottle. The invention consists more especially in providing the tapering plug with a substantially triangular or heart-shaped slot, through which the inwardly bent ends of the ball wire can be inserted."

The claim of the patent is single, and is as follows:

"What I claim as my invention is the combination of the bottle stopper plug, e, having substantially heart-shaped slot, l, the apex of said slot being lowermost and centered in said plug, e, with the ball wire, d, having bent ends, d², and means substantially as described for connecting said ball wire to the bottle, the slot, l, being wider than the bend, d², of the ball wire is long, as and for the purposes described."

The state of the art at the time of the issue of this patent is sufficiently shown by the references made by the patent office in denying the first application by the patentee. The references are to White-

man, No. 284,523, September 4, 1883, and an English patent to Michel, No. 1,601 of 1878, for stopper fasteners and swing stoppers and yoke. In the patent in suit the bail wire, the eccentric lever, and the general mechanism for producing and maintaining pressure upon the stopper, together with the rubber band interposed between the shoulder of the stopper and the top of the mouth of the bottle, elements of the combination, are old; but the heart-shaped slot or hole in the top of the stopper, with the apex of the heart pointing downwards, and the top thereof wide enough to allow the bent end of the bails to readily pass through, are claimed to be new, and, in combination with the other elements described, to produce a new and patentable result. We have examined the other patents referred to by defendant as anticipations, but do not find that, in the restricted form in which the patent was finally granted by the commissioner, they can be relied upon as such. Prior to the patent in suit, bail wires have been passed over the top of flat metal stoppers, as in the Whiteman patent and the Quillfeldt reissue patent. They were unsatisfactory, the metal corroding and disintegrating the rubber, and in other respects they were insufficient for the purpose of a secure and durable stopper. There had also been other devices for porcelain stoppers or glass stoppers with slots through the top of the stoppers, sufficient to hold the wire, but not to allow the bent end to pass through. One patented device allowed the bent end to pass through a horizontal slot, and then down another vertical slot, at right angles to it. The thing desired in the art seems to have been what has now been produced under the patent in suit; that is, a stopper of porcelain, or other like material, with a sufficiently large but shapely head, containing an aperture large enough to allow the passing through readily of the bent end of the bail piece, in combination with mechanism for producing and maintaining pressure, and, with the adjustable rubber bands, to render air-tight the contact between the top of the mouth of the bottle and the stopper. The peculiar device of the patent in suit is not only for an opening or slot in the head of the stopper large enough to admit readily the bent end of the bail piece, but also that it should be triangular, or heart-shaped, with the apex pointing downwards towards the mouth of the bottle, so that the bail piece readily and necessarily centers itself through the stopper, thus insuring equally applied pressure to the stopper when the lever is thrown down. It is the enlarged aperture and this peculiar shape together, both claimed in the patent in suit, which give the device its peculiar value and advantage over anything theretofore existing in the art. Incidental advantages claimed by the patentee, though not specified in the claim, are ease of cleaning and keeping clean the stopper and aperture, and increased facility of adjustment, when the stopper is hanging loose on the bail piece, for the purpose of entering it into the mouth of the bottle. The great advantage, however, of the device of the patent in suit is that, besides furnishing an easily adjustable stopper, the capacity of the aperture to receive the bent end of the bail piece preserves the bail mechanism for use again should the stopper be broken. That these results should have been accomplished by so simple a change in the prior

art, suggests, it must be admitted, a possible want of invention. As said by the commissioner of patents, in rejecting the first application, the mere enlargement of the aperture in the top of the stopper did not involve invention. It was merely a matter of degree, more or less, that would have suggested itself to ordinary mechanical skill. The claim, however, as finally granted, is not for the mere enlargement of the hole, through which the bail piece passed, but for an enlarged aperture of triangular or heart-shaped character. The advantages of this device, as appears from the testimony, are that it will permit the removal of an old or broken plug from the bail wire, and the substitution of a new plug; that the bail wire will automatically center itself in the plug, and apply its pressure at the proper place, when the lever is turned down, with the other incidental advantages spoken of above.

It is easy to belittle the invention involved in a simple device, such as this, but the fact that it had not occurred to any one before to make such a combination for the attainment of so many useful results appeals strongly in favor of the conclusion that there is here a true invention. The presumption, too, in favor of the action of the patent office in issuing the letters after protracted consideration, is, as always, an important factor in determining the presence of invention in a given patented device. The testimony in this case does not, in my opinion, overcome this presumption, and the patent, therefore, must be pronounced valid.

No serious contention is made by the defendant as to the validity of the design patent No. 25,435, of April 23, 1896. Infringement, however, is denied, on the ground of certain differences discovered between the form of complainant's and defendant's stoppers. The existence of such differences depends principally upon the testimony of defendant's experts. By that testimony it is also pointed out that the button at the bottom of the stopper actually made by complainant differs from the drawing in his design patent, in that the former extends to the outer limit of the bead, D, while the latter is slightly offset from the edges of said bead. A careful inspection, however, of the design patent and of the exhibits of the defendant's stopper convinces me that these differences, whether between the drawing of the design in the patent and complainant's actual structure or between either of these and defendant's structure, are too minute and unimportant to overcome the charge of infringement. The design of the patent and the alleged imitation must be viewed as wholes, and judged by the impression made upon the eye of an intelligent observer not unaccustomed to observe the same. If to such an eye—for instance, that of a dealer in the articles in question, or one interested commercially in their use—the appearance of the two articles is so similar as that one could readily be mistaken for the other, ground for alleging infringement may be said to exist. And this is so notwithstanding that real, but minute, differences of outline, not affecting the general contour and form as apparent to the ordinary observer, may have been discovered by expert examiners. The testimony of several witnesses, accustomed to handle such goods, establishes such substantial similarity between the design of

complainant's stopper, as protected by his patent, and that of defendant's stopper, as to justify and support the charge of infringement.

The two inventions which are the subject-matter severally of the patents in suit being, in my opinion, capable of conjoint use in one and the same bottle stopper, and it appearing from the testimony that the defendant actually conjointly was using the said two inventions in single bottle stoppers made, used, and sold by him, let a decree be drawn in conformity with this opinion and the prayer of the said bill.

AMERICAN SURETY CO. v. WORCESTER CYCLE MFG. CO. et al

(Circuit Court, D. Connecticut. March 17, 1902.)

MORTGAGE—CONTEST BETWEEN RECEIVER AND ATTACHING CREDITORS—APPORTIONMENT OF EXPENSES.

Where attached property was claimed by a receiver appointed in a suit to foreclose a mortgage, and a sale under the attachments thereby prevented, on its subsequent sale under a stipulation that one-half the gross proceeds should be held subject to the rights of the attaching creditors, and its being adjudged to them, the term "gross proceeds" may properly be construed to mean the proceeds after deducting the necessary expenses of sale; but such creditors should not be charged with any part of taxes, insurance, and other expenses which would not have been incurred but for the claim of the receiver.

In Equity. On motion to approve special master's account.
See 100 Fed. 40.

Watrous & Day, for complainant.

Seymour C. Loomis, for trustee.

Breed & Abbott, for defendant.

Butler, Notman, Joline & Mynderse, for Central Trust Co. of New York.

C. Walter Artz, for F. S. Smith, Receiver Worcester Cycle Mfg. Co.

TOWNSEND, District Judge. The property in the possession of the receivers was sold by a special master under an order of court. As to a part of the property sold, known as "First Parcel," it was impossible to tell how much of it was acquired by the company before, and how much after, the execution of the mortgage. This property was included in the order of sale, and it was, therefore, stipulated between the surety company and the trustee in insolvency that the trustee should have one-half of the gross proceeds. At the time of the sale, counsel for the attaching creditors threatened to prevent the sale unless their rights were protected, and thereupon a stipulation was made that the net proceeds of the sale of that portion of said first parcel claimed by the trustee, being one-half of such net proceeds, should remain subject to the lien of the attachments of any of the attaching creditors, and that if the surety company should purchase said first parcel it should not be required to pay into court more than one-half the purchase price. The American Surety Company claims that the proceeds of said one-half of the first parcel, viz., \$3,000, should

be charged with a proportionate share, viz., $\frac{2}{3}$, agreed to amount to \$433.76, of certain costs and expenses, of which \$2,170 were expenses of sale, including the services of the special master, and the remainder consisted of counsel fees, taxes, and insurance.

This property would have been sold shortly after the attachment had it not been claimed by the receiver, and the interest of the attaching creditors and trustee should be preserved as nearly as may be to the same extent as if it had not been so claimed by the receiver. It is just that this property should pay its share of the \$2,170 expenses of sale, \$74.83, as this amount is probably no greater than the expense of sale by a sheriff would have been. It is not just that it should pay its share of taxes and insurance and other expense which would not have been incurred but for the claim of the receiver.

By holding "gross proceeds," in the first stipulation to mean gross proceeds of the sale after deducting necessary expenses of sale, but not deducting other charges, and by holding "net proceeds" in the second stipulation to mean the net amount which would be coming to the trustee or attaching creditors, except for the claim set up by the receiver, justice will be done, the real intent of the parties effectuated, and both stipulations construed in accordance with each other and in accordance with what is most probably the meaning of the parties.

Let the \$3,000 be charged with its $\frac{2}{3}$ of the \$2,170, and not with any part of the remaining \$8,888.55.

**CENTRAL TRUST CO. OF NEW YORK v. WORCESTER CYCLE MFG. CO.
et al.**

(Circuit Court, D. Connecticut. March 17, 1902.)

No. 927.

1. ATTACHMENT—DISSOLUTION BY APPOINTMENT OF RECEIVER—CONNECTICUT STATUTE.

The provision of the Connecticut statute (Pub. Acts 1895, p. 491) that attachments shall be dissolved by the appointment of a receiver for a corporation within 60 days is intended to apply only to general receivers of all the property of the corporation situated in the state for the purpose of protecting the creditors of the corporation generally, and the appointment in a suit to foreclose a mortgage given by a corporation of a receiver for the mortgaged property to protect the rights of the mortgagee therein does not have the effect of dissolving a prior attachment under such provisions.

2. RECEIVER IN FORECLOSURE SUIT—CONSTRUCTION OF ORDER APPOINTING.

An order appointing a receiver in a suit to foreclose a mortgage, although broad in its terms, and purporting to extend to all the property of the mortgagor which was claimed to be covered thereby, should not be construed to cover property not in fact included in the mortgage, so as to affect rights which were paramount to the mortgage.

3. ATTACHMENT—SURRENDER OF PROPERTY TO RECEIVER UNDER STIPULATION—EFFECT.

Where an attaching creditor surrenders the attached property to a receiver appointed in a suit against the debtor, who claims the same under a stipulation that such surrender shall be without prejudice to his legal rights, which is approved by the court, it does not operate to

terminate the attachment, but the possession of the receiver is his possession, as against all other claimants.

4. SAME—FAILURE TO LEVY EXECUTION.

Under the Connecticut statute (Gen. St. 1887, § 922) providing that an attaching creditor shall lose his rights if he fails to take out and levy an execution within 60 days after recovery of judgment unless such issue or levy is prevented or stayed by some legal proceeding, an attachment creditor who, prior to judgment, has surrendered the attached property to a receiver, under a stipulation and order of court that it should be without prejudice to his rights, and that in case the property should be sold by the receiver his rights should be transferred to the proceeds, does not lose his rights by failing to take out execution on his judgment within 60 days, since the possession of the receiver effectually prevented a levy.

5. SAME—SURRENDER OF PROPERTY TO RECEIVER—PROTECTION OF RIGHTS UNDER STIPULATION.

Where an attachment creditor, to avoid a conflict of authority, surrenders the property to a receiver of a federal court claiming adversely, under an order of court providing that his rights shall not thereby be prejudiced, the court will see that the provision of such order is carried out in good faith, and that he is paid from the property or its proceeds in case his priority of lien is established.

In Equity. Suit for foreclosure of mortgage. On motion to dismiss petition of attaching creditor.

Butler, Notman, Joline & Mynderse, for complainant.

C. Walter Artz, for receiver.

H. D. McBurney, for Thomas Towne.

Perkins & Jackson and Seymour C. Loomis, for trustee.

Watrous & Day, for special master.

Breed & Abbott, for J. Burnett Nash.

TOWNSEND, District Judge. The history of this case will be found in the various opinions filed on questions heretofore raised. 86 Fed. 35; 90 Fed. 584; 91 Fed. 212; 35 C. C. A. 547, 93 Fed. 712; 110 Fed. 491. This hearing was on motion to dismiss the petition of one Camille Weidenfeld, an accommodation indorser of the note of defendant held by J. Burnett Nash, who, as holder of said note, brought suit prior to the appointment of the receiver, and levied an attachment on the property of defendant, and who, on February 4, 1898, obtained judgment thereon against defendant. Afterwards, said Nash obtained judgment against said Weidenfeld as indorser of said note, and Weidenfeld paid the amount thereof to Nash, and is now the owner and holder of said note and the assignee of said judgment recovered against the defendant the Worcester Cycle Company.

Weidenfeld, therefore, became subrogated to all of the rights accruing to Nash in the various proceedings herein, and Nash now prosecutes said claims for the benefit of said Weidenfeld and as his trustee. Nash and Weidenfeld join in this petition, which is for an order for the payment to Nash, as such trustee, of certain moneys in the hands of the special master, and granting leave to Nash to issue execution against the property of defendant in possession of the receiver, and authorizing the sheriff to levy thereon and sell so much of the same as shall be sufficient to satisfy the balance of petitioner's attach-

ment claim, and for an order that, in case the proceeds from such sale shall be insufficient to pay such balance, said receiver shall pay the balance thereof, or, in case of dispute as to the facts alleged, the same may be referred to a master, and for general relief.

Goodrich, the trustee in insolvency, moves to dismiss said petition on the ground that "upon the facts stated in said petition the petitioner is not entitled to any relief, inasmuch as the said petitioner's attachment has been dissolved, and for that and other reasons the property now in the hands of the receiver is not subject to any attachment lien in favor of said Nash or anyone claiming under him."

The receiver herein, appointed on June 26, 1897, having claimed that his appointment dissolved two prior attachments, those of said Nash and one Towne, the property was turned over to him under a stipulation that this should be done without prejudice to any rights under said attachments, and that said rights should be afterwards determined by the court. Subsequently, by decree of this court, which, as to the personal property involved herein, was affirmed by the circuit court of appeals, it was determined that said personal property, as against the trustee in insolvency, was free from the lien of the mortgage, but subject to the rights, if any, of attaching creditors, which rights were reserved for future determination. Goodrich was appointed trustee in insolvency of defendant on November 5, 1897, by the Connecticut probate court, and, as already stated, Nash took judgment against defendant on his claim February 4, 1898.

The trustee, Goodrich, in support of the motion to dismiss, claims first that said attachments were dissolved by the appointment of the receiver, or of the trustee. The provisions of the Connecticut statute relied on by the trustee are as follows:

"The commencement of proceedings for the appointment of a receiver of a corporation or a copartnership shall dissolve all attachments and all levies of executions, not completed, made within sixty days next preceding, on the property of such corporation or copartnership; but if the property is subsequently taken from the receiver, so that it cannot be used for the benefit of the creditors of said corporation or said copartners, nor made subject to the orders of the court in the settlement of the affairs of said corporation or copartnership, or if the receivership shall be terminated by order of the court, pending the settlement of the affairs of the corporation or copartnership, said attachments and levies of execution shall revive, and the time from the commencement of such proceedings to the time when the receiver shall be dispossessed of the property, or the finding of the court that said property is not subject to the orders of said court, or when said trust shall be terminated, shall be excluded from the computation in determining the continuance of the lien created by such attachment; but the attaching or levying creditors shall be allowed the amount of their legal costs, accruing before the time of the appointment of a receiver, as a preferred claim against the estate of said corporation or copartnership, if their respective claims upon which the attachments are founded shall, in whole or in part, be allowed." Pub. Acts Conn. 1895, p. 491.

The bill filed by the bondholders was for the foreclosure of their mortgage, which purported to cover the real and personal property of the defendant, alleged that it was expedient that all of said mortgaged property should be placed in the possession and control of a receiver, and prayed for the appointment of such a receiver. The court appointed Smith receiver of the property of defendant, being the mort-

gaged property described in the bill of complaint. 86 Fed. 35, 35 C. A. 547, 93 Fed. 712.

Counsel for the trustee lays great stress on those portions of the order in which the receiver was directed, *inter alia*, to take possession of all the "above-described" property of the company, "and to wind up its affairs," and was authorized to conduct the prosecution or defense of any suit which will "be for the interest and rights of creditors interested therein." In view of these circumstances, counsel for the trustee says:

"The court had jurisdiction of the parties and of the bill, and had jurisdiction to make the order that it did make. The fact that afterwards it turned out that the statements of the bill were not true, and that the mortgage was invalid as to the personal property, does not affect the jurisdiction of the court in making the appointment and in giving the receiver the power and authority which it did give. It is true that the receiver ought to have been appointed only of the property legally covered by the mortgage, but the court appointed him a general receiver and gave him general powers to act for, and in place of, the corporation."

Upon the *ex parte* application it appeared that said mortgage purported to cover all property owned by said corporation at the date of the mortgage, and which might thereafter be acquired by it, and also its corporate franchise. It is not clear that the order as drawn embraced property not covered by the mortgage, as between mortgagor and mortgagee, and it should not be so construed as to affect rights which were paramount to said mortgage.

In *Smith v. McCullough*, 104 U. S. 25, 26 L. Ed. 637, in a mortgage foreclosure suit where a receiver was appointed, the supreme court said:

"Notwithstanding the broad terms of the order appointing him [the receiver], we are satisfied that the court had no purpose to appoint him receiver of any property except that covered by the mortgage."

As to the jurisdiction of a court under such a petition to empower a receiver to appropriate property not covered by the mortgage, the court of appeals in the Eighth circuit says:

"When a bill is filed to foreclose a mortgage, the court may, upon a proper showing, appoint a receiver to take into his possession and control the mortgaged property. But the jurisdiction possessed by a court of chancery to foreclose a mortgage and to appoint a receiver for the mortgaged property pending the foreclosure gives it no jurisdiction or power to seize or take into its custody or control, through a receiver or otherwise, property of the debtor which is not covered by the mortgage. Nor can the court in such a suit rightfully make any order that will prevent, hinder, or delay the other creditors of the mortgagor from subjecting property not included in the mortgage to the payment of their debts." *Scott v. Trust Co.*, 16 C. C. A. 353, 66 Fed. 17. See, also, *United States Trust Co. v. New York, W. S. & B. R. Co.*, 101 N. Y. 478, 5 N. E. 316; *Tyler v. Hamilton* (C. C.) 62 Fed. 187.

The Connecticut courts have held that a receiver appointed under the provisions of the statutes of that state is like a trustee in insolvency, and holds all the property of the debtor for equal division among creditors, and is not in any sense a receiver such as is appointed *pendente lite* under the ordinary powers of a court of equity to preserve property pending the determination of a suit involving title to the property in dispute. *Pond v. Cooke*, 45 Conn. 126, 29 Am. Rep. 668; *New Haven Wire Co. Cases*, 57 Conn. 352, 18 Atl. 266, 5 L. R. A.

300; In re Waddell-Entz Co., 67 Conn. 324, 35 Atl. 257; In re E. S. Greeley & Co., 70 Conn. 494, 40 Atl. 233; In re Wilcox & Howe Co., 70 Conn. 220, 39 Atl. 163. The distinction between the two classes of receivers is recognized and stated in the text-books. Beach, Rec. Introduction, par. 3; High, Rec. pars. 313-357.

Inasmuch as at the time of the receiver's appointment the property in question was already in the custody of the law, subject to the determination of the rights of the parties in interest, and the facts now appearing were not before the court when it made the appointment, these questions may now be considered as though they had been raised upon the original application. It is clear that upon proof that said personal property was in the possession of attaching creditors the court would not have appointed a receiver thereof upon the application of holders of bonds under a mortgage which, as to said property, was subject to the lien of such attachment.

The provisions of the Connecticut statute, that attachments shall be dissolved by the appointment of a receiver for a corporation within 60 days, are intended to apply only to general receivers of all the property of a corporation situated in the state, appointed for the purpose of protecting the creditors of a corporation generally; and it is not intended that attachments shall be dissolved by the appointment of courts of equity of receivers of mortgaged property merely for the sake of protecting a mortgagee under an invalid mortgage.

Unless the appointment of a receiver in this action was of such a nature as to secure for the benefit of the general creditors such assets as a trustee in insolvency thus appointed would have held for their benefit, these attachments ought not to be held to be dissolved by such appointment.

That this receiver, appointed upon the application of the bondholders, was not constituted either a statutory or equitable general receiver of the corporation, but merely a custodian of the mortgaged property, further appears from the whole history of this litigation. This court, in its original opinion, stated that Smith was appointed "receiver of the mortgaged property," and that these attaching creditors would be permitted a hearing as to the superiority of their rights over those of the mortgagee (86 Fed. 35); this trustee was permitted to intervene by the circuit court of appeals, upon the theory that he represented creditors whom the receiver did not represent; although this court refused to turn the property over to the trustee until the amount of these claims under the attachment was ascertained, it held the mortgage invalid as against them as to personalty situated in Connecticut (90 Fed. 584); and in the opinion of the circuit court of appeals Judge Lacombe stated that "a receiver of the property described in the bill was appointed," approved the foregoing ruling, and held that the appointment of the receiver did not affect the title or the ultimate right of possession. This attachment was not dissolved by the appointment of said receiver.

Under the Connecticut statute an attachment is dissolved by the appointment of a trustee in insolvency within 60 days after the

attachment. Counsel for the trustee contends that the attachment only continued until the taking possession by the receiver, and that, therefore, the property had not been under attachment for 60 days, although the trustee was appointed more than 60 days subsequent to the attachment. This claim is untenable. The possession of the receiver is the possession of the attaching creditor. If the attaching creditor had surrendered the property to the owner, this would have dissolved the attachment, but placing it in the hands of a third person under an agreement and order of court that such action should be without prejudice to his rights under the attachment, does not terminate the attachment, and the appointment of a trustee after 60 days from the attachment did not dissolve it. Nor does the decree of foreclosure cut off, as claimed by the counsel for the trustee, the rights of the attaching creditor. The property was allowed by him to go into the possession of the receiver under the pledge of the court that his action should be without prejudice, and the decree of the court should not be so construed as to violate said pledge.

Counsel for the trustee further contends that this Nash attachment has been lost because the time of its duration given it by statute after judgment rendered has expired. Counsel for Towne, the other attaching creditor, joins in this contention. The Connecticut statute pertinent to this question is as follows:

"No estate, which has been attached, shall be held to respond to the judgment obtained in the suit, either against the debtor or any other creditor, unless the judgment creditor shall take out an execution and have it levied on the personal estate attached; or demand made on the garnishee in cases of foreign attachment, within sixty days after final judgment, or levied on the real estate attached, and the same appraised, and the execution and proceedings thereon recorded within four months after such judgment; or if said goods or estate are encumbered by any prior attachment, unless the execution shall be so levied, within the respective times aforesaid, after such encumbrance is removed; excepting only in case of a foreign attachment against an executor, administrator, or trustee in insolvency, upon whom the demand shall be made within the times limited in sections 1261, 1262, and 1263. But in reckoning said periods within which the attaching creditor is so required to take out and levy execution, any time during which the issue or levy of an execution may be prevented or stayed by the pendency of a writ of error, or by an injunction or other legal stay of execution, shall be excluded from the computation." Gen. St. 1887, § 922.

On February 4, 1898, Nash took judgment for the amount of his claim. No execution has been taken thereon. The property on which the attachment was levied was surrendered to the receiver under a stipulation and order of court that such surrender should be without prejudice to the rights of the attaching creditors thereunder; that the present rights of said Nash and the said Towne to the said attached property shall, if the same be sold by the said receiver, be transferred to the proceeds of the said property in the hands of the said receiver, who shall hold the said proceeds subject to the said rights, and said property and its proceeds have since remained continuously in the possession of said receiver.

It is contended by counsel for the trustee that, even if such possession might originally have been such a stay as would have oper-

ated to prevent a levy of execution, the court, on November 23, 1898, ordered that it be turned over to the trustee, subject to the rights of attaching creditors. The court did not so order. The property remained in the possession of the receiver until the rights of the parties should be finally determined.

It is further suggested that Nash might have allowed the attachment to continue by delaying to take judgment. But a judgment was necessary in order to establish the validity and determine the amount of the claim, and to preserve the lien under said attachment in case of the dissolution of the corporation. If the corporation should be dissolved before entry of final judgment, the attachment lien would be lost. *Morgan v. Association*, 73 Conn. 151, 154, 46 Atl. 877. The property in question is in the custody of the receiver of the court under its original order, which has never been vacated or modified except as aforesaid. During the whole course of the proceedings the question as to the rights of the attaching creditors has been recognized, and the receiver has been treated as a custodian of the property under authority of the court. As was stated by the circuit court of appeals (35 C. C. A. 547, 93 Fed. 712):

"The property is taken by the court, and is put into the hands of its officer to hold for the benefit of 'whom it may concern.' He holds and manages it for the benefit of the party to whom the court may ultimately decide that it belongs. * * * The property is put into the hands of the receiver only to preserve it from harm, to secure its accretions, and to insure its delivery unimpaired to the successful litigant; but the custody of the receiver should not be held to make any change in the status of any litigant's title."

That such possession operates to prevent a levy of execution does not seem to be open to question. *Smith*, Rec. § 45; *High*, Rec. § 141; *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322.

In *Woerishoffer v. Construction Co.*, 99 N. Y. 398, 2 N. E. 47, the question was whether the court below had had authority to forbid in its order appointing a receiver further interference, by levy and seizure on execution or attachment, with the property placed in his possession. It was held that not only had the court authority to make such restraining order, but that the mere appointment of a receiver operated ipso facto to restrain such interference. The court says:

"Both parties concede that the possession of the court must not be invaded; that its officer cannot be sued without its permission; and that he cannot be dispossessed except at the peril of a contempt. What then must needs be the effect of the order in this case? It commands nothing which was not already commanded; it forbids nothing which otherwise was permissible; it takes away no right or remedy which the appointment of the receiver had not already taken away. Its sole practical effect was to give notice of that appointment and the rights secured by it, and charge the specific creditor with a conscious and willful contempt if he assailed the possession of the court."

As was said by Judge Taft in *Vance v. Manufacturing Co.* (C. C.) 82 Fed. 251:

"The receiver agreed with the sheriff that his taking possession should not affect the validity of any lien which might have been created by the sheriff's levy and continued in force until the receiver's taking possession. The arrangement made by the sheriff and the temporary receiver is to be commended. It was a judicious compromise to avoid a conflict between

jurisdictions, and certainly this court will not permit the commendable spirit of confidence which the sheriff showed in the justice and equity of this court to be made a ground for depriving him or those whom he represented of the rights in the property which had been acquired and maintained by lawful levy and subsequent official custody. The finding of the master that the judgment creditors, by reason of these levies, acquired a priority of lien, is confirmed."

The present case is substantially similar. Good faith requires that the confidence reposed by the attaching creditor in the order of this court that his rights be preserved shall not prove to have been misplaced.

The motion to dismiss the petition is denied.

RATICAN v. TERMINAL R. ASS'N OF ST. LOUIS.

KINNAVEY v. SAME.

(Circuit Court, E. D. Missouri, E. D. March 11, 1902.)

Nos. 3,969, 3,970.

1. LIMITATIONS—ACTIONS BASED ON INTERSTATE COMMERCE ACT.

The interstate commerce act prescribes no limitation of time within which actions based thereon shall be instituted, and therefore such actions must be governed, as to limitation, by the statutes of the state wherein they are brought.

2. SAME—PLEADING STATUTE—DEMURRER.

The bar of limitations may be invoked by demurrer in a federal court in an action at law in all cases where it could be done under the statutes of the state, and where such is the practice the petition or complaint must contain a statement of any matter relied on to avoid the running of the statute.

3. SAME—MISSOURI STATUTE—ACTION TO RECOVER PENALTY.

In view of Rev. St. Mo. 1899, § 4292, contained in chapter 48, relating to the limitation of actions generally, which provides that "the provisions of this chapter shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute," the provision of section 4290, found in the same chapter, which extends the time for the commencement of an action when the same has been prevented by some improper act of the defendant, has no application to an action brought to recover a penalty under a statute, which is limited by section 2425, relating to criminal and penal actions.

4. SAME—PLEADING IN ANTICIPATION OF DEFENSE—SUFFICIENCY OF ALLEGATIONS.

An allegation in plaintiff's petition in an action against a railroad company, based on section 2 of the interstate commerce act, to recover damages for discrimination in rates, in effect, that defendant announced publicly at the time of the shipments complained of that it made no discrimination in rates, and that plaintiff did not learn of the falsity of such statement until shortly before the action was commenced, does not state sufficient facts to suspend the running of limitations against the action, under the provision of Rev. St. Mo. 1899, § 4290, which extends the time when the action was prevented by some improper act of defendant, where there is no allegation that plaintiff believed and relied on defendant's announcement, or that he exercised diligence to ascertain the facts.

5. SAME—STATUTE GOVERNING—ACTION TO RECOVER DAMAGES UNDER INTER-STATE COMMERCE LAW.

The interstate commerce act is a penal statute, and an action to recover damages for a violation of section 2, prohibiting discrimination in rates, is one to recover money in the nature of a penalty, and, when brought in Missouri, is governed, as to limitation, by Rev. St. Mo. 1890, § 2425, which requires actions "upon any statute for any penalty or forfeiture, given in whole or in part to the party aggrieved," to be brought within three years.

At Law. Action under interstate commerce act to recover damages for discrimination in rates. On demurrer to amended petition.

F. A. Wind and C. G. B. Drummond, for plaintiff.

McKeighan, Barclay & Watts and H. S. Priest, for defendant.

ADAMS, District Judge. The petition in this case is based upon section 2 of the interstate commerce act (24 Stat. 379). That section is as follows:

"If any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Plaintiff alleges in the separate counts of his complaint that at divers times between the 1st day of May, 1891, and the 1st day of October, 1892, he was engaged in the business of coal merchant in the city of St. Louis, and that during the same period the Consolidated Coal Company was also engaged in the same business at the same place; that between the dates aforesaid the defendant, as common carrier, at his request, transported from East St. Louis, Ill., to plaintiff's switch in the Union Depot yards in St. Louis a large quantity of coal, the same being specifically set forth in the petition; that the defendant charged the plaintiff, and plaintiff paid to the defendant, for such service, at the rate of 30 cents per ton; that during the same period defendant performed like service in the transportation of coal under substantially similar circumstances and conditions for the Consolidated Coal Company, and charged the last-named company for the same service 25 cents per ton only; that thereby the defendant was guilty of unjust discrimination against plaintiff, and violated section 2 of the interstate commerce act, hereinbefore set forth. Plaintiff's suit was instituted June 26, 1896, —more than three years after the alleged wrongful act of the defendant.

The foregoing facts appearing in the complaint, the defendant demurs thereto on the ground, among others, that each and all of the alleged causes of action set forth in the petition accrued more than three years prior to the filing of the original petition herein, and are barred by the statute of limitations of the state of Missouri in such case made and provided. Section 2425, Rev. St. Mo. 1899, provides as follows:

"All actions upon any statute for any penalty or forfeiture, given in whole or in part to the party aggrieved, shall be commenced within three years after the commission of the offense, and not after."

This statutory provision was in force, as section 4005, Rev. St. 1889, at the time plaintiff's cause of action accrued. It is contended by the defendant that the foregoing statute of limitation is an effectual bar to plaintiff's right of recovery in this case. Whether such contention is sound is the proposition now to be considered.

The interstate commerce act prescribes no limitation of time within which actions based thereon shall be instituted. Such being the case, the statute of limitations of the state in which the action is brought must apply and control. *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; *Metcalf v. City of Watertown*, 153 U. S. 671, 14 Sup. Ct. 947, 38 L. Ed. 861; *Balkam v. Iron Co.*, 154 U. S. 177, 14 Sup. Ct. 1010, 38 L. Ed. 953; *Campbell v. City of Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217, 39 L. Ed. 280.

Under the Code of Civil Procedure of Missouri, the ancient distinction between legal and equitable actions is abolished, and but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs is recognized. The petition must contain a plain and concise statement of the facts constituting a cause of action, and a demurrer is the recognized pleading to test the sufficiency of the facts stated in the petition, to constitute such cause of action. The demurrer must distinctly point out the grounds of objection to the petition. Sections 539, 598, 599, Rev. St. Mo. 1899. The foregoing provisions of the Code have been held by the supreme court of Missouri to permit a defendant to invoke the protection of the statute of limitations of the state by demurrer. *Boyce v. Christy*, 47 Mo. 70; *Henoch v. Chaney*, 61 Mo. 129; *Heffernan v. Howell*, 90 Mo. 344, 2 S. W. 470. Such being the construction placed upon the provisions of the Code by the supreme court of the state, the federal courts are bound thereby.

The supreme court of the United States, in *Bank v. Lowery*, 93 U. S. 72, 23 L. Ed. 806, had occasion to consider the question of practice now before the court. It arose in a case from Wisconsin, where the provisions of the Code of Practice were quite similar to those of Missouri already adverted to, and the conclusion was there reached that the courts of the United States will permit a defendant to invoke the protection of the statute of limitations by a demurrer in all cases where the same could be done under the statutes of the state in which the action arose. The court there said, advertng to the contention that there might be exceptions which would take the plaintiff's cause of action out of the statutes, as follows:

"If the plaintiff relies on a subsequent promise or on a payment to revive the cause of action, he must set it up in the original complaint, or ask leave to amend. Without this precaution the complaint is defective, in not stating, as required by the statutes, facts sufficient to constitute a cause of action. But although defective, advantage cannot be taken of the defect on motion, or in any other way than by answer, which answer, however, we have seen, may be a demurrer."

Following the intimation of the foregoing opinion, counsel for plaintiff in this case undertook to plead facts in the petition to avoid the running of the statute of limitations. The averment is as follows:

"Plaintiff further states that it was publicly announced by defendant during said period that all coal dealers were paying the rate charged and paid by plaintiff for said services, and plaintiff did not learn that said representations were false, and that he was being unjustly discriminated against as aforesaid, until, to wit, the 1st day of March, 1890, when the fact was elicited by a committee appointed by the legislature of the state of Illinois, and reported in the daily press."

Plaintiff's counsel contends that the foregoing averment brings his case within the provision of section 4290, Rev. St. Mo. 1899, which reads as follows:

"If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented."

This last section is found in chapter 48 of the Revised Statutes, relating to the limitations of actions generally. Defendant's counsel contends that the last-quoted section has no application to the statute of limitations which he invokes, found in a different chapter of the statutes, under article II, concerning limitations of criminal actions and prosecutions, which contains section 2425, already quoted as relied upon by defendant's counsel, namely:

"All actions upon any statute, for any penalty or forfeiture given in whole or in part to the party aggrieved, shall be commenced within three years after the commission of the offense, and not after."

There is much reason in the contention of the defendant's counsel on this proposition. Section 4290, *supra*, by its terms, relates to the commencement of such actions as are "herein" limited, and refers, obviously, to those personal actions which are the subject-matter of article 2 of chapter 48, under consideration. Moreover, section 4292 of the same statutes enacts as follows:

"The provisions of this chapter shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute."

It seems obvious from plain reading of the foregoing section that section 4290, exonerating the plaintiff from the effects of the general statute of limitations in case the defendant has been guilty of some improper act which has prevented commencement of an action, has no relevancy to an action upon a statute for a penalty or forfeiture, referred to in section 2425, *supra*, because such actions are, in the language of section 4292, "otherwise limited," namely, they must be commenced within three years after the commission of the offense, "and not after." Such is the conclusion reached by the supreme court of Missouri in *Revelle v. Railway Co.*, 74 Mo. 438. But if section 4290, *supra*, which extends the time for the commencement of an action when the same has been prevented by the defendant's improper act, is applicable to an action founded upon a penal statute, the plaintiff is not at all relieved. The allegation of the petition obviously intended to excuse the delay in instituting the suit, already quoted, fails to disclose any such improper act on the part of the defendant

as should have prevented the commencement of the action. The substance of the allegation is that the defendant, during the time it was performing the services for the plaintiff already referred to, announced publicly that all coal dealers were paying the same rate as that charged and paid by plaintiff for the services rendered, and that plaintiff did not learn that that public announcement was false until a short time before he instituted his suit. This allegation, when reduced to its plain and simple meaning, is certainly no broader or more comprehensive than would have been the averment that the defendant told the plaintiff that it was treating everybody alike. This certainly does not constitute an "improper act" contemplated by section 4290, supra. There is not even an averment here that the plaintiff believed the statement contained in defendant's public announcement, or relied upon the same, or that he exercised any diligence to ascertain the falsity of the fact stated. The supreme court of Missouri, in *Shelby Co. v. Bragg*, 135 Mo. 291, 36 S. W. 600, in dealing with this subject, says:

"Statutes of limitation are favored in the law, and cannot be avoided unless the party seeking to do so brings himself directly within some exception. A party seeking to avoid the bar of the statute of limitations because of the fraud must aver and show that he used due diligence to detect it, and, if he had the means of discovery in his hands, he will be held to have known it."

The case of *Murray v. Railway Co.*, 35 C. C. A. 62, 92 Fed. 868, was based on section 2 of the interstate commerce act, to recover damages against the railroad for unjust discrimination. The plaintiff, in his petition, after setting forth the difference in the tariff rates charged to him and the lower rates charged to other shippers, with a view of excusing his delay in instituting suit for the recovery of the damages, and thus avoiding the statute of limitations, alleged as follows:

"That defendant, at the time these shipments were made by plaintiff, kept posted at its stations freight tariff lists showing the tariff rates of freight for the transportation of such articles from its stations to Chicago, and informed plaintiff at the time he made his shipments that no deviations were made from these rates, and no rebates, drawbacks, or concessions from the posted rates were made to any shippers, and that plaintiff had equal rates and proportions of rates with other shippers from its stations to Chicago, and that no discriminations were made against him; that plaintiff believed these statements and relied on them, but that they were untrue and fraudulent, and that defendant was in fact at that time making such discriminations in favor of other shippers; that defendant fraudulently concealed that fact as to the giving of rebates; that plaintiff only ascertained the facts within 18 months before bringing suit."

To this petition there was a demurrer on the ground that the action was barred by the statute of limitations. The demurrer was sustained, and final judgment entered in favor of the defendant. Judge Caldwell, in delivering the opinion of the court of appeals in that case, made use of the following language:

"In cases where concealment and ignorance of the facts suspend the statute, there must have been such concealment as would prevent a person exercising due diligence from discovering the facts; and what diligence was used is a question of law, to be determined by the court from the petition, and not a mere statement of a conclusion of law. The allegation of the petition

is that 'the plaintiff had no reason to believe or suspect that said statements made to him as aforesaid were untrue, or that he had been discriminated against, and deceived as aforesaid, until within the eighteen months last past, when for the first time he learned of such facts.' Just such a general allegation as this was held bad in *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, where the rule on this subject is succinctly and clearly stated. 'Statutes of limitations,' says the court, 'are vital to the welfare of society, and are favored in the law. They promote repose, by giving security and stability to human affairs. While time is constantly destroying the evidence of rights, they supply its place by presumption which renders proof unnecessary. * * * A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. * * * Whatever is notice enough to excite suspicion, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. * * * Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence, and the means of knowledge are the same thing, in effect, as knowledge itself. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.' The allegation in the petition in this case amounts to no more than 'ignorance at one time and knowledge at another.' The petition does not state what he discovered, how he discovered it, or show any reason why he did not discover it sooner. There is no allegation that he ever at any time made the slightest effort to discover whether he was being discriminated against, and there is no averment that such an effort would have been unavailing. The suspicion entertained by the public generally, and which found daily expression in the public prints, and an occasional judicial verification, and which was probably the origin of the interstate commerce act itself, that railroad companies did discriminate between shippers, particularly in shipments of the character the plaintiff was making, seems not to have shaken the plaintiff's perfect faith in the veracity of the railroad agent who billed his shipments."

The judgment of the trial court was therefore affirmed.

The petition in that case certainly stated all and much more than is stated in the present case, by way of showing concealment or wrongful act on the part of the defendant, such as would operate to suspend the running of the statute. On the authority of that case, and of others therein cited, the conclusion is unhesitatingly reached that plaintiff has stated no grounds in his petition for suspending the running of the statute of limitations in favor of the defendant.

The only question now remaining for determination is whether plaintiff's action in this case is upon a statute for a penalty given in whole or part to the party aggrieved, and therefore, within the purview of section 2425, Rev. St. Mo. 1899, barred by the lapse of three years' time, which intervened before this action was brought. The plaintiff, in direct terms, bases his right of recovery on the interstate commerce act (section 2), which declares discrimination between shippers for services in the transportation of like kind of traffic under substantially similar circumstances and conditions to be an unlawful act, and declares that any carrier indulging in any such discrimination shall be deemed guilty of unjust discrimination. Section 8 of the interstate commerce act makes any such common carrier liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions

of the act, together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery. Section 10 of the same act subjects any common carrier, and also the officers, agents, and directors of any such common carrier, to a fine not exceeding \$5,000 for each offense. Accordingly it may be safely stated that the act in question is a highly penal statute, conferring certain rights upon the party aggrieved, recoverable by him in a civil action, and also subjecting the party offending to its pains and penalties. The supreme court of the United States, in *Parsons v. Railroad Co.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231, has finally and conclusively settled this question. That case was one wherein the plaintiff sought to recover damages against the railroad under the interstate commerce act. The supreme court disposed of that case by holding that the interstate commerce act was a penal statute, and that the action of the plaintiff thereon was to recover money in the nature of a penalty. See, also, to the same general effect, the case of *Revelle v. Railway Co.*, supra.

It follows as a necessary consequence from the foregoing that plaintiff, by postponing the institution of his suit for a longer period than three years after his cause of action accrued, is barred from recovery by the statute of limitations applicable to the case, and that the demurrer of the defendant to the petition for that specific reason is well taken. The demurrer is sustained.

THE MINNEHAHA.

(District Court, S. D. New York. March 31, 1902.)

ADMIRALTY—ACTION FOR PENALTY UNDER HARTER ACT—PARTIES ENTITLED TO SUB—TEST CASE.

An action cannot be maintained to recover the penalty for a violation of Act Cong. Feb. 13, 1893, known as the "Harter Act," requiring the owner, master, or agents of any vessel transporting merchandise from or between ports of the United States and foreign ports to issue to shippers bills of lading or shipping documents, by a party put forward by an organization of lumber exporters for the mere purpose of making a test case, and not himself having any interest in the lumber shipped, not even being in the lumber business, where it further appeared that the lumber shipped was properly delivered at the destination, and that no one was injured.

In Admiralty. Action for penalty under the Harter Act.

John J. McKelvey, for libellant.

Convers & Kirlin, for claimant.

ADAMS, District Judge. This is an action brought by the libellant to recover such penalty as the court might fix, with costs, for a violation by the owners or agents of the steamship *Minnehaha* of the provisions of the act of congress of February 13, 1893, known as the "Harter Act." Sections 4 and 5 of the act provide:

"Section 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any law-

ful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

"Sec. 5. That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the government of the United States."

It appears that the libelant was put forward by the National Lumber Exporters' Association, an organization of lumber exporters, for the purpose of making a test case, which would, if decided favorably to the libelant, as stated in the brief of the advocate for the libelant, "mean a warning to the ocean carriers that the law must be complied with, and an assurance to the shipper that he may demand his rights under the law without running the risk of a boycott by the carriers." It is shown that the organization, in December, 1891, arranged a plan of shipping to London two car loads of lumber in the libelant's name upon one of the claimant's steamers, with a view of exacting such bill of lading as the members thought they would be entitled to under the act. The shipment was made, and the shippers obtained two receipts therefor, in the name of the libelant, from the claimant for the lumber, which was delivered to the steamer in question, each containing the words "More or less," "Not accountable for marks or splits." These receipts were afterwards presented at the claimant's office with bills of lading prepared for the association by certain freight brokers, which did not contain the quoted words. The bill of lading clerk of the claimant took the papers, and, after stamping on the bills of lading the words, "More or less all on board to be delivered," "Not responsible for marks or splits," signed and returned the bills of lading, retaining the receipts. These bills of lading were accepted at the time in lieu of the receipts, but afterwards the libelant, claiming that they were not in conformity with the statute, returned them with a demand that a bill of lading be issued to him for the lumber received, stating, among other things, the number of packages of lumber and the number of pieces, or the number of feet of lumber not made up into packages, without any qualification. The claimant contends that it did furnish shipping documents in conformity with the statute.

I do not think it necessary to enter into the merits of the controversy, because it is clear at the outset that the libelant has no interest whatever in the matter, and is not entitled to recover. The lumber was not his, and there was no way in which he could possibly have been identified with any loss or damage which could occur. He was not in the lumber business, and did not even have such a general interest as that fact might have given him. He was

a mere figurehead or dummy in the transaction, and not only did not suffer any injury, but could not possibly have suffered any. Indeed, it appears affirmatively that the lumber was properly delivered at its destination, and that no one was or could be injured in the matter. I do not see how the statute can be invoked under the circumstances. It seems that the court is not asked to decide a real case but merely to express an opinion which might hereafter be of some possible advantage to lumber exporters. Courts do not sit for such a purpose. Legal actions are designed to afford redress for injuries already inflicted and rights of persons or property actually invaded, not to pass upon abstract questions of law for the benefit of individuals who may desire the court's opinion for their benefit, or, as stated here, to be a warning or menace to others. *Thomas v. Protective Union*, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175.

Libel dismissed.

In re DAYVILLE WOOLEN CO.

(District Court, D. Connecticut. March 5, 1902.)

No. 780.

BANKRUPTCY—APPOINTMENT OF TRUSTEE.

A trustee for a bankrupt should be impartial, and free from all entangling alliances; and, when an attorney representing a majority of the creditors at the election of trustee had been attorney for the bankrupt, it was proper for one representing other creditors to ask him whether any of the claims he represented were held in the interest of the bankrupt, and upon his refusal to answer it was the duty of the referee to put the question and permit a full investigation into the relations between the attorney and the bankrupt and the creditors he represented, and, if any collusion appeared, to decline to receive the collusive votes or to approve the election.

In Bankruptcy. On question certified by referee.

Arthur L. Shipman, for opposing creditors.

Donald G. Perkins, for trustee.

TOWNSEND, District Judge. In this case the referee certifies certain questions to me for opinion and action thereon. It appears that at the meeting for the proof of claims and election of a trustee, and after the claims had been approved and the referee was proceeding to take the vote for trustee, Attorney Shipman, for certain creditors, asked Attorney Perkins, counsel for a majority of the creditors, as to whether or not any of the claims attempted to be voted by said Perkins had been assigned to any person or corporation in the interest of the bankrupt. Counsel refused to answer this question, and claimed that Attorney Shipman had no right to ask such a question. Said Shipman then requested the referee to ask the question, which the referee refused to do, on the ground that the previous reply was sufficient to raise the question. Said Shipman then asked the referee not to permit to be received or counted votes cast by said Perkins on account of such refusal, and on the further ground that

said attorney was the attorney for the bankrupt. The referee ruled that these objections to the vote were insufficient, and confirmed the election of the trustee voted for by said attorney for the bankrupt. It is admitted that said Perkins had been counsel for the bankrupt during proceedings in insolvency. In these circumstances it was his duty to answer said question, and, upon his refusal, it was the duty of the referee to put said question and permit a full investigation into his relations to the bankrupt and the creditors. The trustee should be free from all entangling alliances. The question as to whether there is any collusion with the bankrupt is one which should be definitely disposed of before the appointment, and, if there appears to be reasonable cause to believe such collusion exists, the referee should either decline to receive the collusive votes or to approve the election. In re Rekersdres (D. C.) 108 Fed. 206; In re Houghton, 2 Low. 243, Fed. Cas. No. 6,729; In re McGill, 45 C. C. A. 218, 106 Fed. 57; In re Henschel (D. C.) 109 Fed. 865.

The action of the referee in confirming the election of William P. Kelley as trustee is disaffirmed and set aside, and the referee is directed to call a new meeting for the election of a trustee.

In re DIXON.

(District Court, N. D. California. April 8, 1902.)

No. 3,590.

BANKRUPTCY—COSTS AND FEES.

Bankr. Act, § 40, subd. "a," provides that "referees shall receive as full compensation for their services, * * * a fee of ten dollars, * * * and from estates which have been administered before them" certain commissions. General Orders in Bankruptcy, No. 35, pt. 2, declares that the compensation of referees prescribed by the act shall be in full "for all services performed by them * * * but shall not include expenses * * * necessarily incurred in the performance of their duties." *Held*, that the expenses incurred in the publication of notice of application for discharge, and for stationery, were chargeable against the bankrupt, but that the referee could not charge for his own services in making copies of the petition for discharge.

John Goss and T. W. McDonald, for petitioner.

DE HAVEN, District Judge. Upon filing the bankrupt's petition for discharge, his attorney was required by the referee to make a deposit of \$8 for the following purposes:

For publication of notice of application for discharge, as required by prescribed form (57) of G. O. in bankruptcy (voucher No. 1).....	\$2 50
For seven copies of petition of bankrupt for discharge, and the order fixing time of hearing, in accordance with the G. O. and form (57) prescribed, at 20c. per folio.....	5 25
For stationery	25
	<hr/> \$8 00

The bankrupt paid the deposit, but took exceptions to the order of the referee in the matter, and the question of the right of the

referee to demand such deposit has been properly certified to the court for decision.

The bankruptcy act (section 40, subd. "a") provides:

"Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

In harmony with this statute, the supreme court has, in the general orders in bankruptcy adopted by it (general order 35, pt. 2), declared as follows:

"(2) The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge."

It is obvious that the cost of the publication of the necessary notices upon application for discharge, and for stationery, are expenses properly chargeable to the bankrupt or his estate, under the general order just quoted; but the referee is not entitled to charge for his own services in making copies of the petition for discharge at the rate of 20 cents per folio, or at all. It may be necessary in some cases for the referee to employ clerical assistance in giving such notices, and then the expense actually incurred by him for such assistance would be a charge against the bankrupt or his estate, but the referee is not entitled to make any charge for clerical services rendered by himself in cases pending before him. The fee of \$10 allowed by the statute to the referee includes full compensation for all such personal services.

The bankrupt is entitled to recover the sum of \$5.25 from the amount deposited with the referee.

CHICAGO & A. RY. CO. v. GREEN.

(Circuit Court, C. D. Missouri, W. D. January, 1902.)

No. 2,250.

1. REFORMATION OF INSTRUMENTS—GROUNDS FOR RELIEF—MISTAKE.

A court of equity has jurisdiction to reform a release in which, through a mutual mistake, the name of the party paying the consideration was erroneously stated, and by inserting therein a part of the consideration which in fact entered into the settlement, whether the same was omitted through mistake of fact or of law.

2. SETTLEMENT—VALIDITY—IMPEACHMENT FOR FRAUD OR INCAPACITY.

A settlement of a disputed claim against a railroad company for a personal injury should be sustained where fairly made, and evidence of fraud or incapacity to impeach such settlement should be clear and persuasive. A court is not justified in setting it aside because of an impression that the amount paid was inadequate.

2. SAME—EVIDENCE TO IMPEACH.

Defendant was injured by the breaking of his leg while in the service of complainant railroad company. Three days afterward an agent of complainant, after investigating the accident, visited defendant, and in the presence of others, some of whom were friends of defendant, a settlement was made, and a release was signed by defendant of all claims against the company on account of the injury, in consideration of the payment to him by the agent of \$50. After the release had been signed and handed to the agent, he further agreed to pay the bill of defendant's physician, and thereafter read the release to defendant, to which the latter made no further objection. There was no evidence of any fraud or misrepresentation on the part of the agent, but it fairly appeared that he was justified in believing, and did believe, from statements made to him by others, that the company was under no legal liability for the injury, and the weight of the evidence tended to show that defendant was in a condition to fully understand the transaction and the purport of the release. *Held*, that no ground was shown which would justify a court of equity in setting it aside.

In Equity. Suit for reformation of release.

The defendant, Squire L. Green, brought an action against the Chicago & Alton Railroad Company in the state court to recover damages for personal injuries. The cause was removed into this court, whereupon the complainant, the Chicago & Alton Railway Company, presented its bill in equity, in the nature of a cross action, against said Squire L. Green, alleging that the defendant at the time of the injury was an employé of the Chicago & Alton Railway Company, and that any cause of action which he had was against the latter company. The bill further alleges that, after said injury, said defendant,—for a valuable consideration to him paid by the complainant shortly after the injury,—in writing, executed a release to said company for any and all liability resulting therefrom; that by the mutual mistake of the parties the said release was executed to the Chicago & Alton Railroad Company, instead of to the complainant, the Chicago & Alton Railway Company, and that, as a further consideration for the execution of said release, the complainant assumed the payment of the services of the physician and surgeon who attended upon the defendant; and that this consideration, through a misapprehension of the parties as to the necessity of incorporating it into the release, was omitted therefrom. The bill prays for a reformation of the said release to make it conform to the facts of the case. The further facts sufficiently appear in the following opinion of the court:

Lathrop, Mcrow, Fox & Moore, for complainant.

E. W. Henry, for defendant.

PHILIPS, District Judge (after stating the facts). That there was a mistake in the written release executed by the defendant, in inserting therein the "Chicago & Alton Railroad Company" instead of the "Chicago & Alton Railway Company," was not contested by defendant's counsel at the hearing; and, if it had been, the evidence is clear that it was a mistake of both parties. It is the special province of a court of equity to rectify such mistakes. "If, by inadvertence, accident, or mistake, the terms of a contract were not fully set forth in the policy, the plaintiff is entitled to have it reformed so as to express the real agreement, without the necessity of resorting to extrinsic proof." *Thompson v. Insurance Co.*, 136 U. S. 296, 10 Sup. Ct. 1019, 34 L. Ed. 408. See, also, *Snell v. Insurance Co.*, 98 U. S. 88, 25 L. Ed. 52; *Trenton Terra Cotta Co. v. Clay Shingle Co.* (C. C.) 80 Fed. 46. This is equally true where the failure to express in the written instrument "resulted from a mistake as to the legal meaning

and operation of the terms and language in the writing." *Corrigan v. Tiernay*, 100 Mo. 281, 13 S. W. 401. So, in *Parlin v. Stone* (C. C.) 48 Fed. 808, Judge McCrary, on this circuit, said: "When the mortgage shows on its face that the consideration moved from a certain person, and it appears that his name as mortgagee was omitted by mistake, equity will reform the instrument by inserting his name."

The fact that a check was given, instead of money, can make no difference. The giving of the check evidenced the purpose on the part of the agent of the railway company to extinguish the debt; and, when the defendant accepted it without the objection that it was not money, he also evidenced the fact that he received it as payment. This was emphasized by the statement made at the time by the agent, Anderson, to the defendant, that he could cash it by presenting it to the agent of the complainant.

The same rule respecting the province of a court of equity to correct mistakes is laid down by Bispham in his work on the *Principles of Equity* (4th Ed.) § 185, as follows:

"A mistake exists when a person, under some erroneous conviction of law or fact, does or omits to do some act, which, but for the erroneous conviction, he would not have done or omitted."

And this principle has application to the omission to write into the release the additional consideration of the undertaking that the railway company would assume the payment of the doctor's bill. Thus, Mr. Bispham, at section 190, says that:

"Where there was an agreement that part of the purchase money of certain real estate should be paid by a judgment note for a certain sum, 'with interest,' and the words 'with interest' were omitted from the note by the mistake of the scrivener by whom it was written, it was held that this was such a mistake as equity would correct."

And if in fact this additional consideration to pay the doctor's bill entered into the contract of settlement, and was not inserted in the release, either from inadvertence, or misconception of the law as to the necessity of inserting it in the instrument to make it operative as a release, such fact does not deny to complainant the assistance of a court of equity to reform it in this respect. As said by the supreme court of this state in *Corrigan v. Tiernay*, supra:

"In such cases equity will reform the contract, and this, too, though the instrument fails to express the contract which the parties made, by reason of the mistake of law. Says Pomeroy, 'In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing.'"

Neither can importance attach to the contention of defendant's counsel that the promise to pay the doctor's bill in addition to the \$50 was made after the defendant signed the release and handed it to Anderson, or whether the promise was made contemporaneously (as testified by complainant's witnesses) with the act of handing the release by defendant to Anderson. The defendant's testimony is that when he had signed the release, and Anderson took it, the latter said to him it was his duty to read it to him. If so, the transaction was

yet in *feri* until this duty was performed. And as soon as it was read over to him, and he fully realized that its effect was a complete settlement of any claim he might have for damages, he said, "This will not more than pay my doctor's bill," or words to that effect; and thereupon the additional promise was made to pay the doctor's bill. Whether or not the defendant then said "Well," his silence gave consent, accentuated by no further objection, and acquiescing in Anderson taking away the release, while the defendant retained the check. It was a part of the *res gestæ*, and the whole transaction was a unit. Defendant's witnesses claim that the additional promise of Anderson was that the railway company would "pay for the first aid," which, as I gather from the incidents of the case, meant the doctor's service for setting the leg; but, as complainant's witnesses testified it included the whole of the doctor's bill up to the settlement, the defendant cannot complain if the court reforms the instrument to include the larger obligation on the part of the complainant.

Defendant's contention at the hearing was confined to two propositions: First, that Anderson obtained defendant's signature through deception and fraud; and, second, that defendant was so far non compos as not to fully comprehend his acts.

It should be the inclination of every court to closely scan and scrutinize such settlements, to see that they are absolutely free from deception and imposition. The injury in question occurred on the 21st day of the month, and Anderson, the railroad's agent, came on the 24th day of the month to investigate it. I am unable to discover any artifice or deception employed by Anderson to justify the judicial mind in denouncing his conduct as fraudulent and wrongful. In the first place, on his arrival at the place of the accident he instituted inquiry among the collaborators of the defendant present at the injury to learn the particulars thereof, and obtained their statements, which are filed with the depositions herein, which showed that the accident resulted from an unforeseen cause in tearing down or removing portions of a bridge, under circumstances both of contributory negligence on the part of the defendant, or where the danger resulted in the progress of the work of tearing down, where the conditions were constantly changing, and in the absence of the overseer, and which, under the ruling of the court of appeals of this circuit in *Gold Mines v. Hopkins* (recently decided) 111 Fed. 298, presented the state of case where a servant undoubtedly assumes the risk of the place and conditions under which he works. While the merits of the defendant's claim for damages are not on trial in this case, it was competent for the complainant to show this information thus obtained, as evidence of its good faith and motive in proffering the settlement proposed at \$50; believing, as the testimony of complainant shows, that there was no actual liability on the part of the railway company. It is true that Anderson took with him when he called to see the defendant an employé of the complainant, to show him where to find the defendant. He held no secret interview with him. On the contrary, the whole interview was in the open, in the presence of the defendant's son, a man of mature years, and defendant's friend, whose hospitality and nursing he was receiving. It is not important to find what were the precise

words used by Anderson when he opened the conversation with the defendant, as there is no ground for question that the defendant understood that Anderson was there as the representative of the railway company, and that what he was doing was in the interest of the company.

The only pretense based upon the defendant's evidence for any artifice practiced by Anderson is that, when he handed the defendant the release in duplicate to sign, they were folded up. If they were folded when handed to the defendant, there was nothing whatever to prevent him from unfolding a loose paper before signing it, and there is nothing to indicate that there was any design in this incident. The excuse given by the defendant for not reading it himself is that he could not read without his eyeglasses. This is without force, for the reason that he stated that his eyeglasses were then in the room, and he could have had them for the asking. There was nothing done or said by anyone to prevent him. He did not even suggest the want of his glasses. It is the well-settled rule in this state that if a person so signing such a paper, having the opportunity and ability, neglects to read all of the receipt releasing the company from any and all claims on account of and arising from injuries received by him while in the service of the company, and signs the same, he will not afterwards be heard to say that he did not read it. *Mateer v. Railway Co.*, 105 Mo. 320, 16 S. W. 839. The court further said:

"He could read it. No one connected with the company had made any statement to him of what it contained. He was told to sign it. It was his duty to read it before signing it, and he will not now be heard to say that he did not, when every opportunity was afforded him to do so. To permit such a rule would unsettle the business affairs of this country."

So the court of appeals of this circuit, in *Insurance Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532, said:

"If one can read his contract, his failure to do so is such gross negligence that it conclusively estops him from denying knowledge of its contents, unless he was dissuaded from reading it by some trick, artifice, or fraud of the other party to the agreement."

And what is still more conclusive on the defendant is the admitted fact that, just after he did sign it, Anderson said to him, in substance, that it was his duty to read the paper to the defendant, and he did thereupon read it to him. So that as a matter of fact the defendant was fully advised at the time of the nature and effect of the instrument he signed,—as much so as if he had read it over himself. The incident further demonstrates the fact that Anderson, in saying that it was his duty to read the paper to the defendant, recognized that he did not regard the transaction as closed by the mere act of obtaining the defendant's signature.

The only remaining question for consideration is, did the defendant understand what he was doing? Reliance is placed by the defendant upon the testimony of Dr. Pritchett, who attended upon the defendant as his physician, and expresses the opinion that the defendant's mind at the time was not normal, and hardly in condition to fully comprehend his act. Although Pritchett was the local surgeon of the railway company, in attending upon the defendant at his instance he

was defendant's physician. He did not even see the defendant that day. He had not prescribed an opiate for him for a day or two previous, and it is exceedingly doubtful if one had been administered within the preceding 12 hours. That the defendant understood full well what he was doing, the moment the release was read to him, he comprehended that he had, for \$50, conceded away any further claim against the company, by saying that the sum would not pay his doctor's bill. And when Anderson, in reply, said to him, "We will pay for that," he was satisfied, and acquiesced, by making no further objection. And his own son, and the party with whom the defendant was staying in his tent, both testified that all understood that it was a full settlement. The defendant further heard Anderson then say to the man waiting on defendant, "Send in your time for payment for your attendance up to this time, and hereafter you must look to [the defendant]," or words to that effect. The naked statement of the doctor, who had not seen him that day, and whose opinion was necessarily more or less speculative, ought not to prevail over the substantially established fact that the defendant did intelligently and fully comprehend what he was doing, and the effect of the release.

Since this cause was submitted to the court, defendant's counsel invites attention to the ruling in *Wilcox v. Railway Company* (C. C.) 111 Fed. 435. The substantive effect of that decision is that where an injured party was induced to make a settlement and give a release under the impression, created by the agent of the railroad company and the attending surgeon, that her injuries were not of a permanent character, and that, in the opinion of the physician, she would fully recover within one year, and thereupon the settlement was based upon an estimate of the value of one year's services, if it turned out afterwards that she did not fully recover within the year, and that her injuries were permanent, the release should be set aside, notwithstanding it was expressly found that the evidence failed to show "fraud or wrongdoing" on the part of the company's agent or the surgeon. This ruling is not in harmony with that of the supreme court of this state in *Homuth v. Railway Co.*, 129 Mo. 629, 31 S. W. 903. In that case, as the syllabus recites, "defendant's physician called to see her, and, in answer to a question as to her condition, stated that she would be well within fourteen days. Her own physician, who was present at the time, expressed a similar opinion. A settlement was effected and a release executed on the basis of a recovery by the time stated by defendant's physician. Plaintiff did not recover for several weeks thereafter. Held, the evidence did not sustain the charge of fraud in obtaining the release, and the trial court should have directed a verdict for defendant." See, also, *Railway Co. v. Bennett* (Kan.) 66 Pac. 1018. But conceding, for the purposes of this case, the correctness of the ruling in *Wilcox v. Railway Co.*, supra, the facts which influenced the conclusion of the court there are not present in the case at bar. There were no representations of a similar character whatever made by the complainant's agent to the defendant. The defendant's leg was broken, and had been set, and there was no representation made or opinion expressed as to the length of time of recovery, and no indication of any serious complication resulting therefrom. As was said by

the supreme court of this state in *Mateer v. Railway Co.*, 105 Mo. 354, 16 S. W. 839:

"The law favors the compromise and settlement of disputed claims. If these settlements, fairly made and entered into, are to be disturbed upon frivolous grounds, it will often deter these companies from doing justice to their employes who have received injuries, for fear of future litigation. A wise policy would dictate that they be encouraged to do justice in these cases outside of the courts, and that their settlements should be sustained when they are just and fair."

And I may add that, if such settlements are to be disturbed because of the impression the judge may entertain that the amount of compensation was inadequate, it would establish a most uncertain and dangerous rule of law. If the employer, believing from the facts in his possession that there was no legal liability for the injury sustained by his employé, nevertheless recognizes a moral obligation to contribute aid of a substantial character to the unfortunate, under the circumstances surrounding his situation at the time, and the employé is willing to accept it, before a court takes upon itself the function of undoing such settlements the evidence of fraud or incapacity ought to be made clear and persuasive.

Decree for complainant as prayed.

UNITED STATES *ex rel.* COFFMAN *v.* NORFOLK & W. RY. CO. *et al.*

(Circuit Court, S. D. West Virginia. April 17, 1902.)

1. MANDAMUS—PLEA IN ABATEMENT.

The pendency of another mandamus may be pleaded in abatement of a second mandamus proceeding instituted in the same jurisdiction, where in the parties and the questions involved are the same.¹

2. SAME—IDENTITY OF CONTROVERSY.

Where a final judgment has been rendered in a former proceeding, but an appeal has been taken, and such judgment suspended by a supersedeas bond, and the pendency of such appeal is pleaded in abatement to a second mandamus proceeding, upon consideration of such plea the court is not confined to the pleadings in the former proceeding for the purpose of determining what the real issue therein was, but may look to the pleadings, the evidence, and the opinion of the court filed in support of, and as a part of, the judgment appealed from.

3. SAME—INTERSTATE COMMERCE.

C. instituted mandamus proceedings against the Norfolk & Western Railway Company *et al.* under an act of congress of March 2, 1889, alleging unjust discrimination against him, and in favor of C., C. & B. in the shipment of coal in interstate trade from the Pocahontas coal field, and procured an alternative writ commanding the railway company to furnish cars for the shipment of a specific cargo of coal. The railway company denied the allegations of the alternative writ, including the charge of unjust discrimination; and, by written stipulation, matters of law and fact were tried by the court. At the trial the railway company showed by the evidence that it had a system of car distribution, and that it furnished cars, under such system, uniformly to all shippers alike. The district judge found, as a matter of fact, that the system existed, and that it had been uniformly applied, and held, as matter of law, that such system was reasonable and lawful, and refused the peremptory,

¹ See Abatement and Revival, vol. 1, Cent. Dig. § 67.

and discharged the alternative writ of mandamus. The judge so finding filed a written opinion, as a part of the record, in support of his judgment. C. took a writ of error to the circuit court of appeals, and executed a supersedeas bond. Subsequently, the writ of error still pending, C. instituted another mandamus proceeding against the same respondents, alleging the same unjust discrimination, charging the same to be the result of the railway company's arbitrary and unlawful system of car distribution, and praying that a specific number of cars be furnished to him daily. The railway company pleaded the pendency of the first proceeding in abatement of the second. *Held*, upon an inspection of the record upon a replication of nul tiel record, that the parties and subject-matter involved in the two proceedings were the same, and that the second should be abated.

(Syllabus by the Court.)

Mandamus.

Harold A. Ritz and B. M. Ambler, for relator.

Campbell, Holt & Duncan and Jos. I. Doran, for respondents.

KELLER, District Judge. This case comes up upon the alternative writ of mandamus issued therein, and upon a plea of abatement interposed by respondents to said writ, setting forth that on January 15, 1901, in the circuit court for the district of West Virginia, a certain other mandamus proceeding was instituted by the relator against the respondents to compel the furnishing of cars and shipping facilities for transporting coal for the relator, and that in said proceeding the same right of the relator and the same duty on the part of respondents were alleged which are averred in the petition filed in this proceeding, and recited in the alternative writ issued herein; that the respondents in said former proceeding made return, denying the allegations of relator's petition; that issue was joined thereon, a jury waived by written stipulation of attorneys for all the parties, and the issue tried by the Honorable John J. Jackson, judge of said court, in lieu of a jury; that evidence was taken on behalf of both relator and respondents, and the pleadings and proofs submitted to the court and argued by counsel; and that such proceedings were had thereon that on June 15, 1901, a judgment was entered against the relator, and in favor of respondents, denying the peremptory writ of mandamus, quashing the alternative writ, and ordering that the respondents recover of the relator their costs. 109 Fed. 831. The plea then alleges that the parties to the former action were the same as the parties to this action, and that the matter in controversy in that action was and is the same as the matter in controversy in this action, namely, the legality of the said Norfolk & Western Railway Company's basis and method of coal-car distribution in the Pocahontas coal region; that the said matter in controversy in said former action was determined on its merits therein by the final judgment of the circuit court of the United States for the district of West Virginia, and that said judgment still remains in full force and effect; that from said final judgment a writ of error was allowed, on the petition of the relator, to the United States circuit court of appeals for the Fourth circuit, at Richmond, Virginia, and is still pending, undetermined, in said last-mentioned court; and respondents proffer to verify this plea by the record remaining in said last-men-

tioned court, a certified copy whereof is filed with the plea, and asked to be taken and read as part of the plea. Under the practice prevailing in West Virginia, the respondents at the same time tendered a motion to quash the alternative writ herein, and a plea in bar vouching the record remaining in the United States circuit court for the district of West Virginia in the former mandamus. To the filing of these pleas and this motion the relator, by his attorneys, objected, and at the same time tendered his motion to strike out said pleas and motion, and, in the event said motions should be overruled, offered his replications of nul tiel record to the plea in abatement and plea in bar tendered. This action was taken for the convenience of both counsel and court, and it was understood and agreed that, while all the questions involved were argued, the decision of the court should take up the matter in legal sequence, and only such matters should be decided as were essential to a final determination of the pleadings herein.

We have first, then, the plea in abatement tendered by the respondents, with an objection interposed to its being filed, which I treat as a demurrer to the plea. The question, then, is whether a former action in mandamus, resulting in a final judgment adverse to relator, which judgment was carried by writ of error to an appellate court for review, and is still there undetermined, is sufficient to abate a subsequent action between the same parties, and involving the same subject-matter. The relator argues that the very terms of the statute (the interstate commerce act as amended; section 10, Act March 2, 1889) provide that the circuit and district courts of the United States shall have jurisdiction, upon the relation of any person or persons alleging such violation of said act as prevents relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus, etc., and that the terms of the statute contemplate the possible necessity and the certain power to issue more than one writ in favor of a relator. To this there may be several replies. It may be that the words "a writ or writs" were inserted to meet the grammatical necessities arising from the use, in the beginning of the section, of the words "upon the relation of any person or persons," as, if several persons asked the aid of the court, it might be necessary that several writs issue. Again, it may be that more than one writ might be awarded in favor of a single relator on account of repeated violations of the act in respect of such relator; and it might arise that a writ might be refused upon one application by a relator, and subsequently, upon a second application setting forth a different state of facts, a writ might be allowed. But the question now presented upon the objection to the filing of the plea is whether the pendency of a former mandamus proceeding in a court of competent jurisdiction is pleadable in abatement of a second action between the same parties, and with the same matter in controversy. I have no doubt that such is the law. As a general proposition, the pendency of a former suit between the same parties, and involving the same subject-matter, may be pleaded in abatement of a subsequent suit. Hogg, Pl. & Forms, pp. 168, 169, §§ 213, 308; Id., § 245, note; Insurance Co. v. Brune's Assignee, 96

U. S. 588, 24 L. Ed. 737; *Cook v. Burnley*, 11 Wall. 659, 20 L. Ed. 29; *Stephens v. Bank*, 111 U. S. 198, 4 Sup. Ct. 336, 337, 28 L. Ed. 399. Merrill, in his work on *Mandamus*, says (page 343): "The pendency of another mandamus proceeding, wherein the parties and the questions involved are the same, may be pleaded in abatement." See, also, 13 Enc. Pl. & Prac. p. 728, and cases there cited; Merrill, *Mand.* § 315, and cases cited.

The question then arises as to the status of the mandamus proceeding referred to in the plea as pending in the circuit court of appeals of the United States for the Fourth circuit. From the allegations of the plea, it appears that the action was heard upon its merits, and resulted in a final decision by Judge Jackson adverse to the relator; that a writ of error was allowed to the relator, by virtue of which said proceeding is now in the circuit court of appeals. Is this proceeding now a pending proceeding, in which case it is pleadable in abatement, or a final judgment, in which case, under the authorities cited in Merrill, *Mand.* § 315, it would be pleadable in bar? The answer to this question can make but little difference, save as it causes us to examine and try the plea in abatement or the plea in bar. In *Boswell v. Tunnell*, 10 Ala. 958, it was held that where the suit was pending on appeal the same rules will apply as where it was pending in the original court. In Illinois a writ of error may be pleaded in abatement to an action on a judgment if the writ was sued out before the action was commenced, and the writ of error acts as a supersedeas. *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449. It appears from the record filed with the plea herein that a supersedeas bond was given, and hence the writ of error in the case now in the court of appeals acted as a supersedeas under section 1000, Rev. St. I think it unnecessary to refer to all the authorities cited to show that a supersedeas does not suspend the operation of a judgment as an estoppel. They are very numerous and conclusive. I cite *Ransom v. City of Pierre*, 101 Fed. 665, 41 C. C. A. 585; *Freem. Judgm.* §§ 328, 433; *Black, Judgm.* § 960.

For the foregoing reasons, I have overruled the objection to the filing of the plea in abatement, and also the motion to strike the same out. The plea in abatement now coming on for trial upon the replication nul tiel record thereto, I have examined the record vouched in the plea, and now offered in evidence in support of the allegations thereof, with considerable care. The gist of the contention is that the identical matter in controversy in this action was also in controversy and was decided in the former mandamus proceeding, tried in the circuit court of the United States for the district of West Virginia, the record of which case is now offered in evidence, and that said matter in controversy was the legality and reasonableness of the basis, system, or method of coal-car distribution for interstate traffic in what is known as the "Pocahontas Coal Field." Objection was made on behalf of the relator that the pleadings and judgment in the record do not show, or even tend to show, that this basis was at all in controversy in the former proceeding; that the only place where this becomes apparent is in the opinion of the court setting forth the reasons for its judgment; and that this opinion is neither in form nor effect a special finding of facts, and hence forms no part of the record, and cannot be looked to

to determine what matters were actually in controversy in that proceeding. This conclusion does not appear to be supported in toto by the authorities cited, namely, *Parks v. Turner*, 12 How. 39, 13 L. Ed. 883; *Stone v. U. S.*, 164 U. S. 380, 17 Sup. Ct. 71, 41 L. Ed. 477; *Egan v. Hart*, 165 U. S. 188, 17 Sup. Ct. 300, 41 L. Ed. 680. It is true that it has been held that an appellate court cannot, upon writ of error or appeal, refer to the opinion of the court below for the purpose of eking out, controlling, or modifying the scope of the findings of that court. *Stone v. U. S.*, supra. But the opinion of the court is to be treated as part of the record, and may be examined in order to ascertain the questions presented. *Egan v. Hart*, supra. To the same effect are *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 684, 688, 15 Sup. Ct. 733, 39 L. Ed. 859; *Baker v. Cummings*, 181 U. S. 117, 21 Sup. Ct. 578, 45 L. Ed. 776, and the recent case of *National Foundry & Pipe Works v. Oconto City Water Supply Co.* (decided January 6, 1902, by the supreme court of the United States, and reported in advance sheets of the opinions of the United States supreme court) 22 Sup. Ct. 111, 46 L. Ed. —. In this case the opinion of the court in writing was made a part of the record by the order entered on June 15, 1901, and the order specifically says that, "in conformity to the views in said opinion expressed, doth order and adjudge that the peremptory writ of mandamus herein be, and the same is, denied," etc. If, therefore, the opinion of the court is ever a part of the record, it is in this case. Whatever may be the true scope of the rule when applied to appeals and writs of error (and I think the weight of recent authority is in favor of the doctrine that the opinion of the court may be looked to, to determine the questions in controversy), a somewhat different question is presented when the matter at issue is not whether the court committed any error in its findings, but whether it did in fact decide a certain matter, and whether that matter was in dispute. In such a case I think the opinion of the court is properly a part of the record, and might be looked to in order to ascertain what was decided. But in this case it is not necessary to do this. The evidence, or a great part thereof, has been made part of the record by bills of exception, and shows that the material question submitted to the court for decision was the legality and reasonableness of the "oven basis" of car distribution. See bills of exception Nos. 1 and 2, record.

It also appears, upon the hearing, and after the evidence was submitted, that the relator presented to the court 11 propositions of law, and requested rulings thereon in his favor; that the court overruled each and all of said propositions of law, and refused to affirm any of them. Several of these propositions of law embody the idea that under the evidence in the case the relator, as matter of law, is entitled to have awarded a writ of mandamus as prayed. The refusal to affirm these propositions is made the basis of numerous exceptions in the record. The tenth proposition refers in direct terms to the so-called coke-oven basis of distribution, and the eleventh proposition requested the court to find, as matter of law, that it was the duty of defendant to distribute its available cars upon a basis therein set forth. These propositions, all of which were rejected, taken in connection with the evidence detailed and set forth in the several bills of exception, show

that the substantial matter in controversy was whether the so-called coke-oven basis of distribution, as operated by the respondent, was a legal and reasonable one; and I think that the court held, and intended to hold, as matter of law, that it was, and, by denying at the hearing all the propositions of law asked by relator, gave evidence, negatively it may be, of his findings of law upon the evidence. I may say further that the relator, in his twentieth exception (page 130 of record), evidently adopts the view that the court ruled and decided that the so-called coke-oven basis of car distribution did not work an unjust discrimination against relator. Quite a number of authorities were cited by counsel for the respondents to the proposition that the breadth of the issue determined by the court in rendering judgment in the former proceeding is not determined by the pleadings, but that the evidence heard on the trial may be looked to for the purpose of determining whether or not the questions in the two suits are the same. *Black, Judgm.* § 614; *Wood v. Jackson*, 8 Wend. 9, 22 Am. Dec. 603; *Smith v. Town of Ontario (C. C.)* 4 Fed. 386; *Nesbit v. Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; *Wandling v. Straw*, 25 W. Va. 692; *Sayre's Adm'r v. Harpold*, 33 W. Va. 553, 11 S. E. 16; *Harshman v. Knox Co.*, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. Ed. 1152. I think this is the correct doctrine, and applying it, and looking to the evidence in the former proceeding, we easily ascertain that the whole question was as to whether the system of car distribution adopted by the railway company in the Pocohontas coal field was unjust and discriminative against relator.

A point was made by the relator in argument to the effect that the present suit should not be abated even though I held that the record showed that the former suit involved, as the great question, the so-called coke-oven basis of car distribution, because the present proceedings, in addition to charging that said basis is unjust and discriminative against relator, also charge a number of other matters violative of the interstate commerce act. For example, on page 9 of the printed alternative writ it is charged that the railway company has furnished transportation to relator so irregularly as to disorganize the force at the mine and subject the relator to disadvantage, while no such irregularities are inflicted on other shippers, to wit, *Castner, Curran & Bullitt*. I confess that this question has given me great difficulty, as it seemed possible that, although one of the questions presented by the present alternative writ had been decided adversely to relator, still, if the specific violations charged by him in it were not all referable to the system or basis upheld by the former decision, they might present a case for relief. I have made diligent search, in the limited time I have had for the investigation of the intricate questions presented, for authority directly upon this proposition, and I have found one case which seems directly in point. In *Buffum v. Tilton*, 17 Pick. 511, it was held, in a case involving the pendency of a former suit between the same parties, that "where it appears by inspection that the cause of action in the second suit is, in a material and substantial part, the same as in the first, although other causes of action are inserted in the second, it is, within the meaning of the rule of law, an action instituted for the same cause of action, and is a good cause of abatement." Upon re-

flection it has seemed to me that this decision is founded in wisdom, and I therefore adopt and follow it.

A further contention is made by the relator that it is a non sequitur that because the oven basis was reasonable in January, 1901, it is reasonable now; but I think, if it was not violative of law then, it cannot be now. If conditions have so changed that such basis is no longer reasonable or legal, such change should be averred, as otherwise the principle of *res adjudicata* between the parties is as applicable in the case of car distribution as in the case of any custom or usage of trade, or, as I believe, in any other case,—even one involving the construction or validity of a positive law.

For the reasons given, I find for the respondents upon the issue joined upon the plea in abatement; and, so finding, it is unnecessary for me to consider the other matters presented.

LOGANSFORT RY. CO. v. CITY OF LOGANSFORT et al.

(Circuit Court, D. Indiana. March 8, 1902.)

No. 10,031.

1. EQUITY JURISDICTION—CONTRACTS BETWEEN STREET RAILROAD COMPANY AND CITY.

Before a street railroad company can complain, in a court of equity, of the violation by a city of its contract rights, it must show that it has a contract which is free from fraud and enforceable at law, and one which is fair and reasonable in all its parts, and within the power of the city lawfully to enter into. If it is unfair, unreasonable, or against good conscience, a court of equity is justified in refusing to enforce it, and in leaving the complainant to its remedy at law.

2. STREET RAILROADS—AUTHORITY TO USE STREETS—LAW OF INDIANA.

Under the law of Indiana, by which the fee of streets in cities is in the abutting lot owners, and exclusive authority, jurisdiction, and power over the streets of a city are vested by statute in the common council, such authority is held in trust for the benefit not alone of the city, but for that of all the people of the state, and extends only to the regulation of the use of streets for ordinary public purposes. The authority to lay tracks and operate a street railroad thereon can only be conferred by statute, in express words, or by language from which such power must be necessarily implied.

3. SAME—POWERS OF CITY COUNCIL.

By Act Ind. Sept. 7, 1891 (2 Burns' Rev. St. 1894, § 5450 et seq.), authority was conferred to organize street railroad companies, and to construct and operate street railroads, but it is provided that "nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets * * * within the corporate limits of such cities; and all street railroad companies * * * shall first obtain the consent of such common councils to the location, survey and construction of any street railroad through or across the public streets of any city, before the construction of the same shall be commenced." By Act March 3, 1891 (2 Burns' Rev. St. 1894, § 5473), horse railroads were authorized to use electricity for motive power; but the same reservation as to the power of city councils was made, and it was provided that companies desiring to change to electricity should first obtain the consent of the common councils, which might give such consent "upon such terms and conditions as they may see fit to impose." *Held*, that neither of

such acts conferred on the common council of a city, either expressly or by necessary implication, the power to grant to a street railroad company either an exclusive or a perpetual use of its streets for railway purposes.

4. SAME—ULTRA VIRES GRANT.

The common council of a city in Indiana, vested by statute with exclusive authority, jurisdiction, and power over the streets of the city, cannot alienate such power by a grant to a street railroad company in perpetuity of the right to build and operate railroads through such streets as it may from time to time elect to use and occupy.

5. SAME—CONTRACT CREATED BY ORDINANCE.

Such a grant, even if authorized and valid, amounts merely to an offer, which creates no contract as to a particular street until accepted and acted upon; and until such time the offer may be withdrawn by a repealing ordinance.

6. SAME—NECESSITY OF CONSENT OF CITY COUNCIL TO USE OF STREET—INDIANA STATUTE.

Under the statute of Indiana (2 Burns' Rev. St. 1894, § 5464) which requires all street railroad companies to first obtain the consent of the common council "to the location, survey, and construction of any street railroad through or across the public streets of any city," an ordinance giving general consent to a company to occupy and use any or all of the streets of the city for railway purposes, at its election, does not obviate the necessity of a specific consent to the location, survey, and construction of a road upon any particular street selected; and the company acquires no vested right to the use of such street until such consent has been given.

In Equity. On demurrer to bill.

Winter & Winter, Nelson & Meyers, and Charles A. Dryer, for complainant.

John G. Williams, McConnell, Jenkins & Jenkins, and Frank M. Kistler, for defendants

BAKER, District Judge. The question for decision is raised by a demurrer to the bill of complaint. The bill is brought by the Logansport Railway Company against the city of Logansport, and the mayor and members of its common council, to enjoin them from enforcing an ordinance adopted on October 30, 1901, on the ground that it is void because it impairs the contract rights of the complainant. The bill is in the nature of a bill for the specific enforcement of the complainant's contract rights against alleged infringement by the enforcement of the later ordinance. Before the complainant can, in a court of equity, complain of the violation by the city of its contract rights, it must show that it has a contract, and that such contract is free from fraud and enforceable at law, and one that is fair and reasonable in all its parts, and within the power of the city lawfully to enter into. If the contract is unfair, unreasonable, or against good conscience, a court of equity would be justified in refusing to enforce it, and would leave the party to its remedy at law. The court, too, must enforce the contract, if it enforces it at all, just as it is written; and it has no power, by changing or varying material terms, to make, in effect, a new contract for the parties.

By an act of the legislature of this state in force on September 7, 1861 (2 Burns' Rev. St. 1894, §§ 5450-5454, 5463, 5464), authority
114 F.—44

was conferred on any number of persons, not less than five, to incorporate as a street railway company in perpetuity; prescribing its powers, and providing generally for the construction of the street railway. By section 5464 it was enacted that:

"Nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets, highways, alleys and bridges within the corporate limits of such cities; and all street railroad companies which may be organized under the provisions of this act shall first obtain the consent of such common councils to the location, survey and construction of any street railroad through or across the public streets of any city, before the construction of the same shall be commenced."

By the first section of an ordinance adopted on December 6, 1882, the consent, permission, and authority of the city of Logansport were given, granted, and duly vested in the Logansport Railway Company, to lay and construct a single or double track for a street railway, with all necessary and convenient tracks, turn-outs, etc., in and along the course of the streets and bridges of the city of Logansport hereinafter mentioned, and the same to occupy, maintain, and use, and to operate thereon street railway cars, etc., in perpetuity, and in the manner and upon the conditions set forth in the ordinance. By the second section of the ordinance it was provided that said railway company, its successors and assigns, were exclusively authorized to construct, own, and keep, maintain and operate, street railways therein provided for, as follows: Commencing at the center of Fourth street, on the north line of Canal street, thence southerly through Fourth street to Market street, thence easterly through Market street to Second street, thence northerly through Second street to Broadway, thence easterly through Broadway to the easterly limits of the city; also through such other streets and over such bridges in said city as the said company, its successors and assigns, might from time to time elect to use and occupy: provided, that the common council reserves the right to ordain and direct said company to build and operate a line of railway through other streets, and if the company, its successors or assigns, fail or refuse to construct and operate such line on such streets within one year, then and in that event the common council may grant the privilege to any other company. The power to be employed in moving the cars was restricted to animal power. By an act of the legislature in force on March 3, 1891 (2 Burns' Rev. St. 1894, § 5473), it was enacted that:

"Any street or horse railroad heretofore or hereafter organized in this state may, with the consent of the common council of the city in which the railroad or any part thereof is located and operated, and with the consent of the board of commissioners of the county where such railroad or any part thereof is operated beyond the limits of such city, use electricity for motive power: provided, that nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets, highways, alleys and bridges within the corporate limits of such cities, and all such street railroad companies shall first obtain the consent of such common councils for the operation by electricity of their cars along, through or across the public streets or alleys of any city before the operation by electricity of their cars shall be commenced: provided, that in giving such consent such common council or board of county commissioners may do so upon such terms and conditions as they may see fit to impose."

After the enactment of this statute, on July 3, 1891, the common council of the city of Logansport adopted an ordinance by the first section of which it was provided:

"That consent, permission and authority be and are hereby given, granted and hereby vested in said Logansport Railway Company, its successors and assigns, to operate by electricity its cars, carriages and vehicles of any kind and character along, through, on, over and across the streets, and alleys, bridges and highways in the said city of Logansport now existing or that may be hereafter established or constructed as it may from time to time elect, in perpetuity."

There was the same reservation to the city as is contained in the ordinance of 1882 in respect to the right to require the company to construct a railway and operate cars on other streets than those occupied by it.

The statute of this state confers exclusive authority, jurisdiction, and power over all streets, highways, alleys, and bridges within the corporate limits of cities in this state on the common council. In *Eichels v. Street Ry. Co.*, 78 Ind. 261, 41 Am. Rep. 561, it was held that the authority to lay the tracks and operate a railway on the streets of a city can only be conferred by statute in express words, or by language from which such power must be necessarily implied. Such a power, it was said, is an extraordinary one, and one which cannot be implied from a charter of a municipal corporation which confers only the usual powers ordinarily bestowed upon such corporations. Hence the sole power possessed by the city of Logansport to grant an exclusive and perpetual right to the complainant to occupy and use such streets of the city for street railway purposes as it might from time to time elect depends upon the acts of 1861 and 1891 above mentioned. We are not concerned with the question whether or not the legislature possesses the constitutional power to grant to the cities of this state the authority to confer upon street railway companies the exclusive and perpetual use of such streets of the city as they may from time to time elect to use and occupy. The question in hand is, has the legislature conferred upon the city of Logansport any such power? The fee of the streets in cities in this state resides in the abutting lot owners, and the city possesses only an easement of way in the streets. It does not hold title to the easement as a private property right, which it may alienate at pleasure, as it might alienate property belonging to the city by a title unimpressed with a trust. The city holds the easement in the streets in trust not simply for the city alone, but for the benefit and use of all the people of the state. In interpreting the statutes, the court ought never to lose sight of the fact that in dealing with the use of the streets the common council of a city is acting as a trustee for the benefit and advantage of the public.

It is manifest from a reading of the above-mentioned statutory provisions that the legislature has not conferred, in explicit and express words, on the city of Logansport, the power to grant to a street railway company either an exclusive or a perpetual use of its streets for railway purposes. The act of 1861 simply provides that the street railway company shall first obtain the consent of such common council to the location, survey, and construction of its railroad, before the con-

struction of the same shall be commenced. No words of perpetuity are expressly employed. The same is true of the act of 1891. There being no express words of perpetuity in the legislative grant, is such power necessarily to be implied from the language employed? In *Detroit Citizens' St. R. Co. v. Detroit Ry.*, 171 U. S. 48, 18 Sup. Ct. 732, 43 L. Ed. 67, the question for decision was whether the legislature of Michigan had conferred power on the city of Detroit to grant to a street railway company the exclusive use of its streets. The statute provided that:

"All companies or corporations formed for such purposes [the railway purposes mentioned in the act] shall have exclusive right to use and operate any railways constructed, owned or held by them: provided that no company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe."

The court says:

"It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes."

And so it must be held here that similar and no broader language employed in the acts of 1861 and 1891 above mentioned does not explicitly and directly confer the power on the common council of the city of Logansport to grant either an exclusive or a perpetual privilege to occupy its streets for railway purposes. The court further says:

"There were many reasons which urged to this; reasons which flow from the nature of the municipal trust,—even from the nature of the legislative trust,—and those which, without the clearest intention explicitly declared, insistentlly forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

And how much stronger are the reasons which insistentlly forbid that the future should be committed and bound in perpetuity by the conditions of the present time, and that functions delegated for public purposes should be forever paralyzed in their exercise? That such powers must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly established.

The power to grant the use of its streets in perpetuity not having been granted to the city of Logansport in explicit and express words, is it granted by a necessary implication? The supreme court, in the above-cited case, further says:

"*Mr. Justice Jackson, in Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co. (Q. O.) 38 Fed. 659, says * * * 'that municipal corporations possess and can exercise only such powers as are granted in express words or those necessarily or fairly implied, in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable.' The italics are his. This would make 'necessarily implied' mean inevitably implied. The court of appeals of the Sixth circuit, by Circuit Judge Lurton, adopts Lord Hardwicke's explanation, quoted by Lord Eldon in Wilkinson v. Adam, 1 Ves. & B. 422, 466, that 'a necessary implication means not natural necessity, but so strong a probability of intention that an intention*

contrary to that which is imputed to the testator cannot be supposed.' If this be more than expressing by circumlocution an inevitable necessity, we need not stop to remark, or, if it mean less, to sanction it, because we think that the statute of Michigan, tested by it, does not confer on the common council of Detroit the power it attempted to exercise in the ordinance of 1862. To refer the right to occupy the streets of any town or city to the consent of its local government was natural enough,—would have been natural under any constitution not prohibiting it,—and the power to prescribe the terms and regulations of the occupation derive very little, if any breadth, from the expression of it."

But assuming that the power "to give consent upon such terms and conditions as the common council may see fit," found in the act of 1891, does acquire breadth from such expression, surely there is sufficient range for its exercise without extending it so as to embrace the power to grant the use of the streets in perpetuity. The supreme court, further on, says:

"Easements in the public streets for a limited time are different, and have different consequences, from those given in perpetuity. Those reserved from monopoly are different, and have different consequences, from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

Can it be successfully contended that the perpetual use of the streets of a city is indispensable to their use for railway purposes?

But there are other reasons why the bill cannot be maintained. The ordinances of 1882 and 1891 grant the exclusive right to use in perpetuity certain streets, designated by name, and also the right to use and occupy such other streets and bridges in the city as the street railway company, its successors and assigns, may from time to time elect to use and occupy. The repealing ordinance expressly excepts from its operation all the streets and parts of streets occupied and in use by the complainant at the time of its adoption. Its effect is simply to repeal so much of the ordinance of 1882 as purported to grant to the complainant the right to use and occupy such other streets of the city as it might from time to time elect to use and occupy, and also to repeal so much of the ordinance of 1891 as purported to grant to the complainant the right to use and occupy, at its election, all the streets of the city then existing or thereafter to be established, in perpetuity. The right granted, except as to the designated streets, was a mere offer, which could only become a contractual obligation by the election of the complainant to use and occupy the streets for railway purposes. Such election must be made in good faith, and evidenced by some open and notorious act brought to the notice of the common council. Until the offer was accepted by such an election, it could be withdrawn.

But the grant is open to a more serious objection. It was ultra vires of the common council to surrender its control of the streets of the city in perpetuity to the complainant. The municipal authorities had no power to grant forever to the complainant the right, at its own uncontrolled election, to use and occupy such or all of the streets of the city as it might from time to time elect. The right to determine for itself from time to time what streets could be used and occupied for street railway purposes consistently with the public safety and welfare

is a power incapable of absolute alienation by the common council. By these ordinances the common council has undertaken to surrender this power, and to remit it to the uncontrolled election of the complainant. The only power reserved is the power, if the common council wishes the railway to be extended along a particular street, to notify the complainant of such desire; and, if it fails within one year to construct and operate its road on such street, then the use of such street may be granted to another railway company. But no right or power is reserved to prevent the railway company, at its election, from using with a double or single track any and all the streets of the city, however injurious it may be to the public convenience, safety, or welfare. The public convenience, safety, and welfare, in this regard, are surrendered to the complainant. By these ordinances, if valid, to the complainant's election is relegated the question whether or not a street can, with due regard to the comfort and safety of the people, be occupied by a single or a double track railway. Such a surrender of corporate power in perpetuity to a street railway company cannot and ought not to be upheld. It cannot be supported as a reasonable exercise of the power of a trustee over a trust estate committed to its charge, to be administered in the interest of the public, and not for the private advantage and gain of railway or other corporations.

But if the granting ordinances are not invalid and unenforceable so far as the repealing ordinance affects them, still the bill cannot be maintained for another reason. It was ruled in the opinions of Judge Woods and myself, both concurring in this particular, in *Citizens' St. R. Co. v. City R. Co.* (C. C.) 64 Fed. 647, that, under ordinances similar to those granted to the complainant, the Citizens' Street Railroad Company acquired no vested right to commence the construction of a particular line of street railway on an unoccupied street without first obtaining the consent of the common council to "the location, survey, and construction" of such proposed line. No such consent is alleged to have been obtained before the complainant began to construct its railway on George street, High street, Erie avenue, and Seventeenth street. It is simply averred that the complainant gave notice of its intention to construct such street railway, and then, without asking or waiting for the consent of the common council, it began to tear up these streets and to lay down its tracks. By the ordinances of 1864 and 1865 the city of Indianapolis granted to the Citizens' Street Railroad Company the right to enter upon, use, and occupy for the term of 30 years all the streets of the city then existing and thereafter to be established, for street railway uses and purposes. Under this grant the company had constructed and had in operation about 40 miles of street railway. In 1889 the common council and board of aldermen of the city of Indianapolis adopted an ordinance prohibiting the railway company from entering upon or constructing its railway on any unoccupied street until it had first obtained the consent of the city street commissioner. In 1893 the city granted to the City Railway Company the right to enter upon and construct a street railway system on and along 29 specified routes, embracing a great proportion of the most important streets of the city, and including many of the streets on which the Citizens' Street Railroad Company had construct-

ed its railroad, and had it in operation. It was claimed by the Citizens' Street Railroad Company that the two later ordinances infringed the contract rights secured to it by the earlier ordinances of 1864 and 1865. In discussing this question, Judge Woods said:

"I am of the opinion that the complainant is not entitled to equitable relief in respect to its alleged rights in the streets so designated for the use of the defendant. Prior to that designation the complainant had no lines upon those streets, except a fragment on Pennsylvania street, which had been practically, if not legally, abandoned. By its own charter, as I construe it,—indeed, according to the plain letter,—it had no right to commence construction on a particular line without first having obtained the consent of the common council to the 'location, survey, and construction' proposed. The necessity for this consent was not affected, as I think, by anything contained in the ordinance of January 18, 1864, or in the supplemental ordinance of September 18, 1865. Besides, the entry of the complainant upon those streets was in violation of the ordinances of 1889 and 1893; and, if rights were thereby acquired, the complainant, in view of all the circumstances, should rely upon the courts of law for their defense, rather than look to equity for their establishment. The question whether the last-named ordinances are valid or not need not be considered, because, by its own charter, the complainant had no right to enter upon a street without the consent of the city; and the city was free, with or without reason, to give or withhold its consent."

This was said by the learned judge notwithstanding the city of Indianapolis had given a general consent, permission, and authority to the Citizens' Street Railroad Company to enter upon, use, and occupy for railroad purposes, all of the streets of the city. In the same case Judge Baker said:

"Prior to the designation of the additional north and south streets for the use of the defendant, the complainant had no lines upon those streets, except a fragment upon South Pennsylvania street, which had been practically, if not legally, abandoned. I do not think the complainant, under the ordinance of 1864 or 1865, had any vested right to commence the construction of a particular line without first obtaining the consent of the common council to the location, survey, and construction of such proposed line. Therefore the complainant, having obtained no consent from the city to occupy the streets in question, has no right to complain of their occupation by the defendant company."

The consent conferred upon the Logansport Company by the ordinances of 1882 and 1891, so far as the ordinance of October 30, 1901, affects them, is not so clear and explicit in giving consent and granting authority to enter upon the streets of the city of Logansport as were the ordinances of 1864 and 1865 adopted by the common council of the city of Indianapolis. Judges Woods and Baker, in the above-cited case, held that the general consent conferred by the original ordinances to occupy and use all of the streets of the city for railway purposes did not satisfy the statute, nor take away from the common council the right, before the railway company should construct a street railway upon an unoccupied street, to require it to obtain the consent of the common council to its location, survey, and construction.

For these reasons I am of opinion that the demurrer to the bill should be sustained, and it is so ordered.

In re BOORSTIN.

(District Court, N. D. Georgia. March 7, 1902.)

No. 778.

BANKRUPTCY—EXEMPTIONS UNDER LAW OF GEORGIA—GOOD FAITH OF BANKRUPT.

Under the law of Georgia, which requires a debtor claiming exemptions from personal property to "act in perfect good faith," and to "make a full and fair disclosure" of all his property, a bankrupt will not be allowed exemptions from a stock of goods, as against the creditors who sold him such goods, where he fails, on his examination, to make any satisfactory showing as to the general conduct of his business, to explain circumstances which are strongly indicative of fraud or concealment of property, or to answer questions in relation to his business which any man of ordinary intelligence should be able to answer.

In Bankruptcy. On review of referee's decision denying the bankrupt's claim to exemptions.

The following is the report of the referee, Clifford M. Walker:

B. Boorstin, a merchant of Covington, Ga., was on December 23, 1901, adjudicated bankrupt on his own petition. He scheduled debts aggregating \$8,151.96. His assets he schedules as a stock of goods worth \$2,000, and open accounts worth \$500. The first meeting of creditors was held January 6, 1892, and a trustee elected. The trustee filed his report, setting aside homestead exemption in certain articles of merchandise composing a part of his said stock, selected by the bankrupt, amounting to \$1,500. Before the expiration of twenty days after the filing of the trustee's report, certain creditors, whose claims had been filed and allowed, filed exceptions to said report, alleging that the bankrupt had not acted in perfect good faith, and had not made a full and fair disclosure of all his personal property, including money, stocks, and bonds, as required by the laws of Georgia in reference to exemptions. All creditors having been duly notified thereof, the issue so made came on to be heard before the referee February 7, 1902. A full stenographic report of the evidence then taken, together with evidence taken heretofore,—it being agreed to use the same for this hearing,—is of file in the referee's office. Counsel for bankrupt demurred to the exceptions, insisting that the allegations therein made were too general and vague, and not specific. Amendments were proposed and allowed, and the demurrer overruled. What purports to be bankrupt's ledger, his invoices now shown on the ledger, his bank-deposit and check-stub books, and the canceled checks were presented in evidence. In the earnest effort to arrive at the truth in this case, all this mass of evidence has been gone over minutely, and in the investigation the referee has spared no time or labor. That such exertion was necessary is largely due to the failure of bankrupt to keep any cash book, and only a semblance of a record of his liabilities.

While bankrupt shows payment of large sums of money on account and for expenses, and says he has acted in good faith, without concealing any property whatever, there is much damaging evidence against his contention. Among the very few entries on his ledger bearing any definite information is one presenting a statement of his condition on January 1, 1900, showing his stock to be worth \$4,500, and his liabilities to be \$2,419, or a net worth, without including bills receivable, of \$2,081. Bankrupt testifies that the year 1900 was a remarkably fine business year, and his evidence is corroborated by the fact that his cash deposits for the last three months average \$1,555 per month. Carefully avoiding the dangers of estimating, we can safely conclude from this evidence that on January 1, 1901, bankrupt's net worth must have been as great as on January 1, 1900, or \$2,081. His schedules show that on December 23, 1901, less than 12 months thereafter, his liabilities exceed his assets \$5,551.95. When bankrupt filed his schedules he valued his stock at \$2,000. Fifty days afterwards, when called upon by the creditors to ac-

count for his property, he swears that his stock is worth \$3,500. Waiving this strange change of view, giving to the bankrupt the benefit of any possible doubt by allowing the valuation of the stock at \$3,500, instead of \$2,000, as scheduled, there still remains \$6,732.95, and the profits on sales during the year, if any, to be accounted for in expenses, losses in accounts receivable, and depreciation in stock. The bankrupt himself attributes his failure to expenses alone, and the referee is of the opinion that this enormous loss in a business carried on in a small town, with store rent at \$27.10 per month, and house rent at \$9 per month, even with a family of six children, has not been satisfactorily explained. The only reasonable conclusion to be arrived at is that the bankrupt has concealed from his creditors and the trustee in bankruptcy a considerable portion of his property, and has failed to make a full and fair disclosure thereof. Significantly throwing light on this question of the perfect good faith of the bankrupt are many other circumstances of more or less import. One M. Levin, of the same nationality as bankrupt, boarding with bankrupt, and paying nothing for it, though bankrupt says his contract included board, closely associated with bankrupt before and after the adjudication, present in several private consultations between bankrupt and bankrupt's attorney, was bankrupt's clerk. On May 25, 1901, he swore before the tax receiver of Newton county that \$100 in money, \$125 in notes and accounts, and \$350 in merchandise (furniture) comprised "every species of property that I own in my own right or have control of." The evidence shows that his furniture business was sold out in the summer, and in August Levin entered into clerkship with bankrupt. From this time to December 28, 1901, he deposited in bank \$1,401.31 in cash; and bankrupt's schedules a large sum of money due to Levin, besides his claim for services, not one cent of which had Levin collected. Though there is evidence going to show that Levin sold furniture on the installment plan, and collected installments which fell due from time to time, it staggers one's belief that such a business could have been conducted on the basis of a \$350 stock. On December 3, 1901, less than three weeks before the filing of bankrupt's petition, but several months after the sale of Levin's stock of furniture, Levin shipped to the city of Atlanta a box which he says contained dry goods consigned to his brother. The explanations of Levin, as well as of his brother, are suspicious, to say the least. Bankrupt schedules no household furniture, and asks no exemption as to such personalty, though on June 20, 1901, he swore before the tax receiver of Newton county that he owned such property, and gave in taxes thereon. He schedules these taxes as a debt due by him, though now he swears that such taxes are due by his wife; and such duplicity is contrary to every principle of good conscience, and does violence to the tenor of the act of the Georgia legislature, already too liberal with a claimant of homestead exemption, which requires that such claimant must present clean hands before any allowance can be made to him. For five days before adjudication, bankrupt made no deposits in bank. Though he attempts to explain that his receipts were applied to creditors' claims, he shows no vouchers for same, and makes absolutely no explanation of the whereabouts of proceeds of sales for several hours after the petition was filed, during which the store was open. Bankrupt suspiciously carried several trunks to Atlanta within three months of his adjudication. He received a sum of money from M. Levin a few days before adjudication, although Levin is scheduled a creditor for a large amount. On November 15, 1901, bankrupt gave a check to J. Turner for \$300, which he utterly fails to explain, stating that he does not know how it is. He "does not remember" several material matters tending to show fraudulent acts. There are other suspicious circumstances, but those hereinbefore set out are enough for the purposes of this opinion.

In anticipation of a possible finding that bankrupt had not scheduled all his property, counsel for bankrupt earnestly insisted that in such event intentional fraud must be shown. The Code of Georgia requires that a full and fair disclosure of all property must be made. The supreme court of this state has declared (*Torrance v. Boyd*, 63 Ga. 23) that "any failure, until satisfactorily explained and accounted for, and the consequences repaired, is to be deemed intentional, and therefore fraudulent." In a long line of deci-

sions, the United States courts have held that, when properly placed on notice, bankrupts must make a satisfactory account of their assets, from which a reasonable conclusion can be arrived at that the bankrupt has acted in perfect good faith. The supreme court of Georgia cites with its approval in *re Salkey*, 6 Biss. 269, Fed. Cas. No. 12,253 (*Ryan v. Kingsbery*, 88 Ga. 390, 14 S. E. 605), the facts in which present an analogous case to the case at bar. It also approves the opinion of Judge Drummond, expressed in this language: "The court is not bound to accept his [the bankrupt's] answer that he has told all that he knows about his property, if it clearly appears that there is still property unaccounted for." As to the badges of fraud partly set out in this opinion, the laws of Georgia declare (Code, § 4029) that "fraud may not be presumed, but being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence."

The referee has rarely seen such ability as has been shown in the presentation of the bankrupt's contentions by his counsel in this case. Their earnest efforts and evident honesty of belief in the honesty of their client have elicited the most painstaking investigation of the record on the part of the referee. But it is his opinion, after such an investigation, that the bankrupt has not acted in perfect good faith, and has not made a full and fair disclosure of his property. An order will therefore be entered denying the application for exemption, and it is considered and ordered that the exceptions to the report of the trustee setting aside the exemption be, and the same are hereby, sustained.

Capers Dickson, Foster & Butler, J. M. Pace, and L. L. Middlebrooks, for creditors.

James F. Rogers and E. F. Edwards, for bankrupt.

NEWMAN, District Judge. The above is the report of the referee on the right of the bankrupt to have the exemption allowed by the constitution and laws of Georgia out of his stock of merchandise, which has passed into the hands of his trustee in bankruptcy. The referee, as will be seen, refuses to approve the exemption. In view of the fact that counsel were somewhat restricted in their oral argument before the court on these exceptions, I have examined the evidence in the case, and the entire record, very carefully, and have considered the case, as counsel for the bankrupt urges it should be considered, only with reference to the admitted condition of the bankrupt in June, 1901, and the situation subsequent thereto. That which operates most strongly against the bankrupt, to my mind, is not so much the amount of goods on hand in June, the amount afterwards purchased, and the small amount on hand at the time the petition in bankruptcy was filed, and the failure to account for the proceeds, although this is not at all satisfactory, but it is the failure of the bankrupt to make any satisfactory showing as to the general conduct of his business. His testimony is a succession of failures to answer questions which any business man of ordinary intelligence could answer with reference to the conduct of his own business. He utterly fails to make a full, frank, and complete disclosure as to his affairs, which is required of one seeking an exemption under the laws of Georgia. Section 2830 of the Code of Georgia provides that:

"It shall be the duty of each and every person who claims the benefit of the exemption allowed in this article, as the allowance is a liberal one, to act in perfect good faith; and as it is in the power of the debtor, claiming the exemption of personal property, to conceal part of his property or money, and to claim the balance as exempt, it shall be the duty of such debtor, when he takes steps in the court of ordinary to have said exemption of personal prop-

erty set off to him, to make a full and fair disclosure of all the personal property, including money, stocks and bonds, of which he may be possessed at the time, and all such money or property which he may hold in excess of the said exemption shall be subject," etc.

Another part of the same section is as follows:

"The debtor guilty of wilful fraud in the concealment of part of his property from his creditors, of which he is possessed when he seeks the benefit of the exemption, shall, on account of his fraud, lose the benefit of such exemption, and his property shall be subject to the payment of all just debts which he owed at the time such fraud was committed."

It is impossible to read the examination of this bankrupt, and believe that he has acted "in perfect good faith," as the statute requires, with his creditors.

Questions similar to that presented here have been before this court. In *re* Waxelbaum, 101 Fed. 228; In *re* Williamson (in the Northwestern division of this district) 114 Fed. 190, and In *re* Stephens (in this division) 114 Fed. 192. In the Williamson Case referred to, this language is used:

"In Georgia the exemption from levy and sale provided by statute will not be allowed unless the person claiming the same comes into court with clean hands; and certainly, in order to justify the allowance of an exemption out of a stock of goods, as against the creditors who sold the goods with which the business has been conducted, a case should be shown of fair dealing on the part of the debtor."

I think the conclusions reached by the referee are fully justified by the record in this case. As I was impressed with the argument of counsel for the bankrupt that he had not had opportunity to present the bankrupt's condition prior to June, 1901, I have, as stated, confined my examination of the case to the condition of the bankrupt at that time, and to facts which are developed subsequent thereto, and really mainly as to occurrences at the time and just before the failure of the bankrupt, which seem to me amply sufficient to justify the refusal of the exemption claimed.

It is well understood that the court will not interfere with a finding of the referee on the facts of a case unless it is manifestly erroneous, and certainly this cannot be said of the referee's report in this matter. The action of the referee denying the exemption is approved.

**CARTERSVILLE LIGHT & POWER CO. v. MAYOR, ETC., OF CITY OF
CARTERSVILLE, GA., et al.**

(Circuit Court, N. D. Georgia, N. W. D. March 13, 1902.)

No. 3.

PRELIMINARY INJUNCTION—GROUNDS—QUESTIONS CONSIDERED ON APPLICATION FOR.

Where it appears on an application for a preliminary injunction that doubtful questions, both of fact and law, are involved in the case, the court will not enter upon the merits, but will grant the injunction, if necessary to preserve the status of the parties until the final hearing.

In Equity. On motion for preliminary injunction.

Gray, Brown & Randolph, for complainant.

John H. Wilkie and J. M. Neel, for defendants.

NEWMAN, District Judge. A brief statement of the facts in this case will be sufficient for the purposes of the decision now made. On August 6, 1888, the city of Cartersville, Ga., entered into a contract with the Orient Illuminating Company by which the city granted to the illuminating company the exclusive privilege of furnishing gas and lighting the city at a fixed price for the period of 20 years. The contract also provided that upon the request of the city, and under certain circumstances, and upon certain conditions, the Orient Illuminating Company should erect and operate an electric lighting plant in the city of Cartersville, in which case the exclusive privilege of lighting the city should be extended for 20 years from the date of such request. Subsequently the rights and privileges of the Orient Illuminating Company were, with the consent of the city, transferred and assigned to the Cartersville Improvement, Gas & Water Company, which latter company erected and put in operation a gas plant in the city of Cartersville, and the same was accepted by the city. In October, 1888, the gas and water company executed a mortgage upon all of its property, rights, easements, and franchises to the International Trust Company of Boston, Mass., to secure an issue of \$100,000 of bonds. This mortgage was afterwards foreclosed in this court, and all of the property mentioned therein was sold under order of the court, and bought by John W. Akin and assigns, on January 5, 1895, and afterwards transferred by said Akin and assigns to the Cartersville Light & Power Company, the complainant in this case. In 1894 the International Trust Company of Boston sought to amend its original bill for foreclosure of the mortgage by making the city of Cartersville a party defendant thereto, and asking for damages against the city for the breach of the contract of August 6, 1888, on account of the city's repudiation of the contract and refusal to comply with its provisions, which amendment was stricken on demurrer. 63 Fed. 341. In 1898 Norbert Becker, the president of the complainant company, purchased all of its capital stock, since which time the company has continued to furnish gas and to light the town of Cartersville. On May 15, 1901, the mayor and aldermen of the city of Cartersville passed a resolution providing that an election be held in the city of Cartersville to pass upon the question of issuing bonds for the purpose of erecting an electric lighting plant to furnish light for the city. The election was duly held on June 22, 1901, and the result declared to be in favor of issuing bonds and erecting an electric lighting plant to provide light for the city of Cartersville; whereupon the complainant filed its bill to enjoin such action by the city, and to require it to specifically perform its original contract of August 6, 1888. This case has now been heard on the bill, answer, certain records and documents, and ex parte affidavits, on an application for injunction pendente lite.

If it was clear that the plaintiff would not, on the final hearing, be entitled to an injunction, it would be proper to determine this controversy now on its merits; but such is not the case. There are very interesting and doubtful questions of law involved, and sharp conflict in the evidence as to some very material facts.

Since the oral argument of the case counsel on both sides have furnished me with full and elaborate briefs. With the benefit of these

I have, as soon as opportunity offered, gone over this entire record, and my judgment is that it is a case which should not be disposed of on this application for preliminary injunction. It should not be determined on its merits until the evidence can be taken by depositions on examination and cross-examination of witnesses. The proper course for the court in a case like this is to preserve the status until a final hearing can be had. The rule is stated in 10 Enc. Pl. & Prac. p. 1010, in this way:

"It is not proper, on an application for a preliminary injunction, to decide, or to consider with a view to a final decision, the merits of the controversy, especially where grave questions of law are involved; and the court should do no more than determine that the bill, assuming its allegations to be true, sets forth facts sufficient to warrant the issuance of an injunction."

To the same effect is the case of *New Memphis Gas & Light Co. v. City of Memphis* (C. C.) 72 Fed. 952; and it is also very strongly stated by the circuit court of appeals for the Eighth circuit in *City of Newton v. Levis*, 25 C. C. A. 161, 79 Fed. 715.

An injunction may be issued to remain of force pending the litigation, unless counsel can continue the agreement which has heretofore existed between them to the effect that the city of Cartersville will take no further steps towards issuing bonds or erecting its own electric light plant until this case is determined.

FOSHA et ux. v. WESTERN UNION TEL. CO.

(Circuit Court, W. D. Pennsylvania. April 26, 1902.)

No. 18.

FEDERAL COURTS—JURISDICTION—RESIDENCE OF PARTIES—WAIVER OF OBJECTIONS.

Act March 3, 1887 (24 Stat. 552), as corrected by Act Aug. 13, 1888 (25 Stat. 433), providing that "no civil suit shall be brought" before either a district or circuit court of the United States "against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of different states suit shall be brought only in the district of the residence of either the plaintiff or defendant," confers a mere personal privilege or exemption on the defendant, which he waives by a general appearance to the suit.

John O. Petty, for plaintiffs.

J. S. & E. G. Ferguson, for defendant.

ACHESON, Circuit Judge. The first section of the act of March 3, 1887 (24 Stat. 552), as corrected by the act of August 13, 1888 (25 Stat. 433), gives, generally, to the circuit court of the United States, jurisdiction of controversies between citizens of different states where the matter in dispute exceeds the sum of \$2,000 exclusive of interest and costs. This case presents such a controversy. Therefore we have here a controversy of which a circuit court of the United States has jurisdiction. *Railroad Co. v. McBride*, 141 U. S. 127, 131, 11 Sup. Ct. 982, 35 L. Ed. 659. Now, upon the authority of a long line of decisions, it must be held that the provision of the statute,

"no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant," merely confers a personal privilege or exemption which a defendant may waive. *Toland v. Sprague*, 12 Pet. 300, 330, 331, 9 L. Ed. 1093; *Ex parte Schollenberger*, 96 U. S. 369, 378, 24 L. Ed. 853; *Railroad Co. v. McBride*, supra; *Railroad Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. And it must also be accepted as a settled principle applicable to the act of 1887-88, that the objection that the suit is brought in the wrong district is waived by the defendant by a general appearance to the suit. *Levy v. Fitzpatrick*, 15 Pet. 167, 171, 10 L. Ed. 699; *Foote v. Association (C. C.)* 39 Fed. 23; 2 Enc. Pl. & Prac. 639; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 206, 13 Sup. Ct. 44, 45, 36 L. Ed. 942. In the last-cited case the supreme court said: "It may be assumed that the exemption from being sued in any other district might be waived by the corporation by appearing generally, or by answering to the merits of the action, without first objecting to the jurisdiction." Here, at the institution of the suit, the plaintiffs filed their statement of claim, which disclosed as well the diverse citizenship—that they were citizens of the state of West Virginia and the defendant a corporation of the state of New York—as the cause of action. The defendant, with full knowledge of the facts, entered its general appearance; and it was not until nearly two months later, and three days after the expiration of the time within which a new action could be brought, that the defendant, by this plea to the jurisdiction, raised the objection that the suit was brought in the wrong district.

The plea to the jurisdiction is overruled, with leave to the defendant to plead to the merits within 20 days.

UNITED STATES v. LEUNG SAM. SAME v. LEE YEE et al. SAME v. LEUNG FOO et al.

(District Court, W. D. New York. March 13, 1902.)

1. DEPORTATION OF CHINESE—FINDINGS OF COMMISSIONER—REVIEW.

A finding of a United States commissioner that a Chinese person is not lawfully in the United States will not be disturbed unless clearly against the weight of evidence.

2. SAME—WHO ENTITLED TO REMAIN IN UNITED STATES.

A person born in the United States, of alien Chinese parents, permanently domiciled here, is a citizen of the United States, and cannot be excluded therefrom or denied the right of entry.¹

3. SAME—EVIDENCE—SUFFICIENCY.

The father of a deported Chinaman testified that he had been in the United States 30 years; was married in San Francisco and had one child, the one in question; that at the age of 12 the boy's mother re-

¹ See *Allens*, vol. 2, Cent. Dig. § 83; 1899B Dig. § 5 [c]; *Citizens*, 1898 Dig. § 2 [d].

turned to China, the boy remaining and accompanying his father to New York, where he lived with his father three years, and then obtained employment with a third party, working for him five years; that shortly thereafter the boy returned to China to visit his mother, staying three years. He testified that he had received letters from the son while in China, but could not produce any of them. The son testified that he was born in San Francisco; that he visited his mother in China in 1898, remaining until 1901, when he returned, landing in Vancouver, and paying the head tax, and coming into the United States from Canada. No other testimony was offered in his behalf. *Held*, that the commissioner's order deporting the son would not be disturbed.

Charles H. Brown, U. S. Dist. Atty.
Roswell R. Moss, for defendants.

HAZEL, District Judge. This is a proceeding for review of five orders of deportation of Chinese persons made by United States Commissioner Dyott in each of the above-entitled cases. I have examined the evidence upon which the orders of removal are based, and the authorities of analogous cases, to which I am referred by counsel. It does not appear from the record that the commissioner arbitrarily exercised the power given him by the statute in cases of this nature, or that he was lacking in conscientious and sound judicial discretion. It was entirely for the commissioner to determine the credibility of the witnesses and the sufficiency and weight of their testimony, and it is uniformly held that his finding will not be disturbed unless clearly against the weight of evidence. *Quock Ting v. U. S.*, 140 U. S. 417, 11 Sup. Ct. 733, 35 L. Ed. 501; *Elwood v. Telegraph Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *Kavanaugh v. Wilson*, 70 N. Y. 177; *Gee Fook Sing v. U. S.*, 1 C. C. A. 211, 49 Fed. 147; *In re Jew Wong Loy* (D. C.) 91 Fed. 240; *U. S. v. Chung Fung Son* (D. C.) 63 Fed. 261; *Lee Sing Far v. U. S.*, 35 C. C. A. 327, 94 Fed. 834; *In re Louie You* (D. C.) 97 Fed. 580.

It is undoubtedly true that a person born in this country of Chinese parents, who are permanently domiciled here, though aliens, is a citizen of the United States, and cannot be excluded therefrom or denied the right of entry. *U. S. v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. But the question here is whether the evidence offered on behalf of Leung Sam is sufficiently clear and satisfactory upon that point to justify the court in deciding that the commissioner, who had the witnesses before him and heard their testimony, erred in the exercise of sound judicial discretion in entering judgment remanding him. Leung Fong testifies that he came to this country 30 years ago, was married in San Francisco, and had one child, a boy. At the age of 12 his mother went back to China, the boy remaining in this country, accompanied his father to New York City, and lived with him for three years, and then obtained employment with Leung Hor, by whom he was employed for a period of five years. Shortly thereafter he returned to China to visit his mother, and remained for three years. On cross-examination he testifies that, although he received letters from his son while he was in China, he has none that he is able to produce; that his son never took out any papers to show his right to remain here. Leung Sam gave testimony in his own behalf. He states that he was born in San Francisco, and that he is a son of Leung

Fong; that in 1898 he returned to China to visit his mother; that he remained there until October, 1901, when he returned to this country, landing at Vancouver, and paid the head tax; that he came, with the other defendants, into the United States from Canada. That is substantially all the evidence offered in his behalf. No presumption arises from the presented facts that Leung Sam was born in the United States. His right to remain must be affirmatively established to the satisfaction of the commissioner who heard the case, and in whom congress lodged the power and duty to remand. Undoubtedly the commissioner was impressed by defendant's failure to insure his safe re-entry to the United States when, as he claims, he departed therefrom in 1898. Assuming his contention to be true, he would be presumed to have knowledge of the drastic inhibitions of the exclusion act, and therefore the inference is warranted that he would have exercised diligent care to establish his right to entry. Payment by him of a head tax at Vancouver; failure to show by disinterested proof that he formerly resided in this country, which undoubtedly would have been available had he resided in New York for 20 years, as he testified; unfamiliarity to any extent with the English language; failure to show facts from which it could be fairly assumed that he had an acquaintance with the environments of New York or San Francisco,—were pertinent circumstances which justified the commissioner in concluding that an imposition was attempted, the consummation of which it was his duty to prevent.

The case at bar is analogous to that of *Gee Fook Sing v. U. S.*, supra. In that case the petitioner's right to remain in the United States on account of his birth therein was quite similar to that urged here. I quote from the opinion:

"As to each of the cases, we consider that the evidence as a whole does not make as good a case for appellant as it might be reasonably expected a man would make out in his native city, after time for ample preparation, and the case is such as any impostor could easily make. We hold that when, upon a candid consideration of all the evidence in a case, there appears to be room for difference of opinion as to the material facts in issue, this court ought not to reverse the judgment on a question of fact alone."

A cursory examination of the evidence offered in behalf of the other defendants to establish their right to remain in this country reveals the presence of sufficient improbability so that the commissioner was justified in giving it no weight.

I have read the exhaustive brief of defendant's counsel, but, as the other questions raised have been fully passed on and decided adversely by undoubted authority, it seems to me unnecessary to give these questions any further consideration.

The order of removal in each case is affirmed.

JACOBSEN et al. v. DALLES, P. & A. NAV. CO.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1902.)

No. 728.

COLLISION—STEAMER AND SAILBOAT.

Where it was found, on evidence which supported such finding, that a sailboat, when being overtaken by a steamer, was on a course nearly parallel to that of the steamer, and at such a distance as to involve no danger of collision if both vessels kept their courses, the steamer was not in fault for not reducing speed, although, by the navigation rules (20 and 23), she was required to keep out of the way, and, "if necessary, slacken her speed or stop or reverse," since by rule 21 the sailboat was required in such case to keep her course and speed; and the latter must be held solely in fault for a collision brought about by her changing her course and attempting to cross the steamer's bows, when, on seeing such maneuver, the steamer at once reversed, and did all that was possible to avert the collision.¹

Appeal from the District Court of the United States for the District of Oregon.

See 93 Fed. 975; 106 Fed. 428.

T. J. Geisler and W. W. Cotton, for appellants.

Carry & Mays, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge. It appears that on August 14, 1898, a collision occurred between the river steamer Sarah Dixon, operated by the respondent, and a sailboat, in charge of the libelant Jacobsen on the upper Columbia river, resulting in the wreck of the sailboat, personal injuries and loss of property to the libelants Jacobsen and Forde, and the death of Hansen, whose administrator appears herein as a libelant.

The steamer was going up the river to the Dalles, Or. The sailboat was beating down the river towards White Salmon, Wash. The day was bright and clear, but a strong wind was blowing up the river, so that the sailing vessel was obliged to tack to and fro across the river to keep under way and proceed on its course.

The libelants charge that, by reason of the courses of the vessels lying in opposite directions, and the fact that it was necessary for the sailing vessel to tack and cross the course of the steam vessel, it became the duty of both vessels to comply with the rules of navigation for such cases established and provided; that under these rules it was the duty of the steamboat to proceed cautiously and so navigate as to keep out of the way of the sailing vessel, by directing its course astern of the sailing vessel, by timely slackening of speed, or stopping; that the officers of the steamboat did none of these things, and that the collision was therefore wholly occasioned by the negligence and improper conduct of the respondent, its agents and servants. It is alleged that the libelant Jacobsen was and is an experienced sailor,

¹ Collision rules, see notes to *The Niagara*, 28 C. C. A. 532; *The Mount Hope*, 29 C. C. A. 368.

and properly navigated said sailing vessel, and that the libelant Will E. Forde and one Harper L. Hansen were with him in said sailing vessel.

The respondent answers these charges by averring that on said 14th day of August, 1898, the steamer Dixon, being in good condition, well equipped and manned, arrived at a point on the Columbia river opposite Eighteen Mile Island, going up stream, and on a course slightly east of north, nearer to the Washington shore than to the Oregon shore; that at that point there appeared in view a small fishing boat under sail, bearing down the river and diagonally crossing on a course from near Mosier Rock, on the Oregon side, toward Eighteen Mile Island, on the Washington side, and on such a course as would have carried her far behind the said steamer; that the wind was blowing up stream at an average rate of 25 miles an hour, and when said sailboat had approached within some 500 feet of the path of the steamer, and in advance of her, the course of the sailboat was changed by tacking to starboard, so as to run on a course nearly parallel with the course of the steamer, but slightly converging toward the line the said steamer was pursuing; that on this latter course the sailboat was traveling in the same general direction and in advance of the steamer, and in such a position the steamer would have overtaken and passed her on the sailboat's port side, at an ample distance to have avoided any possible chance of collision; that when the steamer had almost overtaken the sailboat, and the latter was some 100 feet off the starboard bow of the steamer, the course of the sailboat was suddenly and without warning, and without any reason or excuse, turned to port, and so changed as to direct her course directly across the path of the steamer and under her bows; that the officers and crew of the steamer perceived that a collision was impending, and signaled and shouted to warn the sailboat occupants of the danger, and at once stopped and reversed the engines of the steamer, and began to back her, and turned her aside to avoid the accident; that the steamer was under full control, but was a large and heavy vessel, and was running with the wind astern, so that, in spite of the efforts made as aforesaid, she continued to go forward after the engines were reversed and the wheel turning backward, and struck the sailboat about 10 feet from the bow. It is averred that the said Jacobsen, in charge of the sailboat, was in an intoxicated condition, and utterly unfit to manage the boat; that he could have avoided any accident by not attempting to cross the bows of the steamer, or by promptly diverting the course of his boat when warned and signaled that a collision was impending. It elsewhere appears that the steamer was some 140 feet long, and the sailboat about 26 feet in length.

A number of witnesses were called, and testified in the presence of the court as to the change of course of the sailboat, the action of the steamer thereafter, and as to the intoxicated condition of the libelant Jacobsen. Jacobsen and Forde, libelants herein, testified that the course of the sailboat was not changed prior to the collision, and that Jacobsen had not been drinking. But their testimony was discredited by the court below, it being entirely unsupported by the testimony of the other witnesses, and, in fact, impeached by some, while the circum-

stances of the case and the proofs made warranted a finding in favor of the respondent. The court therefore found that the officers and agents of the steamer were without fault, and that the said collision was wholly caused by the negligence and want of care of the libelant Jacobsen. The libel was accordingly ordered dismissed. Upon petition for rehearing, the cause was reargued before the court, and reconsidered by the court, resulting in the same decree as before.

The libelants assign as error these findings of the court, and the failure of the court to apply the rules of navigation to the facts of the case, under which, it is claimed by the libelants, it was clearly the duty of the steamer to keep out of the way of the sailboat. These rules are contained in the act of June 7, 1897 (30 Stat. 96, 101), and are as follows:

"Art. 20. When a steam vessel and a sailing vessel are proceeding in such direction as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

"Art. 21. Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed.

"Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

"Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

"Art. 24. Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel."

There is some question whether these rules were intended to apply to a case where the sailing vessel is a mere rowboat equipped with a sail; but it will not be necessary to discuss that question in this case. It will be assumed that these rules do apply to the navigation of such a vessel. What, then, do these rules require? They require, among other things, that, when a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel. This is a very important rule in the law of navigation, and often prevents collisions between steam vessels and sailing vessels; or, where collisions do occur between such vessels, determines their duty and liability. But an appeal to this rule does not determine any question of negligence in this case upon the facts as found by the court. The court found as a fact that the sailboat was proceeding on a course with respect to the steamer which did not at first involve a risk of collision, but that it changed its course and sailed directly into the pathway of the steamer, incurring the peril of an immediate and unavoidable collision. The finding of the court in this respect is as follows:

"That, at the time of the collision mentioned in the amended libel and answer, the respondent was the charterer and was operating the steamer Sarah Dixon, near Eighteen Mile Island, on the Columbia river, when there appeared in view a small fishing boat under sail, in which were the libelants Jacobsen and Will E. Forde and Harper L. Hansen, now deceased, which said sailboat was in charge of the said Jacobsen, and was bearing down the river, and on a course from near Mosler Rock, on the Oregon side, toward the shore opposite Eighteen Mile Island, on the Washington side of the river, and on such course as would have carried her behind the said steamer, the wind at the time blowing up stream; and, when the said small boat had approached within some distance of the above steamer, she changed her course

by tacking to the starboard, so as to run on a course nearly parallel with the course of the steamer, but slightly converging toward the line the steamer was pursuing, traveling in the same general direction in advance of the steamer, and thereupon the course of the said sailboat was again so changed when the steamer had almost overtaken the said sailboat as to direct her course across the path of the steamer and under her bows; the day being bright and clear and both vessels distinctly visible."

The conduct of the sailboat, under these circumstances, was not justified by any rule of navigation. On the contrary, it violated the rule which requires that where, by other rules of navigation, one of two vessels is to keep out of the way, the other shall keep her course and speed. This rule has been construed as requiring that a sailing vessel in the near presence of a steamer must beat out its tack where there are no exigencies of navigation to prevent it. *The W. C. Redfield*, 29 Fed. Cas. 477; *The Clara Davidson* (D. C.) 24 Fed. 763; *The Philadelphian*, 10 C. C. A. 127, 61 Fed. 862; *The Illinois*, 103 U. S. 298, 26 L. Ed. 562; *Spencer*, Mar. Coll. § 91. In the case of *The Illinois*, supra, the supreme court said:

"Because a steamer must keep out of the way of a sailing vessel, it by no means follows that a sailing vessel may unnecessarily throw herself across the bow of an approaching steamer. It is as much the duty of the sailing vessel to be diligent in the performance of her duty as it is that of a steamer to be mindful of hers."

Under the facts as found by the court in the present case, the act of the sailboat in attempting to cross the bow of the steamer was an act of culpable negligence, rendering it responsible for the collision.

With respect to the findings of fact, it is sufficient to say that a reading of the evidence satisfies us that not only is the evidence sufficient to support the findings of the district court, but the presumptions and weight of evidence are in favor of the conclusions reached in the decree dismissing the libel.

The decree of the district court is therefore affirmed.

MEXICAN CENT. RY. CO. v. WILDER.

(Circuit Court of Appeals, Fifth Circuit. March 4, 1902.)

No. 1,073.

1. APPEAL.—REVIEW.—HARMLESS ERROR.

Where a railroad company by plea tendered an issue as to the condition and inspection of its roadbed and track, and evidence on the subject was introduced by both parties without objection, it was not prejudicial error for the court, over defendant's objection, to permit an engineer who had been employed on the road at the time referred to to testify that it was common for him to receive orders at terminal stations to look out for broken rails.

2. SAME.—QUESTIONS NOT PRESENTED TO TRIAL COURT.

Defendant railroad company pleaded a release in defense to an action for a personal injury, and plaintiff in his replication admitted the signing of the same, but denied its validity. It did not appear from the record that the release was introduced in evidence, that any evidence was taken with reference to it, or that it was in any manner brought to the attention of the court. *Held*, that in such state of the record the appellate court would not consider an assignment of error based on the failure

of the trial court to make such release the basis of a special instruction directing a verdict for defendant.

In Error to the Circuit Court of the United States for the Western District of Texas.

T. A. Falvey and Waters Davis, for plaintiff in error.

Thomas J. Beall and Wyndham Kemp, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is a suit brought by Halbert Wilder to recover damages from the railway company for personal injuries sustained by him about March 17, 1900, through the derailment, near Puerto Hill, in the state of Chihuahua, republic of Mexico, of one of the railway company's freight trains on which Wilder was employed as a brakeman. It was charged that said train broke or struck a broken rail, about six feet of which was thrown out of place; that said rail was old and worn; that the cross-ties thereunder were old and out of repair, thereby causing the derailment aforesaid. The railway company answered with a general denial, and a plea to the effect that the plaintiff's injuries resulted through one of the risks incident to his employment, and that the railway company's track and roadbed were properly constructed, inspected, and maintained, and that the rails and cross-ties of said company's track were of good and suitable quality; that said rails were to all appearance good and sufficient for the purpose, and no inspection could have determined or discovered any vice or fault therein; that caution and prudence were exercised in keeping in condition and inspection; and that the accident was fortuitous, without fault or neglect on the part of the railway company. And for a further plea the railway company pleaded a written agreement entered into by Wilder whereby he relinquished all his right and claim to damages for a valuable consideration, and to the said plea annexed a copy of a written release, purporting to be signed by Wilder and witnessed by the surgeon in charge of the railway company's hospital, and executed the 21st of May, 1900, wherein it is recited as follows:

"For and in full release, discharge, and satisfaction of all claims, demands, or causes of action arising from or growing out of an accident occurring at kilometer 1,727 on the Chihuahua division of the Mexican Central Railway, March 17, 1900. While riding on caboose, car was derailed by broken rail, turning over, causing injuries to head, producing concussion of the brain. Received of the Mexican Central Railway Company, Limited, one dollar in full payment of above claim (\$1.00). In consideration of the payment of said sum of money, I, Harry Wilder, of Fairfield, state of Iowa, United States of America, hereby remise, release, and forever discharge the company of and from all manner of actions, causes of action, suits, debts, and sums of money, dues, claims, and demands whatsoever, in law or equity, which I ever had, or now have, against said company, by reason of any matter, cause, or thing whatever, whether the same arose upon contract or upon tort."

To this last-mentioned plea Wilder filed a replication, denying that the company's track and roadbed were properly inspected and maintained, and admitting his signature to the release, but alleging that at the time of—

"* * * the execution of said instrument he was suffering from the severe injuries which he had sustained through the negligence of the defendant company in his back and spine and head, and that he was so enfeebled in mind and body at the time of the execution of instrument that he was incapable of understanding the contents of said instrument, if the same was read to him, which he does not now remember; that he is informed and believes, and so charges, that he was in a condition of unconsciousness for several weeks after he was injured, and while confined to his bed in the hospital of the defendant company in the city of Chihuahua, Mexico; that the said instrument of release referred to was presented to him by the company's physician, in whose charge he was a patient, being treated, as he is informed and believes, for concussion of the brain, from which he has not entirely recovered; and plaintiff charges and avers that the execution of said instrument at the time, in the manner and under the circumstances, was a fraud upon his rights, and was and is without any sufficient consideration to support it. Plaintiff avers that, owing to his enfeebled condition of mind on the date of the execution of said instrument, he did not know or realize the extent of his injuries, both physical and mental, and that the same were continuing and permanent. Wherefore plaintiff says that said instrument so signed by him, under the conditions and circumstances aforesaid, was procured by fraud, as aforesaid, and ought not to be held to bar the plaintiff's action."

On the trial of the case, as shown by first bill of exceptions, several witnesses were examined on behalf of plaintiff and for the defendant in the court below touching the condition of the railway company's track at the place where the accident occurred, and as to the general condition of the track in the neighborhood, all apparently without objection. Among other witnesses called was one George A. Lambeth, for the plaintiff, who was examined, cross-examined, re-examined by the plaintiff, recross-examined, re-examined again by the plaintiff, and recross-examined, and subsequently was recalled and re-examined by the plaintiff, recross-examined, twice again re-examined, and again recross-examined. In his evidence he testified, apparently without objection, among other things, as follows:

"I had been running on the Mexican Central Railway as engineer between four and five years. I know where kilo 1,732 is on the Chihuahua division. It is about six kilometers this side of Puerto,—north of Puerto. I had been running over that piece of road as engineer, off and on, ever since been with the company,—between four and five years. I was well acquainted with the condition of the roadbed, ties, and track at that place,—that kilo,—I guess. I was no more familiar with kilo 1,732 than any other part of the road. I had been running over it off and on between four and five years. The rails that were on that kilo were steel rails, 56 pounds to the yard,—56 pounds steel. I do not know just how long those rails had been in use, except ever since the track was laid there. The rails on the line of the road at that place were old ones. As to the condition of the ties just under that particular rail I could not say. I passed two or three days after the wreck, and it looked to be in a bad condition. The ties were badly decayed. I passed on the 20th, the third day after the wreck occurred. I saw where the wreck occurred, and the ties were pretty badly decayed. On every trip at terminals we got orders to look out for broken rail on every kilo. That would be the nature of the order we would get. That was common, and included this kilo."

Cross-examination:

"I mean that I would get orders at the different terminals to look out for broken rail on 1,750, another time for kilo 1,872, etc.,—different kilos on the same section of the road,—not that this kilo was any worse than any others, but that the whole track from here to Chihuahua was in bad condition.

They had the same kind of rails from here to the end of this division at that time,—58 pound rails. The rails for the whole division were apparently of the same age, in the same condition. I did not make any complaint about this kilo merely, but the whole division was in about the same condition. We would strike places where the ties were not so bad. This kilo (1,732) was no worse than any of the others,—all bad. I was not any more familiar with this kilo than any other kilo. When running over it I could not discern that it was any worse than any of the rest. If I ever got an order to look out for any broken rail on kilo 1,732, I cannot remember the date, but it was issued over the road master's signature. I do not know that I ever got an order to look out for a broken rail on that particular kilo. * * *

Recross-examination:

"I passed by there three days after the accident on an engine. They had put on new ties before I got there. The engine and cars had torn up the others,—ground them up considerably. The ties were crumbled up where they were decayed. I cannot say they had new rails in before I got there. Probably a different rail had been taken from a side track to repair it. I reduced speed down to a very slow walk—probably to three or four miles an hour—where the wreck had occurred. I did not stop to inspect the place,—just what I could see from my engine."

Redirect examination:

"The ties that were there as I saw them were rotten. * * * The ties that were thrown out from the place of this wreck were all rotten. They seemed to extend from where the wreck began to where it stopped. They repaired the track entirely all along, and put in new ties, but they seemed to be in about the condition it was, I could see. The ties seemed rotten all along the track. I could only see, as I passed over where they were taken out, where the good ones had been put in, but they seemed to be rotten where they were thrown out. Their condition was all rotten, it seemed to me. They had a little crust over the top of them where the sun had shone on, but underneath that, say 1½ inches, they were all rotten at the ends. That extended the whole distance. I was traveling at a rate of speed that I could see the condition of the ties just as well as if I was walking along. Of course, I could not see right down under the engine, but I could see ahead, and see how the track was being repaired, and how it was being got in line."

Cross-examination:

"I could not tell the particular place where the rail broke. I do not know the condition of the ties under the particular place where the rail broke. I could only tell from the condition of the ties thrown out. They had repaired right over where the cars jumped the track. I do not know where the rail was broken, but where the cars jumped the track. They had repaired the ties from the rails where the wheels of the cars got off the irons and on to the cross-ties. I could not tell where the cars got off the track. Every tie apparently had been ground up and thrown out. It seems to me that all the ties, commencing where they began to be broken up by the wheels of the cars, had been thrown out, but I could not say positively. Under the circumstances, I could not observe so closely as to be able to say. It seemed to me as if all the ties had been removed. I could not tell about what was the number. The whole mass was piled up, and I could not tell whether they had ever been in there or not. I do not know the condition of the broken rail, or the condition of the ties underneath the broken rail. I could not say whether the ties under it were removed or not."

Redirect examination:

"I do not know where that particular rail broke, nor where the particular broken rail was, but where the track had been repaired up all along the line. I was coming north. Of course, I could see where they had commenced repairing the track and where it ended. I could not see where the new rail had commenced. As I came on, the ties at the north end right

opposite that place were in about the same condition. In fact, the north section they were about all the same condition. You could not say just how they were, because the top of the ties seemed to be sound when not more than an inch below. They were simply dry on top, but underneath were rotten, and by just passing over it with your finger you could see whether they were sound or not; but you could get down—I have very often done that—to pick the spikes out. I could not tell whether these ties right opposite the place where they had been repairing on the north end were decayed or not. The ones taken out were all rotten. They would not have left them in while rotten. They were nothing but dust. They extended up to where I could see the new rails commenced. The ties they had taken out were rotten. They were all broken into dust. I could not tell you they had been ties. They extended the whole length, from the beginning to the end. They had been thrown backwards and forwards, and you could not tell just where they came from. That was their general appearance,—general condition. To all appearance, in passing right over them, they appeared to be sound, but only about an inch and half before you would find that the ties were decayed. The top of the ties where the sun had come out and dried it after the rains would leave a crust on top, but underneath that the ties,—there was nothing underneath them; all of the rest of the tie appeared to be rotten. Those extending along the sides—extending from the new rail—were all rotten.”

A second bill of exceptions shows that some time during the examination of the said George A. Lambeth he was asked by the plaintiff's counsel the following question:

“About the time and before this wreck occurred I will ask you with reference to the condition of the rails that you say had been in use so long, as to whether there was any other breaking of rails, whether that was common or uncommon, and what your orders were with respect to running over the road, if you had any?”

The defendant objected to this question, assigning as a reason that it was not competent to prove other accidents and notice with reference to the breaking of other rails at different times and places; but the objection was overruled, and the witness permitted to answer, and did answer, as follows:

“A. I had such instructions,—got them at every trip. At terminals we got orders to look out for broken rail on every kilo. That would be the nature of the order we would get. Q. Was that common? The Court: Did that include this kilo? A. Yes, sir.”

This ruling of the court was duly excepted to, and is the substance of the first assignment of error in this case. Considering that the railway company by its plea tendered an issue as to the condition and inspection of its roadbed, and that evidence was offered in relation thereto by both plaintiff and defendant unobjected to, we are inclined to the opinion that the ruling of the court admitting this particular question propounded to witness Lambeth, and the answer thereto, was correct; but, whether correct or not, we are satisfied that, in the mass of evidence offered on both sides on the condition of the railway company's roadbed, the admission of the answer to the question propounded to Lambeth did not prejudice the railway company to any appreciable extent.

The only other assignment of error in the case is as follows:

“(2) The court erred in submitting this cause to the jury, and erred in refusing to give defendant's special charge wherein it asked the court to instruct for defendant, for the reason that under plaintiff's allegations the negligence of defendant in having rotten ties in its track was the basis of plain-

tiff's claim, and for the reason that the testimony wholly failed to establish this allegation or to show that plaintiff was entitled to recover a verdict herein, as shown by defendant's last bill of exceptions."

Counsel contends that the court erred in submitting this case to the jury, because no explanation or avoidance of the recital and release pleaded in the railway company's first amended original answer was proven by the plaintiff, counsel contending that the plaintiff had relieved the defendant of the necessity of any proof of this instrument by admitting that he had signed the same in the replication filed to the first amended original answer. The record does not show that the defendant offered said release in evidence, and no reference appears to have been made to it during the trial either in the evidence offered or in the charge of the court, nor in the motion for a new trial, nor in the special instructions asked for by the defendant. Not having been offered in evidence by the defendant, nor in any wise called to the attention of the court and jury on the trial, we are of opinion that no error can be predicated upon the failure of the court to make it the basis of a special instruction to find a verdict for the defendant. While not offered in connection with the release, there was undisputed evidence showing that at the date of the release Wilder was in no condition of mind and body to make a valid contract.

We have herein recited enough of the evidence adduced on the trial to show that the negligence *vel non* of the railway company in maintaining its track was properly submitted to the jury.

The judgment of the circuit court is affirmed.

THE NEWPORT.

(Circuit Court of Appeals, Second Circuit. March 18, 1902.)

No. 54.

1. MARITIME LIENS—TOWAGE SERVICES—CONTRACT FOR LIEN.

Evidence held to sustain a finding that there was a common understanding between the parties to a contract for towage services to be rendered to a dredge and scows that the services were rendered upon the credit of the vessels and not of the owner.

2. SAME—JOINT LIEN FOR SERVICES RENDERED TO SEPARATE VESSELS.

A joint lien cannot be enforced against a dredge and a number of scows used in connection therewith for towage services rendered to all the vessels, although they were rendered under a single contract.

Shipman, Circuit Judge, dissenting upon the facts.

Appeal from the District Court of the United States for the District of Connecticut.

This cause comes here upon appeal from a decree of the district court, district of Connecticut (107 Fed. 744), in favor of libellant for \$1,947, with interest and costs, out of the proceeds of sale of a dredge and four scows.

Le Roy S. Gove, for appellant.

Howard H. Knapp, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The Bridgeport Towing Line is a partnership, of which John McNeil was managing partner. Morris B. Brainard was a contractor to dredge New London Harbor, and in 1899 hired of the towing line a tug to do the towing necessary for the dredge Newport and four scows, 6, 7, 9, and 10, in the harbor of New London, for the sum of \$800 per month. The tug Confidence was sent to New London, and performed the required services for the dredge and scows from August 3, 1899, to December, 1899. A balance of \$1,947 was and is unpaid. Brainard was a nonresident of Connecticut, and was apparently not a permanent resident in any state. He made the agreement by letter and telephone or telegraph, and in October, 1899, wrote Capt. McNeil to send bills for towing made out for the months worked and against the dredge worked for. He was in poor credit, in straits for money, and the services were rendered upon the credit of the dredge and scows. In December, 1899, he became deeply insolvent, his creditors, among them the Bridgeport Towing Line, libeled the vessels, and his conduct showed that he knew that the debts had been incurred upon their credit. The claims amounted to some \$15,000 or \$16,000. By agreement of the claimant, Laughlin, and all the other parties, the dredge and scows were sold, and the proceeds, amounting to some \$9,000 or \$10,000, were paid into court. The Bridgeport Towing Line libeled the dredge and scows in one libel for its entire debt. A decree for \$1,947, interest and costs, amounting to \$2,180.93, against the dredge and scows and their avails, was rendered, from which Joseph Laughlin, the claimant, appealed. He had made claim to the scows, averring that he was their owner, and had filed a libel against the dredge for moneys advanced for her benefit and for the charter hire of the scows. The commissioner found that the evidence did not show a bona fide valid transfer of the scows to Laughlin, and dismissed his claims for advances and charter hire. The disallowance was sustained by the court. The evidence fully justifies the finding of the commissioner that the alleged transfer was fraudulent and void as against the creditors of Brainard. From the decree of the court dismissing his libel Laughlin did not appeal, and he is now, as against creditors, without title to any of the avails of the vessels.

We agree with the district judge, who said that "upon the practically undisputed evidence" he found "that there was a common understanding and intention that there should be a lien for these supplies and repairs." The case is eminently one where "personal credit of the owner, instead of the vessel, was in the highest degree improbable." The Havana (D. C.) 54 Fed. 201.

The claimant specifically objected to the libel, and attacks the decree because it established a joint lien against the avails of the five vessels, and for services rendered by contract to or for the benefit of a number of vessels a joint lien is not permissible, and should not have been sought in a single libel.

In *Saylor v. Taylor*, 23 C. C. A. 343, 77 Fed. 476, the court of appeals for the Fourth circuit affirmed a decree of the district court for the Eastern district of Virginia, which sustained a libel in be-

half of the owners of a tug for services in towing a dredge and scows, and decreed a lien on the proceeds of the sale of the dredge and scows, but it does not appear that any question was raised as to the validity of a joint lien. In *Munn v. The Columbus* (D. C.) 65 Fed. 430, the precise point was presented, libellant undertaking to enforce a supposed joint lien against a dredge and scows for the entire price of all the services rendered to these vessels and others of the same plant. The district court held that there could be no joint lien for several services. Appeal was taken to the circuit court of appeals for the Third circuit, which affirmed the decision below, saying:

"To sustain this libel would be to apply the law of admiralty lien in a manner for which there is no precedent. The cases cited for the appellant do not support his contention. *The Alabama* (C. C.) 22 Fed. 449, decided nothing but that a dredge which is used in connection with a scow is itself a vessel, within the maritime law; but, conceding this, it does not follow that several dredges and several scows, even when used together, constitute but a single vessel; and the cases which hold that the wrecking apparatus of a wrecking schooner (*The Edwin Post* [D. C.] 11 Fed. 602), the whaling boats of a whaling ship (*Hoskins v. Pickersgill*, 3 Doug. 222), and the boats carried on deck or towed astern a fishing schooner (*The Merrimac* [D. C.] 29 Fed. 157), are not regarded as part of the craft to which they respectively belong, are not authority for the proposition that a number of distinct vessels are to be treated as one thing, merely because they happen to be associated in the same enterprise."

We concur in this conclusion.

The circumstance that in the proceeding brought by Laughlin to enforce claim for advances and charter it was held that the transfer of the vessels to himself was not bona fide and void as to creditors does not change the situation. As against Brainard the transfer was valid. Laughlin is the claimant, has appealed, and is as much entitled to raise the objection as Brainard would be if he were claimant. What disposition may be made of the money in the registry of the district court—which that court decreed should be paid to the towing company—is a question which we cannot determine on the present record, since we are not advised whether all others who were held entitled to share in the proceeds were paid in full. As against creditors of Brainard, whatever title Laughlin got by the attempted transfer cannot avail him.

The decree is reversed, with costs, and cause remanded to the district court, with instructions to decree in conformity with the views expressed in this opinion.

SHIPMAN, Circuit Judge. I dissent from the conclusion of the majority of the court in the above-entitled cause, which reverses the decree, and directs the district court to enter a new decree in accordance with the opinion, because I think that the original decree should not be changed. I concur in the conclusion that a joint lien for the entire value of the services separately rendered to a number of vessels is not, as a rule, to be enforced against the whole number of vessels, although they were associated in one enterprise, and the services were performed under a single contract, but do not think that a reversal of the decree is called for under

the circumstances of this case, as disclosed in the opinion of the majority. Services were rendered by the libellant to the dredge and four scows, upon their credit, for which about \$2,000 are due. The amount and value rendered to each vessel could have been ascertained by the district court. The record shows that the services were rendered about equally. The aggregate amount is unquestioned, and the money in the registry of the court due to other lienors has been distributed without objection.

Laughlin alone makes the point that, as the decree was for a joint lien, it should be reversed. The opinion of the majority finds that he is, as against creditors, without title to any of the avails of the vessels. He is entitled to raise the objection because there was a paper transfer of the scows to him from Brainard, but, as against creditors of Brainard, whatever title he got by the attempted transfer cannot avail him. In this position of affairs, Laughlin being the only appellant and being unable to gain any advantage by a new decree or to vary the old decree in favor of himself, and there being no other dissatisfied lienor, I see no advantage in reversing the decree or of having an additional hearing in the district court. The money now in the registry of the court from the avails of the libeled vessels equitably belongs to the Bridgeport company, complete justice will be done by an affirmance of the decree, and I do not think that the payment of this debt should be delayed by the interposition of this court.

LANGAN v. TYLER.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 42.

1. MASTER AND SERVANT—CREATION OF RELATION—VOLUNTARY ASSISTANCE OF SERVANT.

One who renders temporary service in assisting a servant in his work, at the latter's request, without expectation of pay, and where the master had no knowledge of the performance of the services, and the servant no authority to employ help, does not thereby become a servant of the master so as to charge the latter with the active duty of providing him with a safe place in which to work.

2. SAME.

Plaintiff's intestate, at the request of defendant's servant, employed to run an elevator in defendant's building, assisted the latter in taking apart an electrical machine used to furnish power for the elevator, which the servant thought did not work properly. The servant had no authority to have the work done, his instructions being to report any defects or needed repairs in all cases to defendant's agent in charge of the building. Neither defendant nor his agent had any knowledge of the service, which was rendered without expectation of pay. After the machine had been put together again and started, plaintiff's intestate was killed by the giving way of a hanger in the machinery room. *Held*, that the deceased was not a servant of defendant to whom the latter owed the duty of care in providing a safe place to work, and that defendant was not liable for his death, even though defendant may have been chargeable with the notice of the defective condition of the hanger.

In Error to the Circuit Court of the United States for the Eastern District of New York.

This cause comes here upon a writ of error by the plaintiff below to review a judgment of the circuit court, Eastern district of New York, entered upon direction of a verdict in favor of defendant below. The facts appear in the opinion.

R. J. Moses, for plaintiff in error.

F. V. Johnson, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Plaintiff sued as administratrix of Thomas Langan, deceased, to recover damages, on the theory that the accident which caused his death was the result of negligence for which the defendant should be held responsible to his estate. Langan, a man 33 years of age, was the brother-in-law of Anthony Brennan, aged 22, who was in the employ of defendant. He himself was engaged running a stationary engine on premises a few blocks away from defendant's, and used to do odd jobs as he got a chance, putting in batteries and electric bells and repairing electrical apparatus. Brennan was employed in defendant's building 39 Great Jones street, having been hired by a Mr. Talmadge, who represented the owner as agent, in charge of the premises. Brennan's duties were to run the elevator and take care of the boiler and keep the place clean. He had been instructed that if anything was the matter with the machine, if he needed any assistance, he was to report to Talmadge; that, no matter what was out of order, he was to see him first. Talmadge used generally to come on Tuesdays to inspect the premises, though some times he would not come for two weeks. The accident happened on February 9, 1899. For some time prior thereto the elevator had been "running all right." Brennan testified that he ran the elevator throughout the day (February 9 from 7 a. m. to 5 p. m.); that he ran it the day before, and everything ran properly; that the only thing he noticed about it was that it did not make, as he thought, its proper speed; that in all other respects he saw nothing defective; he could control it to stop it anywhere he saw fit; that there was no apparent defect in it; and he ran it up till 5 o'clock, and the only objection he found was that it ran slowly. After he had shut down at 5 o'clock Brennan tried to telephone to Talmadge, but the latter was not in. He then, about 5:15 p. m., went where Langan was employed, and asked him to come over. On one occasion, about three months before the accident, when the commutator was sparking, he had, of his own motion, brought Langan over to fix it. He had subsequently mentioned this circumstance to Talmadge. On the occasion in question here, Langan came over to defendant's premises about 7 p. m., and went with Brennan into the machinery room. The two men took the machine apart, and after working over it about an hour put it together and started it. The details of the accident are not material,—decedent was killed by the giving way of a hanger; and there was evidence in the case, somewhat contradictory it is true, from which a jury might perhaps have reached the conclusion that the defendant was charge-

able with the knowledge that for some time past its fastening had not been secure.

The brief of plaintiff seeks to sustain a right to recover upon the principle that a master is bound to provide a safe place to work in, and is responsible to his employé for an injury sustained by the latter from a defect in the building where he works, which the employer knew of, or might have known of, by the exercise of ordinary care. The only question in the case, as presented here, is whether or not Langan's legal relation to defendant at the time of the accident was that of servant to master. Langan was not employed by Tyler, nor by Tyler's agent, Talmadge. He was a volunteer, assisting his brother-in-law at the latter's request, without expecting any compensation therefor from defendant. There are many cases in the books treating of the legal relation of a volunteer who undertakes to assist the servants of a master. Most of them deal with the question whether the master is liable to him for the negligence of the servants with whom he works. Where there is some personal interest on the part of the plaintiff in having the work done, as where a passenger on a street car helps to push it back over a switch, or a teamster helps the driver of a team ahead of him to repair some break-down which obstructs the road, or helps the servants of another to load his own cart with coal, it has been held that the relationship between the volunteer and the servant's master is not such as to warrant the application of the rule which relieves the master from any obligation to respond. *Railway Co. v. Bolton*, 43 Ohio St. 224, 1 N. E. 333, 54 Am. Rep. 803; *Holmes v. Railway Co.*, L. R. 4 Exch. 254, L. R. 6 Exch. 123. There are other cases which hold that a mere volunteer, without any personal interest, cannot recover when the injuries result from the negligence of those servants with whom he works, not upon the ground that by volunteering he has made himself their fellow servant and established with their employer the legal relation of master and servant, but upon the ground that he cannot thus put himself in a better position than the servants he volunteers to help. So where servants of a railroad company were busy at a turntable, which moved with difficulty, and the plaintiff, observing them, called out to wait a moment and he would help them, and did so, and was injured by their negligence, the court said: "He cannot, by volunteering his services, have any greater rights, or impose any greater duty, on the defendant than if he was a hired servant." *Degg v. Railway*, 1 Hurl. & N. 773. So, in another case, the court said:

"One who volunteers to associate himself with the defendant's servant in the performance of the defendant's work, and this without the consent, or even the knowledge, of the defendant, cannot stand in a better position than those with whom he associates himself in respect of their master's liability. He can impose no new or greater obligations on the employer than those to which he was subject in respect of the employed." *Potter v. Faulkner*, 31 Law J. Q. B. 30.

These authorities, however, come far short of sustaining the proposition that the volunteer may by volunteering to act make himself a servant, and impose upon the master obligations which the latter owes only to his servants.

As was stated before, neither defendant nor defendant's agent ever employed Langan. To Brennan no authority to employ extra help, or to select individuals to make repairs, or to improve the running of the elevator, was ever intrusted. The mere circumstance that three months before he had invited his brother-in-law to remedy the sparking at the commutator, and had told Talmadge he did so, to which the latter did not object, is not sufficient evidence of authority to employ an additional temporary servant to help do the master's work. The plaintiff's counsel submits the following proposition:

"Where the services are rendered by request of the man in charge, though the person assisting expects no pay, and is employed for a mere temporary purpose, he is for the time being a servant, and entitled to the same protection as any other servant."

The cases cited on the brief, however, do not support this broad statement. *Railway Co. v. Bolton*, 43 Ohio St. 224, 1 N. E. 333, 54 Am. Rep. 803; *Degg v. Railway Co.*, 1 Hurl. & N. 773, and *Potter v. Faulkner*, 31 Law J. Q. B. 30, have been referred to supra. In *Bradley v. Railroad Co.*, 62 N. Y. 99, the track master, who engaged plaintiff to scrape snow with his team, had express authority to hire extra help when occasion required. The language of the proposition in the brief is evidently taken from *Johnson v. Water Co.*, 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243, where the court says:

"Plaintiff was engaged in defendant's work at the request of the man in charge of the work; and although it may be said that he was working for a mere temporary purpose, and that the plaintiff was not expecting any pay for the work done, and in that sense the employment was voluntary, still, being in the defendant's employment at the request of its servant or foreman, he was not a trespasser, and he was at the time being the servant of the defendant, and entitled to the same protection as any other servant of defendant, and probably subject to the same risks of injury from the negligence of his fellow servants."

In that case plaintiff was in the employ of contractors who were digging a ditch for defendant. Other men were in the same trench, laying pipe and calking it for defendant. He was called by one George G. to help them, and the accident happened apparently because an insufficient force was employed in the laying and calking. But it should be noted that the case came up on demurrer, and the complaint alleged that one "Pooley was the superintendent of said defendant, and as such superintendent had charge of said work of calking, and employed men to do such work, and when he was off George G. was authorized by Pooley to have control of the work and of the men who were assisting in such work." In *Wiggett v. Fox*, 11 Exch. 832, it was held that a subcontractor and his servants were the fellow servants of workmen employed by the contractor. In *Warburton v. Railway Co.*, L. R. 2 Exch. 30, the porter of a railroad company was held not to be the fellow servant of an engine driver of another railroad, both roads using the same station. In *Abraham v. Reynolds*, 6 Jur. (N. S.) 53, it was held that the servant of a carter who called to receive a bale of cotton and brought the rope with which to lower it was not the fellow servant of the employes of the owner of the bale who undertook to lower it. In *Railroad Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 356, the injured person was defeated on the ground of contributory negligence.

The last case cited to sustain the proposition that the request of an unauthorized servant is sufficient to transform a volunteer into a servant supports no such proposition. A fireman, acting as engineer on a railroad train, which was at a water station, asked a young boy to turn on the water. The boy was climbing on the tender to put in the hose, when other cars struck the car attached to the engine and knocked him off. The court said:

"In climbing the side of the tender at the request of the fireman, to perform the fireman's duty, he did not come within the protection of the company. To recover the company must have come under a duty to him which rendered his protection necessary. * * * The boy was where he had no right to be, and where he had no right to claim protection,—where the company was in use of its private ground, and was not abusing its privileges, or trespassing on the rights or immunities of the public. The only apology for his presence there is the unauthorized request of one who could not delegate his duty, and had no excuse for visiting his principal with his own thoughtless and foolish act." *Flower v. Railroad Co.*, 60 Pa. 210, 8 Am. Rep. 251.

To the same effect is *Rhodes v. Banking Co.*, 84 Ga. 320, 10 S. E. 922, 20 Am. St. Rep. 362, where brakemen asked a boy to help them pull a car, and he did so. "The plaintiff's son," says the court, "was not a fellow servant with the servants of the defendant in error. To be the servant of another, there must be some contract or some act on the part of the master which recognizes the person as a servant, either express or implied." In *Everhart v. Railroad Co.*, 78 Ind. 292, 41 Am. Rep. 567, plaintiff was returning home along a street intersected by defendant's tracks on which several flat cars were slowly moving. An employé of defendant, who was employed about such tracks, requested plaintiff to get upon one of said cars and apply the brake. He did so, and was injured. The court says:

"If the plaintiff were to be regarded as having been the servant of the defendant, it would seem that he could not recover for the injury caused by the negligence of his fellow servants. But it seems to us that * * * he cannot be regarded as having been the servant of the defendant. He was not requested or directed to man the brake by any one that is shown to have had authority from the defendant to make such employment. * * * The plaintiff was a mere volunteer, consenting, at the request or direction of the defendant, to perform service which should have been performed by the employés themselves, and, while he cannot be regarded as an employé, he is in no better condition than if he had been. Nor is he in any better condition legally than if he had been a mere intermeddler, undertaking to perform the service without request or direction from any one, because, as we have seen, he was not requested or directed to get upon the car and apply the brake by any one having power from the defendant to authorize him to do so. The defendant owed him no duty either as an employé, passenger, or traveler upon a highway crossed by the railroad. Under the circumstances, the authorities above cited make it clear that the defendant is not liable. If there had been an urgent necessity for some one other than an employé of the defendant to get upon the car or cars and apply the brakes, in order to prevent a destruction of human life or valuable property, possibly the case might be different, but no such necessity was shown."

See, also, *Church v. Railway Co.*, 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861. In that case plaintiff was requested by the head brakeman of a wrecking train to assist in switching the cars. The court held that it "was necessary for the plaintiff to establish, as the essential foundation of his right to recover, the existence of the relation of master and servant between himself and the defendant company,

and this, in turn, depended upon the authority of the head brakeman to employ him to assist in the switching." It says:

"In our opinion, none of the evidence introduced or offered had any tendency to prove any such relation between plaintiff and defendant, or any such authority on the part of the head brakeman. The fact that plaintiff had been or was in the employment of the defendant elsewhere is wholly unimportant. He was not at the station on defendant's business. He was not an employé of defendant at that place or as to the switching of that wrecking train. The case stands precisely as if the head brakeman had called on any other bystander at the station to assist. While the head brakeman had charge of the movements of the train in doing this switching during the temporary absence of the conductor from the cars on other business, yet this was the entire scope and extent of his authority. The conductor had not abdicated the general charge and control of the train or turned it over to the brakeman. The latter had no authority, actual or apparent, express or implied, either from custom or from any present pressing emergency, to employ additional brakemen, either permanently or temporarily. It was wholly immaterial whether two brakemen were or were not sufficient to do the switching. Even if they were not, that fact would not, under the circumstances, give a mere brakeman authority to employ an additional force. If any one on the ground had any implied authority to do so it was the conductor, who had charge and control of the train. In doing what he did the plaintiff was, therefore, a mere volunteer, and as such assumed all the risks incident to the position. The defendant did not bear to him the relation of master or employer, and owed him no duty as such."

In *Morris v. Brown*, 111 N. Y. 318, 18 N. E. 722, 7 Am. St. Rep. 751, plaintiff's intestate was an engineer, who, when going to inspect the tunnel for the Croton aqueduct, rode (as he often had ridden before) on a returning dump car of the defendants, who were excavating the tunnel. Eventually this turned out to be an unsafe way of getting to his destination. In the opinion is found the following:

"Plaintiff did not acquire any right to be upon the car through any consent or act or acquiescence on the part of the defendants. The brakeman of the car had known it, but neither his knowledge nor assent could bind defendant. He was not their agent for that purpose. It is a general proposition that a master is chargeable with the conduct of his servant only when he acts in the execution of the authority given him. * * * In the case before us the brakeman was never told or authorized to carry any person, and if he acquiesced in, or by silence consented to, the intestate's going in upon the cars, there is no evidence that in doing so he was acting in the line of his duty or within the scope of his employment. The deceased had, in fact, ridden upon the car. He had done so under no other permission,—a volunteer, but in safety. In each instance, however, he must be deemed to have assumed the risk, and this last time he was unfortunate. The consequences of that misfortune should not be thrown upon the defendants."

It will be remembered that the only negligence charged upon defendant in the case at bar is the failure to keep the hanger securely affixed to its place, or to discover from reasonably careful inspection that it was loose and likely to give way under strain. This measure of active vigilance to secure a safe place to work in and safe appliances to work with may be required of the master by the servant he has employed, but is not due to a stranger. A leading case in this state is *Larmore v. Iron Co.*, 101 N. Y. 393, 4 N. E. 752, 54 Am. Rep. 718. There plaintiff went upon premises of defendant to solicit employment. He passed near a piece of machinery for raising ore. The machine was defective, and by its breakdown while he was near it he was injured. He insisted that defendant was negligent in omitting to take

affirmative measures to ascertain and remedy defects. The court held that as to persons standing in certain relations to defendant a duty rested upon the company to exercise reasonable care in the maintenance and reparation of the machine; "but the plaintiff stood in no such relation to the defendant as imposed upon it the duty to keep the machine in repair. He was in every legal sense a stranger to the defendant. * * * There is no negligence, in a legal sense, which can give a right of action, unless there is a violation of a legal duty to exercise care. The duty may exist as to some persons and not as to others, depending on peculiar relations and circumstances. * * * In the case before us there were no circumstances creating a duty on the part of the defendant to the plaintiff to keep the machine in repair. * * * The machine was not intrinsically dangerous. The plaintiff was a mere licensee. The negligence, if any, was passive, and not active of omission and not of commission." The same principle is enunciated in *Nicholson v. Railway Co.*, 41 N. Y. 529, where the court says:

"Plaintiff had an implied license to cross at that point, and hence he was lawfully there. He was not there by invitation of the defendant nor in the business of defendant. * * * While he was lawfully there he had no right, as against the defendant, to be there. It could at any time have revoked the license. * * * Defendant owed the intestate no active duty. It owed him no duty whatever, except such as every citizen owes another. It had no right intentionally to injure him, and would be liable if it needlessly or carelessly injured him while performing its own business. It owed him a duty to abstain from injuring him either intentionally or carelessly, but it did not owe him the duty of active vigilance to see that he was not injured while upon its land merely by permission."

In our opinion, the direction of a verdict in favor of defendant was correct, and the judgment is affirmed.

UNITED STATES v. ST. ANTHONY R. CO.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1902.)

No. 731.

1. PUBLIC LANDS—CUTTING TIMBER—RIGHT OF RAILROAD.

Under Act March 3, 1875, § 1, granting railroad companies the right of way through public lands, with right to take from public land "adjacent" to the line of railroad timber necessary for the construction of the road, timber cut at a distance from the road of 17 to 23 miles by air line, 20 to 25 miles by wagon road, and 22 to 26 miles by the windings of a river down which some of it was floated, was taken from "adjacent" land, within the meaning of the act; it appearing that it was a barren, frontier country, with no suitable timber nearer than that taken, and that the lands from which it was taken were materially benefited by the road, and the timber could be hauled that distance with reasonable profit.

2. STATUTE—CONSTRUCTION.

In Act March 3, 1875, § 1, the meaning of the word "adjacent," as applied to public lands, should be determined by the evidence in each particular case.

In Error to the Circuit Court of the United States for the Southern Division of the District of Idaho.

This is an action to recover from the defendant in error the value of timber cut by it upon the public lands of the United States in Idaho for use in the construction of the railroad of the defendant in error. After the filing of complaint and answer, the case was submitted to the lower court upon an agreed statement of facts, substantially as follows: The plaintiff in error was the owner and in possession of the lands described in the complaint. During the summer and fall of the year 1889 the defendant in error, an Idaho corporation, entered upon the said lands, and, through its agents and representatives, cut and removed therefrom 1,682,975 feet of timber, of the manufactured value of \$12.35 per thousand feet, and of a stumpage value of \$1.50 per thousand feet, and used the same in the construction of its railroad between Idaho Falls, in Bingham county, and St. Anthony, in Fremont county, state of Idaho, a distance of approximately 40 miles. Said railroad passed through public lands of the United States, and the defendant in error had duly complied with all the requirements of the act of March 3, 1875, granting to railroad companies the right of way through the public land of the United States, and became entitled to the benefits and privileges therein granted to railroad companies. The timber was cut at a distance from the road of 17 to 23 miles by air line, from 20 to 25 miles by wagon road, and from 22 to 26 miles following the windings of the river, down which much of the timber was rafted. The remaining portion was hauled by wagon, the road being a good one, with no unusual grades; and the timber could be hauled by wagon to the place where it was used with reasonable profit. There was no other suitable timber-bearing land upon either side of the line of the railroad as near as were the lands in question, and said lands were so situated with reference to said railroad as to be benefited thereby. It is admitted that the defendant in error, in going upon said lands and cutting and removing timber therefrom, did not act under a mistake of fact, but believed that it had the right to do so, using ordinary care and prudence, and acting under the advice of its counsel. Upon the questions involved in this statement of facts the court below rendered its decision in favor of the defendant railroad company, and the plaintiff sued out a writ of error thereupon to this court.

R. V. Cozier, U. S. Atty.

P. L. Williams and F. S. Dietrich, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The assignments of error present this question: Were the lands from which the timber was cut by the defendant in error "adjacent" to the line of its railroad, within the meaning of the act of March 3, 1875? Section 1 of the said act provides:

"The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, * * * which shall have filed with the secretary of the interior a copy of its articles of incorporation and the proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public land adjacent to the line of said road, material, earth, stone and timber necessary for the construction of its said railroad." 18 Stat. 482.

It is contended by the plaintiff in error that the word "adjacent," in this section, should be construed to mean "in proximity to," "contiguous," or "near" the line of the railroad, and that the distance of 17 to 26 miles cannot reasonably come within such a definition. The section has been variously construed by the trial courts, but not definitely passed upon by the court of last resort. In *U. S. v. Denver & R. G. R. Co.* (D. C.) 31 Fed. 886, the court construed the language of the act as intending to indicate such timber and other materials as

could be conveniently reached by ordinary transportation by wagons. In *U. S. v. Chaplin* (C. C.) 31 Fed. 890, land was declared to be "adjacent," within the purpose and intent of the act, when by reason of its proximity thereto it is directly and materially benefited by the construction of the railroad. And in *U. S. v. Lynde* (C. C.) 47 Fed. 297, 300, the court expressed the opinion that just what should be considered adjacent land must be determined by the evidence in each particular case. The latter view has met with the approval of this court, as indicated by the opinion of Judge Hawley in *Stone v. U. S.*, 12 C. C. A. 451, 64 Fed. 667, 29 U. S. App. 32. No exact definition was there attempted, the court merely holding that, "under the facts presented," a reasonable construction of the language of the act would not permit the timber land in question to be deemed adjacent to the line of railroad of the defendant company. This decision was affirmed by the supreme court of the United States (*Stone v. U. S.*, 167 U. S. 178, 191, 17 Sup. Ct. 778, 42 L. Ed. 127), without further determining the boundary of adjacency contemplated by the act of congress. The court concurred with the view expressed in *Denver & R. G. R. Co. v. U. S.* (C. C.) 34 Fed. 838, 841, that congress did not intend to grant anything like a general right to take timber from land where it was most convenient, but, other than this expression, did not attempt to interpret the language of the act, and left the decision dependent upon the particular facts presented.

It is well settled that, while public grants are to be construed strictly against the grantees, they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. And to ascertain that intent it is often necessary to look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together. *Railroad Co. v. Barney*, 113 U. S. 618, 625, 5 Sup. Ct. 606, 28 L. Ed. 1109. In *U. S. v. Denver & R. G. R. Co.*, 150 U. S. 1, 15, 14 Sup. Ct. 11, 37 L. Ed. 975, this rule of construction was held to be properly applicable to the act of 1875 in controversy in the present action. In that case the timber was cut from lands adjacent to the line of railway of the defendant, but was used in the construction of its road at points distant from the place at which it was taken. Under the rule of construction above stated, it was held to be the purpose of congress to aid railroad companies entitled to the benefits of the act by conferring the right to take timber necessary for road construction from adjacent public lands, and use it upon distant portions of their lines. Applying, then, this liberal construction of the act to the facts before us, we are entitled to consider that the road under construction passed through a barren, frontier country; that, according to the admitted facts, there was no suitable timber upon either side of the said road nearer than the lands in question, and that said lands from which the timber was cut were near enough and so located with reference to said road as to be directly and materially benefited thereby; that said timber could be hauled by wagon to said railroad with reasonable profit. These conditions are important in considering whether the privilege conferred by congress has been properly exercised, and whether the mutual benefits contemplated by

the act are likely to be realized. The case of *Bachelder v. U. S.*, 28 C. C. A. 246, 83 Fed. 986, presented a similar state of facts to the one at bar. *Bachelder*, acting for the Denver & Rio Grande Railway Company, had cut timber from government land some 25 miles distant by wagon road from the line of railroad, in the construction of which it was to be used. No suitable timber could be found nearer. The trial court instructed the jury that the word "adjacent," as used in the act of congress authorizing the cutting of timber for railroad construction, meant the tier of townships lying adjoining on either side of the townships upon or through which the line and right of way of the proposed railroad passed. The supreme court of the territory of New Mexico affirmed the conviction of *Bachelder*, but the judgments of both courts were reversed by the circuit court of appeals for the Eighth circuit; Judge Thayer, speaking for the court, declaring that no court can say, as a matter of law, that a trespass was committed because timber was taken from a place 25 miles distant by wagon road from the right of way of the railroad, but it should be left to a jury of the vicinage to determine, under proper instructions from the court, whether the right accorded by the statute was fairly exercised, as congress intended it should be. The fact that congress did not in definite terms limit the right to take timber and other materials to adjoining townships, but used the word "adjacent,"—a purely relative term, which may be understood differently when applied to different objects or under different circumstances,—was there considered very persuasive evidence that congress did not intend to fix an arbitrary line, beyond which the right to take timber and other materials should not extend, but that its purpose was to leave such right to be governed by circumstances. It was further said:

"Congress intended to offer substantial inducements for the construction of railroads in certain sections of the country where timber suitable for railroad construction was known to be scarce, and in many places distant from the lines of road to be benefited, as they would be projected and built. For that reason it did not establish a fixed line on either side of the right of way, which, if established, would at times render the privilege of taking material valueless; but it chose to confer the privilege in such terms as would allow the land department, and courts and juries as well, some discretion in determining, under different conditions, what was a proper limit within which it might be exercised. It accordingly authorized timber and other materials to be taken from adjacent lands, leaving those whose duty it would be to see that the right was not abused, but was exercised in a reasonable manner, to decide in any given case whether the land from which material had been obtained was adjacent to the right of way, within the spirit and intent of the act."

We are in accord with this construction of the act. And while, under some circumstances, the cutting of timber from public lands at a distance of from 17 to 26 miles from the line of railroad under construction would undoubtedly be deemed a trespass, as without the meaning of the word "adjacent" in said act, the circumstances of the present case do not warrant such a holding. No injury appears to have been suffered by the plaintiff in error by reason of the act of the defendant in error. On the contrary, the land from which the timber was cut is admittedly benefited by the construction of the railroad, and, under all the conditions existing, it should be considered to be

"adjacent" to the line of railroad constructed by the defendant in error, as contemplated by the act of 1875.

The judgment of the circuit court is affirmed.

PHILIPS v. TURNER.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,121.

BANKRUPTCY—JURISDICTION AS DEPENDENT ON CONSENT.

Bankr. Act, § 23b, provides that suits by the trustee shall only be brought in courts where the bankrupt might have brought them unless by consent of the proposed defendant. Creditors filed a petition in involuntary bankruptcy on the ground that their debtor had sold his property to P. with intent to prefer him, and at the same time obtained an injunction restraining an attaching creditor from proceeding with his attachment and the bankrupt and P. from attempting to take possession of the attached property, etc. P.'s motion to dissolve the injunction was denied, and a referee appointed to examine into the good faith of the sale to P., etc. Thereafter, the adjudication in bankruptcy having meanwhile been entered by default, the referee reported that P. had reasonable cause to believe the debtor insolvent at the time of the sale. P. filed a petition in the district court reciting the prior proceedings and praying to have the referee's finding reviewed and the injunction dissolved. The trustee in bankruptcy answered, the answer being made a cross petition, and prayed an order requiring P. to account for and turn over the property. *Held*, that the district court had jurisdiction to make orders directing P. to account for and turn over the property, the record sufficiently showing that he had consented to the litigation.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of Mississippi.

It appears from the record that several creditors of A. B. Wolf, holding claims for an amount sufficient, filed a petition in the district court to have him adjudged a bankrupt. The ground of bankruptcy alleged was that within four months then next preceding he had sold and delivered to the petitioner Philips, one of his creditors, all of his property, consisting of real estate, merchandise, choses in action, etc., with intent to give said Philips an unlawful preference. Simultaneously a petition was filed by the same creditors against the New Orleans Chemical Company, the sheriff of Scott county, Miss., and said Philips, reciting the fact of the petition in involuntary bankruptcy having been filed, and the further facts that the said sale had been made to Philips with fraudulent intent; that the New Orleans Chemical Company had a few days before procured a writ of attachment against Wolf, which the plaintiff had levied upon a large part or the whole of the property of said Wolf, and was in possession of the sheriff, unless it should, before action on the petition, be replevied by Wolf or Philips. It was charged that, if the chemical company should be allowed to proceed with its attachment, it would be disposed of if not replevied, and would be dissipated, or be so intermingled or confused as to defeat the purpose of the bankruptcy proceedings. An injunction was prayed for to restrain the further prosecution of the attachment suit, and to prevent Wolf, Philips, and the sheriff from intermeddling with or recovering any of the property, and for the appointment of a receiver to take charge of the same until a trustee could be appointed after an adjudication of Wolf as a bankrupt. An injunction was granted upon petitioner entering a bond in the sum of \$2,000 to plaintiff Philips. Philips, having been duly summoned, moved for

a dissolution of the injunction four days later on affidavits and testimony. At the same time he filed an answer, claiming to have acquired the property from Wolf in good faith; that the price in hand paid was all cash except \$1,850 borrowed money owing to him by Wolf. He also alleged that a small lot of flour, of the value of \$125, which had never belonged to Wolf, was in his store with the stock bought of the latter. He denied the charge of having acquired Wolf's property in contravention of the bankrupt law. The motion to dissolve, after argument by both parties, was denied, but the injunction was modified to the extent of allowing Philips to recover his flour. In the same order the matter was referred to the referee, Nugent, for full investigation and finding as to the solvency of Philips, the bona fides of the transfer of said property, and of the solvency or insolvency of Wolf, and all other material facts. On December 3, 1900, Wolf was adjudged bankrupt by default. The referee reported, on December 28th, the facts as found by him. He found: (1) That Wolf was insolvent at the time of the transfer of the stock of merchandise and accounts to Philips; (2) that \$1,800 of the consideration was a pre-existing debt; (3) that Philips had reasonable cause to believe that Wolf was insolvent at the time of the conveyance. The report was filed December 28th. Subsequently Philips filed a petition in the district court reciting all prior proceedings and the appointment of a trustee; averring that the referee erred in his finding that petitioner had reasonable cause to believe that Wolf intended to prefer him over his other creditors; alleged that the evidence, all of which was on file, showed the contrary; and that he purchased the property in good faith for an adequate consideration. He prayed that his petition be taken as an exception to the finding, and that the court would review the said evidence and finding of the referee, and dissolve its said restraining order. The attorneys for the creditors and for E. L. Turner, the trustee, who had been appointed by the district court, accepted service of said petition, and for the purpose of a speedy hearing on said petition and such pleas, answers, or demurrers as they might present thereto waived notice, and agreed that the same should be heard before the district judge on April 5th thereafter. This agreement and waiver was made on March 29, 1901. On the next day a separate answer to Philips' petition of review was filed by E. L. Turner, the trustee of the bankrupt, which maintained the correctness of the referee's finding, and repeated the allegation of the unlawful preference. This answer was made a cross petition, and upon an averment that Philips had secured possession of the bankrupt's property, and had disposed of a portion of it, it was prayed that he be required to account for and pay over the proceeds, as well as to surrender what remained. Philips, who had filed the petition which provoked this answer and cross petition, and who had alleged the appointment or election of a trustee for Wolf's estate, entered a motion to strike out the answer of Turner, trustee, upon the grounds: First, that Turner was not a party, and was without interest; and, second, because the court had no jurisdiction to determine the alleged interest of said trustee touching the matter about which relief was sought. He also interposed a demurrer to the cross petition for want of jurisdiction, and because, as alleged, there was no law for granting the relief prayed for. The court entered a decree or order on May 9, 1901, overruling Philips' demurrer and motion, and directing Philips to render an account to the referee of all property and effects received by him from Wolf, the bankrupt, and to turn over and deliver to E. L. Turner, the trustee, the accounts and property remaining in his hands, and that he pay the ascertained value of such portion of the property as should not be surrendered. On the same day the court made an order reciting that, it having been made to appear on the hearing of the issues on petition of the creditors and of P. Philips, the claimant, that a portion of the assets and effects of the bankrupt were still in the possession of the sheriff of Scott county under writs of attachment, and that Philips, out of whose possession the same had been taken, had been required to surrender the same to E. L. Turner, trustee, it was therefore ordered that the sheriff deliver same to Philips, or, in his absence, to E. L. Turner. An application was made for a writ of seizure and sequestration of Wolf's effects in Philips' hands, adjudged to have been transferred in fraud of the bankrupt law, and same was

granted. The petition filed by Philips in this court is to review these orders of the district court.

Geo. S. Dodds, Charles J. Boatner, and Mark M. Boatner, for petitioner.

L. H. Doty and T. M. Miller, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The only material question raised is as to the jurisdiction of the district court to make the orders and decrees relating to the property transferred by the bankrupt, Wolf, to Philips. The petitioner, Philips, having voluntarily entered into the litigation in that court, cannot now be heard to deny its jurisdiction. By the terms of the bankruptcy act (section 23b) Philips consenting, the district court had jurisdiction of the questions litigated with him. The record, we think, shows that Philips consented to the litigation in the district court.

On the authority of *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, the judgment of the district court is affirmed.

TEXAS & P. RY. CO. v. SMITH et al.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,101.

1. RAILROADS—HAND CARS—INJURY TO EMPLOYE—NEGLIGENCE OF FELLOW SERVANTS.

A hand car is within the meaning of Acts Tex. 1897, p. 14, § 1, providing that railroad companies shall be liable for all damages sustained by any servant or employé, while engaged in the work of operating their "cars, locomotives, or trains," by reason of the negligence of any other servant or employé, and the fact that such servants or employés were fellow servants shall not destroy such liability.

2. SAME—VICE PRINCIPAL—RIGHT TO RECOVER FOR INJURIES.

A foreman of a gang of men engaged in repairing the tracks of a railroad company is within the protection of the section recited (Acts Tex. 1897, p. 14, § 1), and the fact that by section 2 he is made a vice principal does not bar his recovering for injuries resulting from the negligence of the men under his control.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Texas.

By an action commenced in the circuit court of the United States for the Northern district of Texas, Mrs. F. S. Smith, for herself and as next friend and guardian of her two minor children, C. F. and B. S. Smith, sued the Texas & Pacific Railway Company for damages on account of the death of F. S. Smith, her deceased husband, and the father of the minor children. In her petition she alleges that on April 11, 1899, Smith was in the employ of the defendant company as foreman of an extra gang of trackmen, whose duty it was to lay steel, etc., and, while thus employed, received certain personal injuries which resulted in his death, while exercising due care; that the company was negligent in delivering to Smith a defective and unsafe hand car to be used by him and his men in the performance of their duties; that at the time of receiving the injury Smith was riding on the front hand car, with a number of his men, returning from their work, and

that the rear hand car was defective, and, being operated by some of the other men, was permitted by them to run into and collide with the front car, and caused Smith to be thrown off and killed; that one of the causes of the collision was the inability of the men on the rear hand car to control the same, by reason of its being in defective condition. It is also alleged that the accident was directly caused and contributed to by reason of the negligence and carelessness of the agents and servants in charge of the rear hand car, in permitting the same to run into and strike the front hand car, and that the company was liable by reason of such negligence; that the agents of defendant on the rear hand car were not fellow servants of Smith, under the statutes of Texas, and were engaged in the operation of one of the cars of the defendant, within the meaning of the Texas statutes relating to the liability of railroad companies for personal injuries; and that the railroad company was liable to plaintiff for the negligence of its servants and agents. The defendant answered, among other things pleading general denial, contributory negligence, act of fellow servant, and that Smith could, by ordinary care, have known of and had knowledge of the condition of the hand car which was being operated, and of the results which would follow, and that he remained in the service with such knowledge, and assumed all risk arising from the condition of the car.

On the trial the material evidence was substantially as follows: That F. S. Smith was dead. That he left the plaintiff Mrs. F. S. Smith, his surviving wife, and two minor children, Courtney F. Smith and Bert S. Smith, and that during his lifetime he had contributed toward their support an amount sufficient to warrant the jury in the verdict given. The evidence also showed that the deceased was in the employ of the Texas & Pacific Railway Company just prior to his death as foreman of what is known as the "extra gang." This force consisted of from 15 to 20 men, whose business and duty it was to look after and repair the track, and to perform such other duties as might be required in the maintenance of said track. This extra-gang force had their headquarters at the town of Eagle Ford, on the line of the Texas & Pacific Railway Company, and their section extended several miles west. All of this force, except the deceased, Smith, were negroes; and all worked together while engaged in the repairing and keeping the track in order, and were under the supervision and control of Smith. He kept their time, and had the power to hire and discharge them, and had, in fact, hired the most of the gang or force of men working under him at the time. He had been working as foreman of this extra gang for about six weeks. Prior to that time he had been regular section foreman, working for the defendant company. He had worked awhile as extra-gang foreman in the yards at Ft. Worth, and then was moved with his force to Eagle Ford; had been there just one day prior to the accident. This force had in use at the time two hand cars, which were used to carry the men and tools out to their work in the morning, and bring them in to their quarters in the evening. It was usual and customary for eight or ten men to ride upon each hand car. These cars were propelled by levers, usually from four to six men on the car, working the lever while in motion, unless same should be going down grade. It appears that on the 11th day of April, 1899, this extra gang had used two hand cars to go out to work about four miles from Eagle Ford, and after the day's work was through they got upon the hand cars for the purpose of returning to Eagle Ford. Smith, the foreman, got upon the front car, and took his seat upon the front part of the front hand car, with about six men with him. This car was set in motion, going toward Eagle Ford. Shortly afterward the remainder of the men, to the number of about six or eight, got on the second car, and followed them. After proceeding on their way about $1\frac{1}{2}$ miles, the first or front car was run into or struck by the rear car, which caused Smith, who was seated on a water keg, to fall or be thrown forward, so that the front car ran over him, inflicting injuries upon him from which he died. The evidence shows, also, that this rear car which ran into the one upon which Smith was riding had been delivered to Smith, by the direction of the defendant's road master, that morning, at Eagle Ford, for use.

E. Greer, a witness for the plaintiff, testified by deposition that the acci-

dent occurred about 20 minutes after 6, after they had done the day's work, and had gone a distance of about $1\frac{1}{2}$ miles from where they had been at work during the day. The front car, on which he was riding, was larger than the second car. One Les Johnson, one of the laborers, was in charge of the second car, and, when the order to quit work was given in the evening by Mr. Smith, the hand cars were placed on the track by the men, and everything gotten ready to go back to Eagle Ford, and they started, and after they got started the car was going at a rapid rate of speed. At the time of starting, the front car was about 120 feet ahead of the second car, and when they reached the top of the grade, and started down, the second car ran into the first car, on which Smith was riding, which threw him over, and the car ran over him, which resulted in his death. The front car at the time of the accident was going about 10 or 12 miles an hour, and where the accident occurred the ground was practically level. He gave it as his opinion that the brakes of the second car were in good condition, and it could have been stopped in about 60 feet, but did not know when the man on the rear car first applied the brakes. Will Hurd, another of the laborers, testified with reference to the accident, and testified that the brakes on the rear hand car were not in good condition, and that the brakes were defective. John Page and Wheeler testified to the same effect. The testimony of Murphy, Lothron, and Fitzgerald was to the effect that the rear hand car was in good condition; that the accident was caused by the negligence of the men on the rear car, in allowing it to run too close to the front hand car, and in not stopping it in time to avoid the collision; and that, if the brakes had been properly applied, the hand car could have been stopped. There was testimony also tending to show that Smith, the foreman, was guilty of negligence in allowing the men on the rear hand car to run too close to the front hand car. The testimony of the plaintiffs' witnesses Lesser and Lambert was to the effect that the hand cars were kept a reasonably safe distance apart. Murphy, road master of the Texas & Pacific Railway Company, testified that he had general supervision over the foreman, Smith; that he had been employed by him as foreman of the extra gang, and that he had been acting as such for about six weeks; that prior to that time he had been a regular section foreman, and, as extra-gang foreman, Smith had power to employ and discharge all hands who worked under him; that he had employed some of those working under him at the time of the accident; that the car which caused the accident had been shipped to Smith for his use prior to that time, while Smith was working in the yards at Ft. Worth, and then taken off and reshipped to him at Eagle Ford; that it had not been in the shop, but had been in use, and each foreman was supposed to inspect the hand cars and see that they were kept in proper condition, and, if anything was wrong about them, he was supposed to report it for repairs; that the foreman was supposed to look after and be responsible for hand cars, as there was no hand-car inspector, but this duty rested upon Foreman Smith, and he had never made any report or complained to him of the condition of the car.

The provisions of the Texas statute drawn in question are as follows:

"Section 1. Every person, receiver or corporation operating a railroad or street railway, the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employé thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver or corporation, by reason of the negligence of any other servant or employé of such person, receiver or corporation, and the fact that such servants or employés were fellow-servants with each other shall not impair or destroy such liability.

"Sec. 2. All persons engaged in the service of any person, receiver or corporation, controlling or operating a railroad or street railway, the line of which shall be situated in whole or in part in this state, who are entrusted by such person, receiver or corporation with the authority of superintendence, control or command of other servants or employés of such person, receiver or corporation, or with the authority to direct any other employé in the performance of any duty of such employé, are vice-principals of such person, receiver or corporation, and are not fellow-servants with their co-employés.

"Sec. 8. All persons who are engaged in the common-service of such person, receiver or corporation, controlling or operating a railroad or street railway, and who, while so employed, are in the same grade of employment and are doing the same character of work or service and are working together at the same time and place and at the same place of work and to a common purpose, are fellow-servants with each other. Employés who do not come within the provisions of this article shall not be considered fellow-servants." Acts Sp. Sess. 1887, p. 14.

Geo. Thompson and T. J. Freeman, for plaintiff in error.

R. L. Carlock, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Substantially, only two questions appear to be presented by the record in this case: (1) Is a hand car within the meaning of the provisions of section 1 of the Texas statute? (2) Was the deceased, F. S. Smith, such an employé of the defendant that, under the terms of section 1 of the act, his representatives can recover for his death, if caused by the negligence of the men working under him?

Without rehearsing or attempting to extend or elaborate the reasoning that we find in reported cases *infra*, we content ourselves with expressing the view that the fair construction of the Texas statute requires that the first question stated above be answered in the affirmative. We cite, with approval both of its decision and of the reasoning contained in the opinion, the case of *Benson v. Railroad Co.* (Minn.) 77 N. W. 798, 74 Am. St. Rep. 444; also the decision of the supreme court of Alabama in *Railroad Co. v. Crocker*, 11 South. 264. And we concur in the suggestion of counsel for the defendants in error that this construction of the statute receives substantial support from the decision of the court of civil appeals of Texas in the case of *Railroad Co. v. Baker*, 58 S W. 965.

We come to the second question. As we understand it, the contention of the plaintiff in error is that by reason of the fact that under section 2 of the Texas law the deceased was a vice principal of the plaintiff in error, and not a fellow servant with his co-employés, had his injuries not resulted in his death he could not have recovered on account of the negligence of these co-employés. While not distinctly so expressed, the argument seems to be that, from the fact that the deceased had the authority to choose his subordinates in the extragang force over which he was foreman, he assumed the risk of any injury resulting to himself from the negligence of any one of these 15 or 20 men under his charge, and that, as against him, evidence of such negligence on their part is evidence of contributory negligence on his part, such as would bar him from recovery for injuries not resulting in his death, and therefore would bar the defendants in error from recovery in this case. If such is not the purpose and effect of the argument, we are not able to see its application. If such is its purpose and effect, it does not appear to us to find any support in the authorities cited, and seems to us to be manifestly unsound. A careful consideration of the provisions of the present statute given in the statement of the case, and of the precedent legislation on that subject set out in the brief of the plaintiff in error, which we do not deem it

necessary to quote, does not lead us to conclude that the other sections of the statute should receive a construction that would bar the foreman of a gang from the protection afforded by such section 1.

We do not deem it necessary to notice the other matters suggested in the argument by counsel for the plaintiff in error, further than to say that they do not commend themselves to us as having sufficient force to warrant us in setting aside the judgment of the circuit court.

We conclude that that judgment was right, and it is therefore affirmed.

PARDEE, Circuit Judge, dissents.

CENTRAL OHIO R. CO. et al. v. MAHONEY.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 765.

REMOVAL OF CAUSES—REMOVAL TO FEDERAL COURT—JOINT DEFENDANTS.

Under Rev. St. Ohio, § 3305, declaring that, notwithstanding an Ohio corporation leases its railroad, it shall remain liable as if it operated the road, and "both the lessor and lessee shall be jointly liable" to any person for negligence, and "may be jointly sued" in the state courts, an action by a citizen of the state, brought in the state courts, for a joint tort, against the lessor of a railroad, a state corporation, and the receivers of the lessee, citizens of another state, was improperly removed to the federal court on the petition of the receivers, alleging that the other defendant "had no interest or liability jointly with the receivers"; plaintiff's petition not presenting a separable, but a joint, controversy, though at the time of filing the petition for removal the lessor had not been served with the summons, the sheriff's return showing that it had not been found.¹

In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

This was an action brought in a state court of Ohio by Mahoney, the defendant in error, against the above-named plaintiffs in error, to recover damages for a personal injury sustained by him from the negligence of the above-named receivers while they were operating the railroad of the Central Ohio Railroad Company under an appointment made by the circuit court of the United States for the Southern district of Ohio, in a case therein pending, in which the Mercantile Trust Company of New York was complainant, and the Baltimore & Ohio Railroad Company was defendant; the last-named company having theretofore been in possession of the railroad under a lease from the Central Ohio Railroad Company. The petition alleged the joint liability of the Central Ohio Railroad Company and the receivers, and prayed a joint judgment against them upon the ground that a statute of the state imposed a joint liability upon the lessor and the lessee for damages arising from the negligence of the lessee in operating the railroad. Section 3305 of the Revised Statutes of Ohio provides that, when one railroad company leases its road to another, "the company to whom any railroad is leased, if a corporation of any other state, shall be subject to all the restrictions, disabilities and duties of a railroad company incorporated within this state; and notwithstanding such lease the corporation of this state.

¹ Removal of causes in cases involving separable controversies, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.

lessor therein, shall remain liable as if it operated the road itself, and both the lessor and lessee shall be jointly liable upon all rights of action accruing to any person for any negligence or default growing out of the operation and maintenance of such railroad, or in any wise connected therewith, and may be jointly sued in any of the courts of this state of proper jurisdiction, and prosecuted to final judgment therein as in other cases of joint liability." Process was duly served upon the receivers, but the sheriff returned that the Central Ohio Railroad Company was not found. At this stage of the case the receivers removed the case into the circuit court of the United States upon their petition setting forth that they were citizens of Maryland, and that the plaintiff was a citizen of Ohio, and further that "the defendant the Central Ohio Railroad Company had no interest or liability jointly with the said receivers of the Baltimore & Ohio Railroad Company." The plaintiff moved to remand upon the ground that the circuit court of the United States had not acquired jurisdiction. This motion was overruled, and thereupon the Central Ohio Railroad Company appeared and filed a demurrer to the petition. The receivers also demurred. Both demurrers were overruled. The defendants severally answered,—the receivers as well as the Central Ohio Railroad Company,—averring, among other things, that the receivers were not operating the railroad under the lease at the time of the plaintiff's injury. The issues being formed, the case was brought to trial, and resulted in a verdict and judgment for the plaintiff, and the case was brought here on writ of error.

J. H. Collins, for plaintiffs in error.

Emmett Tompkins and Thomas Steele, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, having stated the proceedings in the case as above, delivered the opinion of the court.

When this case was reached for hearing at a former term, the question of jurisdiction was brought to the attention of the court, and a grave doubt was expressed whether the case was properly removed from the state court; but the case was permitted to be argued on the merits, and subsequently the following question was certified to the supreme court of the United States:

"Is a suit removable from a state court to a United States court upon the petition of the receivers alone, when the action is against receivers appointed by a United States court, and also against a corporation created under the laws of the state of which the plaintiff is a citizen, when the action is a single action against both defendants for a joint tort?"

The question has been answered in the negative, and that answer practically determines the course which we should take. For the statute upon which the action is founded, in creating the liability, declares that it shall be joint, and that the lessor and lessee may be jointly sued; and the plaintiff, in his petition, pursues the defendants upon their alleged joint liability.

Only one further question requires consideration. It appears from the preceding statement of the proceedings in the case that there had been a return by the sheriff that the Central Ohio Railroad Company was not found at the time when the petition for removal was filed. But this did not discharge that defendant from the case. The plaintiff might still take steps for bringing the railroad company in, by taking out an alias summons. Moreover, the receivers did not pray for the removal upon the ground that the suit had become one against them alone, but claimed the right to remove upon the ground that the

comes a part of the debtors' estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

These paragraphs are closely related. They are parts of a system which aims at equality between creditors of the same class. They should then be read together, and in such manner as to harmonize the several clauses with each other, and to promote the general scheme of the act. It is hard to believe that it was the intention of congress to put a creditor who had innocently taken a preference in a worse plight than a creditor who had knowingly done so. But to that conclusion we are asked to come. The appellant's argument runs thus: That although if the appellees had acted with guilty knowledge, their claims as allowed would stand; yet, having taken a preference ignorantly and in good faith, they cannot have the benefit of their subsequent credits which augmented the bankrupts' estate. Certainly a construction leading to a result so unreasonable is not to be adopted unless it is unavoidable by reason of the language employed by the lawmakers. But we think that we are not shut up to such a construction of the act. In the first place, we do not discover in subdivision "c" of section 60 any language which excludes from the equitable principle of that paragraph creditors who have taken preferences innocently. We do not see that we are bound to give to the words "set off" and "recoverable" such a technical meaning as will lead to unjust discrimination. The clause does not say recoverable "by suit." The views expressed by the circuit court of appeals of the Seventh circuit in *McKey v. Lee*, 45 C. C. A. 127, 129, 105 Fed. 923, 926, commend themselves to our judgment as sound. It is there well said by Judge Grosscup, speaking for the court:

"A thing is 'recoverable' when it is susceptible of being 'regained,' 'gotten back.' The law provides, alternatively, for the regaining of the preferential payments by the trustee—First, by visiting the creditor with the danger of penalty,—the disallowance of any portion of his claim; and, secondly, in case of the knowing creditor, the right upon the part of the trustee to bring a suit. In either case the payments are gotten back,—there is a recovery; and in both, whether under stress of the penalty, or by virtue of a suit, it is the law that makes them recoverable."

We know that in *Pirie v. Trust Co.*, 182 U. S. 438, 455, 21 Sup. Ct. 906, 913, 45 L. Ed. 1171, the supreme court, in discussing a different question, incidentally remarked:

"Nor, again, do we find anything which militates against our conclusion in subdivision 'c' of section 60. That subdivision is applicable to the cases arising under 'b,' and allows a set-off which otherwise might not be allowed."

But this observation by no means implies that subdivision "c" is applicable only to such cases, and does not apply to cases of preferences innocently received, and followed by new credits given in good faith, and to the enhancement of the bankrupt's estate.

While there is a conflict of opinion between district judges and between the circuit courts of appeals as to the meaning of the terms used in subdivision "c" of section 60, we think, with the learned judge below, that the weight of authority sustains the construction which the referee in bankruptcy adopted here, and the court below approved.

But the case is open to another view equally favorable to the appellees. Upon the true interpretation of paragraph "a" of section 60, the preference in such case as this is the net gain to the creditor upon the transactions between him and the debtor. The net balance in favor of the creditor is the real preference under the law. For only to the extent of such net gain does the creditor "obtain a greater percentage of his debt than any other creditors of the same class." And so, on the other hand, only to the amount of the net gain to the creditor is the estate of the debtor impaired. If, then, a creditor innocently preferred has given return credits afterwards, he has surrendered his preference to the extent of such return credits. To effectuate justice, both sides of the account are to be considered in the case of a creditor who innocently has received preferences, and afterwards in good faith has given the debtor further credit, without security, for property which has become a part of the debtor's estate. Otherwise it is plain that such innocently preferred creditor would be compelled to surrender his preference a second time before he could prove his claim against the bankrupt's estate. We find support for these latter views in the decision of the circuit court of appeals for the First circuit in the case of *In re Dickson* (*Dickson v. Wyman*), 49 C. C. A. 574, 577, 111 Fed. 726, 728. And we cannot do better than here quote the forcible observations of Judge Putnam, who, speaking for the court, said:

"It is beyond all reason to hold, because a creditor has, in the ordinary course of business, during the four months preceding bankruptcy, received payments which under some circumstances might operate as a preference. In some views of the law, that that fact can be held to bar the proof of his claim, when, looking at all the transactions together, they demonstrate not only that they were without any intention to acquire any unjust preference, but also that they have increased the net indebtedness to the creditor, and correspondingly increased the bankrupt's estate. In order to avoid so unreasonable a result, we might say that all the transactions covered by the account current should be regarded as one, so that it could not be held that the effect of the payments was to enable the creditors at bar to obtain a greater percentage of their debt than any other creditor of the same class, within the meaning of paragraph 'a' of section 60."

We need do no more than add that we are clearly of opinion that the order here appealed from was rightly made; and accordingly it is affirmed.

MEXICAN CENT. RY. CO., Limited, v. TOWNSEND.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,117.

INJURY OF BRAKEMAN—NEGLIGENCE—DEFECTIVE CAR—DIRECTION OF VERDICT.

Where, in an action by a brakeman to recover for injuries resulting from a fall from the top of a car, caused by the breaking of a running board, the evidence was conflicting as to whether the board was rotten or sound, and it appeared that the brace which supported the end of the board was loose, and hanging down, after the accident, but the evidence did not conclusively show that it was in that condition when the car was last inspected, or when it should have been inspected, it was error to direct a verdict for plaintiff, as the question of defendant's negligence should have been left to the jury.

114 F.—47

In Error to the Circuit Court of the United States for the Western District of Texas.

The plaintiff (defendant in error here) was employed as a brakeman by the defendant (plaintiff in error). On the 9th or 10th of February, 1901, while so engaged in the service of the defendant company, the plaintiff, in the performance of his duties, was required to be on top of the defendant's train, and to go from one car to another. The running board on one of the cars on which the plaintiff was walking suddenly broke and gave way, and the plaintiff was thrown from the top of the car to the ground, and as he fell his left hand, arm, and wrist were caught under the wheels of the cars, and so mangled and bruised that it became necessary to amputate his hand about the wrist. D. S. McCurdy, a witness for the plaintiff, describes the condition of the car as he found it immediately after the accident: "We found the running board on one of the cars with about five or six feet broken off. Only one of the planks was broken. We examined this plank, and found it was dry rot and cross-grain board. We also found that the brace was not attached to the end of the car and the end of the running board, but was hanging downward, and pushed to one side towards the right. The running board is composed of three pieces of plank nailed on the top of the car, and projects over the ends of the car. All of these pieces of plank compose the running board, and extend over the end of the car about eight inches. These boards are nailed on top of the car, and have a brace underneath the ends of the running board, which is fastened with a bracket to the side of the car and the projecting ends of the running board. When we examined this brace, we found it hanging downward to the right. This brace was detached from the end of the car and the end of the running board. We examined the end of the running board that was broken. It was broken or split off with the grain of the board for about six inches. I also examined the running board to see whether it was nailed or not. I only examined at the rear end. This end was nailed. The rear end was nailed. That would be about the center of the car. We also examined the drawheads between these two cars, and found the drawheads all right. * * * The car was No. 1,423. * * * The running board was broken off, and was dry rot, wind-shaken, or dry rot cross-grain. I mean by 'wind-shaken' the same as dry rot. I cannot explain dry rot except that it is dry rot. This was a dry-rot board and also cross-grain. The grain went across the board instead of straight. The plank did not have a hole rotted through it, but was just wind-shaken all through. It was dry rot all of the way through. You can see by looking at the end of the board. I found a dry rot through the end of the board that was left. The bracket was hanging down about six inches, and pushed to the right, and was loose on one end. The bracket was not on top of the car, but was on the end. It was loose from the end where the brace had come loose. There was nothing the matter with it except it was loose. I cannot tell exactly how many minutes it was after the accident until we examined this car. It was just as quick as we could get plaintiff into the caboose, and I could notify the engineer and fireman, when we made this examination." The condition of the car after the accident as described by this witness is confirmed by the evidence of Herman Baker and the plaintiff. Baker said: "I made a very careful examination of this piece of plank, because I wanted to see what caused it to break. The piece that was broken off was between four and six feet long, and at the place where it was broken it was somewhat decayed and rotten, and also seemed to be very old, and the end was freshly broken. I also looked at the top of the car, and saw where this piece of plank had been broken off. I think the running board was made of two or three boards laid together, but only one of the boards on the outside was broken. I think the car on which this board was broken was C. M. No. 1,423." Plaintiff, testifying himself, described the particulars of the accident and the condition of the car as he found it after the accident, and also testified to facts tending to show his suffering, the extent of his injuries, and the extent of his damages. C. E. Meyer, a witness for the defendant, testified as follows: "My business is car inspector for the Mexican Central at Torreon. I am

acquainted with car No. 1,423, Mexican Central. It is a beer car. I do not know anything about when the car was overhauled. There is that board (pointing to the board on floor) that has been on it. I had something to do with the taking of that board from the car. That board came off of the left side of the car. There was no more of the board of the left-hand side of the running board than that. There are two lengths of boarding on the car. There are three boards on the car of that size. This is the one on the outside. That is the full length of it. I sawed that board in two. Complete, it would measure sixteen feet. The board is about eight foot six inches long. There is about seven feet six inches gone. I got that board about a month or five weeks ago. The car was at Torreon at that time, in cold storage, to be overhauled. (Witness examined board.) This board is not rotten. This is where it was turned up, so as to be exposed to the weather (indicating). This is the bottom. That is put on cleats. This part (indicating upper part) is turned towards the sun. There were three boards there when I took this off. The cleats of this board are just about two feet apart. Cleats are the pieces where the nails go. They were still there, and in good condition. Three boards still remained on the car. A board is five inches wide. Five inches width of board was still there when I took this off." Cross-examination: "I saw this car No. 1,423, just as I said, five or six weeks ago. It was about the 24th of July when I took that board off. I didn't see the car from the time of the accident until I took this board off, and didn't pay any attention to it. I took this board off at Torreon. It was taken back there. I believe that the company permitted this broken running board to be on the car from the 10th day of February until the 24th day of July, 1901. If Mr. McCurdy, the conductor, and Mr. Townsend, the brakeman, say that there were three running boards on there, they are mistaken. I do not claim to know this was the car Townsend was hurt on. I do know whether I took that board from the car on which Townsend was hurt on or not. Mr. Cox told me to take it off. I do not know what position he occupies with the Mexican Central. I know that he is an official of that road. I cannot say exactly just what official he is. I do not know just exactly whether I had any orders to obey his request in taking that off or not. He came and asked me to take it off, and I took it off. Had you (to Patterson) asked me to take it off, I would have done so. I do not know who you are. This was a beer car, white painted on the sides, and the ends and roof were red. The running board was of the color red. I mean by 'cleats' the cleats under the running board. I mean the cleats were pieces that ran across the car, and this rested on it. The nails hold up the balance, but I took them off. The balance of the nail holes are the same now as when I took it off the car. The cleat was in the bottom, and these boards were then just like I took them off the cleat. (The boards are shown to the jury.) I have been in the railway service since 1881. I have had considerable experience with cars. It is the only thing I have had to do since that time. About seven and a half feet were gone from this. It extended over the end of the car six inches. If there was a high car, and a man would jump down on it, it might split. A couple of jumps might crack it, and it might open a little. A brace under the end would have a good effect. It would have a good effect for a man to jump here as on there (indicating with reference to table). If a cleat had been there, and a man stepped on it there, it would have been solid. It could not have been broken there. The effect the nails would have on the solidity of the board would be its strengthening. It might not be broken if it was properly nailed down. Stepping on the end wouldn't break it. If I tried to make a pretty good jump, it might strike it, and break it. If I were over on this car, and jumped over, it would not break it. Jumping there (indicating) might break it. If the brace were off, it would not interfere much with the board; at the same time, it might break the board." Redirect examination: "The last cleat is about two inches from the end. There is four feet between the bracket and the end of the car. There are four feet between these brackets." Recross: "I am car inspector. On the Mexican Central it is the duty of the car inspector to inspect the box cars. Q. If this running board came over six inches— Had this been taken out on top, and this cleat braced under

it, could a Mexican Central car inspector have seen it? A. Yes, sir. He is there to look at it. That car laid up there about two weeks or ten days. If I didn't find anything the matter with the car, I made no record of it. I did not inspect it from the day before the accident until the 24th of July. That is something I did not do. I did not say the 24th day of July was the day upon which I first saw it. I said I took the board off on that day. I had inspected it before. Those beer cars came there every ten days or two weeks. I have been inspecting this car on and off for the last year. I could not say how many times I inspected it from the 9th of February until I took this off. I inspected that car between the day of accident and 24th of July, and reported it in good order. There are a whole lot of these cars. Anything is safe to run when there is no danger of getting hurt. Anything unsafe to run we report. I considered that running board just as safe as if a new running board was on there, when I took it off. Between February and the time I inspected it, I saw this running board, but didn't notice it before. The chances are I noticed it, and did not. Had I noticed it, I would have considered it safe to run. I didn't see it from the time of the accident until I took it off. The chances are I might have looked over it. If there are two side tracks, I go on one train and look at other. If there was a cleat, and that was the end of the car, or the end of the board, and this was two or three inches higher than the car (indicating), and it was even, I would consider it safe. The end would be about two inches higher than top of the car. The inside would not be quite so much. Saying this (indicating) is the top of the car, this (indicating) would be two inches higher than the top of the car. That is considered as good pine. Now, if a man jumped from one car to the other, although braced, it would crack. It would break at the rotten or weak place, if properly nailed down. So far as I could see, the board was well nailed. Some inspector might have taken the nails out. I might have taken them out myself. A nail sticking out as this was would be safe. It would be safe two inches above the top of the board. The whole board is about two inches higher than the top of the car. I have been caught lots of times. I either drive them down or pull them out. You will find that the widths of most of the running boards are from 12 to 14 and 16, and 18 and 20, some of them. A good many are not wider than 12. When the strips remained, the running board at that place was fifteen inches." The court instructed the jury to find a verdict for the plaintiff for such damages as he sustained by reason of the injuries which he suffered, to which charge the defendant duly excepted. The jury found a verdict for the plaintiff for \$13,800, and a judgment was thereon rendered.

T. A. Falvey and Waters Davis, for plaintiff in error.

Geo. E. Wallace, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the facts, delivered the opinion of the court.

In determining the question whether it was proper to give peremptory instructions in favor of the plaintiff, we must look at the case as it appears from that part of the evidence which is most favorable to the defendant; for we must concede to the defendant anything which it could fairly claim from the evidence. It had the right to ask the jury to believe the evidence that was favorable to it. When a party asks for peremptory instructions in his favor, he must concede all that his opponent may fairly claim from the evidence presented. When a passenger sues the carrier, proof of an accident carries with it a presumption of negligence on the part of the carrier. But a different rule prevails in a suit by an employé against the employer. The accident in the latter case carries with it no such

presumption. The employé is required to prove the negligence of the employer. *Patton v. Railway Co.*, 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361. The evidence unquestionably shows that immediately after the accident the brace that was intended to support the end of the running board was down. The evidence on the part of the plaintiff also shows that the board which was broken was wind-shaken, cross-grained, and rotten. The evidence on the part of the defendant tended to show that the board broken was sound. There is no conflict, however, in the evidence that the brace or support at the end of the board was loose, and hanging down, when the car was examined after the accident. It appears to us that from the condition of the car either one of two conflicting inferences might have been drawn: The jury might infer that the brace became loose and came down since the last inspection of the car, and at or about the time of the accident; or they might infer that it was for some time—probably a few days—in this condition, with the brace misplaced as described by the witnesses who saw it immediately after the accident. If it was in such condition at the time when the car was or should have been inspected, it would clearly have been negligence in the inspector not to discover and report the defect. On the other hand, other inferences might be made if the car was inspected the day before or shortly before the accident, and the brace was in place, and the part of the running board which broke was sound, and sufficient for the purposes for which it was used; or, if unsound and weather-shaken, it was covered with paint, and the defect hidden, so that it was not perceptible or discoverable by proper inspection. From the fact that the brace was hanging down and misplaced when the accident occurred, the jury might infer that it was in that condition at the time when an inspection was or should have been made. But this inference seems to us, from the facts, not compulsory. A contrary inference is not irrational. The evidence tends to show that an inspection was made before the accident,—probably the day before the accident. Although the witness was examined, cross-examined, and re-examined, he is not asked in what condition he found the car. He does say though, in reference to a later inspection, "Anything unsafe to run we report;" and, as we understand the evidence, this car was not reported. A piece of board was in evidence before the jury. The evidence of the witness producing it tended to show that it was a part of the board which had been broken at the time of the accident; not the part broken off, but the part left on the car at that time. The witness producing it testified that it was sound; that it was not wind-shaken or rotten. If unsound, whether it was so painted as to cover the defects from sight or inspection is left uncertain. It appears, however, to have been painted, but it is left to inference whether it was in such condition that on the day before the accident a proper inspection would have discovered the defects in it, conceding it had defects. It might have been inferred that the defect was perceptible and long-existing; but, to sustain the instruction given the jury, that alone is not sufficient. It must also appear that no other inference was reasonable; that is, to sustain the instructions given, the evidence must be such

that no other inference but that of negligence of the defendant could be reasonably drawn from the facts in evidence. The evidence altogether, as presented in the bill of exceptions, is amply sufficient to authorize a jury to make such inferences as would justify a verdict for the plaintiff, yet we are constrained to say that it is not such as to justify us in saying as matter of law that no reasonable inference could be drawn from it except that of the negligence of the defendant. The evidence in the record tends strongly to sustain the inferences drawn from it by the learned trial judge, but we cannot hold that the jury could have made no rational inference to the contrary, and we are therefore constrained to decide that the case, on proper instructions, should have been submitted to the jury.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

WILSON v. PENNSYLVANIA TRUST CO.

(Circuit Court of Appeals, Third Circuit. April 25, 1902.)

No. 37.

BANKRUPTCY—PREFERRED DEBT—RENT—LEASE FOR FIVE YEARS.

A lease for five years provided that, if the tenant became a bankrupt, the rent for the entire term should be taken to be due and payable forthwith. Within a year he was adjudged a bankrupt, while owing three months' rent. The trustee notified the landlord that the lease would be surrendered at the end of the second month thereafter, but he refused to accept the surrender, and filed a claim for one year's rent as a preferred claim under the Pennsylvania act of 1836, giving a landlord priority of payment for one year's rent out of the proceeds of the sale of the tenant's goods. By an amicable arrangement the premises were occupied by a third person during the seven remaining months, for which rent was claimed, and the landlord then took possession. *Held*, that he was properly allowed, as a preferred debt, three months' rent due when the petition in bankruptcy was filed, and also the rental rate as compensation during the time the trustee retained the premises, and to receive the rent which the temporary tenant was to pay, and the balance of the claim was properly rejected.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Elias P. Smithers, for appellant.

W. A. Way, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This is an appeal by Albert H. Wilson, a creditor of Speer C. Nelson, a bankrupt, from a decree of the district court, sitting in bankruptcy, disallowing in part the claim of this creditor. The material facts are these: By a written lease dated January 26, 1900, Wilson demised to Nelson a lot of ground and building thereon erected for a term of five years from April 1, 1900, at an annual rent of \$1,200, payable in monthly installments of \$100 each, the tenant also to pay the water tax; the lessee stipulating that, if he should "become a bankrupt," the whole rent for

the whole term "shall be taken to be due and payable forthwith." On January 4, 1901, Nelson filed his petition in bankruptcy, and was adjudged a bankrupt. On January 5, 1901, the court made an order restraining Wilson from making a distress for rent. On January 28, 1901, Wilson filed a proof of debt under said lease for \$1,215, being the rent for one year, from October 1, 1900, to October 1, 1901, and \$15 water tax, which sum or debt of \$1,215 he claimed had priority over general debts, and was payable in full out of the bankrupt's estate. On February 14, 1901, the trustee in bankruptcy notified Wilson that the lease would be surrendered and the premises vacated on February 28, 1901, but Wilson refused to accept such surrender. Afterwards, under an amicable arrangement entered into without prejudice to the right of either party, the premises were occupied by a third person until October 1, 1901. On the day last mentioned—October 1, 1901—Wilson accepted a surrender of the lease, and his tenant has since occupied the premises. The fund for distribution arose from the sale by the trustee of goods belonging to the bankrupt which were on the leased premises at the time of the filing of the petition in bankruptcy. The court allowed the claimant out of the fund, as a preferred debt, the sum of \$300 for three months' rent due and payable when the petition in bankruptcy was filed, and the further sum of \$200 as compensation, at the rental rate, for the period of two months the trustee in bankruptcy had occupied the premises; but disallowed the rest of the claim. The court, however, adjudged that the claimant was entitled to receive the rent, to wit, \$300, which the temporary tenant was to pay for his occupancy prior to October 1, 1901.

Has the appellant any just cause of complaint? Notwithstanding the ruling in *Platt v. Johnson*, 168 Pa. 47, 31 Atl. 935, 47 Am. St. Rep. 877, upholding as valid a provision in a lease that the entire rent for the balance of the term should become due if the lessee should become embarrassed, or make an assignment for the benefit of creditors, or be sold out by sheriff's sale, it may well be doubted whether the stipulation here making the whole rent for the whole term due and payable if the lessee "shall become a bankrupt" is enforceable as against the provisions of the bankrupt act. But the court below did not pass upon that question, and we do not find it necessary to consider it. Assuming the validity of the stipulation where the lessee is adjudged a bankrupt, these consequences would follow its enforcement. In the first place, under the Pennsylvania act of 1836 the landlord would be entitled to priority of payment out of the proceeds of sale of the tenant's goods upon the demised premises to the extent of one year's rent. *Longstreth v. Pennock*, 20 Wall. 575, 22 L. Ed. 451. Secondly, the rent for the entire residue of the term would be provable as an unpreferred debt, entitled only to a pro rata dividend, and the unexpired portion of the term would become an asset of the bankrupt's estate, to be disposed of by the trustee in bankruptcy for the benefit of the estate. The latter result, however, this claimant repudiated altogether. He sought a partial and one-sided enforcement of the stipulation. He attempted to secure a preference for one year's rent, and at the same time retain his

interest as landlord unimpaired in the residue of the term. He took that position at the start, and held it to the end. His proof was only for a single year's rent as a preferred debt, and then, at the expiration of the year, he took, and has since maintained, exclusive possession of the leased premises. The court held—and, we think, rightly—that the claimant could not split up the term in that way. The contract was not divisible. If the claimant desired to avail himself of the stipulation as to bankruptcy for the purpose of securing a preference for one year's rent, he was bound to conform to the contract as a whole. But this he declined to do. We are therefore of opinion that the action of the court was right.

The decree of the district court is affirmed.

LEE v. BOARD OF COM'RS OF MONROE COUNTY.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 1,025.

COUNTIES—PURCHASE OF BRIDGES—UNAUTHORIZED ACT—FAILURE TO PAY—RIGHT TO REMOVE.

Where the commissioners of a county, representing that they had complied with the law, and had the right so to do, purchased bridges, and issued orders for the payment, and thereafter the payment of such orders was enjoined because the law had not been complied with, the holder of such orders may maintain an action for leave to remove such bridges unless the county pays therefor.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

The appellant filed his bill in the court below alleging that the defendant (appellee), under the laws of the state of Ohio, is a corporation capable of being sued, and is required to construct and keep in repair all necessary bridges within Monroe county, Ohio; that the Canton Bridge Company and defendant entered into four contracts in writing, by which said bridge company agreed to furnish all the material, except lumber, and construct and complete ready for travel, the superstructure for three iron bridges and the superstructure and substructure for one iron bridge over certain streams in said county, which structures were constructed according to the terms of said written contracts, and were delivered to the defendant and accepted. It is alleged that the Canton Bridge Company was informed and led to believe by the defendant that all of the provisions of law had been complied with in regard to the letting of said contracts; that upon the completion and acceptance of the bridges the board of commissioners paid the Canton Bridge Company on account thereof the sum of \$1,240, and, to evidence the balance due, executed and delivered to the Canton Bridge Company five orders, as by law provided, which were presented to the auditor of the county, who executed and delivered to the company five warrants on the county treasurer, directing him to pay to the order of said company the amount thereof out of the bridge funds, which warrants were presented to the treasurer, who indorsed on them, "Not paid for want of funds," together with the date of such presentation; that these warrants were, for a full and valuable consideration, sold and transferred by the Canton Bridge Company to the People's Bank of Canton, and by it sold to the complainant for a valuable consideration, without any knowledge on his part of any infirmity in them, and that he is now the owner of them; that after the sale of said warrants to the complainant certain taxpayers of the county of Monroe commenced in the court of common pleas an action

against the auditor, alleging that all of the contracts with the Canton Bridge Company and the warrants issued in pursuance thereof were illegal and void, because of the failure of the board of county auditors to comply with the provisions of law relative to the purchase and erection of bridges, and on final hearing an injunction restraining the county treasurer from paying said warrants, or any of them, was granted; that after the commencement of the proceedings for injunction, the complainant learned for the first time that the board of commissioners, in attempting to purchase the bridges, had neglected to comply with certain statutory provisions governing and controlling their action in letting contracts, and by reason thereof said contracts and warrants were void; and thereupon the complainant submitted to the defendant a proposition that he would surrender said warrants for cancellation, repay the money it had paid on the contracts with interest from date of payment, first deducting therefrom an amount that should be reasonable for the use of the bridges from the time they were accepted; and in consideration of so doing the defendant should permit the complainant to remove said bridges at his own expense,—all of which the defendant refused to do. It is alleged that the bridge company made a mistake in acting upon the representations of the defendant that it had complied with the provisions of law regarding the letting of contracts for the erection of bridges; and also made a mistake in believing that the contracts were binding on the defendant, and in believing that the acceptance of the bridges by it amounted to a purchase and ratification of the contracts, and bound the county of Monroe to make payment therefor; and it is alleged that keeping and appropriating said bridges to the public use while the county refuses to make any payment for them is a fraud upon the complainant. The complainant asks that on payment of the amount which has been received by the Canton Bridge Company he be adjudged entitled to take down and remove the bridges, and that an account be taken concerning their use by the county of Monroe during the time it has used them, or, if the defendant elects to keep the bridges, it may do so upon condition of paying for them. To this bill of complaint the defendant interposed a general demurrer, which was sustained by the court below, and the complainant appeals.

H. B. Webber, for appellant.

Spriggs & Ketterer, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and WANTY, District Judge.

WANTY, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The provisions of the statutes of the state of Ohio relating to the purchase and erection of bridges were not complied with by the county commissioners before entering into the contracts with the Canton Bridge Company, and it is conceded by both parties to this suit that they were invalid, and no recovery could be had upon them, nor upon the warrants given in payment, for any part of the purchase price of the bridges. These statutes authorizing the purchase and erection of bridges by county commissioners have been before the supreme court of Ohio, which has held that a contract made for the purchase and erection of a bridge in disregard of the statutes on that subject is void, and no recovery can be had against the county on the contract, or for the value of such bridge; that the commissioners, having no power to bind the county except as provided by the statutes, could not, by accepting and retaining a bridge under a void contract, bind the county to pay what it is reasonably worth; and that, when both parties have acted in disregard of the statutes, the court will leave them where they have placed themselves, and refuse to aid either. Bridge-

Co. v. Campbell, 60 Ohio St. 406, 54 N. E. 372. The appellee contends that the supreme court of Ohio in that case has announced as the public policy of the state that no court of law or equity will grant relief to parties who have entered into a contract in disregard of its statutes, and quotes the language of Judge Burket, saying:

"Whatever the rule may be elsewhere, in this state the public policy, as indicated by our constitution, statutes, and decided cases, is that, to bind the state, a county, or city for supplies of any kind, the purchase must be substantially in conformity to the statute on that subject, and that contracts made in violation or disregard of such statutes are void, not merely voidable, and that courts will not lend their aid to enforce such a contract directly or indirectly, but will leave the parties where they have placed themselves. If the contract is executory, no action can be maintained to enforce it, and, if executed on one side, no recovery can be had against the party on the other side. * * * It is necessary to so construe the statutes in order to prevent the evils which induced the enactment of them. If such statutes could be evaded, there would always be found some public servants who would be ready and willing to join in transactions detrimental to the public, but favorable to themselves or some favored friend; and, if public officers should be ever so honest, some persistent agent or salesman would impose upon them, and obtain more out of the public treasury than is justly due. When the provisions of the statute are followed, and all is done openly and publicly, the public interests are best conserved; and even then there is often complaint to the effect that some one has been favored."

If this language is susceptible of the construction claimed for it by the appellee, it could have no binding force in a federal court sitting in equity. *Bucher v. Railroad Co.*, 125 U. S. 555, 582, 8 Sup. Ct. 974, 31 L. Ed. 795. But it has no application to the suit at bar. There is no attempt in this case to enforce these contracts, directly or indirectly, or to collect the value of the bridges under an implied promise to pay for them. The supreme court of Ohio has not declared it to be the public policy of the state to allow its municipal officers to induce people to part with their property, and then set up its want of power to pay for it, and thus appropriate it, because it has been able to deceive the persons who furnished it, relying on the ability of the municipality to bind itself. It has announced that contracts made by a municipality in disregard of the statutes of the state are absolutely void, and will not lay the foundation for a recovery of any part of the price stipulated for in the contract; and that a municipality cannot bind itself to pay what property is reasonably worth when it is furnished, in disregard of the statutes. But while the law affords no remedy, equity, although it will not enforce the contract or create a contract between the parties on account of the acceptance and retention of the property, when the property is in existence, and in the hands of the defendant, will not allow it to retain that to which it has no title whatever, and prevent the owner from reclaiming it. The case presented by the bill shows no moral turpitude in the transaction, and, although the bridge company should have ascertained whether each step provided by the statutes had been properly taken, the law placed upon the defendant the duty of taking those steps. It was necessary for it to comply with every provision of the statutes in that behalf before entering into these contracts, and it represented to the bridge company that it had so complied, and thus misled the bridge company into entering into the agree-

ment, the carrying out of which placed these bridges in the hands of the defendant. The complainant has no remedy at law, and to deny him equitable relief would be to enforce the contract on the part of the bridge company, and to allow the defendant to repudiate its part of the same contract, and thereby appropriate, without compensation, property to which it had no legal or equitable right. It was said by the federal supreme court in the case of *Marsh v. Fulton Co.*, 10 Wall. 676, 684, 19 L. Ed. 1040, 1043:

"The obligation to do justice rests upon all persons, natural or artificial; and, if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

If there was any fraudulent purpose of the bridge company, or connivance on its part at the action of the defendant in disregarding the provisions of the statutes, so that the purpose for which those provisions were enacted should be thwarted, then neither the bridge company nor this complainant could come into a court of equity and ask any relief, as they could not come into court with clean hands; and the relief would be denied for that reason, and not on the doctrine of the public policy of the state. There is no public policy recognized by the courts which allows any person, natural or artificial, to take the property of another, and appropriate it to its own use, and deny to the person who is innocent of fraud the right to reclaim it. As there was no contract binding on either party in this case, and there was no fraud on the part of the bridge company or this complainant, and the property is in existence and in the hands of the defendant, it seems clear that the relief asked for should be granted. The case seems to come entirely within the principles laid down by the supreme court in the case of *Chapman v. Douglas Co.*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378. See, also, *Wrought-Iron Bridge Co. v. Town of Utica* (C. C.) 17 Fed. 316.

The decree sustaining the demurrer should be reversed, and the demurrer overruled, with leave to defendant to answer.

HALL v. AHREND.

(Circuit Court of Appeals, Second Circuit. March 10, 1902.)

No. 99.

PATENTS—INVENTION—PROCESS FOR MAKING IMITATION PRESS-COPIED LETTERS.

The Hall patent No. 423,558, for a method of producing imitation press-copied letters, claim 1, is void; the process described for treating printed letters or circulars to give them the appearance of having been press-copied being essentially the same to which letters are subjected in the actual copying, which was old.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Alan D. Kenyon, for appellant.

R. B. McMaster, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, District Judge. This cause comes here upon appeal of complainant in the court below from a judgment dismissing the bill alleging infringement of complainant's patent No. 423,558, granted March 18, 1890, to Samuel Hall. The patent is for a process whereby the blurred appearance of press-copied letters may be imparted to printed circulars in great numbers, in rapid succession, and in practically unlimited numbers. The idea was novel; the result was commercially successful.

The first claim, the only one in suit, is as follows:

"(1) The process described, consisting in first printing the original sheets, then placing their printed surfaces in contact with a moist material and passing both together between compression rollers, then removing the ink impression received by the moist material before it is again brought in contact with the printed matter, substantially as and for the purposes set forth."

The process thus claimed consists, as stated by the patentee, in (1) printing the circulars in the ordinary way; (2) placing them face downward on an endless belt of moist material; (3) compressing them together by means of rollers; (4) washing out the ink thus impressed on the moist material; (5) using the moist material over again for the same purpose. The apparatus by which the process is carried out comprises a web, two tanks, one containing water, the other bleaching fluid, and rollers. The web passes under one of the rollers submerged in the water tank, and, thus moistened, passes upward between two adjustable squeezing rollers, which regulate the amount of moisture. The circulars are then placed face downward on the moist web, and are carried thereon between another pair of rollers, "and thus an imprint is taken on the web from the ink on the paper." The circulars then drop off or are removed, and the web passes down into the tank of bleaching fluid, where the ink is destroyed, and then under a roller and between another pair of squeezing rollers, which squeeze out the excess of bleaching fluid, and then over another roller into the water tank, where the bleaching fluid is washed out, leaving the web moist for another printing operation. The patentee, however, expressly disclaims this apparatus, and in the claim in suit does not claim the bleaching fluid, and neither complainant nor defendant uses bleaching fluid in carrying out the alleged process.

If it be assumed that the method employed in this operation of a machine may constitute a true process when no bleaching fluid is used, the question is raised whether such process involved invention in view of the prior art. Letter-copying machines with water troughs, and operated by means of rollers or platens, were old, as shown by the Bailey, Lash, Stiles, and Cope patents. In these presses a process was employed by which copying paper was dampened, and this "moist material" and the printed surface of a letter were passed together between rollers or under a platen, and in some cases the ink was afterwards washed from the rollers. The complainant attempts to differentiate these processes from that claimed in the patent in suit by the contention that the old processes were used to print a copy of the let-

ter on a sheet of interposed paper, but that by the use of the patented process, while a press-copy effect is given to the circular, no real copy of the circular is printed, but only a stain of free ink is imparted to the web, which stain is removed.

But the patentee, describing the operation of his process, says: "Thus an imprint is taken on the web from the ink on the paper." Complainant's expert admits that "the first letter as it is fed through the compression rollers on to the endless belt would be found to contain almost a perfect copy of the letter," and counsel for complainant admits: "In actual practice the printed circular or letter leaves a substantial amount of ink on the moist material; in fact, a complete copy is usually imprinted on the moist material."

The contentions in support of novelty are disposed of by prior patents, notably patent No. 289,983, granted to Ezra Cope in 1883, for a copying press. The chief difference between the patented process and that carried on by means of the Cope patent is in the use by Cope of a platen with his rollers. He uses an endless web of moist material, which, with the letter or circular, is subjected to pressure under the platen. The web passes between rollers into a tank of liquid, which moistens the web, and may serve to wash out the stains of ink. It is true that a sheet of copying paper was interposed between the latter and the web, but this was done only in order to preserve the copy, while in the patented process the copy made directly on the web is destroyed. In each case the ink passing from the letter or circular may afterwards be washed out.

Although the moist material used by the patentee is a cloth web, he does not claim it, but describes the web as made "of cloth or other suitable material," just as Stiles had done in his copying apparatus, patent No. 343,505. And the experts for complainant admit that the process of the patent might be practiced to a limited extent by the use of "moist material," consisting of the dampened paper of copying presses, or by employing the rubber rolls of an ordinary clothes wringer. The old and new processes are the same; in one case the copy is preserved, in the other it is destroyed.

The objection to the Cope apparatus that it could not be speedily operated is met by the proof that the substitution for the platen of the rollers shown in other presses of the prior art would not involve invention, and by the fact that the apparatus by which such speed is accomplished is not covered by the patent. Three-quarters of the Hall specification is devoted to the description of a letter-press copying apparatus of unlimited capacity, designed for speedy and continuous operation, of which he says: "I do not herein claim the apparatus shown and described, * * * since I intend to make that the subject of an application for a patent." His first claim is broad enough to include the old-fashioned letter-press copying system, and therefore cannot be sustained.

The decree is affirmed, with costs.

In re DURHAM.

(District Court, D. Maryland. March 14, 1902.)

1. BANKRUPTCY—JURISDICTION TO DETERMINE VALIDITY OF MORTGAGE—CONSENT OF MORTGAGEE.

A creditor of a bankrupt, who holds chattel mortgages, and who, in response to a petition by other creditors, asking that its mortgages be set aside as illegal preferences, asked and obtained further time to plead, and thereafter answered the petition, asserting the validity of its mortgages, and asking that its claim be allowed and paid from the proceeds of the mortgaged property in the hands of the trustee, thereby consented that its rights might be adjudicated by the court of bankruptcy, and cannot, for the first time, challenge the jurisdiction of such court after the issues have been referred and testimony taken by the referee.

2. SAME—LIENS—VALIDITY OF CHATTEL MORTGAGES.

A bankrupt, before the filing of his petition, was a country merchant, and engaged in the canning of tomatoes, which required during the canning season a large outlay of cash in the purchase of tomatoes and cans. By arrangement with a bank the latter advanced the sums required, taking up the drafts attached to bills of lading for cans, and holding such bills until mortgage bills of sale were executed upon the canned product to secure the advances made, and further advances then made or to be made for the purchase of materials. These mortgages were properly recorded. *Held*, that such mortgage bills of sale created valid liens, which, under Bankr. Act 1898, § 67d, were not affected by the subsequent bankruptcy of the mortgagor.

3. SAME.

A parol agreement between the mortgagor and mortgagee that the canned products should be delivered by the mortgagor to a commission house, and be sold by it, and the net proceeds paid to the mortgagee, did not affect the validity of the mortgages, or constitute a transfer with the intent and purpose to hinder and delay creditors, within the meaning of Nat. Bankr. Act 1898, § 67e.

4. CHATTEL MORTGAGES—VALIDITY—SUFFICIENCY OF DESCRIPTION.

A series of chattel mortgages executed at short intervals, and in effect as a part of the same transaction to secure advances made by the mortgagee to enable the mortgagor to conduct a canning business, and covering the product of such business, are not invalid, under the law of Maryland, for insufficiency of description, although at the date of the first the goods mortgaged were in part to be yet acquired, where they had all been acquired when the last was executed.

In Bankruptcy. Proceeding to set aside certain chattel mortgages from the bankrupt to the Harford National Bank of Bel Air, Md.

John L. G. Lee, W. Irvine Cross, and Harry S. Carver, for E. Savage Shure, John S. Wallis, and other creditors.

Stevenson A. Williams and David G. McIntosh, for the Harford National Bank of Bel Air, Md.

MORRIS, District Judge. The bankrupt, John J. Durham, filed his voluntary petition December 13, 1899, and was duly adjudicated. On April 19, 1900, E. Savage Shure and John S. Wallis, and subsequently other creditors of the bankrupt, filed their petitions, asking that certain bills of sale of the bankrupt's property made by him to the Harford National Bank of Bel Air four months preceding the bankrupt's application be set aside as illegal preferences, and made to hinder, delay, and defraud creditors. An order on the petition re-

quired the Harford National Bank of Bel Air to answer and show cause on or before May 5, 1900. On May 4, 1900, the Harford National Bank of Bel Air filed its petition, asking to have the time for filing its answer extended until May 15th. On May 15th the Bank filed its answer, under oath, to all the allegations of the petition, and, proffering itself ready to furnish such other detailed accounts of its transactions with the bankrupt as might be right and proper, claimed that it was entitled to have the lien of its several mortgage bills of sale preserved, maintained, and enforced, "and its claim therefor allowed out of the proceeds of sale of the property covered thereby now in the hands of the permanent trustee of said Durham." On July 5, 1900, the petition and answer were, by order of the court, referred to the referee to take testimony and report to the court. On July 11, 1900, Thomas H. Robinson, who had been appointed trustee of the bankrupt's estate, and on whom a copy of the creditors' petition had been served, filed his petition, stating that from the information obtained by him he was unable to determine whether the allegations in the petition could be sustained or not, and that for the purpose of bringing the matter properly before this court, and having the allegations investigated, he charged that the bills of sale held by the bank did create illegal preferences, and should be set aside. On July 24, 1900, and after the taking of testimony had been commenced, the bank filed its petition, asking leave to withdraw its answer, and to file a demurrer setting up want of jurisdiction in the court to hear and determine the validity of the bills of sale. This leave was not granted, and the parties proceeded with the taking of testimony.

I am of opinion that the objection to the court assuming jurisdiction came too late. The bank, by its application for further time to answer, and then by answering and submitting to the jurisdiction of the bankrupt court, and asking that its lien be sustained, and its claim allowed out of the proceeds of property in the hands of the trustee in bankruptcy, fully consented that the issues raised by the petition and answer should be heard and determined by the bankrupt court as part of the proceedings in bankruptcy, and as a controversy in relation to the estate of the bankrupt. The Harford National Bank was not a stranger to these proceedings, for on the day that Durham filed his petition, and was adjudicated a bankrupt, it filed its petition stating that it was a creditor for \$15,173.28, and asked that receivers be appointed to take possession of all the bankrupt's goods, and that a restraining order issue enjoining all persons from interfering with the bankrupt's property. Upon its petition the court granted the relief asked for. It seems clear, therefore, that the bank made itself a party to these proceedings, asked substantial relief, and consented to the determination of the controversy as to its claim of lien upon certain assets of the bankrupt by this court of bankruptcy.

There were five mortgage bills of sale duly recorded made by Durham to the bank in August, September, and October, 1899, the total of the sums intended to be secured amounting to \$29,250. Of these amounts it is admitted by the bank that the sum of \$5,000, mentioned in the first bill of sale, was an antecedent debt, carried over from the previous season, for which they held the bankrupt's note, with two in-

dorsers. All the other amounts are claimed by the bank to have been made up either of an advance of money made at the time the bill of sale was delivered to it, or for an advance then agreed to be made and subsequently advanced.

In considering whether this contention has been satisfactorily established by proof, the surrounding facts should be borne in mind. Durham carried on the business of a country storekeeper, and had for several years been engaged during the canning season in canning tomatoes in Harford county, Md. In the season of 1899 he increased his canning business, and had made contracts for cans and other material which had to be paid for in cash, and had made contracts for tomatoes to be grown for him, and contracts for filling empty cans to be provided by him. All these contracts involved the paying out of large sums of cash, the cans not being deliverable until the drafts attached to the bills of lading for them were paid, and other parties having a possessory lien on the cans when filled. No money could be realized from sale of the canned goods until near the end of the season, when they were ready for shipment to purchasers at a distance. It is plainly a case where a large advance upon the cans and other material as delivered to Durham, and upon the goods when packed, was a usual and legitimate transaction, and, for a country storekeeper of small capital, unavoidable. The business of the bank was to loan money, and to loan it securely, and not to put it at the risk of the business enterprises of its customers, as do the vendors of merchandise. The president of the bank, Mr. Williams, testifies that Durham never was allowed to overdraw, or to have money from the bank further than it had securities in hand. This was often by the retention of the bills of lading for cans, which were shipped to Durham in car-load lots, after the bank had paid the drafts for the price of the cans attached to the bills of lading. This security was held, and the cans not delivered by the bank to Durham until a mortgage bill of sale was executed. Durham kept his account at the bank, and it is shown that the sums paid for him by the bank made up of drafts, notes, and checks in the prosecution of his business amounted from July to the end of December, 1899, to \$77,521.03. The taking of security by holding title to the goods paid for by the money advanced by the bank, which could not be paid back until the product of the season's packing was sold, is in harmony with the transaction, and with the custom of banks and bankers. In the city it would be done by pledging warehouse receipts, and, where goods are scattered in country canning factories, by mortgage bills of sale. I am satisfied from the testimony that, except as to \$5,000, secured by the first bill of sale, the bills of sale were taken by the bank to secure present, and not antecedent, advances, and that the money was bona fide advanced to enable Durham to pay the necessary outlays of his canning business, and procure the necessary material and labor to prosecute it. After he had made his contracts for the canning season of 1899, his only hope of escaping disaster was to obtain the funds required to pay for the cans and other material necessary to prosecute the business. These payments tended to increase his estate in so far as the materials purchased increased his assets and facilitated his business. There was nothing secret about the bank's security.

The several bills of sale were all promptly recorded, according to the Maryland law, on the day they were executed, and every one dealing with Durham was affected with notice of their contents. Their meaning and purpose was obvious and unmistakable, viz. that the bank was furnishing Durham with the funds required to carry on his canning business at the season of its greatest activity, and was taking mortgage bills of sale on the material thus paid for and on the product of the canning factories, almost from week to week, to secure its advances. That these advances were bona fide transactions intended to aid Durham in successfully prosecuting the season's canning business, and, if possible, to pay off the debts contracted in it, I discover no sufficient reason to doubt. It is quite apparent that the canning business is often done on a narrow margin of profit, and that a few cents per dozen difference in the price at which the canned goods are finally sold, or at which the empty cans are bought, determines the success or failure of the season's business. It turned out that the price at which Durham's goods of that season were sold was very low and unprofitable. When the bank, after October 23d, refused further accommodation to Durham, and he could get no more money from that source, and he was unable to receive and pay for many thousand bushels of tomatoes which had been grown for him, and they began to rot in the fields, then his creditors became clamorous, and his application in bankruptcy followed on December 13th. Before the application, the bank, finding that Durham's condition was hopeless, proceeded to get possession, as far as possible, of all the canned goods covered by its bills of sale,—about 15,000 cases,—and made sale of the greater portion of them.

By section 67d of the national bankruptcy act of 1898, it is provided :

"Liens given or accepted in good faith and not in contemplation of or in fraud of this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

The cases interpreting the foregoing and similar provisions in bankrupt laws are carefully cited in the note to *In re Little River Lumber Co.*, 1 Am. Bankr. R. 483, 92 Fed. 585, and it is not, therefore, necessary to refer to them here. They hold that pledges to secure money loaned at the time are valid; that an exchange of a security validly held for a new security, the old one being released, is not a preference; that a fair exchange of values may be made at any time notwithstanding insolvency; that an insolvent is not bound to abandon all dealing with his property, provided he does not give preference to antecedent debts, and does not so deal with it as to evidence a purpose to defraud or delay his creditors, and that preferences can only arise in case of antecedent debts. See, also, *In re Wolf* (D. C.) 98 Fed. 84; *In re Davidson* (D. C.) 109 Fed. 882. It is, however, contended by the petitioners that, notwithstanding it may be true that the mortgage bills of sale were made for a valid, present consideration, they were void under section 67e, which enacts that all conveyances, transfers, assignments, or incumbrances given by a person adjudged a bankrupt within four months prior to the filing of the petition, with intent and purpose on his part to hinder, delay, or defraud his creditors, or any

of them, shall be null and void as against the creditors of such debtors, except as to purchasers in good faith and for a present consideration. *Bank v. Bruce*, 48 C. C. A. 236, 109 Fed. 69.

It is urged that, although the bills of sale were given by the bankrupt as the consideration of obtaining advances from the bank to be used in his business, yet by reason of the manner in which the property mortgaged was dealt with it must be held that Durham's purpose was to hinder and delay his other creditors. There was no agreement in the bills of sale allowing the mortgagee to dispose of the property, but it is proved that by an agreement entered into in September Messrs. Smith, Rouse & Webster, who were commission merchants at Bel Air for the sale of canned goods, and were also dealers in canners' supplies, were authorized to make sale of the canned tomatoes; and Durham agreed that, as soon as they were packed and labeled, he would ship them, according to the instructions of Smith, Rouse & Webster, to the purchasers procured by them, and allow Smith, Rouse & Webster to bill the goods in their own names, and collect the proceeds of the sales. Smith, Rouse & Webster agreed to guaranty the payment of the sales made by them, and to notify the Harford National Bank of each shipment of goods as soon as they received the bills of lading; and further agreed, after deducting their own charges and advances, to pay over the balance to the bank, which claimed the goods under the bills of sale. This was not an agreement allowing the mortgagor to sell the goods and appropriate the money received to his own use, but was an agreement by which the proceeds of the goods were applied to the payment of the mortgage debt, the sale being made in the customary manner by commission merchants, through whom Durham usually purchased his cans and sold his canned goods. *Edelhoff v. Manufacturing Co.*, 86 Md. 595-612, 39 Atl. 314. No inference of purpose to delay or hinder creditors can be drawn from this agreement.

It is further urged that these bills of sale should be held invalid because the description of the goods intended to be conveyed is not sufficiently definite. I think, at least so far as the canned goods are concerned, the description is sufficient to gratify the requirements of the Maryland statute. There were five mortgage bills of sale, viz., August 25, 1899, for \$5,000 antecedent debt and \$3,000 present consideration; September 5, 1899, for \$11,000; September 21, 1899, for \$4,250; September 29, 1899, for \$3,000; October 23, 1899, for \$3,000. It was an almost continuous transaction, and although as to the earlier one the goods mentioned were in part to be after-acquired, they had been all acquired at the date of the latest bill of sale. The description of the personal property conveyed by a bill of sale required by the Maryland Code (article 21, § 41) is only a general description by its location, ownership, and general characteristics, and parol evidence is admissible to show the particular articles included within the general words of the description. *Jones, Chat. Mortg.* § 56.

The prayer of the petition is that the said several bills of sale may be declared null and void and set aside, and the proceeds arising from the sale of the property described therein distributed under the orders and directions of this court amongst the creditors of said bankrupt

equally. This prayer, except as to the antecedent debt of \$5,000, attempted to be secured by the mortgage bill of sale of August 25, 1899, is denied.

THE EVA B. HALL.

(District Court, S. D. New York. April 19, 1902.)

ADMIRALTY—INJURY TO SEAMAN—SUBSEQUENT NEGLECT—LIABILITY.

Libelant, a seaman, had his arm broken through being struck with a capstan bar by the mate of the vessel, and the master, during the 11 days it was at sea before reaching port, required him to continue work to some extent, threatening to put him in irons unless he did so. The perfect rest necessary to insure a natural reunion of the disunited parts of the bone was thereby prevented, and the injury greatly aggravated. Libelant told the master that his arm was broken, and it became swollen and inflamed immediately, and remained constantly in that condition. Held that, though there was no fault on the part of the vessel as far as the blow itself was concerned, it was liable for the master's misconduct in compelling the libelant to continue work after he was injured, instead of permitting him to have the necessary rest.

In Admiralty.

Bodine, Quigley & Whiting, for libelant.

Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. The libelant in this action was a seaman on the schooner *Eva B. Hall*, and had his left forearm broken through being struck with a capstan bar by the mate of the vessel on the 4th day of November, 1901, while the vessel was on a voyage from Fernandina, Fla., to New York. He was engaged in the performance of his duties at the time. The mate has disappeared, but the libelant does not seek to hold the vessel for the original injury, nor does the vessel claim that the blow was justified in any way. It is assumed by the parties, for the purpose of this action, that there was no fault on the part of the libelant or of the vessel as far as the blow was concerned, but the libelant complains that, instead of thereafter receiving the care he was entitled to from the vessel, the master wrongfully compelled him to work during the whole of the remainder of the voyage, a period of 11 days, threatening to place him in irons, unless he should do so, with the result that he suffered great pain, and his arm was permanently injured. It is contended by the claimant that, when the injury was reported to the master of the vessel, he examined the arm with all the care and skill of which he was capable, and, supposing the injury to be merely a bruise, treated it daily with liniment; that thereafter until the termination of the voyage the libelant was only required to do such work as he could with the other arm, and, when the vessel reached port, the master and agents of the vessel were willing to send the libelant to a hospital, but he did not request to go to one, but to be paid off, which was done, and he signed clear of the vessel.

There is very little dispute about the facts in the case. The blow caused a simple fracture of one of the bones of the left forearm. The libelant was in a healthy condition, and, if the arm had been properly attended to, and left at rest, there would have been a natural union of

the disunited parts of the bone, so that in a few months the arm would probably have been as good as ever. But, during the 11 days the vessel was at sea before reaching port, the libelant was required to work to some extent, thus preventing the perfect rest which was requisite for the arm, with the result that the broken parts of the bone could not remain in apposition, and the chances the libelant had of his arm healing, or being in a condition for proper treatment when it could be obtained, were destroyed. It now appears that the arm is permanently disabled for any kind of heavy work, unless a surgical operation of cutting down to the bone, and then treating it, should prove successful in getting the parts of the bone to unite properly.

The master could not be expected to know positively that the arm was broken, but it appears that the libelant told him that it was broken. It became swollen and inflamed immediately, and constantly remained in that condition. In view of the complaint and the probability of its truth, I think it was incumbent upon the master to permit the libelant to have absolute rest; but, instead of adopting that humane course, the master threatened to put the wounded man in irons, and forced him, without necessity, to perform duties which would naturally result in an aggravation of the injury. For such action on the part of the master, I think the vessel should be held. The liability of a vessel to her crew ordinarily does not include any compensation or allowance for the resulting effects of an injury received while in her service, but is limited to the expenses of the care, attendance, and cure of the seaman. Where, however, there has been misconduct or neglect by the officers in the treatment of the seaman, after he has been wounded in the service of the ship, an additional cause of action arises against the ship for consequential damages. *The City of Alexandria* (D. C.) 17 Fed. 390; *Whitney v. Olsen*, 47 C. C. A. 331, 108 Fed. 292.

The libelant has been unable to work since the accident, and subjected to living expenses of over \$100. He has incurred a surgeon's bill of \$50, and paid \$1.25 for medicines incident to his injury. He has not released the vessel in any way. Under the circumstances of the case, I think he should be allowed the sum of \$800 to cover his outlays and obligations, as well as for some compensation for his sufferings, and to put him into a position by which he may seek such recovery as surgical science may afford him.

Decree accordingly.

THE WILLIAM E. OLEARY.

THE VIVA.

(District Court, D. Massachusetts. March 4, 1902.)

Nos. 607, 608.

MARITIME LIENS—SUPPLIES—MASSACHUSETTS STATUTE.

Vessels which went from Boston to Scituate, where they were employed for two weeks, left the port of Boston, within the meaning of Pub. St. Mass. c. 192, § 14 et seq., giving a lien for supplies where a statement is filed within four days after the vessel departs from the port where the supplies were furnished.¹

¹ Maritime liens for supplies and services, see note to *The George Dumois*, 15 C. C. A. 679.

In Admiralty. Suit to enforce a statutory lien for supplies furnished.

Albert P. Worthen, for libellant.

Frank H. Stewart, for Lockwood Mfg. Co.

David Benshimol and Julius Nelson, for respondent.

LOWELL, District Judge. These are libels to enforce the lien for supplies which is given by Pub. St. Mass. c. 192, § 14 et seq. The goods were supplied in Boston in 1894. More than four days before the statutory statement was filed in the office of the city clerk, the vessels had left Boston, and had gone to Scituate. There they were engaged for about a fortnight in getting coal out of a vessel stranded on the beach. At night they generally went into the harbor of Scituate for a better anchorage, and there procured certain supplies. The question to be determined by the court is this: Had these vessels left the port of Boston, within the meaning of section 15? In *The Helen Brown* (D. C.) 28 Fed. 111, Judge Nelson held that a trip to Lynn and return, completed on the same day, was a departure from the port of Boston. In *The White Fawn* (an unreported case, decided in 1898) I held that Weymouth was in the port of Boston, and observed "that the southern limit of the port of Boston must be taken to be, substantially, Point Allerton." In the argument addressed to the court, reference was made to cases and statutes concerned with the delimitation of the port of Boston for pilotage and other purposes unconnected with the lien for supplies. After the cases of *The Helen Brown* and *The White Fawn*, it appears to me best to abide by the opinion therein expressed until that opinion shall be overruled by the circuit court of appeals.

Unless it can be shown that some part of the supplies was furnished after the return of the vessels from Scituate to Boston, the libels must be dismissed, with costs.

THE ELIZABETH.

(District Court, E. D. Virginia. April 19, 1902.)

1. ADMIRALTY—COLLISION—VIOLATION OF RULES OF NAVIGATION—LIABILITY.

Act Cong. Aug. 19, 1890 (26 Stat. 320-327) art. 20, requires that, where a steamboat and sailing vessel are in danger of collision, the steamboat shall keep out of the way. Article 21 prescribes that, where one of two vessels is required to keep out of the other's way, the other shall hold its course and speed. Article 22 provides that the vessel required to keep out of the way shall, if possible, avoid crossing ahead of the other. Article 23 declares that the vessel required to keep out of the way shall, if necessary, slacken speed, stop, or reverse. A steam ferryboat came practically to a standstill in Norfolk harbor to permit a steamship to pass, and then rang up, and passed full speed under its stern. At that moment a sloop was observed passing down the harbor immediately across the steamer's bow, and the ferryboat, instead of complying with the rules, whistled for the right of way, without slackening speed or reversing; and a collision resulted, in which libellant's intestate, a passenger on the sloop, was killed. *Held*, that the ferryboat was at fault and liable.¹

¹ Collision rules, see notes to *The Niagara*, 28 O. C. A. 532; *The Mt. Hope*, 29 O. C. A. 385.

2. **SAME—RIGHT TO VIOLATE RULES.**

The ferryboat had no right to call on the sloop to give way or change its course, there being nothing to indicate peril or difficulty to the former in conforming to the accustomed rules of navigation.

3. **SAME.**

Even if there had been apprehension of immediate danger, as contemplated by Act Cong. Aug. 19, 1890 (26 Stat. 327), art. 27, requiring due regard to be had to special circumstances rendering a departure from the rules necessary to avoid danger, the ferryboat should have resorted to all other practical methods of avoiding the collision before violating the statutory requirements.

4. **SAME—CONTRIBUTORY NEGLIGENCE—ERROR IN EXTREMIS.**

Even if the sloop, on the signal from the ferryboat, luffed and changed its course for half a minute, and then suddenly again changed its course across the ferryboat's bow, the ferryboat would still be liable; the sloop's negligence being error in extremis.

5. **SAME—NECESSARY DAMAGES.**

Libelant's intestate was a colored farm laborer, without any special acquirements; having no trade of any kind. He at times worked in a dairy, making \$25 per month, or more. He was 23 years old, of good health, sober and industrious, provided for his family, and left a widow, without children. *Held*, that \$1,200 damages should be awarded.

In Admiralty.

A. B. Carney, Jr., and R. W. Peatross, for libelant.

T. J. Wool and Floyd Hughes, for respondent.

WADDILL, District Judge. This libel was filed by the personal representative of George Chatman, deceased, to recover damages occasioned by the death of the said Chatman in a collision between the steam ferryboat Elizabeth and the sloop Martha Jane, upon which sloop the deceased was a passenger. The collision occurred on the 29th of June, 1901, in the harbor of Norfolk. The ferryboat was en route from its slip in the town of Berkley to the city of Norfolk, and the sloop was proceeding down the Elizabeth river. As is usual in this class of cases, the vessels in collision respectively contend that the occurrence was solely the fault of the other. It is not deemed necessary to enter into a lengthy discussion of the evidence, further than to say that it has been fully considered, and the conclusion reached is that the collision must be attributed to the fault of the ferryboat Elizabeth, in not complying with the rules of navigation, by keeping out of the sloop's way, or slackening its speed, or stopping or reversing, or otherwise taking necessary precautions to avert the collision, when it was apparent that it was in such close proximity to the sloop as to make the danger of collision imminent. Articles 20-23 of Act Cong. Aug. 19, 1890 (26 Stat. 320-327), prescribe the rules for the avoidance of collisions between steam and sailing vessels, and the obligation imposed by these rules is imperative; and those violating them, except under circumstances contemplated by other provisions of said act, must bear the consequence, if damage ensues. From respondent's evidence in this case, it is apparent that on the occasion of this collision the Elizabeth failed to comply with either rule 20, 22, or 23; and in fact the violation of all three of the rules is, in effect, conceded. The evidence establishes that the ferryboat came practically to a standstill

in order for an Old Dominion steamship to go by, and, as it did, it rang up, and proceeded to pass full speed ahead under the stern of the steamship; and at that moment the sloop Mary Jane was observed passing down the harbor, and about 75 yards away, having on board some 25 persons, men and women, including libellant's intestate, who were returning from the city of Norfolk to their homes, in the country near by. The sloop was proceeding immediately across the ferryboat's bow; and the latter, instead of complying with the plain rules of navigation, "tooted or popped" its whistle two or three times, without slackening its speed or reversing, which, according to one of the libellant's chief witnesses, the expert Etheridge, who was a passenger on the ferryboat, and an eyewitness, meant to ask for the ferryboat the right of way. In other words, having itself violated the rules of navigation prescribed for its own conduct, it called upon the sloop to do likewise, and violate the rule governing its movements, by keeping its course and speed. Vessels in such close proximity as these were on this occasion, each at the time freighted with passengers, should not have engaged in any such hazardous experiments. It was the duty of the ferryboat, upon her proceeding in such a direction as to involve risk of collision, to keep out of the way of the Mary Jane, and likewise to avoid a collision with her, by crossing ahead of her, and upon approaching her, if necessary, to slacken her speed, or stop or reverse. None of these things the ferryboat did, but elected to follow rules of her own, which resulted in the collision. The ferryboat should have avoided the risk of collision, and for her failure so to do she is clearly liable. The presence of danger, or anticipated danger, was enough to admonish it of the necessity of complying with the rules of navigation. *The Carroll*, 8 Wall. 302-305, 19 L. Ed. 392; *The New York*, 175 U. S. 187, 207, 20 Sup. Ct. 67, 44 L. Ed. 126; *Steamship Co. v. Low* (C. C. A.) 112 Fed. 161, 166, 172; *The Richmond* (D. C.) 114 Fed. 208. The Elizabeth had no right to call upon the sloop to give way or change her course, under the circumstances of this case, as there was nothing which indicated any peril or difficulty to the Elizabeth in conforming to the accustomed rules of navigation. *Maguire v. The Sylvan Glen* (D. C.) 2 Fed. 905; *Squires v. Parker*, 42 C. C. A. 51, 101 Fed. 843, 845. There is no suggestion of inevitable accident in this case, and had there been apprehension of immediate danger, as contemplated by article 27 of the above rules, the ferryboat should have resorted to all other practical methods of avoiding the collision, before it attempted to violate the statutory requirements. *The Marguerite* (D. C.) 87 Fed. 953; *Squires v. Parker*, supra.

The position of the Elizabeth, that, upon its "tooting or popping," the sloop luffed, and changed its course for about half a minute, and then suddenly again changed its course across the bow of the Elizabeth, which is claimed by the ferryboat to have been the real cause of the collision, will not suffice to relieve it from responsibility in this case; it having neither slackened its speed, nor stopped or reversed, until this alleged change of course of the sloop. The steamer should not have waited in the position in which it was, either to slacken its speed, or stop or reverse; and if it be admitted that the

sloop did luff, as claimed by the respondent, which is exceedingly doubtful, from the evidence, its negligence in this regard should be treated as error in extremis, brought about by the ferryboat's misconduct.

Some evidence was introduced tending to show that the navigator of the sloop was under the influence of liquor at the time of the collision; but this charge is not borne out by the evidence, and, indeed, there is but little to justify the charge, so far as he is concerned.

Upon the question of the amount of damages that should be allowed libelant, it appears that the deceased was a colored farm laborer, at the time of his death, without any special acquirements, having no trade of any kind, and at intervals he worked in connection with a dairy; making, when so engaged, \$25 per month, and at other times something more. He was 23 years of age, of good health, sober and industrious, and provided for his family, and left a widow, without children. Upon these facts, and taking into consideration all of the circumstances of the case, the court thinks an award of \$1,200 should be made libelant, in full of all damages arising from the death of her intestate; and a decree may be accordingly so entered.

FAHY v. SOCIETY FOR REFORMATION OF JUVENILE DELINQUENTS.

(District Court, S. D. New York. March 8, 1902.)

WHARVES—INJURY TO VESSEL—EVIDENCE CONSIDERED.

Evidence considered, and *held* not to sustain the claim that an injury to the bottom of libelant's barge was received through the defective condition of the bottom of the river at defendant's wharf, but to show that it was due to a previous grounding of the barge on some rocks.

In Admiralty. Suit for injury of vessel at wharf.

Hyland & Zabriskie, for libelant.

Miller, Decker & Miller, for respondent.

ADAMS, District Judge. The libelant's barge Maggie Eck was injured by striking the bottom at or near the premises occupied and used by the defendant corporation as a house of refuge on Randall's Island, East river, on or about the 4th day of March, 1901. The barge was loaded with about 330 tons of pea coal, which she had taken on board at Hoboken, and had contracted to deliver to the house of refuge. The usual place of delivery was at a wharf maintained by the respondent on the Harlem river side of the island, and it was at such wharf that the libelant claims the injuries were received, through a defective condition of the bottom of the river at or near the wharf, which the respondent negligently permitted to exist, so that when the barge went there in the due pursuit of her business, and upon the invitation of the respondent, she received the injuries without any fault on her part. The respondent contends that the barge received injuries to her bottom by grounding on rocks through being towed out of the channel to reach another wharf on the island, not in any manner

controlled by the respondent, mistakenly supposed by the tug towing her to be the wharf to which she was bound, and that it was through such injuries that the bark sunk at the wharf in question, where there was plenty of water to have floated her if she had not sunk from her previous injuries.

The facts appear to be that the tug first attempted to take the barge to a wharf known as the "North Dock," opposite 125th street, some distance from the one where she was bound, and, in doing so, ran her upon some rocks. She took the ground about 5:30 p. m., and the tug left her there while she delivered another barge in the vicinity, when she came back and dragged the barge off after she had remained fast for probably an hour, and took her to the respondent's wharf. Difficulty in determining the proximate cause of the sinking arises from the absence of reliable evidence as to the time the barge began to leak, or took the bottom at the respondent's wharf. The latter is said to have been 2 o'clock in the morning of the 5th, but that is altogether dependent upon the statements of the master of the barge, whose testimony was not very satisfactory. He said that the barge drew, as she was loaded, 5 or 5½ feet of water. If such were the case, it is clear that the injuries which caused the sinking could not have been received at the place of sinking, because the testimony is convincing that there was a greater depth of water there at all stages of the tide. It is urged by the libelant that the master was mistaken, and that the draft was much greater. I think it was, but the error militates against the master's reliability, and the libelant is dependent altogether on his testimony for an account of what took place after the barge was taken to the lower wharf, excepting that one of the respondent's witnesses saw the boat there about 10 o'clock, with nothing, apparently, the matter with her then. The master says that, when the barge was first taken to the wharf, there was another boat lying there, and his barge lay alongside of her until she was removed, about 11 o'clock, when the Eck was pulled to within about 4 feet of the face of the wharf, and made fast. The master's first testimony in this connection was:

"Q. What did you do after eleven o'clock, when you made your boat fast? A. I measured her, and there was no water into her. Q. What time was it when you measured her? A. I guess it was about eleven o'clock, after I got through at the dock. Q. Then what did you do? A. Then I went down in the cabin, and sat there and read the paper for a while. Q. Until what time? A. Until about twelve. Q. What did you do then? A. Came out and measured it again. The tide had lowered a little bit, and I slacked the lines off a little bit. Q. Did you find any water at twelve o'clock? A. Yes, sir. Q. How much did you slacken the lines then? Ans. A couple of feet, to get her away from the dock if the tide lowered. Q. Was the tide lowering at that time? A. Yes, sir. Q. Then what did you do? A. Went back in the cabin, and then went to bed. Q. What time was it when you went to bed? A. About half past twelve. Q. What next attracted your attention? A. I got up about two o'clock, and found she was aground."

Upon being recalled by the libelant at the end of the case, he testified:

"Q. When did you next sound your pumps after you were hauled off this place opposite 125th street? A. When I got made fast to the dock; about 10 or 15 minutes. Q. Did you find any water? A. No, sir. Q. When next

did you sound? A. After I got to the dock; lying next to the barge. Q. Find any water then? A. No, sir. Q. I thought you said you sounded up to twelve o'clock at night? A. Yes, sir; I sounded twice after that. Q. Find any water in her? A. No, sir."

There is some variation of the statements of the witnesses as to the hour of high tide, but I gather from the testimony and the standard tide tables that it was high water at Hell Gate about 9:15 o'clock, and there could have been little difference at this place. If the barge was leaking at 12 o'clock, it is not probable that it could have been caused by anything that happened at the lower wharf, but apparently was the result of the first injuries. This view is sustained by the nature of a wound on the bottom of the boat, which was described as having been "chewed up," apparently by sharp rocks. There is evidence on the part of the libelant tending to show that there was a spile somewhat outside of the face of the wharf, and projecting a foot or a foot and a half above the bottom of the river, upon which the inward bilge of the barge rested when she was sunk, and that there was a collection of ashes near the face of the dock, upon which the barge also rested when sunk, giving her a strong outward list, but nothing appears which so satisfactorily accounts for the wound as the fact of the bottom of the barge having been in contact with sharp rocks when pulled off by the tug. If the wound existed when the barge was taken to the lower wharf, and at 12 o'clock she had leaked so much, after the intervening hours of natural absorption of the incoming water by the fine coal of which the cargo was formed, that the leakage was evident to the not very vigilant master, it is obvious, the barge then being afloat, that the proximate cause of the disaster was the first grounding, in connection with the master's neglect to pump when he found she needed it. The testimony with respect to the bottom of the river at the lower wharf is in irreconcilable conflict. On the libelant's part, witnesses have testified that at low tide there were not more than $4\frac{1}{2}$ feet at some places where the barge lay sunk, and on the respondent's part it is shown by a careful survey made by the official hydrographer for the department of docks, shortly after the accident, and while the bottom was in the same condition, that there were 8 to 10 feet of water close to the face of the wharf at low water, clear of obstructions, with increasing depths towards the center of the river. The respondent's contention in this respect is sustained by credible testimony that the wharf had been used in the existing condition of the bottom at all stages of the tide for many years, both by vessels of the character of the libelant's and other vessels of greater drafts, without injury of any kind or suggestion of danger.

A review of the whole testimony confirms my impression on the trial that the libelant's allegations of negligence could not be sustained.

Decree dismissing libel.

VENABLE CONST. CO. v. UNITED STATES.

(Circuit Court, N. D. Georgia. February 11, 1902.)

No. 1,542.

1. CONTRACT FOR PUBLIC WORK—LIABILITY FOR EXTRA WORK OR MATERIAL.

Where the engineer in charge of the construction of a government fortification, having authority to designate the work to be done and the materials to be used by a contractor, requires work or materials which are not fairly within the contract, and the contractor complies with such requirement, as he is compelled to do or suffer loss by the abandonment of his contract, he is entitled to recover the extra cost of such work or materials, notwithstanding a provision of the contract that no claim for extra work or material should be made or allowed unless previously agreed upon in writing.

2. SAME.

Where a bidder for government work, as required, submitted a sample of sand proposed to be used, which was approved by the engineer in charge, and the contract was made upon that basis, but a succeeding engineer required the contractor to use a different sand, which was more expensive to him, he is entitled to recover the extra cost of the same in addition to the contract price for the work.

3. SAME.

A contractor for the construction of a government fortification, required by his contract to erect a building suitable for use in testing cement, who at the request of the engineer in charge built a cottage at a considerably greater cost than was necessary for the purpose of testing cement, but without objection or protest, will be deemed to have voluntarily incurred the extra expense, and is not entitled to recover the same from the United States.

4. SAME.

A government contractor who agreed to construct the work in accordance with detail drawings, to be thereafter furnished, is not entitled to extra compensation because the drawings first furnished were changed before the work was done, and the cost of certain work was greater under the second drawing than it would have been under the first; nor can he recover extra pay because the drawings, which were consistent with the specifications, required certain work to be done in a better and more expensive manner than he supposed would be required.

5. SAME—ALLOWANCE FOR EXTRA WORK—PROFIT.

A contractor who has been required to furnish materials and do work not within his contract is entitled to recover, in addition to the actual cost to him of such materials and work, a reasonable sum as profit.

At Law. Action against the United States to recover for extra work done and materials furnished in the construction of a fortification under a contract.

Hoke Smith and H. C. Peeples, for plaintiff.

E. A. Angier, Dist. Atty., and Geo. L. Bell and W. L. Massey, Asst. Dist. Attys., for defendant.

NEWMAN, District Judge. This is a suit brought by the Venable Construction Company against the United States to recover \$9,981.07. The suit grows out of a contract entered into by the plaintiff with the United States, through O. M. Carter, the engineer

officer in charge, for the construction of certain fortifications called "gun emplacements," on Tybee Island, near Savannah, Ga. The contract for this work was entered into on November 30, 1896. The character of the contract, so far as material here, will appear in the discussion of the several items embraced in this suit. The case involves a claim for certain work done which is said to have been extra work. The items set out in the plaintiff's declaration and relied on here are as follows:

For additional work upon cut stone.....	\$2,650 00
For 38,649 pounds of conduit pipe, at 4 cents per pound.....	1,545 96
For change in plan of doors and extra work thereon.....	900 00
For cottage	949 95
For change in sand.....	3,985 16
Total	\$9,981 07

The United States having filed an answer denying liability for the several items of extra work claimed, the case was, by consent of counsel for the respective parties, referred to an auditor. The auditor made a thorough investigation of the case, and apparently heard the evidence of every one who could throw any light on the transaction, except Capt. O. M. Carter. His testimony was not taken. After hearing the testimony thus presented, the auditor made a report finding in favor of the plaintiff as to each of the items in controversy. The separate claims are here considered in the order in which they can be most conveniently disposed of.

Findings of Fact.

At and before the contract was entered into, on November 30, 1896, plaintiff had only seen what are called "typical plans" of the work to be done; that is, a general outline and plan of the proposed fortification. The detailed plans and specifications by which the work was to be done were furnished later. As to only one of the items involved does any indication appear to have been given as to precisely what would be required. It does appear, so far as can be gathered intelligently from the testimony in this case, that samples of sand such as was to be used in the construction of the battery were furnished, and that an agreement was reached between the engineer officer in charge and the president of the construction company, by which it was understood that the construction company might use one-fourth sharp river sand from the river above Savannah, and three-fourths beach sand, to be obtained from the beach below Savannah, properly mixed and combined. Samples of the sand proposed to be used were furnished by the representatives of the construction company to the engineer officer in charge, and there is sufficient evidence to justify the auditor's conclusion that there was an acceptance on the part of the officers of the government of the proposal to use sand in the proportions above referred to. There was some correspondence on the subject of the character of sand to be used, and a letter from Capt. Carter to the Venable Construction Company of June 9, 1897, shows that the

construction company was required to use all river sand from the river above Savannah. But in a letter written June 16, 1897, this requirement was changed, and the construction company was allowed to use one-fourth sand obtained from above the city, and three-fourths beach sand obtained below the city. After this, and during the time that Capt. Carter was in charge of the work, the construction company was allowed to use sand in these proportions.

On the 20th day of July, 1897, Capt. C. E. Gillette superseded Capt. Carter in charge of the work, and he directed and required that all the sand to be used should be taken from the river above Savannah. The evidence is undisputed that the additional expense of bringing this three-fourths of the sand from the river above Savannah, instead of obtaining it down near where the battery was being constructed, was considerable. The finding of the auditor on this item is as follows:

"Sand: Paragraph 44 of the specifications provides as follows: 'The sand shall be clean, first-class quality building sand, containing a suitable mixture of fine and coarse, sharp grains, free from dirt, organic matter, and other impurities. Bidders will submit with their proposals a sample representing the particular sand they propose to furnish, and will state in their proposals the location of the bank or banks from which it is to be obtained.' Plaintiff's bid contains the following statement: 'Sand, samples of which are furnished, to be of like quality,' and acceptable to the engineer; sample came from Savannah river.' I find that plaintiff furnished samples,—one sample coarse, sharp sand, known as 'river sand,' which came from up the Savannah river; and another sample of finer sand, which came from the Savannah river along Tybee Island, and known as 'beach sand.' I find that plaintiff, through its president, W. H. Venable, contracted with Captain O. M. Carter, engineer officer in charge, to furnish and use in the work to be done under the contract in suit a combination sand, composed of one-fourth of said sand known as 'river sand,' and of three-fourths of sand known as 'beach sand.' I find that under this contract the plaintiff proceeded with the work about six months commencing under Captain Carter, and continuing same under Captain Gillette, engineer officer in charge, who succeeded Captain Carter in July, 1897, until December, 1897. I find that this combination sand was clean, first-class quality building sand, containing a suitable mixture of fine and coarse, sharp grains, free from dirt, organic matter, and other impurities, and that the sand used in the work was of like quality to the samples, and complied with the conditions of the contract. I find that in December, 1897, Captain Gillette, engineer officer in charge, who had authority, under paragraph 58 of the specifications, ordered the plaintiff to stop using the combination of sand contracted for, and required him to use exclusively the coarse, sharp sand, known as 'river sand,' from up the Savannah river. The change made in the sand was beneficial to the defendant, the river sand making a better cement than the combination sand contracted for. The plaintiff protested against the change of sand, and furnished the same under protest. The river sand was much more expensive than the beach sand, for the reason that it was several miles distant from the work, and the beach sand was near at hand. Plaintiff was put to additional expense and cost in furnishing the river sand as required by Captain Gillette, engineer officer in charge, to complete the contract, over and above what he has been paid for same by the defendant, the sum of \$3,935.16. The defendant was benefited by the change of sand to the extent of said sum of money. It was apparent to the engineer officer in charge who ordered the change in sand that such change would result in large additional expense, and extra expense to the plaintiff."

This finding is adopted as stating substantially and fairly the facts as to this part of plaintiff's claim.

The next item which will be considered is that of ventilating pipe, conduit pipe, 20-inch sewer pipe, and flat iron plates for drains. The auditor's finding of the facts on this subject is as follows:

"Cast-Iron Pipe and Plates: I find from the evidence that plaintiff furnished and put in place 10,261.90 pounds of ventilating pipe; also 8,083 pounds of conduit pipe; also 3,752 pounds of twenty-inch pipe; also 11,915 pounds of cast-iron flat plates for drains. I find that these items were not called for in the specifications or in the contract. I further find that the defendant paid for these items 5c. per pound, the same rate that was paid for drain pipes. I find that these items were not even contemplated by the contract, and that they are extra materials, and putting them in place was extra work, for which the plaintiff is entitled to extra compensation. I find that the ventilating pipe was reasonably worth at current rates, over and above the price paid therefor by the defendant, the sum of \$951.16. This sum includes \$827.10, the actual cost of furnishing and putting said ventilating pipe in place, and \$124.00, the fifteen per cent. profit claimed by the plaintiff. The conduit pipe was reasonably worth, at current rates, over and above the price paid therefor by the defendant, the sum of \$511.24. This sum includes \$444.56, the actual cost of furnishing and putting said conduit pipe in place, and \$66.68, the fifteen per cent. profit claimed by the plaintiff. The twenty-inch pipe was reasonably worth, at current rates, over and above the price paid therefor by the defendant, the sum of \$345.00. This sum includes \$300.00, the actual cost of furnishing and putting said twenty-inch pipe in place, and \$45.00, the fifteen per cent. profit claimed by plaintiff. The cast-iron plates were reasonably worth, at current rates, over and above the price paid therefor by the defendant, the sum of \$274.04. This sum includes \$238.30, the actual cost of furnishing and putting said plates in place, and \$35.74, the fifteen per cent. profit claimed by plaintiff. The profit claimed on the items aforesaid constitutes an element in making up and arriving at the reasonable cost and worth of said items at current rates. The amount paid for the drain pipes was not a proper basis upon which to estimate the price of the items aforesaid. This pipe and these plates not being specified in the contract, and the work of putting them in place being exceedingly difficult, I arrive at the difference in the cost by the figures and estimates given by witness Conant, who was examined in behalf of the defendant. Plaintiff furnished the 8,000 pounds of drain pipe, and was paid 5c. per pound therefor, and this pipe is not included in the item aforesaid. These items properly fall under paragraph 58 of the specifications, which said paragraph is as follows: 'If at any time it should become necessary, in the opinion of the engineer officer in charge, to do any work or make any purchase not herein specified, for the proper completion of this contract, the contractor will be required to furnish the same at the current rates existing at the time of said purchases or work, the current rates to be determined by the engineer officer in charge.' I find from the evidence that the engineer officer in charge of the work under this contract did not determine the current rates of the aforesaid items, and that it was necessary for the plaintiff to institute this suit for the purpose of having the same determined by the court."

This finding by the auditor is supported by the evidence, and seems to state correctly the facts. It is in accordance with the testimony of Mr. Conant, one of the witnesses for the defendant, and is adopted by the court to be the facts in reference to this matter.

As to the item of the cottage for testing cement, I find that the evidence shows that the contractor acquiesced in the requirement of the engineer in charge to construct this cottage. There seems to have been an independent memorandum by which it was understood that a cottage to cost \$1,000 was to be erected for this purpose, and that the contractors built this house without any real protest or objection to it. It is entirely clear that no such build-

ing was needed in which to test cement, but it is equally clear that the contractors, for reasons which do not appear, acquiesced in Capt. Carter's request to build a rather expensive cottage. The auditor finds the facts to be as follows:

"Cottage: I find that plaintiff was required by the engineer officer in charge of the work to erect on the defendant's reservation a two-story cottage, at a cost of \$1,249.00, which was partially used for the purpose of testing cement. I find that it was the duty of the plaintiff to furnish a building suitable for the purpose of testing cement, and I further find that such a building could have been furnished at a cost not to exceed three hundred dollars. I find that the cottage which the plaintiff erected as aforesaid was a permanent improvement, and that under the contract plaintiff had no right to remove said cottage from the defendant's reservation after the completion of its contract. I find that the engineer officer in charge must have known that this cottage was not necessary for the purpose of testing cement to be used in the work under this contract, and he must have known that he was requiring the plaintiff to do work which was more expensive than that necessary to carry out and perform its contract. I find that this cottage was not specified in the contract, and that it cost the plaintiff \$949.00 more than such a building as was necessary for the purpose of testing cement should have cost. I find that the plaintiff, through its agent, protested against erecting such a building for the purpose of testing cement, and offered the defendant a proper building for that purpose, which cost less than \$300.00. The defendant's reservation was improved by the erection of said cottage, and enhanced in value to the extent of \$949.00, no part of which has been paid."

While this statement of facts is in the main correct, all of the evidence taken together shows the fact to be that, while the contractors may have thought the character of the building required beyond reasonable needs, there was really acquiescence on the part of the officers of the construction company in building it as they did.

The next item is that of cut stone. The facts, so far as they can be ascertained from the record, are as follows: The plaintiff having entered into this contract, as stated, on November 30, 1896, that on January 6th thereafter certain drawings were prepared and shown the plaintiff's representatives, from which it appeared that there was to be in the stone jambs and lintels of the doors only one check or "rabbet," as it is called in the evidence, and subsequently the officer in charge required that the stone should have two checks, or be double rabbetted. The plaintiff, at the time the contract was made, agreed to construct the work according to detail drawings to be furnished; and, while it is a fact from the evidence that the first drawing made showed only one check or rabbet in the stone, it is equally true that at the time the contract was made there was no specific agreement as to the detailed manner in which this work should be done. The most that can be said for the plaintiff is that the engineer in charge changed the detailed plans as the work progressed. This he seems to have had authority to do under the contract.

The next item is as to the plaintiff's claim for extra work in constructing doors. The contract provided that doors should be constructed as follows:

"Doors will be fitted to the magazines, passages, and rooms. They will be made, according to detailed plan, of two thicknesses of sound, well-seasoned 1½-inch white pine, 4 inches wide, tongued and grooved, and planed on both sides. The two thicknesses will be fastened together with bronze bolts, and hung with bronze hinges and gudgeons, as shown on detailed plans. Double doors will have top and foot bolts and plates. All doors will be secured with bronze staples and padlocks of approved design. The wood in the doors will be paid for by the foot, board measure, in place. All bronze door fastenings and fittings will be paid for by the pound in place. The price paid for doors will include painting with three coats of paint, of quality and color to be approved by the engineer officer in charge."

The fact appears to be that the government officers required the construction of the doors in a better manner than the contractors expected. They seem to have required the strips to be laid, in forming the doors, in such manner as to make what is called in the evidence a "mosaic."

Under another provision of the contract it is required that:

"All work will be executed under the direction of the engineer officer in charge, who will prescribe the order and manner of conducting the same in all its parts, and of inspecting and rejecting such material, work, and workmanship as in his judgment do not conform to the drawings that may be furnished from time to time or to these specifications."

It will be seen, therefore, that this work was to be done in conformity to the requirements of the engineer officer in charge. The proof fails to show any such radical departure from what could have been reasonably expected in reference to the construction of the doors in question as justifies a claim for extra compensation. The requirement of the officer in charge seems to have been that the back set of strips in the doors should cover the cracks or joints or any anticipated aperture in the front set of strips. The whole difference relates to the manner of putting the strips together, and, while the method demanded by the engineer officer in charge was more expensive than that expected or desired by the contractors, its only purpose was to get a first-class door.

Conclusions of Law.

The general question necessary to be determined at the threshold of this case grows out of a provision of the contract relied upon by counsel for the government to this effect:

"If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the secretary of war: provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue

of this contract, and not expressly bargained for and specifically included therein, unless such extra work or material shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the chief of engineers."

The precise question raised is, where the officer in charge of work and the contractors differ as to whether the work required is extra work or not, and it becomes necessary for the contractors either to abandon their contract or to proceed and furnish the material and to do the work not required by a fair interpretation of the terms of the contract, if the provisions of the written contract entered into between the parties, just quoted, applies. Stating it differently, can the engineer officer in charge require materials to be furnished, or particular pieces of work to be done, not within the contract, and the result be that, because the officer in charge or his superior officers refuse to recognize the same in writing as extra, the contractors, when they elect to do the work or furnish the material rather than have the whole burden and financial loss of abandoning the contract thrown upon them, be thereby prevented from recovering for such items as extra? It seems well settled now that where the claim is clearly meritorious there may be recovery.

In *Grant v. U. S.*, 5 Ct. Cl. 72, it is held:

"Where a written contract, entered into by the war department, contains full specifications of a building to be erected, and limits the cost, with a provision that no extra charge for modification shall be allowed unless agreed upon in writing, and where an appropriation therefor is made by congress agreeing with the contract price, yet if the contractor is directed by an agent of the war department to furnish extra materials and perform extra labor, so that the building is rendered more valuable and useful, and is thus accepted and used by the government, the defendants become liable, in an action on an implied contract, for the fair and reasonable value of the extra materials furnished, and for the extra labor performed, notwithstanding the cost exceeds the appropriation, and notwithstanding Act 2d June, 1862 (12 Stat. 411), limiting the power of the secretary of war, as well as all officers or agents acting under him, in matters of contract, to written agreements."

In *Ford v. U. S.*, 17 Ct. Cl. 60, in the syllabus (3), the ruling is that:

"A provision in a written contract declaring that no claim for extra work shall be made unless it was required and agreed upon in writing is merely a condition, which may be waived by a subsequent oral agreement."

The case of *Barlow v. U. S.*, 35 Ct. Cl. 514, is an interesting case, and particularly applicable here as to the item of sand. A distinction is drawn in that case between the requirement of extra work by a subordinate officer and an officer or agent of the government authorized to contract. The engineer officer in charge in that case had an understanding with the contractors as to the quality of sandstone which would be satisfactory to the government. They incurred expense on the faith of that understanding, and, the sandstone thus agreed upon being subsequently rejected by the chief of the bureau, they were allowed to recover for the damage they had sustained.

In the case at bar it was the engineer officer in charge who made the agreements relied upon for recovery, and it was the engineer

officer in charge who really made the contract as to its details, the character of the materials, etc. In the Barlow Case it was said:

"Where additional work or better material than the contract requires was ordered by a subordinate officer having no such authority, the compliance of the contractor must be regarded as voluntary service, and no contract can be implied, even though the defendants acquired a benefit by the change; that is to say, the government cannot thus be compelled to build a better building than was intended by its responsible contracting officer. Driscoll's Case, 34 Ct. Cl. 508, and cases cited page 524. Where, on the contrary, the alterations or additions were ordered by an officer clothed with responsibility and authority to contract, a contract will be implied to the extent of the benefit which the defendants have received, and the claimant will recover in quantum meruit. *Hawkins v. U. S.*, 96 U. S. 689, 24 L. Ed. 607. Where a contract expressly provides that alterations or additions must be ordered in writing, and the cost be agreed upon before the work be done, the principals to the contract, in ordinary cases between individuals, may waive the requirement. So, in the case of government contracts, the officer who has authority to order or agree in writing must be considered *pro hac vice* as the principal; and if he orders a change orally, and the contractor acts on the order and performs the extra work, the parties will be deemed to have mutually waived the requirement. *Ford's Case*, 17 Ct. Cl. 75."

Capt. Carter first, and afterwards Capt. Gillette, were the officers in charge of the construction of these fortifications. They were not such subordinate officers as would classify extra work ordered by them as mere voluntary work, on account of the subordinate or inferior character of their duties; but, having the control that has been indicated, they could make such alterations in the character of material, and direct it to be used in such way, it seems to me, as would make their actions binding on the government. Certainly this is true as to the two items in respect to which their action is held to have brought about an implied contract by the government to pay in this case. Counsel for the government rely on the case decided some years ago in this court of *Bowe v. U. S.* (C. C.) 42 Fed. 761, as authority in this case. I do not think there is anything in that case, or in the authorities there cited, inconsistent with what is determined here.

As to the item of sand, the conclusion of law as to this item is that the contract originally was for the use of a mixture of sand composed of material obtained one-fourth from the river above the city of Savannah, and three-fourths from the beach below the city, which contract was acquiesced in by Capt. Carter, the engineer officer in charge at that time, by allowing the use of the same. The subsequent action of Capt. Gillette in requiring all the sand to be obtained from above the city, at a largely additional cost over the mixture indicated, would justify a recovery by the contractors for such additional cost. The evidence is undisputed as to the cost of the sand as required by Capt. Gillette over that contracted for and allowed by Capt. Carter, to wit, \$3,933.16, for which amount the plaintiff is entitled to recover.

As to the item of pipe, the finding of the auditor in reference to this claim is, as has been stated, supported by the evidence. The additional cost of furnishing the pipe referred to, and the expense of laying the same, seems to have been in addition to what was

provided for in the contract, and the plaintiff is entitled to recover for the same. The only matter which involves real difficulty is that of the 15 per cent. allowed as profit. As to this, I am of the opinion that it would not be just to allow the contractors only the absolute cost of the pipe and the expense of laying the same, without anything whatever to cover their own compensation and the reimbursement to them for their attention to the work and their fair profit as contractors. All the witnesses agree, I think, that 15 per cent. on the actual outlay is a reasonable amount in this respect. The plaintiff is entitled to recover as to this item the difference as stated by the auditor, to wit, \$2,081.44.

As to the item of the cottage for testing cement, I find that, although the plaintiff was required to construct a cottage wholly unnecessary for the purpose intended, yet, as the officers of the construction company appear to have acquiesced in this, they should not be allowed to recover the additional cost over that which would have been necessary for a structure for the proper testing of cement.

As to the item of cut stone, the claim for the special compensation as to this item is for the manner in which the work was required to be done, which was within the control of the engineer officer in charge, under the contract. The plaintiff was not misled in any way before the contract was entered into, and any misapprehension which the officers of the company may have had as to the manner in which the engineer officer in charge would require the stone to be cut occurred after the contract was made. Any hardship to the contractors that may have resulted arose simply from the manner in which the work was required to be done, which was not such as to justify a claim for extra work for which a recovery can be had.

As to the item for doors, the same reasons which have been stated as to the claim for extra work on cut stone apply to the manner in which the doors were required to be constructed, and for the same reason the plaintiff is not entitled to recover as to this item.

The conclusion is that the plaintiff is entitled to recover a judgment for the item of sand in the amount of \$3,933.16, and for the item of pipe in the amount of \$2,081.44, making the aggregate sum of \$6,014.60, for which they should have judgment, with interest.

In re B. H. DOUGLASS & SONS CO.

(District Court, D. Connecticut. March 14, 1902.)

BANKRUPTCY—CLAIM OF CREDITOR—CONTRACT FOR REBATE.

The decision of a referee that, under a contract recognized by the previous course of dealing between a creditor and the bankrupt, the latter was entitled to a rebate on his purchases during the year, which should be deducted from the creditor's claim, affirmed.

In Bankruptcy. On question certified by referee.

James D. Dewell, Jr., for Frederick B. Street.

Hobart L. Hotchkiss, for Walter M. Lowney & Co. and others.

TOWNSEND, District Judge. The Walter M. Lowney Company has a claim against the B. H. Douglass & Sons Company for \$1,048.86, against which the trustee claims that a rebate should be allowed. The substantial part of the report of the referee is as follows:

"About 1892 the Walter M. Lowney Company adopted a system of rebates to its customers, based upon the amount of their purchases for the year. This rebate, as afterward modified, was two per cent. where sales for the year were from \$5,000 to \$10,000, three per cent. where the sales were from \$10,000 to \$20,000, and four per cent. where the sales amounted to over \$20,000. The bankrupt corporation was formed about four years ago, succeeding to the partnership of B. H. Douglass & Sons. From 1892 on, the rebate has been allowed as above stated. Thus, in 1899, the purchases were \$22,429.99; the rebate, four per cent., being \$897.20. In the summer of 1899, Mr. Douglass called upon Mr. Lowney, and, in a conversation referring to the character of the rebate, stated that he supposed, 'of course, we will be subject to that, as usual.' Mr. Lowney's reply was, 'Not having given any contrary notice, so late in the day as this, I should consider myself bound to allow it.' It is claimed by Mr. Lowney that the business was to be done to his satisfaction; that the customers had not been properly served, and the bills had not been paid within ten days; and that he was to be the judge as to whether rebate should be allowed or not. No notice was at any time given to the Douglass Company of any intention not to allow the rebate as usual, and there is nothing to indicate that the rebate would not be allowed if the bankruptcy had not occurred. It was claimed that payments were not made with sufficient promptness, and that orders were not filled in time. It was admitted by Mr. Lowney that the Lowney Company had not goods sufficient to fully supply their customers. I see no reason to discredit the testimony of Mr. Douglass that payments were made with reasonable promptness, and that, if a line of goods had not been withdrawn, and if orders given the Lowney Company had been promptly filled, and the Douglass Company had continued ordering and receiving goods up to January 1, 1901, the output would have exceeded the \$20,000, and the rebate to them would have been four per cent."

The referee allowed the rebate of \$569.36,—being 3 per cent. on sales of \$18,978.74,—and directed that the \$479.50 should be paid in full; considering such payment as a reasonable condition of the rebate. The Lowney Company has requested that the question whether the rebate should be allowed should be certified to the court. The trustee also objected to that part of the decision of the referee which allowed the \$479.50 to be paid in full, but withdrew his objection.

I have carefully considered the testimony, and am not prepared to say that I should have necessarily reached the same conclusion as

that reached by the referee. The testimony of the creditor to the effect that the rebate was conditioned upon having the business conducted to his satisfaction, and that he was to be the judge as to whether it was so conducted, is perhaps not directly contradicted; but, on the other hand, it is not clear that the bankrupts failed to comply with any of the material conditions of the understanding or contract. In view of the evidence tending to show that the claim of rebate rested on a contract based solely on the volume of the business, and especially because the referee, having the witnesses before him, has reached the conclusion that "the testimony of Mr. Lowney as to the conditions of the rebate seemed to me to be rather indications of his own ideas upon that subject, than testimony as to any contract which can be held to vary that implied from the ordinary course of dealing between the parties," the decision of the referee is affirmed.

In re GREENBERG.

(District Court, D. Connecticut. March 11, 1902.)

No. 446.

BANKRUPTCY—DISCHARGE—FAILURE TO KEEP BOOKS.

A creditor objecting to the discharge of a bankrupt is not bound to prove his specifications beyond a reasonable doubt, and proof that the bankrupt made a written statement within a few months prior to his bankruptcy for the purpose of obtaining credit, in which he did not disclose debts to relatives, which he afterwards claimed to owe, and paid while insolvent, is sufficient to cast upon him the burden of explanation, and of showing that the transactions were fully entered on his books; otherwise the court is justified in denying him a discharge on the ground of his concealment of assets and failure to keep books from which his true condition could be ascertained.

In Bankruptcy. On application by bankrupt for discharge.

Hotchkiss & Asher, for bankrupt.

Fleischman & Fox, Wm. A. Wright, D. Strouse, and others, for creditors.

TOWNSEND, District Judge. About April, 1900, bankrupt closed up his clothing business at New York, and removed to New Haven. Upon opening his New Haven store, he purchased a large amount of goods on credit, and removed the stock of winter clothing, which had cost him between seven and eight thousand dollars, from New York to the New Haven store. On June 14, 1900, bankrupt, having found that he was doing a losing business, sold the stock of winter clothing for \$3,617 to a party at New Haven, who had them stored, and during the following fall sold them for about \$4,500. The purchaser paid bankrupt \$2,000 June 20, 1900, and \$1,000 June 25, 1900, both of which sums were deposited in bank; the remaining \$617 being paid about July 1, 1900. The only memorandum of the transaction on the

bankrupt's books is a deposit in his bank account of \$2,030 June 20, 1900, and of \$1,125.22 June 25, 1900, which deposits included said payments of \$2,000 and \$1,000. Bankrupt testified that out of this money he had paid \$2,000 to a sister-in-law in payment of notes for money borrowed the previous year, and \$670 to a friend of his brother-in-law for money loaned, and \$600 to a daughter in payment of a debt. Papers purporting to be notes duly stamped for the \$2,670 were produced. On January 16, 1900, bankrupt made a statement to one of his creditors, Fecheimer, Fischel & Co., the principal petitioning creditor in the bankruptcy proceedings, showing that he had on hand merchandise about \$15,000, cash about \$1,200, making a total of about \$16,200, with total liabilities of \$2,200, leaving a balance of \$14,000. Bankrupt's testimony that he told Fecheimer, Fischel & Co. at the time he signed the written statement that it only included business debts is incredible. If he had told them so, they should have insisted upon his total indebtedness being included, for they must have known that a debt to a relative is more dangerous to other creditors than an ordinary debt. No memorandum or bank account whatever, made in the ordinary course of business, or which could not have been manufactured, corroborates bankrupt's testimony. The \$2,000 loaned by his sister-in-law is testified to have been kept in the house, having been saved by her from time to time. The checks of the friend were made to the brother-in-law, and not to the bankrupt. The \$2,000 paid to the sister-in-law was at once deposited by her husband to his own account, although before the loan she had been keeping the money separate in the house. The presumption from the written statement made for the purpose of obtaining credit from Fecheimer, Fischel & Co. should be discredited only upon the clearest evidence. The evidence in such cases is mainly within the power of the bankrupt. A transaction of this sort should be entered upon the books in the clearest way, so as to attract, rather than to evade, the notice of creditors. In the circumstances, the excuses for such action by one on the verge of insolvency should be made out in a satisfactory manner, and by evidence which could not be manufactured. The objecting creditors are not bound to prove their specification beyond a reasonable doubt.

The discharge is refused on the ground of concealment of property and failure to keep books of account or records from which the true condition of the bankrupt could be obtained.

ALEXANDER v. LOUISVILLE & N. R. CO.

(Circuit Court, N. D. Georgia. February 19, 1902.)

No. 1,459.

1. REFERENCE—FINDINGS OF FACT.

Where, by consent, the issues in an action at law are referred to an auditor, his findings of fact are entitled to the same weight as the verdict of a jury.

2. RAILROADS—INJURY TO PERSON NEAR TRACK—CONTRIBUTORY NEGLIGENCE.

Evidence considered, and held to support a finding that plaintiff, who was caught between a railroad train and a station platform and injured.

was guilty of contributory negligence in attempting to cross the track ahead of the train after he saw it approaching.¹

At Law. Action for personal injury. On exceptions to report of auditor.

Burton Smith, for plaintiff.

King & Spalding, for defendant.

NEWMAN, District Judge. This is a suit brought by the plaintiff against the defendant for the recovery of damages for injuries alleged to have been received by the plaintiff by being caught between a moving train belonging to defendant and the depot platform in the town of Gadsden, Ala., the plaintiff claiming that he was entirely free from fault, and that said injuries were received on account of the negligence of defendant's servants and employés. The case was referred to an auditor,—an unusual proceeding in actions *ex delicto*,—but the reference was by consent of counsel, with the usual leave of exception. The auditor having found in favor of the defendant on the questions involved, the case now comes before the court on the exceptions of the plaintiff to the auditor's finding. There were several grounds of negligence alleged, which were as follows: First, that while the plaintiff was crossing the defendant's tracks, going to the depot to purchase a ticket, and in a place where he had a right to be, without any warning or notice to him of any sort a train of the defendant came swiftly upon him, and ran him down, and caught him between the platform and the train; second, that the tracks of the defendant are so arranged that he could not see the train until it was nearly upon him, and too late for him to escape the danger; third, that the train was running at a high rate of speed, and gave no signal or warning; and, fourth, that the defendant was negligent in running its train across the street where the plaintiff was injured at the time when the passenger train which plaintiff expected to board was due.

The auditor found for the defendant because he thought the plaintiff was guilty of contributory negligence in the following way: He thought the plaintiff saw the train, and sought to cross in front of it as it was approaching, so as to mount the steps leading to the ticket office; and in so doing was caught and injured. The auditor believed that this constituted such contributory negligence on the part of the plaintiff as would prevent recovery. If this finding of the auditor has evidence to support it, the duty of the court here is plain. The evidence set out by the auditor and relied on by him is as follows:

Examination of the plaintiff:

"Q. Where were you just before you started to the depot? A. I was standing just across the track from the platform. Q. About how long was that before train time? A. I had been there, I suppose, about a minute, I don't think I had been there longer than a minute. The train was then due there. I cast my eye up at the hotel, and the train was standing there. I made to cross to the steps down there in about 15 feet of me, and as I got up against the platform I seen the car coming. I didn't advance any further up towards the steps. I seen the distance was too great, and I just closed

¹ Injuries to persons at railroad stations, see note to *Railroad Co. v. Hyde*, 41 C. C. A. 550.

myself up against the platform. Had been to Gadsden twice before,—once by private conveyance, and once by the cars. Got my ticket there at that place. I got off there this time. Q. Were you standing or walking when you first saw the train? A. Standing, sir. My back was towards this freight train. Q. What was the first notice you had of it? A. It was in about 15 or 20 feet of me,—the car was,—when I first noticed it. Q. How did you happen to see it, or know it was coming? A. As I just stated, when I intended to go to those steps, when I got across to the side of the platform. I saw that the car was advancing, and that I couldn't make it any further. Q. You hadn't seen the car until then? A. No, sir. Q. Were you on the track or off of it when you first saw it? A. I was off of the track. Q. On the side towards the platform, or how, when you first saw the train? A. No, sir; I was crossing over to the platform. Q. Where were you when you first saw the train? A. I was against the platform when I first saw the train that hit me. I was crossing,—done across the track,—and was on the ground."

On page 20, cross-examination, Alexander says:

"Q. How were you standing, in relation to those steps,—how far from them were you? A. I was about 15 or 20 feet from them. Q. Was this track that you were hurt by between you and the steps or not? A. Yes, sir. * * * Q. Then, after you came down there and stopped, as you described before, where was it you stopped,—down here the station? A. Well, I stopped in 15 or 20 feet of the steps, just across the track. Q. What did you do there when you stopped? A. Well, I was talking to a gentleman standing there. I don't think it was more than a minute, sir. I look up towards the hotel, and seen the train (the passenger train). Q. Then what did you do? A. I walked right across towards the steps to get my ticket. Q. Where were you, or what looking did you do? A. Well, sir, I taken a general glance as I generally do. I have always been accustomed to trains, more or less, ever since I was a boy. I used to be a butcher (on W. Pt. R. R.). Q. Well, after you had taken that glance, what did you do? A. I walked right across to the steps. Q. Did you see your train? How close to you was it when you first saw it? A. The train was in 15 or 20 feet of me—the car was—before I seen it. Q. What direction were you, as to the car that hit you, just when you saw it, and just before? A. I was sidewise to it, going across, and the car was coming up. Q. Were you on the track, or where were you, when you saw that train? A. I was near the track, just stepped off against the platform, when I seen the train. Q. Was there a good space between the platform and the track there for a man to walk? A. Yes, sir; there is 3 or 3½ feet; may be more; I couldn't say."

Examination of Newt Adams:

Describes walking leisurely down Second street. Was so familiar with the locality that he says it was an unusual time for that train to be there. Did not stop at shanty, slowed up a little. "There was some shade trees, and we made it as long as possible staying in the shade until the train come in." Walked in the triangle. Never saw any ticket sold at Printup House. Office he worked for near the ticket office in Printup House. If any engines or cars had gone along pipe works track could have seen them. Did not see any. Never crossed the cut-off track. Alexander got on it. Went on, did not stop. "When he turned to go across I was on Alexander's left. We didn't make more than a step,—hadn't more than got started back, and started across,—before we discovered this train on us. Q. How far had you gotten into that pipe works track when you saw it? A. When we first saw it, we were just about stepping over into it. I think Mr. Alexander saw it first. He just spoke to me, and says, 'Newt, we are gone,' and we both made a run to the platform. We were going along down here, 'near the frog,' when he was ringing the bell down there getting ready to come out [passenger train]."

W. B. Armstrong, conductor of train that hurt plaintiff, says they made two trips on the pipe works track. On the first trip he saw Alexander and Adams. They were hurt 12 or 15 feet from the steps.

Mrs. C. W. Parr says:

"The men were coming down the sidewalk on Second street. They came on down to the crossing, and got on the track, and walked up the track. The men had the opportunity of seeing the train coming if they had looked back. Don't know whether the bell rung or not."

The auditor says:

"The preponderance of the testimony is that the locomotive bell was ringing as the train which caught the plaintiff was coming 'across Second street.' The plaintiff says he did not hear the bell ring. Adams does not say whether it was ringing or not, but does say he heard the bell on the passenger train. McMullen, the fireman, says he was ringing the bell. Porterfield, the fireman, says the fireman was ringing the bell. The witness Howe says he heard the bell ringing. Carroll, the engineer, says the bell was ringing. There is no positive testimony that the bell did not ring. Some of the witnesses did not hear or did not notice it, while some were not asked about it. No witness denies the switching of the train, and the testimony is convincing that two trips were made to the pipe works, and each time it was necessary for it to cross Second street, making a crossing of that street four times, even if it did not run up and down the house track. It would seem impossible to conclude that the plaintiff did not know of the presence of this train, and that it had crossed Second street, and was in towards the pipe works, at the time he and Adams were approaching the tracks across Second street."

There can be no question that this evidence abundantly supports the finding. If it was the verdict of a jury in favor of the defendant, and a motion for a new trial, on the ground that the verdict was not supported by the evidence, no court would hesitate to overrule the motion. The same rule should apply where, by consent of the parties, the case is referred to an auditor.

The exceptions will all be overruled on the ground that there is sufficient evidence to support the finding of the auditor that the plaintiff endeavored to cross in front of a moving train, and was injured thereby, and was guilty of such contributory negligence as to bar a recovery for the injuries received. The report of the auditor will be confirmed.

In re O'CONNOR.

In re GLOBE REFINERY CO. et al.

(Circuit Court, N. D. Georgia. March 15, 1902.)

No. 870.

BANKRUPTCY—RIGHT OF SELLER TO RECLAIM GOODS—FRAUD.

Evidence held to sustain the claims of sellers to reclaim goods from the estate of the buyer in bankruptcy, on the ground that by reason of fraud the title did not pass.

In Bankruptcy. In the matter of claims of the Globe Refinery Company and Fulton Bag & Cotton Mills. On exceptions to findings of referee.

Culberson, Willingham & Johnson, for the Globe Refinery Co.
Slaton & Phillips, for the Fulton Bag & Cotton Mills.
Tompkins & Alston, for bankrupt.

NEWMAN, District Judge. In the former opinion in this case (rendered November 27, 1901) 112 Fed. 666, the claims of Globe Re-

finery Company, Fulton Bag & Cotton Mills, and Bushway Britt & Co. were referred back to the referee for further investigation and report as to the right of the claimants to reclaim goods in the bankrupt's stock, on the ground that by reason of fraud no title passed to these goods. In the referee's report thereon he finds against all three claims. No exception was taken to his finding on the claim of Bushway Britt & Co., and the case is now before the court on exceptions to the finding of the referee in the claims of Globe Refinery Company and Fulton Bag & Cotton Mills. I am compelled to differ with the referee as to the conclusion he reached. In both of these cases the petitioners are entitled to have the proceeds of their goods allowed to them. As I have frequently held, I will not interfere with the action of the referee as to his finding of facts, unless there is manifest error. In this case, however, the facts require a different conclusion from that which he has reached.

An order may be taken disapproving the action of the referee, and directing the payment to the Globe Refinery Company of the proceeds of the sale of its goods, and to the Fulton Bag & Cotton Mills the proceeds of the sale of their goods. The matter of the taxation of costs as against these two claimants is left to the discretion of the referee.

HOGUE v. NORTHWESTERN MUT. LIFE INS. CO.

(Circuit Court, N. D. Georgia. January 23, 1902.)

No. 1,562.

LIFE INSURANCE—CONSTRUCTION OF CONTRACT—RIGHT OF POLICY TO SHARE IN DIVIDENDS.

Defendant, a mutual life insurance company, by whose charter all policy holders if in good standing were members, and entitled to share in profits, issued a policy for \$10,000, payable on the death of the insured, the entire premium on which was to be paid in 10 annual installments, a part in cash and a part in notes bearing interest, upon which notes all dividends accruing to the policy were to be applied. The policy contained a provision "that said company further promises and agrees that, if default should be made in the payment of any premium, they will pay, as above agreed, as many tenth parts of the original sum insured as there shall have been complete annual premiums paid at the date of such default." It also further provided that, "if the said premiums or interest upon any note given for premiums shall not be paid on or before the dates above mentioned, * * * the company shall not be liable for the payment of the whole sum insured, but for such part only as is expressly stipulated above." The notes required the interest thereon to be paid annually. The insured paid eight complete annual premiums in cash and notes, together with the interest accruing on the notes previously given up to the time of the last premium payment, after which he made no further payments of premium or interest. *Held*, that by the payments made the policy, by its terms, became a legal and complete policy for the sum of \$8,000, carrying all the benefits which would have accrued to it if the remaining two payments had been made, except as to the amount insured, including the right to share in further dividends, which must be applied to the payment of the interest and principal of the outstanding premium notes; and that, such application not having been made, on the death of the insured the beneficiary was entitled to have it made, and to recover the sum of \$8,000, less the amount remaining due on the notes.

At Law. Action on life insurance policy, tried by the court without a jury.

Anderson, Anderson & Thomas, for plaintiff.
B. H. Hill, for defendant.

NEWMAN, District Judge. This suit was brought by the plaintiff against the defendant company on a policy of life insurance. The plaintiff was the beneficiary, and her husband, David Scott Hogue, the insured. The case was submitted to the court on the law and facts, without the intervention of a jury.

The parties have agreed on the following statement of facts:

"That the defendant issued on the 15th day of January, 1867, to the plaintiff the policy of insurance sued on, upon the life of the plaintiff's husband, David Scott Hogue, and that the copy of said policy, which is attached to the declaration in said suit, is a correct copy thereof. That eight complete annual payments by cash and notes were paid by the plaintiff and her husband on said policy of insurance, in accordance with the terms thereof, to wit, for the premiums which under the terms of said contract were due on the 15th day of January in the years 1867 to 1874, both inclusive. That the plaintiff's husband died on the 22d day of June, 1890, and proofs of death in the form required by the company were made and filed with said company. That the part of the annual premiums required to be paid in notes each year, to wit, two hundred and fifty-two dollars and ten cents, was so paid, and notes for that amount were each year given to the defendant during the years 1867 to 1874, both inclusive. Two of said notes, to wit, the two notes made January 15, 1867, and January 15, 1868, respectively, were paid off, and returned to the plaintiff by the defendant, out of the dividends earned during the years 1871, 1872, 1873, and 1874; said dividends so earned being as follows: 1871, \$160.90; 1872, \$92.10; 1873, \$117.10; 1874, \$150.70; or a total amount of five hundred and twenty dollars and eighty cents (\$520.80); which, being applied to the payment of said notes, paid off the first two thereof, as above stated, and entitled the third to a credit of sixteen dollars and sixty cents (\$16.60), which was credited thereon, leaving the balance due upon that note two hundred and thirty-five dollars and fifty cents (\$235.50). True and correct copies of notes Nos. 3 to 8, inclusive, are hereto attached and made a part of this agreement; and it is agreed that the form and substance of notes Nos. 1 and 2 were exactly like those hereto attached, differing only in the dates. That on January 15, 1875, a note was given by the plaintiff's husband to the defendant for three hundred and ninety-eight dollars and seventeen cents (\$398.17) as an extra note for cash premium and interest then due, a true and correct copy of which is hereto attached and made a part of this agreement. And on January 15, 1874, a note was given by the plaintiff's husband to defendant for four hundred and forty-seven dollars and forty-three cents (\$447.43), being an extra note for cash premium and interest then due, a true and correct copy of which is hereto attached and made a part of this agreement. That receipts were given by said defendant to the plaintiff for the said eight annual premium payments, acknowledging the payment thereof in each instance; all of which were in form and substance, differing only in date and in the amount of accrued interest, exactly like that dated the 15th day of January, 1870, the original of which is hereto attached and made a part of this agreement. That neither the said defendant nor her husband, David Scott Hogue, paid any other premiums, either in notes or cash, after the 15th day of January, 1874, but that all interest due on premium notes given prior to that date were paid either in cash or by note, up to said January 15, 1874. That, within ninety (90) days after the filing of proofs of claim by the plaintiff with the defendant, the latter tendered to her the sum of one thousand four hundred and eighty-nine dollars and seventy-seven cents (\$1,489.77), claiming that that sum was the amount due to her upon said policy of insurance, and the said

plaintiff declined and refused to receive the same in full satisfaction of her said claim."

Copies of resolutions passed by the directors of the defendant company from 1875 to 1898, inclusive, are agreed upon and are attached. The resolution passed on July 30, 1875, is as follows:

"Resolved, that a dividend shall be paid in the usual manner to such policy holders only as shall duly meet whatever cash payments may fall due on the anniversaries of their respective policies in 1876, according to their several contributions to the company's surplus, and that the actuary be, and is hereby, instructed to compute such dividend on the business of 1874 on such scale as to make the sum disbursed on that account in the year 1876 amount, as near as may be, to eight hundred and forty thousand (\$840,000) dollars."

There was no substantial difference in the resolutions for the subsequent years on the point which is claimed to be material here. A somewhat different resolution, however, passed on July 20, 1886, it is agreed is as follows:

"Resolved, that after December 31, 1886, the surplus arising in the fifth and succeeding policy years of any participating policy be allowed as dividend, on the usual conditions, at the close of such years, respectively, but that surplus arising in either of the first four years be held a year, as heretofore; it being the object of this change to retain the existing conservative system up to the end of five years from the date of each policy, and thereafter to make returns of surplus as speedily as possible to the members from whose payments it may be found to arise."

Counsel also agreed to use the act of incorporation of the Northwestern Mutual Life Insurance Company and the amendments thereto, including those of April, 1887; also the by-laws of the company, so far as they are pertinent to the issues in the case. It was also agreed that either party could use the original policy of insurance as they might desire. It was further agreed that the court might consider any and all admissions made by either the plaintiff or defendant contained in any of the pleadings in the case. There were certain agreements as to dividends earned by the company which are not material for the present purpose.

The policy of insurance issued to the plaintiff on the life of her husband was for \$10,000. The entire premiums were to be paid in 10 annual installments. The policy contained, however, this provision:

"And the said company further promises and agrees that, if default should be made in the payment of any premium, they will pay, as above agreed, as many tenth parts of the original sum insured as there shall have been complete annual premiums paid at the date of such default."

It is conceded that in cash and notes the premiums were paid for eight full years, which under the terms of the policy made it a good policy, payable at the death of the insured, for \$8,000. What other rights it had is the question for determination.

The premium notes outstanding against the plaintiff bear interest at the rate of 7 per cent. per annum. The notes contain language forfeiting the policy if the interest is not paid annually, which provision is not insisted upon. They also contain this language: "The dividends on the policy are to be applied to the payment of the notes."

The company claims that it had the right, at the death of the insured, in 1899, to compute the interest on the notes, compounding

it each year, and then adding interest to principal, and deduct the aggregate from the \$8,000 called for by the policy. The plaintiff insists that, as against the principal and interest so computed, she has the right to offset the dividends which an \$8,000 policy earned from January, 1875, until the death of the insured. By the charter of the defendant company all persons insured therein are members and entitled to participate in profits, subject to certain restrictions as to default on the part of the holder of the policy.

Counsel for defendant in this case relies largely on a provision in the policy on which the present suit is brought, which is as follows:

"If the said premiums, or interest upon any note given for premiums, shall not be paid on or before the dates above mentioned for the payment thereof, at the office of the company, or to agents, when they produce receipts signed by the president and secretary, then in every such case the company shall not be liable for the payment of the whole sum insured, but for such part only as is expressly stipulated above."

He says, taking this in connection with what has been already stated of the terms of the policy, viz., that they will pay as many tenths of the original sum insured as there shall have been complete annual premiums paid at the time of such default, that, therefore, when the premium due January 15, 1875, was not paid the policy by its terms lapsed, except as to that portion already secured by the payment of premiums, and the company was liable for such part only as was then secured. Counsel for the company in his brief makes this further statement:

"Besides, no interest was paid on any outstanding premium note after January 15, 1874, and by the terms of the premium notes this interest was to be paid annually or the policy forfeited. The condition in the notes that the failure to pay interest would forfeit the whole amount of the policy has been frequently decided; but the company in this case construes the forfeiture clause in the notes in connection with the forfeiture clause in the policy as applicable to that portion of the amount which was not secured by complete annual payments of premium. In other words, it concedes that the eight complete annual premiums mentioned by cash and note secures absolutely eight-tenths of the policy which was nonforfeitable, less outstanding premium notes, with interest thereon. The defendant insists—First, a failure to pay the cash part of any premium, or to give a note for the note part, when the same became due, forfeits, not the entire policy, but all of the policy and future benefits thereunder, except so many tenths as there have been made annual payments of premiums by cash and notes; second, the failure to pay in cash the interest on premium notes at the time when the interest became due forfeits the whole policy, except as above stated."

The contention of counsel for defendant, briefly stated, therefore is that the failure to pay premiums for the full period of 10 years, although premiums for several years have been paid, works such default as to deprive the insured or the beneficiary of all future benefits under the policy. It can hardly be doubted that, if the premiums had been paid in cash and notes for the entire period of 10 years, the beneficiary would have been entitled to dividends on the policy from the time of the expiration of the period until the death of the insured. If the company issues an ordinary life policy, the premium to be paid every year from the time the policy is issued until death, it is conceded that the person so insured would be entitled to the full dividends. In a policy of the character now under consideration, such additional

amount of premium is fixed and collected as will justify the company in agreeing that if the stipulated amount is paid for 10 years, or for any less number of years, it will entitle the beneficiary to the amount provided for, payable at the death of the insured. The fact is, of course, that a calculation made as to a large number of lives would show the same result in favor of the company in both classes of policies. Why should there be any distinction, then, between members holding the two classes of policies, as to the right to share in the profits of the company? There is none in reason or under the terms of the contract of insurance.

So that the matter to be determined here is, does the failure to pay for the full period of 10 years work such default as to deprive the holder of the policy of rights or benefits that would accrue in case the 10-years payments were made? It is true that the term "default" is used in the clause of the policy providing for the payment by the company, at death, of as many tenths as there shall have been complete annual payments, but this expression is as to succeeding payments. The right to what has been acquired by payments already made is as complete as if payments for the full period were made. No qualification is put on the right of the holder of the policy paying for less than the full period, except as to the amount, and that is fixed by the number of annual payments. The company, having issued a policy of this kind, certainly cannot be heard to say that the holder of such a policy is in "default" because such holder avails herself of a right granted by the policy. There is nothing whatever in the contract of the parties which makes the rights of the holder of this policy less than they would have been had payments been made for the full period of 10 years, except as to the amount, and she must be held to be entitled to the same benefits.

It is unnecessary to review the interesting cases cited on the briefs of the counsel for the respective parties. The greater number of these cases are upon the question of forfeiture for nonpayment of interest, and this, as has been stated, is not insisted upon by counsel representing the defendant company. The case which comes more nearly to deciding the precise question for determination here is *Dutcher v. Insurance Co.*, 3 Dill. 87, Fed. Cas. No. 4,202. That case was decided by Judges Dillon and Treat in the circuit court for the Eastern district of Missouri, and, while other reasons appear to have controlled the decision there made, the right of the policy holder to have dividends under conditions such as exist in the case at bar appears to have been determined. This case was taken to the supreme court of the United States (*Insurance Co. v. Dutcher*, 95 U. S. 269, 24 L. Ed. 410); and, while the decision there was not upon the question here involved, there was no dissent whatever from the views upon this question expressed by the judges in the court below.

The conclusion reached in this case is that this policy is entitled to dividends from January 15, 1875, to the death of the insured, and that the plaintiff has the right to set off such dividends against the interest on these premium notes which accrued from year to year, and, if such dividends were more than sufficient to pay such interest, then against the principal to the extent that such dividends should go.

CLARK et al. v. GUY.

In re COE'S ESTATE.

(Circuit Court, D. Connecticut. March 7, 1902.)

No. 976.

1. REMOVAL OF CAUSES—BOND.

A circuit court of the United States cannot entertain a cause on removal from a state court unless the removal bond required by statute has been duly executed by the principal and surety.

2. JURISDICTION OF FEDERAL COURTS—ADMINISTRATION OF ESTATE.

A federal court is without jurisdiction of proceedings for the administration of the estate of a deceased person, either original or by removal.¹

On Petition for Order Removing Cause from State Court.

Judson S. Hall, for petitioners.

Clarence E. Bacon, for executrix.

TOWNSEND, District Judge. The petitioners herein allege that they are heirs at law of Sanford Coe, late of Middletown, in the district of Connecticut; that the said Coe was an aged and decrepit person, and that, through undue influence of one Amy Ann Guy, and without the knowledge of the petitioners, the said Coe was induced to make a certain will in favor of the persons who exercised such undue influence; that the beneficiaries under said will have sold certain of the property formerly belonging to said testator, and threaten to dispossess one of the petitioners of her homestead; and that the beneficiary Mary J. Hollister has unsuccessfully applied for relief to the probate court for the district of Middletown. The petitioners therefore petition for removal to the circuit court of the United States for the district of Connecticut, for the purpose of having their property rights protected and adjusted. The petitioners allege that the suit in which the above relief is sought is pending in the probate court, and they petition for removal thereof, under section 639, Rev. St. U. S., because they believe that, from prejudice or local influence, they will be unable to obtain justice in such state court. Counsel for the petitioners alleges that, acting under the advice of the United States circuit court, and of the clerk of said court, he filed an application for a trial of said case. Thereafter the case was set down for hearing on the 11th day of October, 1898, before me, and the petitioner was heard thereon. Thereafter, upon examination of the papers, the petition was denied. Counsel for the petitioners, however, having alleged that I had agreed to defer the decision until further notice to him and an opportunity for further hearing, the order was set aside, and the case has again been heard upon argument of counsel and a brief submitted by counsel for the petitioners. The petitioners allege that they are aggrieved because:

"First. Said probate court did not have power to hear and determine whether the residue of said estate was testate or intestate estate, nor was said question properly before said court. Second. That if said question was

¹ See Courts, vol. 13, Cent. Dig. § 792 [c, v, x, zz], § 1325 [a-e], § 1410 [a, b].

properly before said court for determination, it should have held that said residue was intestate estate, and as such intestate estate said court should have ordered its distribution to the heirs of said Sanford Coe, of whom said Fred. C. Clark was one. Third. Because said court did not have power to construe said will. Fourth. That if said court has power to construe said will, such power could be exercised only for the purpose of determining whether the claim of the heirs was reasonable, and made in good faith, and in a proceeding had for that purpose. Fifth. Because the heirs and distributees of said Sanford Coe were persons other than Maria J. Hull, executrix of the will of Andrew R. Hull, deceased, and the person to whom the court ordered the intestate estate distributed. Sixth. Because the estate of Sanford Coe, deceased, was not pending for settlement in the orderly and prescribed way for the settlement of estates. Seventh. Because Sanford Coe died leaving real and personal property, intestate, and more than one heir to said real and personal property undisposed of by a will of which he had disposed of certain of his property, and the said court, in proceeding to distribute the same to persons other than the heirs and distributees of the said Sanford Coe, in the proper and prescribed way, acted beyond its jurisdiction. Eighth. Because said will did not leave the testate estate indefinite, and necessary to be defined, so far as the heirs and distributees therein mentioned were concerned in the action of said court in proceedings to ascertain the heirs and distributees of the intestate estate, and in ascertaining the heirs and distributees of the aforesaid, and in ordering the distribution of all said estate, was acting beyond the power of said court. Ninth. Because the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars."

Therefore the petitioner appeals from the judgment of the probate court, and asks that the orders of said court be set aside, and that this court should order a decree distributing the estate to such heirs as may be found to be entitled to receive the same.

It is unnecessary to consider the various contentions of counsel herein, because an inspection of the record shows that a bond for removal was not signed either by the principal or the surety therein. The only signature of either of these persons is that of the surety, appended to his affidavit that he is worth the sum of \$500 over and above his debts and liabilities. In view of the insufficiency of said bond, and in view of the statutory requirements therein, I do not see how it is possible for me to entertain this case upon the merits.

There is, however, a further objection to this petition. The courts of this state have repeatedly decided that the settlement of the estates of deceased persons is within the sole jurisdiction of the probate courts. *Pitkin v. Pitkin*, 7 Conn. 315; *Beach v. Norton*, 9 Conn. 182; *Prindle v. Holcomb*, 45 Conn. 111, 122; *Clement v. Brainard*, 46 Conn. 174; *Clement's Appeal*, 49 Conn. 519; *Guthrie v. Wheeler*, 51 Conn. 207, 211. This conclusion is supported by the case of *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, where the supreme court formulated the doctrine laid down in the Connecticut cases cited above:

"If original jurisdiction of the administration of the estates of deceased persons were in the federal court, it might, by instituting such an administration and taking possession of the estate, through an administrator appointed by it, draw to itself all controversies affecting that estate, irrespective of the citizenship of the respective parties. But it has no original jurisdiction in respect to the administration of a deceased person."

The petition is denied.

SIMMONS v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, N. D. Georgia. March 4, 1902.)

No. 1,649.

1. REMOVAL OF CAUSES—JURISDICTIONAL AMOUNT—CONSTRUCTION OF PLEADINGS.

Where, in an action against a life insurance company to recover the present value of a policy, such value is alleged in the declaration, the amount recoverable under such declaration, unless it should be amended, is limited to the value so stated; and where that is less than \$2,000 the cause is not removable into a federal court, even though the present value of the policy, if correctly computed, would be greater than that sum.

2. SAME.

In a suit to recover excessive premiums alleged to have been exacted by, and paid to, a life insurance company, interest on the several amounts sued for, from the dates of their payment to the date of the suit, cannot be added, and treated as principal, to determine the amount in controversy for the purposes of federal jurisdiction.

On Motion to Remand to State Court.

Hoke Smith and H. C. Peebles, for plaintiff.

Anderson, Anderson & Thomas, for defendant.

NEWMAN, District Judge. This is a motion to remand a case removed from the state court. The ground of the motion is that the necessary jurisdictional amount is not involved. The plaintiff's declaration, as it appears in the record brought from the state court, is as follows:

"The petition of Thomas J. Simmons respectfully shows: (1) The Mutual Reserve Fund Life Association, hereinafter styled the 'defendant,' is a corporation of the state of New York, now and at the times hereinafter mentioned engaged in the business of life insurance; and it had at the time it contracted with petitioner, as hereinafter stated, and has now, an agency, place of doing business, and an agent in said county of Fulton. (2) Said defendant is indebted to your petitioner in the sum of two thousand (\$2,000) dollars, with interest upon the sums and from the dates as shown by the following: (3) On May 13, 1890, defendant issued to your petitioner a policy of life insurance, in the sum of \$5,000, upon the terms and conditions shown by a copy thereof, hereto attached as an exhibit, and made a part hereof, to which leave of reference is prayed as often as may be necessary. Your petitioner's wife is named in said policy as beneficiary thereof. (4) By said policy, defendant promised that upon payment by petitioner of certain dues and mortuary calls mentioned therein, and for so long as such payments should be made by him, said contract should be and continue of force. (5) Petitioner charges that, under said contract, defendant was and is only entitled to charge him for mortuary calls at the bimonthly rate of \$20.80, which was and is its rate of bimonthly mortuary calls at the age of fifty-three (53) years,—the age of your petitioner at the time said contract was made. (6) Defendant did charge him \$20.80 for bimonthly mortuary calls from the time of issuing said policy until its call No. 96, of February, 1898. (7) Commencing with said call No. 96, and continuing to and including its call No. 104 (that is to say, for nine mortuary calls), defendant called upon petitioner, as a basis of keeping said contract of force, for the sum, bimonthly, of \$33.90. (8) Thereafter defendant again increased its rate of mortuary call of and upon your petitioner, and, continuing to and including mortuary call No. 110 (that is to say, for six mortuary calls), called upon your petitioner, as a basis of keeping said contract of force, for the sum, bi-

monthly, of \$41.40. (9) Thereafter again defendant increased its rate of mortuary call of and upon your petitioner, and, continuing to and including mortuary call No. 116 (that is to say, for six mortuary calls), called upon your petitioner, as a basis of keeping said contract of force, for the sum, bimonthly, of \$45.15. Call No. 116 was made June 1, 1901. (10) Each and all of said increased calls was and is in violation of said contract, and without authority of law. (11) Petitioner has paid all entrance fees, medical examination fees, and dues required of him under said contract. (12) He has paid up all the mortuary calls made upon him by defendant up to, but not including, said call No. 116. (13) Petitioner paid said increased calls under protest, desiring to maintain the policy, if possible, without dispute or disagreement with defendant. (14) Tiring of the repeated demands made upon him in violation of his contract for such increased sums, petitioner refused to pay said call No. 116, and thereupon defendant has notified him that said policy of insurance is forfeited, null, and void. (15) Defendant has further broken and violated said contract, in that, contrary to the terms thereof, and without authority of law, it has on June 15, 1901, notified him that it called upon him for \$1,365.25, payable within thirty days from said date, for the alleged purpose of providing a reserve. It has also in said notice stated that it would lend him said sum, as a lien against his insurance, and bearing interest. Copy of said notice is hereto attached as Exhibit B, made part hereof, and leave of reference thereto as often as may be necessary is prayed. (16) Petitioner has refused to pay said call, has so notified defendant, and has also notified it that he would not accept such loan, or consent to any such lien upon the policy. (17) Defendant claims the right to make such call, and, if the same be not paid, to charge the amount thereof, with interest, as a lien upon the policy, under an alleged amendment of its constitution or by-laws made at the annual meeting of its members in January, 1901. (18) Petitioner was not present or represented at said meeting. He has never consented to such amendment. He charges that the same is directly violative of his said contract with defendant, and impairs his vested rights thereunder. (19) He charges that said amendment is unreasonable, retroactive, and otherwise illegal. (20) Now, so it is, defendant has exacted from him unlawfully said increased calls, has unlawfully made upon him said call of June 15, 1901, and in each and both has violated and broken said contract. (21) Petitioner thereupon elects, as is his right, to sue now for the damages sustained by reason of said breach, and shows: (22) He has now grown older, and is unable, because of his physical condition, to procure new insurance in lieu of said policy, though he has tried repeatedly to do so. (23) He is entitled to recover from defendant the present value of \$5,000, estimated upon the basis of his expectancy of life, which is 12.30 years, diminished by the present value of the insurance defendant would have the right to charge him under said policy, to wit, \$20.80 bimonthly mortuary calls, and \$15 annual dues, estimated upon the basis of said expectancy. (24) He charges that the present value of \$5,000, so estimated, is at least \$2,500, and that the present value of \$20.80 bimonthly mortuary calls and \$15 annual dues, so estimated, is \$950, and prays judgment for the excess. (25) Petitioner is entitled to further recover the amounts on the payments made by him, as above stated, in excess of \$20.80 bimonthly mortuary calls which defendant had the right to make, with interest on each of said amounts from the time of each, and of said payments. Said excessive payments amount to the principal sum of \$363.25, and he prays judgment therefor. (26) He prays judgment against defendant in the sum hereinabove first stated, and that process may issue requiring the defendant to be and appear at the next term of said court to answer your petitioner's complaint."

It will be seen that this suit is for \$2,000 and interest. This, of course, would be insufficient to give the court jurisdiction, but the claim for the defendant is that, under the further allegations as to the damages sustained by reason of the breach of the contract set up by the plaintiff, there could be a recovery of more than \$2,000. The

argument for the defendant is that, conceding plaintiff's right to recover at all, the present value of his policy would be considerably more than is set out in the declaration, namely, \$1,550, and that, notwithstanding this statement of an amount, if the present value should be more, he could recover it, because of his general allegations of his right to recover the present value of the policy. Whatever such present value may be, it is urged, the plaintiff could recover, even if its value was in excess of the amount stated. It is also claimed that, to the amount of excess premiums claimed to have been paid before the alleged breach of the contract, the interest should be added, and become a part of the principal at the date of the suit, for the purpose of determining jurisdiction. I am unable to agree with either contention. Under this declaration, without amending it, the plaintiff could not recover exceeding \$1,550 for the present value of the policy. It may be true that his allegations as to his right to recover the present value of the policy would justify an amendment changing and enlarging the amount claimed, but what might be claimed by amendment can be no test of jurisdiction as to the amount involved. Neither do I think that the interest claimed on excess of premiums paid is that character of interest which becomes principal, and which may be so treated for the purpose of determining the jurisdictional amount. Even if interest be added to the amounts of excess of premiums claimed to have been paid, it would not, with the \$1,550, make the jurisdictional amount. It is claimed for the defendant that, by a calculation made in the manner provided in the Code of Georgia (section 2049), it would make the present value of this policy more than is claimed by the plaintiff. The section of the Code referred to is a part of the act of the legislature of Georgia of 1887 for "regulating the business of insurance in this state," and this particular section states the manner in which the insurance commissioner of the state shall arrive at the value of life insurance policies for the purpose of determining the condition of the companies doing business in Georgia. It is not at all clear that this law is applicable to the question involved here, but, even if it is, the jurisdictional test as to the amount involved is the plaintiff's claim; and that, as has been stated, is less than \$2,000.

I am clear, therefore, that there could not be a recovery, under this declaration for \$2,000, exclusive of interest and costs; and for that reason the case will be remanded to the city court of Atlanta, from which it was removed. An order may be taken accordingly.

POSTAL TEL. CABLE CO. OF MONTANA v. OREGON SHORT LINE R. CO.

(Circuit Court, D. Montana. March 22, 1902.)

1. EMINENT DOMAIN—POWERS OF TELEGRAPH COMPANY—CORPORATION DE FACTO.

Where the proper formal steps have been taken to organize a telegraph corporation under the laws of a state, it becomes such a corporation de facto; and its right to exercise the power of eminent domain, conferred on such companies by the statutes of the state, cannot be denied by the defendant in a suit instituted for the condemnation of

right of way on the ground that it is only a pretended, and not a real, corporation, that being a question which can only be raised by the state.¹

2. SAME—USE OF RAILROAD RIGHT OF WAY.

A telegraph company which has accepted the conditions imposed by Rev. St. §§ 5268-5269 is entitled to construct its line over the right of way of a railroad which by section 3964 is declared to be a post road of the United States and to have the damages assessed in any court of competent jurisdiction, where such line may be so constructed as not to interfere with the operation of the railroad.

3. SAME—MONTANA STATUTE.

Under the statute of Montana (Code Civ. Proc. p. 3, tit. 7) which confers on certain corporations, among which are telegraph companies, power to exercise the right of eminent domain, subject to the limitation that the court must find that the use sought to be made of the property condemned is a public use, and, if the property has already been appropriated to a public use, that the second is a more necessary public use, it must be held that the use of land for a telegraph line is a public use, and that the appropriation for telegraph purposes of a portion of the right of way of a railroad not occupied for railroad purposes is for a more necessary public use than that of the railroad company.

4. SAME—COMPENSATION—MEASURE OF DAMAGES.

Where the construction of a telegraph line over the right of way of a railroad will not appreciably diminish the value of the use of such right of way for railroad purposes, the telegraph company is required to pay only nominal damages on condemnation of a right of way for its line.

Proceeding to Condemn Right of Way.

J. R. McIntosh and Orlando W. Powers, for plaintiff.

P. L. Williams and J. G. Willis, for defendant.

KNOWLES, District Judge. The plaintiff in this suit desires to have condemnation, for the purpose of a telegraph line, over and along certain portions of the right of way of the Oregon Short Line Railroad Company in Montana. Originally three suits were instituted for this purpose,—one in Beaverhead county, one in Madison county, and another in Silver Bow county. These suits were all consolidated in pursuance of a stipulation between the parties, and removed to this court upon the application of the defendant. It appears from the pleadings that the plaintiff is a corporation organized under the laws of Montana, and the defendant a corporation organized under the laws of Utah.

There is an objection made that the plaintiff is not entitled to be classed as a corporation *de jure*. It appears, however, that certain parties who were residents and citizens of the state of Montana, complied with the laws of said state in filing the proper certificate and in making the proper records to create a corporation under the laws of said state. *Prima facie*, this would create the corporation named as the plaintiff herein. There were certain meetings of the officers of the plaintiff corporation, and, among other proceedings, a resolution was offered and passed looking to the acquirement of a right of way over and along the defendant's railroad right of way in Montana, for the purpose of establishing a telegraph line. It would appear that

¹ See Eminent Domain, vol. 18, Cent. Dig. § 469; 1901B Dig. § 44 [d]; Corporations, vol. 12, Cent. Dig. § 78 [gg, uu]; 1899B Dig. § 8 [b].

under these conditions the defendant could not raise the question as to whether the plaintiff is in fact a corporation, or only a pretended or "fake" corporation. That would be the prerogative of the state of Montana, in a proper suit instituted for that purpose by and through its proper officers. In *Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Idaho*, 49 C. C. A. 663, 111 Fed. 842, it was held by the circuit court of appeals of this circuit, while considering a similar statute of Idaho, and in passing upon an objection identical with the one raised in this case, that such a corporation was a corporation de facto, and, as such, entitled to all the rights and privileges of a corporation, including the exercise of the power of eminent domain.

Plaintiff, on the argument before this court, claimed a grant of the right of way over and along the defendant's railroad right of way under and by virtue of the provisions of sections 5263 to 5269 of the Revised Statutes of the United States. Evidence was introduced to show that plaintiff had accepted the conditions named in the aforesaid statutes. Section 5263 of the statutes supra reads as follows:

"Sec. 5263. Any telegraph company now organized, or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

It will be seen, by this statute, that the right is given to any telegraph corporation organized under the laws of any state to construct and maintain its telegraph line over and along any of the military or post roads of the United States which have been, or may hereafter be, declared such by law. Such lines must not interfere with the ordinary travel on such military or post roads. By section 3964 of the Revised Statutes of the United States, all railroads such as that operated by the defendant in this state have been and are declared to be post roads. If this statute is applicable to this case, then the act of congress itself determines whether the power of eminent domain should be put in motion for the purposes named, and whether the exigencies of the occasion and the public welfare required or justified its exercise. In the case of *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206, the supreme court, speaking by Mr. Justice Field, said:

"* * * When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. * * *"

Although congress had put its right of eminent domain in motion by granting to the telegraph companies who complied with the foregoing provisions of the statute the right of way over and along post roads, and determined the necessity for using said ways for telegraph purposes, it at the same time imposed the condition that such use should not interfere with the ordinary travel thereon; but there was a further

constitutional limitation that, before such right of way could be so utilized, just compensation should be awarded therefore to the owners or proprietors thereof. There would not appear to be any doubt, from the evidence presented in this case, but that the telegraph line as proposed by the plaintiff may be constructed over and along defendant's said right of way, so as not to interfere with the ordinary travel thereon. In this grant to the telegraph companies, congress, however, made no provision for the assessment of the damages arising out of the taking. In the case of *Kohl v. U. S.*, 91 U. S. 367, 23 L. Ed. 449, the supreme court held that an action could be maintained as a civil action at law to fix the damages arising from the taking of any property for a public use. The court there said:

"* * * It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right.
* * *

In that case, after advertng to the fact that congress had made no provision for the assessing of-damages for property taken under the power of eminent domain, the court said:

"* * * But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law. * * *

The views expressed in this opinion were affirmed in the above case of *Boom Co. v. Patterson*.

It would seem, then, that the plaintiff company had the right to proceed either in the state court or in the federal court to ascertain the just compensation to which the defendant would be entitled for the amount of its railroad right of way taken for the plaintiff's telegraph line; and I might stop here, and proceed to determine the just compensation to which the defendant is entitled, were it not that it would seem in the suit brought here that plaintiff appeals for its right, not to the power of eminent domain vested in the national government, but to that power inherent in the state government. The state government, by a general law, has granted the power to exercise its eminent domain to certain corporations,—among them, to telegraph companies. In this general law it is left to the courts to determine whether the use to which the property is sought to be condemned is a public use, and, if it sought to condemn property that has already been appropriated to a public use, then to determine whether such further condemnation and appropriation is for a more necessary public use than the one to which it is devoted, and for which it was first condemned.

It is alleged in the complaint in this case that the right of condemnation is asked in virtue of the provisions of the statutes of Montana. Paragraph 4 of the complaint, inter alia, contains the following:

"That said plaintiff claims and asserts the power to exercise the right of eminent domain by this proceeding under and by virtue and authority of part 3, tit. 7, of the Code of Civil Procedure of Montana (page 917)."

The right of eminent domain exercised by the national government must be for national purposes. The right of the state government to exercise such power must be for state purposes. It is evident that

both governments seek to foster the building of telegraph lines,—one for national purposes, and the other for local purposes. Under section 2211 of the Code of Civil Procedure of Montana, it is provided that the power of eminent domain may be exercised in behalf of the government of the United States for any public use it authorizes. It would appear, however, from the whole scope of the proceedings in this case, that only the state power is invoked. It becomes necessary, therefore, for this court to determine whether the construction of the telegraph line, and whether the use to which the plaintiff would appropriate the railroad right of way of the defendant, is a more necessary public use than that to which the defendant has devoted and is devoting it. In considering the evidence presented in the case, the conclusion is reached that it is desirable that the plaintiff should have the right to construct its line of telegraph over and along the right of way of the defendant's railway. In determining the question as to whether this use is a more necessary public use than that to which the defendant has devoted the right of way under consideration, we may consider the opinions of others. We find, in a case where a corporation bearing the same name as the plaintiff brought a similar suit against this same defendant in the state of Idaho, having for its object the condemnation of a portion of the defendant's railroad right of way, Judge Beatty, before whom the case was tried, held that the appropriation for telegraph purposes of the portion of the defendant's right of way not occupied by its railway tracks is a more necessary public use than its use for a right of way by the railroad company. *Postal Tel. Cable Co. v. Oregon Short Line R. Co.* (C. C.) 104 Fed. 623. In this opinion Judge Beatty says:

"* * * It cannot for a moment be doubted that the use to which plaintiff proposes to put that portion of the defendant's right of way would be of greater public utility than that for which it is now used. * * *

This case was taken to the circuit court of appeals for this circuit on a writ of error, and the above ruling by Judge Beatty was there considered. 49 C. C. A. 663, 111 Fed. 843. The statute in Idaho is the same as the Montana statute, and provides for the taking of property already devoted to a public use for a more necessary public use. In construing this statute, the circuit court of appeals says:

"* * * Considering the words used, and the general tenor of the law controlling the devotion of private property to public use, we think the statute was intended to provide that property already devoted to a public use might, whenever deemed necessary for the use of a corporation having the authority to exercise the right of eminent domain, be devoted to a second use which will not interfere with the first. It was not intended to require that absolute necessity should exist for the devotion of the property to the second use. * * * The defendant in error in this case has alleged that this property is necessary for its use, and that it is not necessary for the use of the plaintiff in error. The court has found that these allegations are true, and has found that the second use is more necessary than the first. As we construe the statutes of Idaho, we find no error in this conclusion. * * *

The supreme court of Utah, in the case of *Postal Tel. Cable Co. of Utah v. Oregon Short Line R. Co.* (Utah) 65 Pac. 735, said:

"* * * The appropriation of the right of way of a railroad, not essential to the enjoyment of its franchise and property, to the construction of a telegraph line, is to and for a more necessary public use. * * *

And in pursuance of this view it was held that it was proper for the telegraph company to appropriate a portion of the right of way of the Oregon Short Line Railroad Company in the state of Utah.

In considering the act of congress before quoted, it is evident that congress was of the opinion that it would be right to appropriate portions of any post road for a telegraph line, when such appropriation did not interfere with the ordinary travel thereon. Guided by these opinions, I find in this case that the portions of the railroad right of way of the Oregon Short Line Railroad Company, in Montana, sought to be appropriated by the plaintiff to the uses named, is a proper appropriation, and a more necessary public use than that to which the defendant is devoting the same. This appropriation by the telegraph company of the right of way of the defendant must be confined, however, to that portion of the same not now actually used and required for railway purposes, and along a line which will not interfere with the ordinary use thereof for railway purposes.

As to the question of damages, I find, from a careful examination and consideration of the decisions, that what may be considered as nominal damages only should be awarded defendant. *St. Louis & C. R. Co. v. Postal Tel. Cable Co.*, 173 Ill. 508, 51 N. E. 382; *Chicago, B. & Q. R. Co. v. City of Chicago*, 149 Ill. 457, 37 N. E. 78; *Id.*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 978; *Railway Co. v. Catholic Bishop*, 119 Ill. 529, 10 N. E. 372; *Allen v. City of Boston*, 137 Mass. 319; *Mobile & O. R. Co. v. Postal Tel. Cable Co. (Miss.)* 26 South. 370. The evidence in this case does not establish clearly that the defendant would suffer any peculiar or special damage by the taking, and hence what is considered a nominal damage, merely, can be awarded. The damages to the defendant are hereby fixed in the sum of \$1 per mile, amounting in the aggregate to \$127.

It is substantially agreed that the right of way of the defendant varies in width; that at some points on the line it is 200 feet in width, at other portions 100 feet, and at other portions only 66 feet in width. I hold that, upon such portions of the aforesaid right of way where it is 200 feet wide, the poles and wires of the plaintiff should not be placed nearer than 75 feet to the outer line of the track or rail; at such portions thereof where it is 100 feet wide, the line of telegraph should not be nearer to the outer edge of the defendant's track than 40 feet; and at all such portions where it is only 66 feet in width, the telegraph poles of the plaintiff should not be nearer than 30 feet to the track.

Let a decree be prepared in consonance with these views.

OIL SEEDS PRESSING CO. v. UNITED STATES.

(Circuit Court, S. D. New York. March 1, 1902.)

OLIVE OIL.—CUSTOMS DUTY.

Where witnesses called for the government were Italians, who testified that the olive oil imported was fit for food, but was of a poor quality, and that it burned the throat, and that it was bought by the poorer class of Italians, and it had a strong, offensive, and rancid odor, and a witness for the importer testified that it was a nonedible oil, unsafe for human consumption, and that it was not manufactured, imported, or adapted for food consumption, it was free, under Act 1897, par. 626, as olive oil for manufacturing or mechanical purposes, "fit only for such use," and not dutiable as olive oil not specially provided for, under paragraph 40 of the act.

D. Frank Lloyd, Asst. U. S. Atty.
Hatch & Wickes, for the importers.

TOWNSEND, District Judge. The merchandise in question is olive oil assessed for duty as "olive oil, not specially provided for," at 40 cents per gallon, under the provisions of paragraph 40 of the act of 1897, and claimed to be free, under paragraph 626 of said act, as "olive oil for manufacturing or mechanical purposes, fit only for such use and valued at not more than sixty cents per gallon." The board of general appraisers, in overruling the protest of the importer, found that:

"The oil is worth less than sixty cents per gallon, and that it was actually used for manufacturing purposes; but we are satisfied from the evidence that it can be used for food consumption, and it is fit for such use. While it is true that this oil contains a small percentage of free fatty acid, it is nevertheless fit for food consumption."

The dealers called as witnesses to support the contention of the government that the oil was fit for food were Italians, who admitted that the oil was of poor quality, and that either they did not import or deal in such inferior oil, or had succeeded in selling very little of it; that it burned the throat; and that it was bought by the poorer class of Italians. This oil contains a great excess of free fatty acid and albuminous sediment. It has a strong, offensive, and rancid odor, and an acrid taste. Dr. Cyrus Edson testifies that it is a nonedible oil, "unsafe for human consumption, * * * because of the process of fermentation, which leaves certain germs free in the oil," and he adds, "I shouldn't permit it to be used for food." The fermentation referred to by the witness is explained by him to refer to the method by which the oil is made, which "oil itself is a product of fermentation." The word "fit" seems to be equivalent to "suitable,"—the actual, practical, and commercial suitability of the article for the purpose designated. The article in question is not manufactured, imported, or adapted for food consumption, and its perverted use for frying or for salads by a class of foreigners presumably ignorant of its deleterious qualities and injurious effects does not show that it is fit for use as food.

The decision of the board of general appraisers is reversed.

In re HOLSTEIN.

(District Court, D. Connecticut. April 11, 1902.)

No. 707.

BANKRUPTCY—REFUSING DISCHARGE—FRAUD.

An insolvent retail merchant, who, immediately on receipt of goods, sells them at wholesale, and turns the larger part of the proceeds over to a friend, whom he says he owed, but of which there is no documentary evidence, and fails to enter the check on his check book, should be refused a discharge in bankruptcy for concealment of assets.

In Bankruptcy.

The following is the report of the referee upon petition for discharge:

I, Henry G. Newton, referee in bankruptcy for the New Haven county district of the district of Connecticut, to whom the above-entitled case was referred under the act of congress relating to bankruptcy, do hereby certify: That the above-named Harry Holstein, of New Haven, Connecticut, was duly adjudicated a bankrupt herein on August 12, 1901. That the petition of the bankrupt for a discharge in bankruptcy from all his debts was duly filed with the clerk of said court on September 16, 1901, and was duly referred to me by said court for further proceedings. That on September 18th I fixed the 2d day of October, 1901, at 12 m., at my office, room 7, No. 818 Chapel street, New Haven, Connecticut, as the time and place for a hearing on said petition for a discharge, for examining the bankrupt, and for showing cause, if any, why such discharge should not be granted; and on September 20, 1901, I gave due notice thereof to all creditors whose names appear upon the schedules of the bankrupt, to all attorneys who appear in the case, and to all persons interested, by mailing and publishing, as appears by my certificate, with copy of notice, hereto annexed. That William H. Ely appeared at the hearing on the discharge to oppose on the part of S. D. Velts & Co., of Springfield, Massachusetts; his written specifications of the grounds of objection to the granting of the discharge being filed on October 11 and argued on October 23, 1901. The objections to the discharge were, in substance: (1) Concealing and failing to keep books of account; (2) paying \$350 to Charles Rosenstein in trust for the bankrupt, and failing to enter the transaction on his books; (3) disposing of a driving horse and vehicle immediately before the filing of his petition in bankruptcy, without any legal transfer, and without entering the transaction upon the books. The total indebtedness of the bankrupt, as appears by his schedules, is \$2,064.90. It was agreed upon the hearing that the case should be heard and decided upon evidence taken upon a former examination and hearing. The schedules in bankruptcy were dated August 10, 1901, and filed August 12, 1901. Mr. Holstein, the bankrupt, has been engaged in the business of dealing in feed, hay, and oats at retail. On July 27, 1901, he ordered of S. D. Velts & Co., the creditor objecting to his discharge, a cargo of oats, the price being \$504.38. These oats were received on or about August 6th, and the cargo was immediately sold at wholesale by the bankrupt for a price slightly less than the price paid by him; but, as stated by him, at a price slightly in advance of the ruling market rate. Of the money received for the sale of the cargo of oats he deposited in bank on August 6th, \$500; and on August 7th he made a further deposit of \$96.09,—\$596.09. He paid checks as follows: On August 6th, to the N. Y., N. H. & H. R. R. Co., \$75.19, for freight on the cargo mentioned. The First National Bank, where he kept his account, charged against his account a draft of \$176.17, which had been accepted by him 30 days previously. A check of August 5th to R. Sanford, for \$80, was paid by the bank on August 7th. On August 7th he paid Charles Rosenstein the \$350, and on August 8th to Abner Hendee, a bona fide creditor, \$74.64, which exhausted his bank account within 35 cents. On his check book the stubs are not filled out for a payment of \$72.19, a part of the \$75.19 paid to the railroad company, or for the ones to Rosenstein and Hendee. The bankrupt did not, at any other time during the course of his business,

sell at wholesale a cargo of oats. His journal shows various charges and receipts on August 5th and August 6th and August 7th. No entry of his purchases or indebtedness appears anywhere upon his books. His testimony was that he simply made charges upon his books of goods sold, and trusted to the bills to know his indebtedness for goods purchased. Bankrupt testified that the \$350 paid to Charles Rosenstein was on account of a debt which he owed him for borrowed money. Charles Rosenstein was not called by either side. No written entry of any kind was offered in corroboration of this indebtedness, and there is no written entry in regard to the Rosenstein matter upon the books of the bankrupt, nor concerning the horse and wagon. The principal question in this case is the good faith of the payment to Rosenstein, and whether the failure to note the check to him upon the book was for the purpose of concealing the payment. There is no claim as to any other payment proved to have been made, that it was fraudulent. Bankrupt testified that he sold the horse and wagon about two weeks before making the assignment in bankruptcy for \$110, of which \$10 was paid in cash and the balance paid by check, which was deposited in bank. No specific deposit of \$100 appears upon the books, although, within two weeks there is a deposit of \$120.50, which might possibly contain the \$100 check. I find this objection as to horse and wagon not sustained. The question here largely turns upon the credit which ought to be given the testimony of the bankrupt. In my opinion, a sale in bulk by an insolvent retail merchant of a cargo of oats for somewhere about \$600, the deposit of \$500 of the money in bank, and the using of the larger part of it, other than that needed to pay the freight, for the payment of a personal debt to a friend, is not a transaction which should be looked upon with favor, and does not entitle the doer of it to credit. Except for the payment to Abner Hendee and Mr. Sanford about that time, I should not hesitate to say that the testimony ought to be discredited. It has before been reported by me, and affirmed by this court, that the obtaining of money by the sale of goods and paying it out, not in the ordinary course of business, but to a personal friend, throws the burden of proof that the transaction was fair strongly against the bankrupt. In the absence of any documentary evidence of the debt, or of any corroborative evidence whatever, in my judgment it ought to be found that the \$350 was paid to Rosenstein on a concealed trust, and that the failure to enter the check upon the stub of the check book was for the purpose of concealing the true state of his affairs from his creditors in bankruptcy; and, solely from the evidence above stated, I find and report, unless the court shall be of the opinion that the facts in evidence do not sustain the finding, that the bankrupt has concealed \$350, and has failed to enter the check upon his check book, with the intent to conceal from his creditors the true condition of his affairs. It may be proper to add that the failure to enter checks, and the failure to correctly state transactions on the schedules, have been repeatedly found, in other cases, not to militate against the granting of a discharge, no fraudulent intent being found. In my judgment, it would be a reproach upon the law if an insolvent retail merchant could obtain money by the sale of goods at wholesale immediately upon their receipt, and turn the bulk of it over to one who is not a business creditor, and, by his simple statement that he owed the recipient, exonerate himself from blame, and obtain a discharge from the debt. While the debt to Velts & Co. may not have been incurred by false pretenses, so as to render a discharge invalid against that particular creditor, it is a debt which ought not to be discharged in bankruptcy unless the court is absolutely forced to grant such a discharge. I therefore find from the facts and evidence, and for the reasons stated above recommend, that the discharge be refused.

Simon H. Kugel, for bankrupt.

Wm. H. Ely, for opposing creditor.

PLATT, District Judge. I am entirely in accord with the referee in his opinion upon the facts presented. His report is accepted, and the discharge is refused.

**THE EL MONTE.
THE RAPPAHANNOCK.**

(District Court, S. D. New York. March 4, 1902.)

1. COLLISION—NAVIGATION IN FOG—CONSTRUCTION OF RULES.

Under the second clause of article 16 of the international navigation rules, which requires a steam vessel, "hearing apparently forward of her beam the fog signal of a vessel the position of which is not ascertained," to stop her engines, and then navigate with caution until danger of collision is over, it is the duty of a vessel to stop under such circumstances, in all doubtful cases, until both the position and course of the other is known.¹

2. SAME—STEAM VESSELS CROSSING—EXCESSIVE SPEED AND FAILURE TO STOP IN FOG.

In a suit for collision between two ocean steamships in a dense fog, while on crossing courses, it appeared that after entering the fog both continued at more than half speed, in violation of the first provision of rule 16, and that, after hearing each other's fog signals, both proceeded without stopping for some time, in violation of the second clause of such rule; the vessels when they saw each other being within 500 feet, and unable to check their momentum in time to avoid collision. *Held*, that both must be held in fault, and the damages divided.

In Admiralty. Suit for collision.

Convers & Kirlin, for the Rappahannock.

Maxwell Evarts, for the El Monte.

ADAMS, District Judge. These actions arose out of a collision between the steamship Rappahannock and the steamship El Monte, which occurred in a dense fog in the early morning of the 5th day of October, 1900, about 50 miles in a northeasterly direction from Cape Charles. The Rappahannock was bound into Newport News from Liverpool. She was practically in ballast, having very little cargo on board. The El Monte was proceeding up the coast, fully laden with general cargo, on a voyage from New Orleans to New York.

The contentions of the respective parties as to the main facts are as follows:

On the part of the Rappahannock, that in the early morning of the day in question the weather was fine, but became foggy about 6:30 a. m. The chief officer was in charge of the navigation of the Rappahannock at the time. He at once put the telegraph to the engine room at "stand by," to give the engineer on watch notice to be ready for maneuvers. This order was received and noted by the second engineer, who was on duty below. The captain had noticed that it was coming in thick, and was dressing when the chief officer called him, at this time, to tell him the state of the weather, and he came out on the bridge in less than a minute afterwards. At 6:40 a. m. the weather became thicker, and the telegraph was put to "half speed," which order was immediately executed. Meanwhile, from the time the weather first began to get thick, the fog

¹ Collision rules, see notes to *The Niagara*, 28 C. C. A. 532; *The Mount Hope*, 29 C. C. A. 368.

whistle had been continually sounded at intervals of about a minute, and the speed of the steamer had been reduced to about 6 knots, when at 7:10 a. m. one single long blast, the ordinary fog signal, was heard by her watch. It came from broad off the port bow, and was judged to be about four or five points before the beam. This afterwards turned out to be a signal from the El Monte. The chief officer looked at the clock at that moment, and noticed that it was 7:10. Instantly the engine room telegraph was rung to slow, and a prolonged single blast was given on the whistle. Both acts were done by the chief officer, and just as he finished blowing the whistle the master, before any further signals were heard from the El Monte, rung the telegraph to stop. Very shortly thereafter, a two-whistle signal was heard from the El Monte. The Rappahannock continued to blow single blasts at about 45 seconds intervals up to the collision, blowing four in all from the time of first hearing the El Monte. Three sets of two-whistle signals were heard from the El Monte after the first fog whistle was heard from her and before the collision. These signals seemed to be coming more abeam all the time. As the El Monte swung into sight, she was bearing about a point before the beam, and her masts were slightly open to starboard, so that her starboard side could be made out. She was coming in at about a right angle, heading forward of the bridge, and turning her bow towards the Rappahannock's stern, as though under a port helm, and apparently trying to clear the latter. Her distance from the Rappahannock, when first sighted, was probably not over $1\frac{1}{2}$ ship's length. Upon seeing her, the order "full speed ahead" was immediately given, and the helm put hard aport to throw her bow around to starboard, as it seemed that the El Monte would strike forward of the beam. But it was immediately seen from the way the El Monte was swinging that she would strike abaft the beam, so that, before the Rappahannock felt the influence of her port helm, the helm was put hard to starboard to throw her quarter off, and give the El Monte a better chance of clearing. As the Rappahannock was practically stopped when the full speed ahead order was given, there was not sufficient time for her to gain headway to escape the blow from the El Monte, although perhaps a half a minute elapsed between the order and the collision. At the time of the collision, the Rappahannock's heading was W. S. W. She had changed a point and a half to starboard from her previous course, S. W. half W., after hearing the El Monte. This was chiefly due to the influence of the right-hand propeller, which tended to make the ship swing to starboard while the engines were stopped. The engines were stopped the second time immediately after the collision. The engine room record shows that the order "slow" was received at 7:10 a. m., the order "stop" at 7:11, the order "full speed ahead" at 7:12, and the final order "stop" at 7:13. Fractional portions of the minutes were not taken into account in marking down the time of the orders,—the minute to which the hand of the clock appeared to be nearest, being put down, so that, if an order came 20 seconds before the minute, it would be put down as of the minute, and if it came 20 seconds after the minute it would also be put down as of

the same minute. The engine room and deck clocks were in accord.

On the part of the *El Monte*, that at about 4:20 a. m., while off the Virginia Capes, the ship ran into a heavy fog. Her engines were put at slow, and the fog whistle was blown every two minutes. The ship was in charge of the captain and first officer in the pilot house. The quartermaster was at the wheel and a man on lookout. The *El Monte* proceeded under this speed, blowing her fog whistle, according to the regulations, every two minutes, until about 6:10, when the fog lifted in the immediate vicinity of the steamship. The engines were then put at full speed until the fog again thickened, at about 6:40, when a slow bell was given, and the speed of the ship reduced to half speed, which was somewhere between six and seven knots an hour. About 10 minutes after that, according to the ship's log, at 6:50 a. m., a whistle was heard on the starboard bow from the vessel, which afterwards turned out to be the *Rappahannock*. This whistle was a considerable distance away, and seemed to be a point or two forward of the starboard beam. The *El Monte*, which was on a course N. 10½ deg. E., at once blew a fog signal in reply. The next signal from the *Rappahannock* was two short, sharp blasts, which were answered by two short, sharp blasts from the *El Monte*, and the *El Monte's* helm was put to starboard. The *Rappahannock* then replied with one sharp blast, crossing the signal theretofore given. The *El Monte* at once stopped her engines, and blew two prolonged blasts, with a second interval between to indicate to the *Rappahannock*, that she had stopped. The order to stop her engines was given at 6:56. A minute or so after, the *Rappahannock* was seen from the *El Monte's* deck on the starboard bow, heading directly across the course of the *El Monte*. An order was given to reverse the engines at full speed at 6:57, and about two minutes after that the collision took place. The *Rappahannock* had ported her helm for the purpose of enabling her bow to clear the *El Monte*, and by such maneuver threw her stern on the *El Monte's* bow. The *El Monte's* stern came in contact with the *Rappahannock's* port quarter, near the stern.

The vessels charge each other, inter alia, with fault in not proceeding at a moderate speed in fog, and in not stopping at once upon hearing the first signal. In these particulars, the situation is governed by the sixteenth international rule, providing as follows,—the new part of the rule, which went into effect July 1, 1897, being in italics:

"Art. 16. Every vessel shall, in a fog, mist, falling snow, heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The clocks of the vessels did not agree, those of the *Rappahannock* being from 12 to 15 minutes faster than the *El Monte's*.

The testimony shows that the *Rappahannock's* normal full speed was 10 or 11 knots an hour, under about 67 revolutions per minute

of her engine. She had been proceeding at this speed up to 6:30 a. m., according to her time, when it became somewhat foggy. The steamer was not slowed at this time. Ten minutes later, at 6:40, the fog became thicker, and speed was reduced from 67 to 40 or 45 revolutions per minute, by which, the Rappahannock contended, the speed was reduced to about six knots. This speed was continued in a thick fog until 7:10 a. m., when the El Monte's first signal was heard broad off the port bow. The signal was then rung to slow, which speed was continued until the master came out of his room shortly after, and assumed direct command, when a signal was given at 7:11 to stop. The collision occurred between 7:12 and 7:13.

The El Monte's testimony shows that her normal full speed was from 12 to 12½ knots an hour, under about 65 revolutions per minute of her engine. Entries in her log show that she slowed down at 6:40, according to her time, because it set in thick, and stopped at 6:56. Testimony from her officers is to the effect that she first heard the Rappahannock's signals at 6:50. (The master at one place apparently says 6:10, but that is probably a typographical error for 6:50.) The slowing down was from 65 revolutions to about 50, under which she claimed a speed of about six or seven knots. The collision occurred at 6:59 a. m.

Thus, according to her own account, each vessel continued at a speed of more than half her usual full speed up to within two or three minutes of the collision, in a frequented part of the ocean, and in a fog of such density that they could not discern each other until they were within a distance of about 500 feet. This was a violation of the first paragraph of the sixteenth rule (The Niagara, 28 C. C. A. 528, 84 Fed. 902; The Martello, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637); but it is possible that a collision might then have been avoided had not the second paragraph been also clearly violated in the failure to stop the engines and navigate with caution until danger of collision was over. The Rappahannock seeks to avoid the effect of the rule by asserting that she did practically stop at the moment of hearing the El Monte's first signal, as the slowing and stopping were almost simultaneous, the records of the movements of the engine not showing fractional parts of a minute, and the orders instead of being a minute apart might have been only twenty seconds, as twenty seconds either way would, by the record, be included in the minute mark. I do not see, however, why there might not have been, upon the same theory, an interval of a minute and forty seconds between the orders, and the presumption here would be, in the absence of contrary proof, in view of the violation of a statutory duty, rather in favor of a lapse of the greater time. She has certainly not relieved herself of the statutory burden. The El Monte, in effect, concedes the proper application of the rule to her navigation, unless it appears to be inapplicable because the position of the Rappahannock was ascertained by means of the signals exchanged. That is, having received, as a second signal, a two-whistle signal from the Rappahannock from some distance away, she was justified in concluding that the Rappahannock was proceeding down the coast on a course that would carry the vessels safely past each

other starboard to starboard, and that, therefore, no necessity existed for stopping. An ingenious argument is advanced in support of this theory to the effect that, when a fog signal is clearly on the starboard or on the port bow, the position of the vessel whose signal is heard is ascertained so far as the position of a vessel in a fog can ever be ascertained, and is ascertained within the meaning of the words in the sixteenth article, and under such circumstances it was never intended that the vessel hearing the fog signal should stop her engines and remain stationary, thus stopping navigation in fogs. The difficulty with the contention is that the *El Monte* did not hear such a signal, because none such was given, but, assuming that she was justified in believing that there was a signal of the kind, she was not at liberty to conclude that the vessel was on a course to pass her in safety, or that the signal was given as a course signal to her. The object of this section of the article, providing an additional precaution against collision, was obviously to prevent vessels from approaching each other closely in a fog,—not, perhaps, requiring vessels to stop when so far away from each other that no danger actually existed, or could exist, until the situation changed, but in all doubtful cases requiring an immediate stoppage of the vessel for the purpose of a better hearing, to get the vessel's headway fully under command, and to cause all on board to be on the alert to provide for contingencies. An instructive discussion of the reasons for this amendment occurred when it was being considered in the International Maritime Conference of 1889, showing that the duty of stopping should be made imperative in order to avoid the danger of leaving too much to the navigator's judgment. *Protocol of Proceedings*, vol. 1, pp. 453-461. I consider this case directly within the spirit and letter of the rule. Here was a vessel, going ahead in a dense fog at the rate of at least six knots, receiving the signal of another, whose position and course were only conjectural, and yet kept on, with the result of bringing the vessels together, when an observance of the rule would undoubtedly have avoided danger. The violation cannot be overlooked. *The St. Louis*, 39 C. C. A. 201, 98 Fed. 750; *The Rondane*, 9 Mart. Law Cas. 106. As I conclude that both vessels were in fault under the sixteenth article, it is not necessary to discuss the other questions.

A decree will be entered dividing the damages.

HENDRYX et al. v. PERKINS.

(Circuit Court of Appeals, First Circuit. February 13, 1902.)

No. 378.

1. EQUITY—DECREE—CONFORMITY TO BILL.

A bill for the vacation of a prior decree of the same court, which charges fraud as the ground for the relief asked, will not sustain a decree granting such relief on the ground of mistake of fact, even though such mistake related to the state of the pleadings at the time of the hearing, and was shared by the court, and prevented a determination of the cause on the merits.

2. APPEAL—APPEALABLE DECREE—BILL TO IMPEACH DECREE FOR FRAUD.

A bill to impeach a prior decree for fraud is an original bill, although, when filed in the court which rendered the decree attacked, one in the nature of a bill of review; and a decree entered on such bill, vacating the prior decree and restoring the parties to their former situation in that cause, terminates the litigation on the second bill, and is therefore final and appealable, whether it leaves further proceedings to be taken in the original suit or not.

3. SAME—DISCRETION OF TRIAL COURT

A bill to vacate a decree for fraud, which, although filed in the same court, and in the nature of a bill of review, may be filed, as a matter of right, without leave of court, is not addressed to the absolute discretion of the court of primary jurisdiction, but to its judicial discretion, and a decree granting or denying the relief prayed for is reviewable on appeal.

4. DECREE—BILL TO VACATE FOR FRAUD—LACHES.

Neither a bill to vacate a decree for fraud nor a bill of review can be maintained after a lapse of nine years, during all of which time the complainant had knowledge of the decree, when no sufficient facts in excuse of the delay are alleged.

Aldrich, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

The following is the opinion of the court below:

COLT, Circuit Judge (orally). In this case I thought it would be better to send for counsel and state to them certain conclusions which I have reached, rather than to file a written opinion in the first instance. This suit was brought in the state court December 8, 1883. It is a suit upon a license contract dated October 4, 1878. Under the license the fees were paid to January 1, 1883. The complainant seeks an account from that date. The subject-matter of the license was bird-cage springs. The suit was removed to the circuit court in May, 1884. In November, 1884, the defendants demurred to the bill. One of the grounds of demurrer was that the plaintiff had an adequate remedy at law. On April 9, 1885, the court sustained the demurrer without prejudice to the complainant to amend and replead in this court. On April 14, 1885, the complainant divided his action, and filed a bill for discovery merely on the equity side of the court, and a declaration at law on the law side thereof. On April 28, 1885, the defendants filed a demurrer to the bill of discovery, which was overruled May 11, 1885. On the same day the defendants filed an answer to the bill of discovery. On May 22, 1885, a motion of the complainant to file additional interrogatories was granted, and the defendants ordered to answer on or before June 1st. On May 27th the time to answer interrogatories was extended to June 4th. On June 3d the amendments to the answer were filed. On June 12th the complainant filed a supplemental bill, changing the bill for discovery to one for discovery and relief. On June 23d leave to file the supplemental bill was granted. On the same day the court ordered the defendants to bring their account under the bill of discovery down to May 22, 1885, the date of filing the additional

Interrogatories; the additional account to be filed on or before June 29th. In obedience to the order of court, the defendants filed an amended answer June 29th, bringing their account down to May 22, 1885. In their answer and amended answer to the bill of discovery, the defendants had set up, among other things, that there was a revocation of the license on January 1, 1883, and consequently that they could not be called on to disclose any account beyond that date.

On June 30, 1885, the situation was this: The defendants to the bill for discovery had brought their account down to May 22, 1885; and at the same time in their answers had stated why they did not think they should be called upon for this discovery. Further, the complainant on June 23d had been allowed to file a supplemental bill, changing the bill for discovery into a bill for discovery and relief. On June 29th the complainant moved for a final decree, or to set the case down for hearing on the bill and answer. This was irregular, and should not have been entertained. There was no hearing to be had, and no decree to be entered on the bill for discovery, as the complainant was only entitled to use the answer of the defendants as evidence in his action at law. That is what a bill of discovery is brought for. There is no such thing as setting down a bill of discovery for hearing upon bill and answer. I am aware that the complainant takes the position that there was another answer, which was filed on June 29th, which was an answer to the bill for discovery and relief, or the supplemental bill. There is no proof that any such answer was ever filed until July 21st following. The amended answer which was filed June 29th was the answer to the bill of discovery, and brought the account down to May 22d of that year. In that amended answer the defendants stated the reasons why they thought they should not be called on for that accounting. There is no proof of any nature or description that there was any other answer filed at that time. On the contrary, the facts and circumstances conclusively negative any such contention. The supplemental bill was not allowed until June 22d, and under the rule the defendants had until the August rules to file their answer. That bill covered the whole case, and required the defendants to make full answer. Rule 57 is perfectly clear when you look at its terms. It contemplates that a supplemental bill shall be filed upon a rule day. That rule day would have been in July, and the defendants would have until the next succeeding rule day to answer. "Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown and due notice to the other party; and, if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court." The complainant maintains that the paper which was filed upon June 29th was an answer to the supplemental bill. I must conclude that he is mistaken. We are not entirely in the dark as to what that paper was. The complainant did not desire to have anything filed in answer to his bill for discovery except the bare account. He thought other matters were irregular, and therefore we find that on July 14th following he made a motion to strike out part of the answer. The inference from this might be that the answer was upon the files at that time, or at least that the complainant knew the contents of that answer. He moved to strike out the portions of that answer which did not relate to the account but were a defense to any accounting. We have, further, the letter-press copy of Mr. Roberts, counsel for the defendants, of this amended answer; and that shows conclusively that it is the amended answer to the order of the court which was made upon June 23d. Nor is it reasonable to suppose that the defendants would come in and answer the supplemental bill five or six days after it was filed. I am therefore satisfied that the copy of the amended answer which was allowed to be filed by the court at a later date in 1885 is a copy of the original answer which was filed on June 29, 1885, and which was lost from the files.

On July 21st, the defendants filed an answer to the supplemental bill for discovery and relief, and the court proceeded to a hearing on this bill and answer. This is most material. The complainant objected to any hearing upon this bill and answer, and the court had no right to set the case down for hearing, unless upon motion of the complainant or with his assent. That hearing took place under a mistake of all parties,—the counsel for the complainant, because he supposed that the case had been set down for hearing upon the bill and answer as they stood on June 30th, when it could not have been so set down under the facts as I find them; and under a mistake of the court and of the counsel for the defendants in setting the case down for hearing upon the bill and answer of July 21st. The result is that the complainant has not been allowed to make out his case. There has been no hearing upon the merits. There was a mistake of fact for which I think the parties, the counsel, and the court were all to a certain extent responsible. The court undertook to render a decision and enter a decree upon the bill and answer filed on July 21st, which was a wrong proceeding on its part. To be sure, the complainant contended for a position which was untenable, and which helped to mislead the court; but that affords no justification of the course which was pursued.

The serious objection to granting the complainant any relief in this case is laches. It appears, however, that the position of the parties is substantially the same as it was when the final decree was entered. Under these circumstances, there having been a clear error, which was not discovered until the present time, I believe that the court should endeavor, if possible, to correct it. We need not say who is liable for it,—the complainant, the defendants, or the court. That fundamental error was in setting this case down for hearing upon the bill and answer filed on July 21st, against the protest of the complainant, upon an answer to the merits of the supplemental bill. There are some things in the petition and in the bill for review which the court deems entirely irrelevant, and which ought, perhaps, to be stricken from the records of the court. There is not a particle of evidence to my mind in this record that anybody connected with this case has been in the least degree guilty of any fraudulent practice of any nature whatsoever. It is true that it does not appear that the then clerk of the circuit court entered upon his minutes the answer which was filed on June 29th; but this was no more than a casual omission. There is no proof of any intention to injure the complainant. It does appear that the answer could not be found later. It would rather seem that it was on the files of this court on July 14th, when the complainant filed his motion to strike out a portion of the amended answer. It may have been among the papers when the case was heard in Providence, and it may have been mislaid by me, and therefore not returned to the clerk's office with the papers.

Under all the circumstances, I have decided to take the responsibility of allowing this case to be reheard, leaving my action to be reviewed by the appellate court. I propose, therefore, to enter an order that the final decree entered on March 31, 1888, be vacated; that the copy of the amended answer filed on the 31st day of March be treated in all respects as the amended answer to the bill for discovery, ordered by the court on June 23, 1885, and which has been lost from the files of the court; that all other opinions, motions, and orders made or entered subsequent to July 21, 1885, be vacated; and that the cause stand upon the pleadings as they appear on the 21st day of July, 1885.

Lauriston L. Scaife (William L. Bennett and Charles M. Reed, on the brief), for appellants.

John M. Perkins, in pro. per.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. This case arises by an appeal from a decree on a bill, sometimes styled in the record a "bill of review," filed pursuant to leave granted by the circuit court. Although, as

Mr. Perkins, the appellee, justly says, the bill is one of the class which may be filed without leave first obtained, we also may, for convenience, at various points, name it a bill of review. Perkins commenced a proceeding of some nature against the appellants in the courts of Massachusetts. The appellants removed this litigation to the circuit court, where the docket entries commence: "May term, 1884, May 15th, entered by defendants. Removed from state court." The next entry to which we need call attention is that of April 14, 1885: "Bill for discovery filed. Defendants to answer within two weeks. Declaration at law filed, and transferred to law docket." On June 12, 1885, what was styled a "supplemental bill" was "presented to the court," and, on June 23d, "leave to file supplemental bill" was granted. On July 21, 1885, appears the following entry: "Answer to bill, amended so as to become a bill for relief, filed." From this we draw the conclusion that what was styled the "supplemental bill" was, in effect, an amendment to convert the bill of discovery into a bill for relief. The next docket entry is, "Heard on bill and answer." This occurred at Providence, in the absence of the clerk, so no date is given; but it was between July 21, 1885, and January 13, 1886, and, probably, on July 28th. This was followed by an opinion, on January 13, 1886, to the effect that the bill must be dismissed. The subsequent proceedings will be referred to hereafter so far as necessary. On June 29, 1885, it is alleged that an answer of some kind was filed by the present appellants, the then respondents, the true nature of which will be given hereafter.

No replication had been filed, and the record before us does not show that the complainant moved to have the case set down for hearing. Therefore in that particular the record is, on its face, defective; and unless, either expressly or by inference, this was waived by the complainant, he was entitled as a matter of right to a bill of review for error of law. But, ordinarily, the right to file a bill of review of this nature expires with the time limited by statute for an appeal. *Thomas v. Brockenbrough*, 10 Wheat. 146, 6 L. Ed. 287; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 Sup. Ct. 736, 34 L. Ed. 97; *Reed v. Stanley*, 38 C. C. A. 331, 97 Fed. 521; *Id.*, 179 U. S. 682, 21 Sup. Ct. 915, 45 L. Ed. 384; *Blythe Co. v. Hinckley* (C. C. A.) 111 Fed. 827, 837; *Story, Eq. Pl.* (10th Ed.) § 410. The decisions with reference to this rule happen to have been applied to cases where, by the statute, there was an existing right of appeal. In the present case there is nothing in the record to show whether the amount involved permitted an appeal to the supreme court; but, assuming that it did not, there is, as we will see further on, nothing justiciable in the present proceedings with reference to any such error of law.

The final decree in the original cause was entered on March 31, 1888, and, on October 13, 1897, after a lapse of more than nine years, the appellee presented his petition for leave to file the bill the proceedings on which are now before us. The bill, in some particulars, departs from the petition, and also it may be defective in some of its details. The appellants made a motion to strike it from the files by reason of these irregularities, and the motion was refused. We do

not, however, perceive any proper assignment of error on this point. The assignments to which our attention is called are of a too general character to raise technical questions of this nature. However, this will all disappear as we go on.

The gravamen of the present bill is that in the original cause the respondents filed an answer on June 29, 1885; that the complainant did, in fact, consent to a hearing on bill and answer, although the docket entries do not show it, but that it was his understanding that the hearing was to be on the bill and the answer of June 29th; that subsequently, and before the hearing, the respondents fraudulently withdrew that answer, and fraudulently interposed in its place the answer of July 21st; that the court, as well as the complainant, was unaware of the fraudulent substitution of one answer for the other; that the court understood that the complainant's consent to a hearing applied to the answer filed on July 21st; and that it proceeded to hear and dispose of the case on the bill and that answer. The bill alleges that the court, as well as the complainant, was deceived, to use its language, by "the fraud and trickery which were practiced upon him and upon the court." What has been said constitutes the pith of this bill, although it contains enlargements of allegations which put the matter in somewhat different forms. These are confused, as will appear from the following extracts:

"Your complainant did not know of this fraud and trickery which was practiced upon him and upon the court until January, 1886, when the court ordered complainant's bill to be dismissed. The false and unlawful answer filed on July 21, 1885, denied every right claimed by complainant, and the true and correct amended answer to the bill for discovery and relief was never seen by the court. On July 28, 1885, complainant protested against any consideration being given to the so-called amended answer, filed on July 21, 1885, it being a second answer to the same matter, and was unlawfully interpolated among the papers in this suit after the cause was submitted to the court on bill and answer, and was not filed with the consent of the court, as it could only have been lawfully filed and considered." "As the case now stands, defendants have, as a practical fact, been allowed to put in new testimony in their behalf, and destroy the old and correct testimony after the cause has once been submitted to the court; and this without the knowledge and consent of the court, and against the protest of complainant."

These allegations do not weaken our statement that the gravamen of this bill is fraud. Although the complainant alleges that he protested against a hearing on the answer of July 21st, yet nothing of that character is made the basis of a specific and independent proposition; and everything rests on the background of the claim that the interposition of that answer was fraudulent.

The decree on the bill of review was entered on December 13, 1900, in the following language:

"This cause came on to be heard at the October term, A. D. 1899, upon the pleadings and proofs, and was argued by counsel for the respective parties, and now, upon consideration thereof, to wit, December 13, 1900, it is ordered, adjudged, and decreed as follows:

"First. That the final decree entered on the 31st day of March, A. D. 1888, in the cause in equity No. 2,023, be, and the same is hereby, set aside and vacated.

"Second. That the copy of the amended answer filed on the 31st day of March, A. D. 1888, in cause No. 2,023, stand, and be treated in all respects as the amended answer to the bill for discovery, ordered by the court on

June 28, 1885, and directed to be filed on or before June 29, 1885, and which has been lost from the files of the court.

"Third. That all other papers, motions, and orders made or entered subsequent to the 21st day of July, A. D. 1885, the date of the filing of the answer to the supplemental bill in No. 2,023, be, and the same are hereby, stricken from the files and vacated, and that said cause stand upon the pleadings as they appear upon said 21st day of July, A. D. 1885."

This decree, as is permitted by the rules of the supreme court, contains no special finding, and therefore it, in form, adjudges the allegations of the bill in favor of the complainant, and, consequently, it, in form, adjudges that the respondents have been guilty of fraud as charged. We are advised by the opinion of the learned judge who sat in the circuit court that he found no fraud proven; that the complainant objected to any hearing on the bill and the answer filed on July 21st; that the court had no right to set the case down for a hearing unless on motion of the complainant, or with his assent; that the hearing took place under a mistake of all the parties; and that, therefore, under the circumstances, he decided to take the responsibility of allowing the case to be reheard, leaving his action to be reviewed by the appellate court. If this had appeared of record in the final decree or otherwise, it would have shown only that the court granted relief on the ground of a common mistake, and not on that of fraud.

The complainant (now the appellee) has filed in this court his brief furnished the circuit court on the hearing of the bill of review. This raised no point of the character found in the opinion referred to. The brief, after two preliminary sentences, opens thus: "The ground for this bill of review is based on alleged fraud practiced on the complainant, and also on errors of law apparent on the face of the case." No other propositions were submitted. On the other hand, at the hearing before us, the appellants assured us that in the circuit court no suggestion was made that relief was asked on the ground of mistake, and that that subject-matter was not in any way discussed or considered. Nothing in the record, or in any matter submitted to us on either side, indicates anything on the part of the respondents (now the appellants) waiving their right to have a determination based on the allegations of the bill. This right was, under the circumstances, of a substantial character, and could not have been held to have been waived except by some clear line of action leading to that result. *Putnam v. Day*, 22 Wall. 60, 66, 22 L. Ed. 764, says: "A decree has to be founded on the allegata, as well as probata, of the cause." This, as is well known, and for the best of reasons, is especially applicable to bills in equity charging fraud; and the rule is most strictly enforced under such circumstances. *Daniell, Ch. Prac.* (6th Am. Ed.) *382. A party who charges fraud assumes a grave responsibility by reason of making injurious allegations, which he cannot escape by substituting another issue in lieu thereof. The only exceptions have been in some instances where the bill had a double aspect, so that, therefore, it might be sustained according to its other allegations, even if those charging fraud were not proven. In such cases the proper practice is to expressly dismiss the bill so far as fraud is concerned. This is fully explained in *Archbold v. Commissioners*, 2 H. L. Cas. 440, 460. It is clear, for the reasons which we have stated, that there is nothing

in the record which would justify us in looking at any questions except those raised by the complainant in the circuit court; namely, that the bill of review is "based on alleged fraud practiced on the complainant, and also on errors of law apparent on the face of the case."

We may well add that this view of the pleadings and proofs relieves us from the necessity of carefully considering what powers courts can exercise for relief against mistakes, either by summary petitions or by formal bills of review.

The substantial questions presented to us are threefold, namely:

First. Whether the decree of December 13, 1900, now appealed from, is final, so as to be appealable;

Second. Whether that decree involves a matter of discretion of such a character that it is not appealable; and

Third. Whether, if we have jurisdiction, the merits of the case are with the appellants.

Coming to the first question, the bill now before us is one to file which, as already said, no leave of court was required. It is in fact a bill to impeach a prior decree for fraud, and therefore it is an original bill, although in the nature of a bill of review. Story, Eq. Pl. (10th Ed.) § 426; Adams, Eq. *419; Daniell, Ch. Prac. (6th Am. Ed.) *1584. Of course, a bill to impeach a decree, when brought against the party who committed the fraud, by a person who has no interest in maintaining any affirmative adjudication, may merely annul the decree if it succeeds, because one who has imposed on the court by fraud may have no further right in the same proceeding with reference to the same subject-matter. But, when the fraud has been practiced by a respondent, and the complainant has an interest to secure an affirmative decree, a different rule prevails; otherwise the complainant might be left in no better condition than if the decree stood. It is therefore said in Story, Eq. Pl. (10th Ed.) § 426, and Adams, Eq. *419, referring to this class of bills, that, where a decree has been obtained by fraud, the court will restore the parties to their former situation, whatever their rights may be. That is precisely the nature and effect of the decree now appealed from. The decree in the original cause was not merely set aside by it, but the parties were restored to their former situation in that cause. Therefore the frame of the decree appealed from, by necessity, terminated the litigation before us, so it was final in form, and in those respects it was correct. We have, then, an original bill, and a decree which terminates the litigation on that bill. It is difficult to see why, on principle, it is not appealable.

The supreme court has several times said that a bill of this nature will lie in a federal court to set aside a judgment or a decree fraudulently obtained in a state court, and vice versa. *Marshall v. Holmes*, 141 U. S. 589, 596, 12 Sup. Ct. 62, 35 L. Ed. 870; *Robb v. Vos*, 155 U. S. 13, 38, 15 Sup. Ct. 4, 39 L. Ed. 52; *Bank v. Stevens*, 169 U. S. 432, 463, 18 Sup. Ct. 403, 42 L. Ed. 807. A statement of the rule is found in *Arrowsmith v. Gleason*, 129 U. S. 86, 100, 9 Sup. Ct. 237, 32 L. Ed. 630, being there repeated from a prior opinion, as follows:

"The court of chancery is always open to hear complaints against it [that is, alleged fraud], whether committed in pais or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor

does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it."

The fact that proceedings of this nature are of such a character that they may be maintained in the federal court in which the original bill was decreed on, without reference to the citizenship of the parties or other jurisdictional questions, does not contravene our propositions. This is fully explained in *Carey v. Railroad Co.*, 161 U. S. 115, 128, 131, 16 Sup. Ct. 537, 40 L. Ed. 638. The citations there made show that, although this proceeding may be ancillary for jurisdictional purposes, it is original and independent in the chancery sense.

Even if the bill in the proceeding appealed from had not been strictly original, and were only a bill of review, the decree, nevertheless, is, as we have shown, of such a character as to make it final. It leaves nothing further to be done in this cause. It reinstates the original suit on the pleadings as they appeared at the time of the hearing on bill and answer, and all other proceedings must be in that case.

Our attention has not been called to any decision of the supreme court directly in point on this question under the precise circumstances of this case. So far as we have found any, they have been with reference to appeals from decrees which were necessarily final by their inherent nature, either because they refused relief, or because they directed a reversal of the decree on the original bill, with such further directions as left no opportunity for further proceedings in the original cause. *Bank v. Ritchie*, 8 Pet. 128, 142, 8 L. Ed. 890; *Whiting v. Bank*, 13 Pet. 6, 16, 10 L. Ed. 33; *Craig v. Smith*, 100 U. S. 226, 230, 234, 25 L. Ed. 577; *Clark v. Killian*, 103 U. S. 766, 768, 26 L. Ed. 607; *Ensminger v. Powers*, 108 U. S. 292, 305, 2 Sup. Ct. 643, 27 L. Ed. 732; *Osborne v. Town Co.*, 178 U. S. 22, 32, 20 Sup. Ct. 860, 44 L. Ed. 961. Others related to bills impeaching judgments at law. Nevertheless, in view of all the considerations which have come to our attention, we hold that the decree in the present case was final for the purpose of an appeal.

Coming to the second question, it is said that review lies in the discretion of the court of primary jurisdiction, and that, therefore, this decree is not appealable. There are two kinds of discretion,—one absolute, as in granting or refusing continuances, from which there is no appeal; and one of a judicial character, which properly affords the basis of revision by an appellate tribunal. With reference to bills of review which are filed, not as of right, but only on application to the court of primary jurisdiction, granted or not, according to its sound discretion, an appeal does not lie from the granting or refusal of the application; but when, afterwards, a bill of review has been filed, and proceedings in regular course have followed the bill, such proceedings become a matter of strict right. They are analogous to proceedings after a new trial has been granted. No authoritative statement can be found to the contrary. There are some occasional inapt expressions, but they arise from not clearly stating the circumstances, or the distinction between a petition for leave to

file a bill and the proceedings thereafter. Adams, Eq. *417, merely states that, "Where a bill of review is founded on the occurrence or discovery of new matter, the leave of the court must be first obtained." This refers only to what precedes the filing of the bill. What Story, Eq. Pl. (10th Ed.) says on this topic in section 417, is, of course, limited by section 412, to the effect that leave of the court must be obtained before a bill of review can be filed on the ground of newly discovered matter. The court, in *Rubber Co. v. Goodyear*, 9 Wall. 805, 806. 19 L. Ed. 828, was speaking of an application made to itself for leave to file a bill of review below. This concerned that class of cases in which it has been held that, after a mandate has gone down, the court below cannot entertain a bill of review without the consent of the appellate tribunal,—a rule which was fully expounded by us in *Re Gamewell Fire Alarm Tel. Co.*, 20 C. C. A. 111, 73 Fed. 908. Therefore, even if the present case were one of a bill of review, properly speaking, of the class to which the leave of the court must be obtained before one can be filed, the exercise of unappealable discretionary powers would end with the granting of the application therefor. But we have here, as we have shown, an independent and original bill, asking independent and original relief, which might have been filed as a matter of right, and as to which no mere discretion is exercised at any stage.

While neither *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797, nor *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013, relates to the setting aside of a decree in equity, yet they are so closely analogous to the case at bar on the question of finality, and also on the question whether the action of the circuit court was so far within its mere discretion as to be unappealable, that the principles which they recognize seem quite conclusive in favor of the results which we have reached. In *Bronson v. Schulten* the action of the circuit court vacating a judgment entered at a former term was reversed, and that court was directed to restore it. *Phillips v. Negley*, however, is so much fuller on both propositions involved that it does not seem necessary to dwell on *Bronson v. Schulten*, except to say that it pointedly called attention to the fact that any peculiar practice of state courts is not to be considered. *Phillips v. Negley* will be better understood by examining the facts as stated in the same case, 2 Mackey, 236, and the opinion of the court there reported. The special term of the supreme court of the District of Columbia, after a vacation following the entry of a judgment against the defendant Negley, set it aside, as appears in 117 U. S. 668, 6 Sup. Ct. 902, 29 L. Ed. 1013, "because of irregularity, surprise, fraud, and deceit." The record also shows that Negley had had no hearing on the merits. At the general term, according to the opinion in 2 Mackey, 236, an appeal was dismissed on the ground that the opening of the judgment was not a finality, and was a matter of mere discretion, thus involving the two principal questions we have already considered, although at law, instead of in equity. These facts are well stated by Mr. Justice Matthews in 117 U. S. 671, 6 Sup. Ct. 901, 29 L. Ed. 1013. The United States supreme court, however, held that the action of the special term was appealable, and that what it did in

setting aside the judgment was void, suggesting, however, at pages 678, 679, 117 U. S., and page 907, 6 Sup. Ct., 29 L. Ed. 1013, that Negley had, perhaps, a remedy by a bill of the class now before us. The result was that it reversed the proceedings of the supreme court of the District of Columbia, and remanded the cause, with directions to dismiss the motion of the defendant to reopen the judgment.

Coming now to the third question,—that is, the merits of the case,—we have already shown that the gravamen of the present bill is alleged fraud on the part of the present appellants. As we have also already shown, the only grounds of relief which were set up in the circuit court, and which can be within the four corners of the bill of review, are fraud and errors in law arising on the face of the record in the original cause. It is impossible to combine both matters in one bill, because a bill to set aside a decree for fraud is, as we have shown, an independent, original suit, and may be brought in some other court than that in which the decree was entered, while a bill of review for errors in law can lie only in the same court. Moreover, inasmuch as the bill now before us does not show that the complainant made any movement towards rectifying the decree for more than nine years, and sets up no excuse for the delay, it is plain that, independently of the rule that a bill of review for errors of law on the face of the record must be brought within the time within which an appeal will lie, the general doctrine of laches offers a perfect defense. It is plain, moreover, that, notwithstanding there were some allegations which might, under other circumstances, be appropriate for a bill of review for errors of law, they are here only incidental to the gravamen of the bill, which, we have already shown, is limited to alleged fraud.

It is not necessary for us to advert in detail to the well-settled rule that allegations of fraud in a bill in equity, positively denied in the answer, as is the record here, cannot be sustained on the uncorroborated testimony of a single witness,—which, at the most, is all we have here,—nor to bear on the fact that here that single witness is the complainant, and that his testimony lacks the details essential in proofs of that class. Moreover, we find, under date of June 23, 1885, the following: “Ordered that the defendants bring their account down to May 22, 1885, the date of the filing of additional interrogatories, the additional account to be filed on or before Monday, the 29th instant.” This clearly related to the bill in its aspect as a bill of discovery, although the same day the “supplemental” or amended bill was filed. As already said, the docket entries show that on July 21st, the respondents filed an answer to the amended bill. The answer which the complainant claims was fraudulently withdrawn he alleges was filed on June 29th. There is enough in the docket entries to make it plain that that answer, if it was ever filed, had no relation to the amended bill. It appears that while the original bill remained simply a bill of discovery, on May 11, 1885, the respondents filed an answer thereto. Afterwards, on June 3d, the complainant moved for attachment for contempt against some of the respondents for not answering fully. Then, on June 23d, we find the order already cited. This merely directed an additional account to be filed on or

before the 29th. At that time no answer was due to the bill amended to become a bill of relief, and the presumption is inevitable that whatever was filed on the 29th, if anything, was simply the account ordered by the court to be filed on or before that date. On March 24, 1887, the respondents in the original cause produced therein a copy of the paper of June 29th, and accompanied the same with a motion for leave to file it, and an affidavit of their counsel in reference thereto. On March 31, 1888, the court made an order allowing the motion. The court, in granting leave to file this copy, authenticated it as true; and no action has been taken on the part of the complainant to qualify that authentication. Therefore the first step for the complainant in sustaining his bill of review, in that it alleges that the answer of July 21st was fraudulently interposed for the alleged answer of June 29th, was to have brought before the court the copy of the latter, so that the court could perceive its nature, or else to have challenged its authenticity. As the record stands, we are forced to the conclusion that the alleged answer of June 29th was of the character which we have stated, and that it could not have been of any consequence on the hearing which occurred in the original cause, or with reference to the final decree entered thereon. There was no motive whatever to induce its suppression as alleged in the present bill.

While thus the very foundation on which a superstructure of fraud could be erected is taken away, nevertheless, without referring to the record further than we have already done so, we ought to repeat that there is an entire failure to prove by suitable evidence any charge of fraud, connivance, or misconduct of any kind on the part of the appellants, or of any one else, and that no proper basis for any suspicion of that character is left.

It is not uncommon for the supreme court, where the record indicates merits, but the court below has departed from the pleadings or proofs, to reverse the decree, and remand it, with leave to amend the pleadings, or supplement the proofs, as the circumstances may be. There is no necessary difficulty, arising from the mere matter of form, to prevent a bill from being regarded as a summary petition, provided the substantial allegations are present. The parties having been fully heard on the merits, we treated a cross bill as an intervening petition in *Gregory v. Pike*, 15 C. C. A. 33, 67 Fed. 837, 846. But, in any view, whether relating to the bill now before us as framed, or whether to it as made by the circuit court, no case can be found emanating from the federal courts which can overcome the defense of laches. Whatever may have been the condition of the complainant's knowledge before the copy of the answer of June 29th was ordered to be filed on March 31, 1888, he then knew every detail which he knows at the present time. The bill alleges no excuse whatever for his delay, except the pretense of an attempt to reopen the case by a paper filed on March 25, 1887, to which we will refer further hereafter. Under these circumstances laches is an absolute bar. The principle is so well settled that it seems hardly necessary to refer to authorities, but we will cite *Hardt v. Heidweyer*, 152 U. S. 547, 14 Sup. Ct. 671, 38 L. Ed. 548, both as to what lapse of time, when not excused, operates in equity absolutely as laches, and what

allegations the bill or petition must contain to lay the basis of excuse. The decision also shows that the defense of laches is so absolute that it may be taken on demurrer; and, indeed, it is well known that, even without a demurrer, or without any matters appearing in the answer, the court sometimes raises the defense of its own motion. The various expressions found in the decisions of the supreme court with reference to the sound discretion of the court, or special circumstances, refer to the sound discretion of the court in which the case is pending, whether the court of the first instance or the appellate tribunal, and to peculiar circumstances which may either abbreviate or extend the delay in consequence of which the defense of laches becomes operative. A collection of various instances will be found in *Gallihier v. Cadwell*, 145 U. S. 368, 372, 373, 12 Sup. Ct. 873, 36 L. Ed. 738, where, according to the circumstances, delays for so short periods as twenty months, two years, four years, and, the longest there named, five years, operated as a bar. It will be impossible for us to sustain a decree on the bill before us on any theory whatever without violating the law with reference to laches as laid down by the supreme court on many occasions and as supported by well-established equitable rules.

The appellee has called the attention of the court to the fact that on March 25, 1887,—which was the day after the motion for leave to file the copy of the alleged answer of June 29th was made,—he, as complainant in the original cause, filed a petition for leave to file a supplemental bill, which was never considered by the court, and which, as he alleges, was never entered on the docket. He brings to our attention a copy of that petition, which states that its object was to obtain the discovery ordered on June 22, 1885, and also to obtain the answer which he alleges was filed on June 29th. If this effort had been diligently followed up, and had been brought to a close within a reasonable period before the bill now before us was filed, even though it had resulted adversely to the complainant, it might, in accordance with many precedents, have bridged the long intervening period, and avoided any defense of laches; but now answers are numerous. It does not appear that the petition was ever brought to the attention of the court. The substance of all which could possibly have been obtained by it was obtained by the order allowing the filing of the copy of the answer of June 29th; and, if there had been any loss of any right so far as the petitioner was concerned, or any irregularity through the alleged omission to docket the petition or to act on it, the lapse of time gives to all this the same conclusive answer which it gives to all the other propositions which we have considered.

Some other minor matters have been called to our attention, but they are not of sufficient importance, in any view of them, to weigh against the great preponderance of the case as we have explained it, and any reference to them would merely prolong this discussion without avail.

The appellants did not obtain a supersedeas of proceedings in the circuit court subsequent to the decree now appealed from and pursuant thereto. Also it is apparent from what we have already stated

that neither party can be properly charged with all the conditions which required this appeal. Therefore it is plain that neither party should bear the entire costs, and it seems impracticable to apportion them correctly on any satisfactory theory, or even to determine satisfactorily that they should be apportioned.

The decree of the circuit court is reversed, and the case is remanded to that court, with directions to dismiss the bill, with the costs of the circuit court for the respondents therein, and to take such further proceedings as may be necessary to restore the final decree entered in the original cause on the 31st day of March, 1888, without any costs for either party in said original cause except as provided by said decree of said 31st day of March, and neither party will recover any costs of appeal.

ALDRICH, District Judge (dissenting). I am under a strong conviction that the decree of the circuit court vacating its own earlier decree upon the ground of mistake should be affirmed, and the gravity of the question and the importance of the principle involved require that the reasons for my dissent should be stated at considerable length. The question is whether a party shall lose his right of trial and his day in court upon the merits through a mistake of the court in considering and dismissing his bill upon a paper not submitted, and one upon which the party has never been heard either as to its form or substance. I can conceive of no more important question than this. It at once goes to the fundamental right of trial. No truth is more essential to the usefulness and the security of the judicial system than that all parties shall have a full, regular, and fair trial. It is hardly less essential that judicial proceedings shall be so ordered that all parties shall feel that they have had their day in court, and that they have had a fair trial.

The court below has found that the decree dismissing the bill resulted from a mistake of fact,—that of considering an answer filed after submission upon bill and answer,—and that the mistake was one for which the court was, to a certain extent, responsible. This finding, with the same parties before him, relates to an earlier decree of the same judge in the same court, with the position of the parties substantially the same as when the earlier decree was entered. It is also found that the mistake was not discovered until the hearing in which the finding was made, and that the mistake is one which the court should endeavor, if possible, to correct.

At the outset I venture to say that no case can be found in this country or in England where the discretion of a chancellor, exercised to relieve the parties and his own conscience from the consequences of his own mistake in dismissing a bill upon misapprehension as to the state of the pleading, has been overruled by an appellate tribunal, and the chancellor compelled to execute a decree which, upon a subsequent hearing, with the parties all before him, and with the situation unchanged, and no third-party interests intervening, he has found as a matter of fact was based upon a mistake of fact, preliminary to the merits, which deprived the party of his day in court. If it is done in this case, it will be the first instance in the history of equity jurisprudence.

It is not seriously contended in argument or in the majority opinion that the mistake was not made substantially as found by the circuit court; and the majority opinion proceeds upon the idea,—First, that relief cannot be granted, because the petitioner proceeded in his application for relief upon allegations of fraud, rather than mistake; and, second, that his right to relief was lost through laches or lapse of time. I cannot but feel, therefore, that the reasoning resorted to to uphold the mistaken and wrong decree is extremely technical as applied to a situation like the one in question; and this is so because a course of reasoning, which has been the outgrowth of public policy and the necessity of upholding decrees and orders based upon hearings upon the merits, is invoked by the majority opinion to fortify and hold fast to a decree not based upon the merits, but upon a mistake, which side-tracked the merits, and deprived the plaintiff of a hearing.

I maintain that the order of the circuit court setting aside the mistaken and unwitting decree of dismissal was required—First, upon general grounds of equity; and, second, because, as a result of the mistake, the plaintiff was denied the due process of law guaranteed to suitors by amendment 5 of the federal constitution.

While it is somewhat unusual to vacate decrees after enrollment, it is not by any means unheard of, and the power to do so upon proper proceedings in respect to unauthorized decrees and those based upon mistakes not relating to the merits, but preliminary thereto, when justice requires it, is unquestioned. *Phillips v. Negley*, 117 U. S. 665, 674, 6 Sup. Ct. 901, 29 L. Ed. 1013; *Freem. Judgm.* § 100, and cases in note 1; *Black, Judgm.* § 301; *Seton, Decrees Ch.* 787; 2 *Daniell, Ch. Pl. & Prac.* (6th Ed.) §§ 1026, 1027, and cases. See, also, cases in 17 *Am. & Eng. Enc. Law* (2d Ed.) p. 837, note 5, subd. "o."

It is undoubtedly a general rule that no deliberate decision should be reversed by the same court where reversal would do injustice, or unduly disturb rights of property; and it is equally axiomatic that, if a decision is clearly incorrect, and no injurious results will be likely to follow from a reversal, and especially if the decision is injurious and unjust in its operation, it is the imperative duty of the court to reverse it. In a case like this an arbitrary rule which would deny to courts the power, or absolve them from the duty, of relieving from their own mistakes in deciding cases upon wrong papers or the wrong record, would be discreditable to the administration of justice. Such a hard and fast rule would be contrary to the spirit of the law and contrary to equity. It would at once violate the plain teachings of simple justice. It would compel a chancellor to hold fast to a right which he had established upon a clear mistake. Of course, a court should and would stand to its decree based upon an adjudication of the facts and of the law; and probably no one would contend that, after the end of the term or the lapse of the statutory time for appeal, it would enter upon a review of the merits, and upon ground of error disturb its rulings of law or findings of fact; but neither conceding nor maintaining this rule of *stare decisis* touches the question of a decree which is wholly based upon a mistake as to

jurisdiction, or upon a mistake preliminary to the merits, like the one presented here. The first would be the review of the judgment of the chancellor; the second would be the correction of a pure mistake. Every regularly constituted court has and must have inherent power to do all things that are reasonable and necessary for the administration of justice within the scope of its jurisdiction. Holding fast to a decree based upon a mistake of the court preliminary to the merits is not administering justice. On the contrary, it is administering a mistake,—administering a wrong; still worse, administering the mistake and the unwitting wrong of the court.

The general rule that relief from decrees and judgments will not be granted upon motion after the term has no application here. This is a proceeding whereby all the parties are again brought before the court, and under circumstances in which jurisdiction both over the parties and the subject-matter again obtains. The court therefore has full and complete power to do what ought to be done.

There is no general rule that should govern this case. The petitioner has never had a trial, and he is entitled to one. He never submitted the case upon the answer. He has never been heard upon any question as to its form, substance, or effect. That he has not had a hearing is due in part, as found, to a mistake of the court, and the nature of that mistake was never discovered until the hearing in which the finding was made. But, without regard to when it was discovered, I should maintain that the court, in the presence of the parties, had the inherent power of correcting the mistake. The right of a court to correct a mistake of this character must be an inherent right. I cannot divest myself of the opinion that there is a wide difference between the idea of disestablishing a right settled by a decree upon hearing and the disestablishment of a decretal right created by the court through dismissing a bill before hearing upon mistake. In the first instance the right is established upon a regular proceeding, and in accordance with the constitution and the laws; while in the other the right is established upon a mistake,—an irregularity,—and a consequent denial of the right of a hearing.

The relief sought herein is not a review of the case upon the merits as to either law or fact, for the reason that the merits of the plaintiff's case, as presented by his original bill, have never had a first-instance consideration or decision as to either law or fact. The vacated decree was not based upon a decision upon evidence or upon the merits of the bill, but upon the allegations of a distinct and different answer, filed after submission upon bill and answer, and by reason of the rule of law that in a case submitted upon bill and answer the allegations of the answer are, for purposes of decision, to be accepted as the facts of the case, and the relief sought is, in effect, only a review of the order of dismissal; and the ground of relief is that the court, by mistake, dismissed the bill upon the merits of an answer not submitted, and not before it. So this proceeding, although somewhat in the form of a bill of review, is, in substance, not one in the sense in which such a bill is understood to be maintained,—as, for instance, to correct mistakes of law apparent on the record, or for a review of the merits upon the ground of mistake

or newly discovered evidence,—but is, in effect and substance, and should be treated upon the situation presented by the findings of the circuit court simply as, a petition or summary proceeding for relief from an inadvertence or mistake in dismissing a bill upon the facts stated in an answer supposed to be before the court, when in fact the allegations of the answer were neither admitted nor before the court for consideration under the submission.

The questions presented by this record should be approached with the idea that it is contrary to principles of natural justice that one party should be benefited or that another party should suffer by a decree based upon inadvertence, accident, or mistake; for, as said by Chief Justice Marshall in an early case, "It is against conscience that one should enjoy such a benefit or that another should suffer such a wrong." If we sustain the circuit court, we establish no property right, but we give to the complainant what he has never had,—a trial and a consideration of his case upon the merits, or a hearing upon the bill and answer as they stood when the case was submitted on bill and answer, where both parties can be heard. But, on the contrary, as a record showing a dismissal of a bill, upon bill and answer, operates as a bar to subsequent suits in respect to the same subject-matter, if we reverse the circuit court we establish a property right, and do an injustice by compelling that court, against its conscience, to hold to a decision dismissing a bill which that court finds, as a matter of fact, was ordered under a mistake of fact, not as to the merits of the case as to either law or fact, but as to the state of the pleadings before it.

In my view, we may disregard the question whether the complainant is entitled to relief upon a strict bill of review as such, and we may and ought to treat his bill as within that class of rare occurrence which is referred to by Lube, by Mitford, by Story, and by other authors on equity procedure, as embracing petitions, supplemental bills, and bills in the nature of a bill of review, and which are not subject to all the limitations as to scope and time incident to a bill of review proper, and which may be invoked in the same cause between the same parties for the purpose of suspending or avoiding a former decree, and because, a case having been concluded by such a decree, it is necessary to bring the parties again before the court upon an original petition or bill; and I am under a strong conviction that the relief sought ought to be afforded, not upon the ground of fraud, for that is not shown, but upon the ground of accident or mistake, which is found as a fact, and stated by the learned circuit judge in the court below as a reason for his action in vacating the original decree; and, if necessary for such relief, that leave should be granted to reframe the petition to the end that relief may be afforded upon the ground of mistake in accordance with the view of the circuit court as shown by the findings and the opinion therein. But I shall refer to this feature of the case at the conclusion of my dissent.

The difficulties of the situation presented here should not be magnified by confounding this case with authorities based upon situations where there was a hearing upon the merits and a final decree,

and where the parties had departed from the court with their rights established and unchallenged, and where, through lapse of time, public interests and the interests of third parties had intervened. This decree, at the most, was a decree precipitated by a technical rule as to the effect of a submission upon bill and answer, and it now turns out that the application of the rule was under a mistake and misapprehension of fact in respect to the submission; neither the court nor the parties understanding correctly under what answer the cause was submitted. In other words, the court and the parties were laboring under a mistake of fact as to the state of the pleadings.

The cause remained upon the docket from October, 1885, when the order that the bill be dismissed was entered, until October, 1887, when the decree thereon now under consideration was entered. The docket entries show that the complainant resorted to a petition for rehearing within 12 days from the order dismissing the bill, and that he constantly sought relief by motions and petitions from that time forward to 1887, from what he alleged was an unjust and mistaken result.

While, as a general rule, the law as administered by courts is careful to protect rights which vest in reliance upon judicial decrees, if there is no change in the situation, and no actual vesting of rights of third parties, the law naturally inclines to the idea of relieving from mistake and accident and to the idea of correcting that which is wrong. In this case the technical final decree—technical in the sense of not being based upon a hearing on the merits—beyond question had its foundation in mistake and misapprehension; and I cannot bring myself to a concurrence in the view that, in a case where no third party rights are in question, where no question of public justice is involved, where the same parties, with no change in the situation, are before the same court and the same judge, that the court is without the power to correct a decree to which it was led through an error or mistake of fact as to the state of the pleadings, and a mistake which it distinctly finds produced an unauthorized, mistaken, and inadvertent result. Such power must exist as an inherent, necessary, and wholesome function of a tribunal established to administer law, not upon the basis of mistakes and accidents, but upon principles of equity and justice.

The learned judge, in vacating the decree, finds that the hearing took place under a mistake of all parties,—the counsel for the complainant, because he supposed the case had been set down for hearing upon the bill and answer as they stood on June 29th, and under a mistake of the court and of the counsel for the defendant in setting the case down for hearing upon the bill and answer of July 21st,—with the result, as the learned judge proceeds to say, "that the complainant has not been allowed to make out his case," and that "there has been no hearing upon the merits." The circuit court frankly says:

"There was a mistake of fact, for which I think the parties, the counsel, and the court were all to a certain extent responsible. The court undertook to render a decision and enter a decree on the bill and answer filed on July 21st, which was a wrong proceeding on its part. * * * The complainant

objected to any hearing upon this bill and answer, and the court had no right to set the case down for hearing unless upon motion of the complainant, or with his assent."

Notwithstanding the term was passed, and notwithstanding the fact that time had elapsed, I maintain that it is plain that, the circuit court having the same parties before it, with the position of the parties substantially the same as when the final decree was entered, as is found by the learned judge below, and there being, as said by the circuit court, clear error (meaning the mistake) which was not discovered until that time (the time of vacating the decree), the court had power, in the exercise of its discretion, to relieve from the unjust and wrong decree resulting from a mistake which the court had the courage to declare it was in part responsible for, and which, as he says, "the court should endeavor, if possible, to correct."

I do not question the general proposition that, where the situation of the parties has materially changed, or where third party interests have intervened, considerations of public policy may compel a wrong and mistaken decree to stand; but such views are wholly excluded from the present situation, because here the parties and their conditions are the same. And thus the question presented is whether, under such circumstances, a decree based upon accident and mistake, which the judge making it says resulted from accident and mistake, and which the record demonstrates was the result of mistake, shall stand as an impregnable barrier, or whether it shall yield to plain and palpable considerations of justice.

It is not necessary to maintain that the order vacating the decree is altogether one resting in discretion in the sense that it was not appealable; but I do maintain that in respect to the merits, and in respect to the time in which relief was sought, the order so far rests in discretion that it should not be disturbed, if, as said in the Michigan case,—*Stockley v. Stockley*, 93 Mich. 307, 53 N. W. 523 (see, also, 3 Enc. Pl. & Prac. p. 585, par. 2, note 2, and *Id.*, p. 588, and cases cited in note),—it effectuates substantial justice, and protects the legal and equitable rights of the parties. The supreme court has repeatedly and expressly refrained from deciding such questions in respect to orders as to judgments appealable, and from disturbing action of the circuit courts in the exercise of discretion. See cases collected 3 Enc. Pl. & Prac. 589, in note on appeals.

While the weight of authorities seems to hold that a bill of review, strictly speaking, which does not constitute a part of the original cause, should be brought within the time in which the case could be appealed, or in which a writ of error would lie, there is no absolute time rule in respect to bills which are incident to and a part of the original cause and of the class of which I have spoken, and it is for the reason that they are incident to and become a part of the original cause. Such proceedings are, in nature and substance, like a petition in the same cause between the same parties, to right that which is wrong.

I think the facts stated in Judge Colt's opinion should be treated as conclusive, because he says, "under the facts as I find them," etc. But, entirely independent of this, the record shows clearly enough

what the mistake was. There was an answer filed on June 29th, and on that answer the cause was set down for hearing on bill and answer. Later, on July 21st, another answer was filed, but, as the court now finds, the case was not set down for hearing thereon; yet the court, under misapprehension, dismissed the bill upon the answer upon which the case had not been submitted. So it follows, in fact, that the bill was dismissed upon a record which was not before the court through mistake of fact in considering a record not before it, rather than the record which the previous submission called for. There is some confusion upon the record as to what the lost answer of June 29th contained, but that is really of no consequence, except as showing how the mistake happened. It was not what the answer of June 29th did or did not contain that wrought the injury to the petitioner. It is quite sufficient to say that his bill was overthrown and his case dismissed by reason of the allegations of fact contained in the answer of July 21st. The case had not been submitted on such answer, and the harm resulted from its being considered against his protest, and without his knowledge.

I do not propose to enter upon any elaborate discussion of the numerous authorities, which are somewhat confused as to the scope of the strict writ of review. I do not enter upon such discussion for the reason, as it seems to me, that under a bill in the nature of a petition, which is sometimes designated as a supplemental bill, sometimes as a bill in the nature of a bill of review, and sometimes as a petition, but which is in fact an incident of the original cause, though issuing as an independent or original proceeding for the purpose of getting the parties before the court, a court not only has unquestionable power, but is under the imperative duty, not by arbitrary methods, not *ex parte*, and not in violation of vested rights or principles of justice, but when face to face with the parties interested in the controversy, with the conditions unchanged, to correct its orders and decrees which are founded either in accident, mistake, or fraud.

The right of the party holding this decree was not an inherent or natural right. The right was founded upon the action of the court, and, with the parties before it, the court subsequently discovered that its action was under misapprehension and mistake; that its action was taken and its decree made upon a record not submitted. Vacating this decree, therefore, did not involve the destruction of an inherent and absolute right. The vacating order only means that one shall not hold by virtue of a decree of a court that which has been accorded to him through accident and mistake; and, as already said, the effect is only to send the parties to a hearing upon the merits, where justice can be done, and, if the defendants have a case, their rights will be accorded to them.

It would be a startling proposition that a judge, who, in handing down memorandums in two cases, misplaces them by inadvertence or mishap, thereby, contrary to his purpose, dismissing a cause which he intended to hold, and holding one which he intended to dismiss, has no power, after the end of the term or at any time, upon proper proceedings, with all the parties before him, and no third party interests intervening, to undo the wrong resulting from such a mistake.

and thereby to prevent a miscarriage of justice. I think the case of *U. S. v. Williams* (in the Eighth circuit) 14 C. C. A. 440, 67 Fed. 384, entirely correct in principle, and entirely consistent with the English and American authorities, so far as it deals with the inherent and necessary power of the court to correct its own mistakes. Whether, in view of the supreme court authorities to the effect that the enrollment of the decree is presumed to have been made at the close of the term, it should be done on summary motion, rather than by resorting to an original bill in the nature of a bill of review or a summary petition, it is unnecessary to say, because the case before us is not upon motion, but upon petition for relief; and, although proceeding upon the idea of fraud, we may treat it as a case for relief, as the circuit court wisely did, upon the ground of mishap, mistake, or irregularity. To me it seems perfectly plain that this complainant should have relief from the decree dismissing his bill, which, though final in name, is technical in substance, in the sense that there never was a hearing upon the merits.

Setting a case down for hearing upon bill and answer is an admission of the facts set out therein, and, as has been said, by inadvertence or mishap, under this entry, the case was made to turn upon an answer filed subsequent to the submission. The court therefore turned the case against the complainant upon an admission which he never made. The circuit judge so finds, and the record sustains the finding. At all events, there is nothing in the record to justify this court in interfering with the discretion involved in the finding of such fact by the judge who made the finding and vacated the decree.

This case simply presents a mistake in dismissing a bill preliminary to the merits. That this party should either have a decision of his case upon the record as it stood when the cause was submitted upon bill and answer, or an opportunity to try his case upon the merits, is the plain demand of simple justice. He has never had either, and, if he fails to get one or the other, he is denied a plain and sacred fundamental right. That the mistake of a judge in dismissing a bill upon a wrong record becomes so impregnable and unalterable as to work such a dire result, I cannot agree. To me it is inconceivable that a judge with all the parties before him is unalterably bound by an order dismissing a case which is made under misapprehension and upon a wrong record,—by an order made through mistake of considering facts as admitted which were not even submitted. That the complainant did not get a hearing upon the record actually submitted was the result of accident or mistake, as the circuit court has found, and the defendant therefore manifestly got what he was not entitled to,—an order of dismissal upon an answer filed subsequent to the entry of hearing on bill and answer.

Courts should never strain a technical rule for the purpose of sustaining a technical advantage at the expense of substance and to the exclusion of the merits of a case. As a general rule, a final decree is conclusive, and establishes the right; but within reasonable rules, and with the parties before the court, the right is subject to being disestablished upon grounds of mistake, accident, or fraud. The right is not fixed and unalterable in the sense that it shall stand though

based upon accident or fraud. The right to hold the decree was at once challenged, and the complainant contended for relief time and again, and finally yielded to the second (or, rather, the third) decision of the circuit court against him; and, failing to get what it has subsequently been found he was entitled to, he yielded for a time; and the mistake being the mistake of the court, and the injustice resulting from such a mishap, and the decree having been challenged over and over again without relief, his inaction between the decision on rehearing and the final application in this proceeding should be treated as involuntary, like yielding to process regular upon its face, or to an unconstitutional law.

The Lord Bacon act has never been accepted in this country or in England as taking from the courts the inherent power of correcting mistakes in accordance with the plain demands of justice. As has been said, the bill was dismissed, as the circuit court finds, upon facts and upon a record not submitted. The character of the mistake is found as a matter of fact by the circuit court, and that court says the decree is based upon a wrong decision, and one from which relief should be given. I agree with this view entirely, and think it is quite plain that it is so.

There is a wide difference and a marked distinction between a case like this, where there never has been a hearing on the merits, and cases where the decree is based upon a full hearing. As pointed out by Mr. Black, in his work on Judgments and the Doctrine of Res Judicata, at section 301 (and see note 42):

"The rule that a decree once enrolled cannot be opened except by a bill of review or by an original bill for fraud is subject to well-founded exceptions arising in cases not heard upon the merits, and in which it is alleged that the decree was entered by mistake or surprise, or under such circumstances as shall satisfy the court, in the exercise of a sound discretion, that the decree ought to be set aside."

Mr. Freeman, in his treatise on Judgments (section 100, and see cases in note 1), recognizes the same doctrine as one necessary to the administration of justice, and says:

"Accordingly it is laid down by the most eminent elementary writers, and fully sustained by the adjudged cases, that when a case has not been heard on the merits the court will, good cause being shown, exercise a discretionary power of vacating an enrollment and giving the party an opportunity of having his case discussed. The fact that the merits of the case were never before the court seems to be the controlling one in all applications for the exercise of this discretionary power. Therefore, where the decree is perfectly regular, so far as regards the appearance of the parties, and is in conformity with the general practice, it may be vacated, at the discretion of the court, upon a showing of mistake, accident, or surprise, or of negligence of the solicitor, by which a decision on the merits was prevented."

The same idea is forcibly expressed by Mr. Whitehouse in his work on Equity Practice, at section 259, and see note.

I do not propose to go over the numerous English and American authorities which agree as to the power of the court to relieve from its decrees based upon accident or fraud. The point of departure between the state authorities and the decisions of the supreme court only relates to the time and mode of the application for relief. In

many of the states the time and manner are regulated by statute, but in the federal courts, in the absence of statutory provisions, each case must be governed by its own circumstances; and the supreme court, while adopting the rule that motions to vacate must be made within the term, and the general rule that a bill of review strictly as such must be made within the time in which a writ of error or an appeal could be taken, has repeatedly recognized the broader view, which permits of relief at a later period upon petitions, supplemental bills, and bills in the nature of bills of review, and that each case must be governed by its own circumstances.

The recent case of *Blythe Co. v. Hinckley* (C. C. A.) 111 Fed. 827, enunciates no new rule. It is merely a reiteration of the old and familiar rule that bills of review ordinarily must be filed within the time limited by statute for taking an appeal, where the review is not sought on matter discovered since the decree. The case at bar is even stronger than a case founded on evidence discovered since the decree, for here the discovery is of a mistake which led the court unwittingly to disregard all evidence and forego all decision except such as related to an answer not before it.

The strong expressions of the supreme court in support of the doctrine of *stare decisis* and of the idea of the inviolability of final decrees have almost always been qualified, as in *Phillips v. Negley*, 117 U. S. 665, 674, 6 Sup. Ct. 901, 29 L. Ed. 1013, by an exception or saving clause in respect to the power of the court to correct clerical mistakes, to reinstate a cause dismissed by mistake, and that class of cases where relief is granted upon principles of equity, and such as are covered by writs of error *coram vobis* at law.

In *U. S. v. McKnight*, 1 Cranch, C. C. 84, Fed. Cas. No. 15,695, the court at a subsequent term set aside a judgment entered by mistake. In *The Palmyra*, 12 Wheat. 1, 10, 6 L. Ed. 531, Mr. Justice Story observed that:

"Every court must be presumed to exercise those powers belonging to it which are necessary for the promotion of public justice; and we do not doubt that this court possesses the power to reinstate any cause dismissed by mistake. The reinstatement of the cause was founded, in the opinion of this court, upon the plain principles of justice, and is according to the known practice of other judicial tribunals in like cases."

In *Sibbald v. U. S.*, 12 Pet. 488, 492, 9 L. Ed. 1167, the court, in stating the general rule that courts cannot reverse final decrees for errors of fact or law after the term in which they have been rendered, expressly qualify it by saying, "Unless for clerical mistakes, or to reinstate a cause dismissed by mistake." So in *City of Elizabeth v. Nicholson Pavement Co.*, 24 L. Ed. 1059, the supreme court, through Mr. Justice Bradley, said, "We have no doubt of our power at any time to amend a decree which has, by inadvertence or mistake, been entered in a different form from that in which we intended it." In *Insurance Co. v. Boon*, 95 U. S. 117, 125, 24 L. Ed. 395, the supreme court observed that, "whatever may have been the rule announced in some of the old cases, the modern doctrine is that some orders and amendments may be made at a subsequent term, and directed to be entered and become of record as of a former term," and quotes

approvingly from a Pennsylvania case that "the old notion that the record remains in the breast of the court only till the end of the term has yielded to necessity, convenience, and common sense."

It must be distinctly borne in mind that we are not dealing here with the power of the court to review its mistakes as to a decision of facts relating to the merits, or in respect to mistakes of law relating to the merits, but only with the inadvertence or mistake of a judge in dismissing a case upon the probative force of an answer not submitted to it; in other words, inadvertently dismissing a bill upon the wrong answer. It is inconceivable that the court may relieve from the mistake of a clerk in filing a wrong paper or wrong order, and still be without power to relieve from its own mistake in taking up, considering and dismissing a case upon a wrong paper, or a record not submitted.

If the power of the court, upon process, to recall the parties, and correct its mistakes, exists,—as I maintain it does,—the question of the time in which it may be done becomes a matter of discretion, and should be decided like questions of kindred character; and a finding of the court of first instance should not be disturbed unless it clearly appears that injustice is being done.

Control of the court of first instance over its judgments and decrees in respect to questions of fraud, accident, and mistake, and relief therefrom on such grounds, was considered as so entirely a matter of discretion, to be determined by that court upon the circumstances of the particular case, that it was distinctly held by the supreme court in *Brockett v. Brockett*, 2 How. 238, 240, 11 L. Ed. 251, as well as in *Connor v. Peugh's Lessee*, 18 How. 394, 15 L. Ed. 432, that, a motion to set aside a judgment being directed to the sound discretion of the court, no appeal lies from its decision. In the later case of *Ricker v. Powell*, 100 U. S. 104, 107, 25 L. Ed. 527, it is said: "Without intending to decide that an appeal will lie to this court from an order of the circuit court refusing leave to file a bill of review." Again: "For a bill of review on the ground of newly discovered matter can only be filed on special leave, which depends on the sound discretion of the court to which the application is made." Again, in *Nickle v. Stuart*, 111 U. S. 776, 4 Sup. Ct. 700, 28 L. Ed. 599: "Without intending to decide that an appeal lies to this court from an order of the circuit court refusing leave to file a bill," etc. See *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 226, 10 Sup. Ct. 736, 742, 34 L. Ed. 97: "The action of the circuit court * * * was taken in the exercise of a discretion with which we are not justified in interfering." So, in *Bufington v. Harvey*, 95 U. S. 99, 24 L. Ed. 381: "The decision of the court upon the issues of fact, so far as they depend upon the proofs, are conclusive on a bill of review." Again, page 100, 95 U. S., 24 L. Ed. 381: "The granting of a rehearing is always in the sound discretion of the court, and therefore granting or refusing it furnishes no ground of appeal." See, also, *Steines v. Franklin Co.*, 14 Wall. 15, 20 L. Ed. 846. *Transportation Co. v. Pearsall*, 33 C. C. A. 161, 90 Fed. 435, is a case where a default was stricken off and the parties in the case restored to their rights. This was held

to be in the exercise of a power within the discretion of the court, and not reviewable on appeal; and at page 437, 90 Fed., page 163, 33 C. C. A., there is a useful collection of authorities (which need not be enumerated) in respect to the discretionary control which the court of first instance may exercise over its orders and judgments, including that of reopening the case and granting or refusing new trials. See, also, *Dexter v. Arnold*, 5 Mason, 303, 315, Fed. Cas. No. 3,856; *Wood v. Mann*, 2 Sumn. 316, 334, Fed. Cas. No. 17,953; *Nichols v. Nichols' Heirs*, 8 W. Va. 174, 186.

While we might reasonably enough follow the precedents established by the supreme court, and affirm, as was done in *Ricker v. Powell*, 100 U. S. 104, 107, 25 L. Ed. 527, and other cases, to which I have referred supra, without deciding the precise question whether an appeal lies as a matter of right from an order like the one made below, it would quite likely be found, upon exhaustive examination of the question, that logic and principle would make the right of appeal depend upon whether the alleged error related to a matter of law apparent upon the record, or to questions of fact relating to newly discovered evidence, fraud, or mistake; and that while, in the first instance, the right of appeal would exist, the other class of questions would be treated as within the discretion of the court whose business it is to find the facts.

Now, quite aside from the question of the administration of justice under general rules of equity, and upon a distinct and different ground,—that of the constitutional right of a hearing,—is a decree based upon facts not submitted, and upon wrong papers through mistake, based upon the due process of law guaranteed by the constitution?

The complainant's property rights have been concluded against him upon the allegations of an answer not submitted, and upon which he has not been afforded an opportunity to be heard. This, it seems to me, is in contravention of the constitutional provision which guarantees to all parties due process of law. Amendment 5 of the constitution does not relate alone to forms of procedure, but to substance, and to the intermediate steps involved in the course of the proceedings and trial. It may be stated as a general rule that the term "due process of law" means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. Again, law in its regular course is due process. Again, decision after full and fair trial is "due process of law." *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. Ed. 478; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Leeper v. Texas*, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225; *Marchant v. Railroad Co.*, 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751. Again: "It is certain that these words, 'due process of law,' imply a conformity with natural and inherent principles of justice, and forbid that one man's property or right to property shall be taken, * * * and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense." *Holden v. Hardy*, 169 U. S. 366, 390,

18 Sup. Ct. 383, 387, 42 L. Ed. 780. Again: "Due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." Cooley, Const. Lim. 433.

I do not propose to enlarge upon this view as applied to the situation in question. It seems to me plain that a party whose rights have been determined upon facts neither proven, assented to, nor before the court, and in respect to which he has not been heard, has not enjoyed the due process of law guarantied by the constitution. The importance of guarding carefully the sacred right of trial, and of providing a full and fair hearing upon the merits, was strongly set forth by Mr. Justice White in the recent case of *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215, and I propose to leave this phase of the subject upon the vigorous and wholesome reasoning of that case, only calling attention to the discussion beginning on page 413, 167 U. S., and page 843, 17 Sup. Ct., 42 L. Ed. 215, where it is said: "The mere statement of this proposition would seem in reason and conscience to render imperative a negative answer. A fundamental conception of a court of justice is condemnation only after hearing." Again, at page 418, 167 U. S., and page 844, 17 Sup. Ct., 42 L. Ed. 215: "No one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression, and can never be upheld where justice is justly administered." Again, referring to Webster's definition of "the law of the land," which is held to be synonymous with "due process of law," Mr. Justice White adopts Judge Cooley's remark that the definition is apt and suitable as applied to judicial proceedings, which cannot be valid unless they proceed upon inquiry and render judgment only after trial.

In *Hovey v. Elliott* the answer was removed on grounds of contempt, and the bill taken pro confesso; and it was held that this was unwarrantable, and a denial of the rights of the defendant, and that the subsequent proceedings were not based upon due process of law. It is difficult to perceive any difference in principle between such a situation and the one involved in the case at bar. In one case the facts of the bill were taken as established by reason of a rule of court in respect to the circumstances under which a bill shall be taken pro confesso; in the other case the facts set out in an answer not before the court, and in respect to which the complainant had never been heard, were adopted for purposes of decision, through mistake, and taken as established by the rule in respect to cases submitted on bill and answer. What is the difference in principle, and what is the difference, pray, in oppressive consequences, between removing an answer by an unauthorized order and deciding against the defendant without hearing upon the allegations of the bill, and an unauthorized decision against the plaintiff without a hearing and through mistake upon the allegations of an answer not before the court? One is a wrong order based upon an unauthorized ruling,

while the other is a wrong order based upon an unauthorized assumption of facts. Neither decision is based upon due process of law, and the consequences are equally dire in both cases.

Quite aside from technical reasoning, does not the question answer itself, can due process of law be based upon a mistake of the court as to the state of the pleadings, which concludes a party's rights without affording him an opportunity to be heard?

Now, as between these parties, with no third-party interests intervening, why should the doctrine of laches be invoked to uphold a decree based upon a mistake, and a mistake which denied one party the right to be heard, and concluded his rights upon facts not submitted, and gave to the other something which he was not entitled to?

The question of laches is one which has generally been treated as involving matter to be resolved by the sound discretion of the court below. In *Brown v. Buena Vista Co.*, 95 U. S. 157, 24 L. Ed. 422, the court, in speaking of the power of equity to relieve against a judgment upon the ground of fraud in a proceeding directly for that purpose, which it says is well settled, and that the power extends to cases of accident and mistake, said, at page 160, 95 U. S., 24 L. Ed. 422, upon the question of laches: "A court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the court." In *Thomas v. Brockenbrough*, 10 Wheat. 146, 151, 6 L. Ed. 287, where the question was whether a bill of review upon new matter was barred by a statutory limitation of five years, the court said that "is a question which need not be decided in the present case, since we are all of opinion that it is in the discretion of the court to grant leave to file a bill of review for that cause."

Laches is an equitable defense, not one of absolute right. It interposes as a defense when general and third-party interests would be disturbed, and when inequity would be done, by granting relief after lapse of time. Here there are no general rights or third-party interests to be disturbed. No inequity would result from granting the relief sought in this case. It is simply proposed in a proceeding between the original parties to right a mistake.

Irrespective of statutes, whether delay will amount to laches sufficient to bar relief is a question largely, if not wholly, within the sound discretion of the court, to be determined by the particular circumstances of each case; and the cases all seem to proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the equity or inequity of permitting the claim to go forward. *Galliher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738, is a useful case on this point. There it is said, at page 372, 145 U. S., and page 874, 12 Sup. Ct., 36 L. Ed. 738, in speaking of the cases on the subject, that "they proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been

abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them." Again, at page 373, 145 U. S., and page 875, 12 Sup. Ct., 36 L. Ed. 738: "But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relations of the property or the parties." See, also, *Townsend v. Vanderwerker*, 160 U. S. 171, 186, 16 Sup. Ct. 258, 40 L. Ed. 383, where the same principles are reiterated, and where it is said that the death of one of the parties to the agreement and the loss of her testimony does not necessarily operate as an obstacle to the maintenance of the bill, but is a circumstance to be considered by the court in weighing the evidence. See, also, *Gunton v. Carroll*, 101 U. S. 426, 428, 25 L. Ed. 985.

In *Cawley v. Leonard*, 28 N. J. Eq. 467, 471, it is said that a mere lapse of time is not sufficient to take away the right of a party to be heard in a court of equity where there has been no laches and there are no intervening rights of others which may be unjustly disturbed. In the same case it is observed, at page 470, upon the question whether a decree should be opened, that "these applications are always addressed to the sound discretion of the court"; and in *Kemp v. Squire*, 1 Ves. Sr. 205, Lord Hardwicke said, on application to set aside the enrollment of a decree on circumstances, "Any court of justice will incline, as far as in its power, to open what is concluded, that the merits may come before the court." See, also, *Story*, Eq. Pl. § 417; *Beames' Orders* Ch. 1; *Massie v. Graham*, 3 McLean, 41, 52, Fed. Cas. No. 9,263.

It is not necessary in this case to maintain the extreme view, although sustained by high authority, that laches is altogether a matter of discretion for the court of first instance, for it is quite sufficient for the purposes of the case at bar to say that it is so far a question of fact, and so far a matter within the discretion of the judge to whom it is presented, that a finding will not be disturbed by an appellate court unless it clearly appears to be contrary to evidence and contrary to equity. Such is not the condition in this case.

Every consideration of equity requires this court to look with favor upon this proceeding, and to reach a result which shall give this man a trial of his cause upon the merits, or at least a hearing upon the bill and answer as they stood when his case was submitted. With the situation of the parties unchanged, the doctrine of laches, administered under wholesome rules of equity, will be slow to deprive this party of his constitutional right of trial. He at once challenged the dismissal of the bill, and in various ways brought the matter to the attention of the court and to the adverse party, and, as appears at page 13 of the record, as early as March 27, 1887, filed a petition for a supplemental bill to restore his rights under the lost answer of June 29th, on which the case was submitted. The petition is still undecided, and has been pending since 1887. He several times moved for a rehearing, and, not succeeding in pointing out to the satisfac-

tion of the court the ground of the mishap, he was repeatedly met with adverse result, and finally succumbed to the moral and legal force involved in repeated adverse decision. His submission under such circumstances should be treated as involuntary. A man need not resort to revolution, or be constantly before the court, in order to relieve himself from the charge of laches as between himself and a party who holds against him a wrong and unauthorized decree.

Quite likely this party did not resort to the most effective means of relieving himself from the consequences of the mistake which deprived him of his rights. It is probable that he never clearly saw what the mistake was, or rather how the mistake happened, until it was pointed out by the court in the opinion and the findings on which the decree vacating the early decree was based. He proceeded until that time upon the idea that he was the victim of fraud, rather than mistake. It is apparent, from reading the various opinions and re-scripts of the circuit court, that the court never discovered the mistake, or how it happened, until final hearing under this petition, and the examination of the record *de novo*. So the mistake is a newly discovered one, and the relief to which the petitioner is entitled is grounded upon something disclosed in a hearing, where all the parties were present with their interests represented.

It is true that the petitioner proceeded upon allegations of fraud, but upon a full hearing in respect to the question as to how the decree dismissing his bill originated, and upon general prayer for relief, the court has found that it resulted from mistake, rather than fraud. Mistake is an equitable ground for relief, and, the merits respecting the ground of relief having been fully heard, he should be permitted to reframe his allegations, to the end that he shall receive what in equity he is entitled to.

Courts are disposed to be liberal in respect to matters where the parties have not been heard upon the merits. In *Gregory v. Pike*, 15 C. C. A. 33, 67 Fed. 837, 846, the court of appeals treated a cross bill as an intervening petition. In *Sherman v. Association* (recently decided in this circuit) 113 Fed. 609, it is said, in effect, that, were the question one of substance, it could probably be met by reframing the bill, for which leave would, of course, be granted. So, in this case, for purposes of relief, there being a general prayer, we should treat it, though somewhat in the form of a bill of review, as a summary proceeding in the nature of a petition or supplemental bill, or a bill in the nature of a bill of review. It has been frequently said that it is quite unimportant how such a bill is denominated, or what it is called. Courts have indulgently applied elastic rules of practice to such proceedings, treating a bill of review as a petition for carrying a decree into execution (*Thompson v. Maxwell*, 95 U. S. 391, 24 L. Ed. 481), or as a petition for rehearing (*Martin v. Smith*, 25 W. Va. 579; *Heermans v. Montague* [Va.] 20 S. E. 899, 902), or one not sustainable upon its allegations may be entertained for fraud (*Sayre v. Lewis*, 5 B. Mon. 90; *Harris v. Hanie*, 37 Ark. 354; *Williams v. Murphy*, 1 Port. [Ala.] 44), and a defective bill of review has been treated as a cross-bill (2 Bro. Parl. Rep. by Tomlins, 88; *Story, Eq. Pl.* [10th Ed.] § 401, note 2a). The object of such bills

or petitions is to bring the party again before the court to have something reviewed which it is claimed ought not to stand; and, although the relief is prayed for on the ground of fraud, it may be accorded on the ground of inadvertence, accident, or mistake. See *1 Daniell, Ch. Pl. & Prac. 378, note 2.*

The plaintiff's bill has a double aspect. It alleges fraud against the defendants, and also alleges, in effect, that the court, against whom no fraud is charged, was led into a mistake by the course taken by the defendants; so the relief, in one aspect of the bill, was sought on the ground of mistake, and the relief may be granted on that ground. *Williams v U. S., 138 U. S. 514, 517, 11 Sup. Ct. 457, 34 L. Ed. 1026.*

The power to undo, in a summary manner, what has been done by a court with no authority or jurisdiction, is unquestioned. The jurisdiction exercised by the circuit court in this case with respect to the order of dismissal was only to undo, by its own order, that which, according to its own findings, it had no authority or jurisdiction to do in the first instance; and, as said in *Fuel Co. v. Brock, 139 U. S. 216, 219, 11 Sup. Ct. 523, 524, 35 L. Ed. 151*, "the power is inherent in every court, whilst the subject of controversy is in its custody and the parties are before it, to undo what it had no authority to do originally." And, further, "Jurisdiction to correct what has been wrongfully done must remain in the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal." True, there it was a writ of error, where, upon remand, the relief could be had by motion, and it was a case where there was no authority or jurisdiction except to undo the wrong which the courts had done; but the reasoning of the supreme court, at page 220, *139 U. S.*, and page 525, *11 Sup. Ct.*, *35 L. Ed. 151*, with respect to contemplated subsequent proceedings below, illustrates the summary manner in which an unauthorized act of the court is righted, the essential and "only requisite being that the opposite party shall be heard." And, at page 220, *139 U. S.*, and page 525, *11 Sup. Ct.*, *35 L. Ed. 151*, it is said: "The mode of proceeding to effect this object must be regulated according to circumstances, * * * and that all needed inquiry can be had to guide its judgment in a summary proceeding."

The petitioner's right to relief in a case like this should not be denied him, either because he failed to invoke the most effective remedy or because he misconceived the ground for relief. The learned judge, in the majority opinion, at page 811, *114 Fed.*, in discussing the merits of the question, says: "We are forced to the conclusion that the alleged answer of June 29th was of the character which we have stated, and that it could not have been of any consequence on the hearing which occurred in the original cause." As I have undertaken to point out, the harm did not result from the consequence or inconsequence of the answer of June 29th. The harm resulted from accepting as conclusive the probative force of the allegations of the answer of July 21st, which was never submitted, and which the circuit court finds never was submitted, and the unauthorized consideration of which deprived the petitioner of a hearing and his day in court.

It was not the absence or the unimportance of the answer of June 29th, but the unauthorized presence of the answer of July 21st, that dethroned the plaintiff and overthrew his rights.

I take the ground that, regardless of the general rules, to which attention has been called in the majority opinion, and regardless of general expressions in the books which could have had no reference to a situation like this, the court should find a way to right a wrong for which it is responsible, like the one found by the circuit court to exist in this case. I maintain that there is no controlling authority applicable to this situation, because such a situation was never before presented; and, if there are general expressions which would seem to hold that a technical final decree like this should stand, though based upon mistake, such expressions should be disregarded. A fact necessary to jurisdiction over the subject-matter, namely, that the answer was before the court, was inadvertently assumed by the circuit court through mistake. Upon such unauthorized assumption the order was based. The court had no power to make the order, because the facts which were supposed to be before the court were not before it. It should, therefore, be treated as void. While not precisely so as to the entire proceeding, the act was surely *coram non judice* as to the finding in question, because the court had no jurisdiction over either the person, the cause, or the process, so far as this answer was concerned. While not precisely the same, the order stands in principle somewhat like an award of arbitrators which goes beyond the submission, and more like a decision of a court based upon lack of jurisdiction of the subject-matter and of the parties, which would be treated as void, and would be vacated, without much, if any, regard to the question of time, rather than like a right which cannot be disestablished. It is contrary to the idea of law, and it is contrary to the plain and simple rules of natural justice, that a decree based upon a mistake of fact in respect to the state of the pleadings preliminary to the merits, which operated to dismiss the petitioner's bill, and to foreclose his rights without hearing, should stand as a solemn and conclusive adjudication and bar.

It is difficult to see upon what line of reasoning such a decree can be justified or upheld. The order of dismissal was absolutely without authority, and therefore contrary to equity and contrary to law. It was the plain duty of the circuit court, upon discovery of the mistake, to do what it did do,—vacate the order at once. There is no principle of law or consideration of equity which calls for a reversal of that court. On the contrary, every principle of law and every consideration of equity and conscience requires that the circuit court should be affirmed. It is quite plain that such a decree is against justice and against conscience, and, viewed aside from the reasoning in the books in respect to decrees based upon hearings upon the merits, and in the simple light of a decree based upon an order of dismissal through mistake before hearing upon the merits, it is clear that there is no reason why it should stand; and, in the absence of controlling authorities in support of such a proposition, it is impossible for me to accept a line of reasoning which upholds or justifies a decree like the one in question in the face of the express finding

of the judge who dismissed the bill that the decree of dismissal was founded upon a mistake which deprived the party of a hearing upon the merits, and one which, for that reason, ought not, in justice or equity, to stand. It is an absolute and inalienable right of a plaintiff that his case shall not be decided against him by mistake upon the strength of a distinct and different answer, filed after he has submitted his case, and one upon which he has not been heard. It is a fundamental right, which cannot be wrested from a party by a pure mistake of the court in dismissing his bill upon a wrong paper preliminary to the merits. It is a right which cannot be withheld from a party through a mistake of the court which denies to him the right of a hearing and due process of law. The general rule of *stare decisis*, or the general rule in respect to the inviolability of decrees, enforced by an appellate tribunal upon a court of equity of first instance, to compel that court, against its own findings, to blindly hold itself and an aggrieved and injured party to a mistake like the one in question,—a mistake so destructive to fundamental right,—would not long stand the test of critical and discriminating legal opinion.

I think the decree of the circuit court vacating the order of dismissal should be affirmed; but if, because the allegations of fraud are not sustained by the evidence, as found by the court below, the decree should not be affirmed for that reason, then the case should be remanded, with directions to grant leave to the petitioner to reframe his allegations and prayer, to the end that the relief shall stand upon the ground of mistake, where the circuit court, after fully hearing the parties, intended it should stand.

UNION SAVINGS & LOAN ASS'N v. BYRNE et ux.

(Circuit Court of Appeals, Ninth Circuit. March 17, 1902.)

No 722.

QUIETING TITLE—SUIT TO REMOVE CLOUD—RES ADJUDICATA.

The owner of land bordering on tide land mortgaged it, including improvements extending over on the tide land, to a loan association, with warranties of seisin, right to convey, quiet possession, against incumbrances, and to defend the title, and thereafter the mortgagor, claiming a statutory preferred right to purchase from the state the tide land in question, filed her application for purchase. In the meantime the loan association foreclosed its mortgage, and purchased the mortgaged property, and then took a deficiency judgment against the mortgagor, on which execution was issued and levied on the mortgagor's interest in the tide land. Subsequently the mortgagor assigned her purchase right to a third party, who procured a conveyance in fee from the state, and sued the loan association under 2 Ballinger's Ann. Codes & St. § 5500, to remove the cloud created by the execution, and to restrain the collection of the deficiency judgment out of the tide land. *Held*, that a decree in such suit quieting title to the tide land in the mortgagor's assignee, and restraining the loan association from the collection of its deficiency judgment out of such land, was conclusive upon such association, and a bar to a suit by it against such assignee to have his title declared invalid, regardless of whether the grounds relied on by the association in the second suit were presented in the former.

Appeal from the Circuit Court of the United States for the Northern District of Washington.

James Kiefer, for appellant.

I. D. McCutcheon, for appellees.

Before McKENNA, Circuit Justice, and GILBERT and ROSS, Circuit Judges.

ROSS, Circuit Judge. It appears from the record that on the 19th day of December, 1896, J. Marshal Morse and Anna M. Morse, his wife, mortgaged to the appellant, who was complainant in the court below, the following described property situated in Island county, state of Washington, to wit:

"Beginning at the point where the line between the claims of Edward Barrington and Lizzie Hill intersects the Co. road running in front of the donation claims of Sumner and Taftzon, on the S. side of said road; running thence one hundred and forty (140) feet on the S. side of said road in an easterly direction; thence south to half tide; thence west one hundred and forty (140) feet; thence north to place of beginning. Also all the wharf extending from the above piece of land to deep water. Also all of lot numbered thirty-six (36), block seventeen (17), of Latona, King county, Washington, as the same appears upon the duly recorded plat thereof, and now of record in said King Co., Wash."

The mortgage contained the following covenants on the part of the mortgagors:

"First, that they are lawfully seised of said premises; second, that they have good right to convey the same; third, that the same are free from all encumbrances; fourth, that the said party of the second part, its successors and assigns, shall quietly enjoy and possess the same, and that the said parties of the first part will warrant and defend the title to the same against all lawful claims."

On December 30, 1896, Mary Morse, claiming a preferred right to purchase from the state of Washington, by virtue of one of its statutes, the piece of tide land over which the improvements mentioned in the mortgage extended, made application to buy the same from the state, which application gave rise to numerous protests and to much litigation. During the time of that contest the appellant foreclosed its mortgage, those proceedings having been begun in the year 1898. In January, 1899, a decree of foreclosure and sale having been entered, the mortgaged property was sold by the sheriff of the county, and bought in by the mortgagee, for a sum less than the amount decreed to be due, and a judgment for the deficiency entered against Mary Morse as well as the other judgment debtors. Subsequently the appellant received the sheriff's deed for the premises described in its mortgage, and purchased by it. On the 6th day of March, 1900, the appellant caused an execution, issued upon the deficiency judgment, to be levied by the sheriff upon the interest of Mary Morse in the tide land she had applied to purchase, which interest was only the preference right to purchase given by the Washington statute, the title to the property then being in the state. That preference right Mary Morse, on April 7, 1900, assigned to Laurence P. Byrne, one of the defendants to the present suit. April 24, 1900, Byrne exercised the right to purchase so assigned to him, and paid to the state \$42.84 for

the land, and received from the state a conveyance of the title thereto in fee, and thereupon instituted in the superior court of Island county a suit against the appellant and the sheriff of the county to quiet his title, pursuant to the provisions of section 5500 of the statutes of Washington, which reads:

"Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title." 2 Ballinger's Ann. Codes & St. Wash.

The complaint in that action set forth, among other things, the application of Mary Morse to purchase the land in question, the contests that arose in respect thereto, the final adjudication thereof in her favor, the assignment of her preference right to purchase the land to Laurence P. Byrne, his payment therefor to the state and its conveyance to him of the title thereto, the issuance of execution upon the appellant's deficiency judgment, and its levy by the sheriff on the interest of Mary Morse in the land, and the advertisement of the same for sale to satisfy the execution; and further alleged that Mary Morse never acquired legal title to this tide land, and that the appellant's judgment never became a lien upon any part thereof; that the levy of the execution thereon by the sheriff for the purpose of satisfying the appellant's judgment and the sale advertised to be made thereunder "constitute a cloud upon the title of these plaintiffs (Byrne and wife) to said property; and, if said sheriff be allowed to make said sale, to issue said certificate of purchase and a deed in pursuance of said sale, the plaintiffs herein will be irreparably injured and damaged, and their title to said property will be permanently clouded." Among the prayers of the plaintiffs was one "that said sheriff and said defendant Savings and Loan Association be perpetually restrained and enjoined from taking any steps whatever to satisfy said execution and said judgment out of said described premises, and from doing any acts whatsoever tending to cloud the title of the plaintiffs to the lands in controversy, or any part thereof." The defendants to that suit answered the complaint, and, a motion on behalf of the plaintiffs thereto for judgment on the pleadings coming on to be heard, the court entered judgment for the plaintiffs, by which it was adjudged, among other things:

"(6) That the defendants, and each of them, be, and they are hereby, perpetually restrained and enjoined from taking any steps whatsoever to satisfy said judgment and execution out of the tide land hereinabove described, and from doing any act or acts whatever constituting or tending to constitute a cloud upon the title of the plaintiff to said tide land, or any part thereof, and from doing any act or acts in any manner interfering with said tide land or any part thereof. (7) That defendants, and neither of them, have any right, title, or interest in said tide land, or any part thereof, by virtue of said judgment, execution, and levy, or either of them, or otherwise."

That judgment was pleaded by the defendants to the present suit in bar thereof, and the plea sustained by the court below. Its ruling in that respect constitutes the only question on this appeal. We think the ruling clearly right. The second amended bill of the appellant sets out the facts above stated, and alleges that Laurence P. Byrne

took the assignment from Mary Morse and the deed from the state of Washington with full knowledge of appellant's mortgage and of its rights growing out of its foreclosure proceedings, and prays for a decree adjudging that Byrne and wife "have no title whatever to or interest in the said premises described in said deed from the state of Washington, and that it may be decreed that the said Laurence P. Byrne and Catherine Byrne, his wife, hold the title to said tide lands as trustee for your orator, and for the use and benefit of your orator; and that they may be required, upon repayment to them of the amount paid to the state of Washington, to convey said tide lands"; and that "the title of your orator to the said premises may be forever ratified, approved, and confirmed and quieted as against all and every claim of the said defendants Laurence P. Byrne and Catherine Byrne, his wife, and each of them." It is thus seen that the appellant, by its bill in this suit, is seeking to accomplish what the judgment of the state court in the suit of Byrne and wife against the appellant and the sheriff of Island county enjoined them from doing, namely, from taking any steps whatsoever to satisfy the deficiency judgment, and "from doing any act or acts whatever constituting or tending to constitute a cloud upon the title of the plaintiff (Byrne) to said tide land, or any part thereof, and from doing any act or acts in any manner interfering with said tide land, or any part thereof." The jurisdiction of the state court over the parties and subject-matter is not questioned. Its decree, therefore, in respect to the conflicting claims of the parties to the land in controversy, is, so long as it stands, conclusive, not only as to every ground of recovery or defense actually presented in the cause, but also as to every ground which might have been presented. *Dowell v. Applegate*, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463; *McAleeer v. Lewis* (C. C.) 75 Fed. 734. If the precise ground here relied on was not presented in the suit brought in the state court to settle the question of title, no good reason existed why it should not have been; for the appellant was there called upon to set up and assert whatever interest it had in the property in question.

The judgment is affirmed.

DAY v. BECK & GREGG HARDWARE CO. et al.

(Circuit Court of Appeals, Fifth Circuit. April 29, 1902.)

No. 1,107.

1. BANKRUPTS—ACTS OF BANKRUPTCY—ASSIGNMENTS FOR CREDITORS.

A debtor who makes a general assignment for the benefit of creditors may be declared an involuntary bankrupt,—that being specified as an act of bankruptcy by Bankr. Act, § 3 (30 Stat. 544),—and his actual solvency is no defense.

2. SAME—TIME FOR ADJUDICATION.

30 Stat. 544, § 18b, gives the bankrupt or any creditor 10 days after the return day in which to appear and plead to the petition in involuntary bankruptcy. Section 18e provides that if, on the last day within which pleadings may be filed, none are filed, the judge shall on the next day, or as soon as practicable, make the adjudication or dismiss the pe-

tition. Section 31 provides that time shall be computed by excluding the first day and including the last. The subpoena in involuntary bankruptcy fixed August 28th as the return day, and on September 7th the bankrupt filed an answer, which was stricken out because not verified, and on the same day the adjudication of bankruptcy was made. *Held*, that the bankrupt or any creditor had until the expiration of September 7th in which to file a sufficient answer, and the adjudication was premature.

2. SAME—JURY TRIAL.

Under 30 Stat. 544, § 19, providing that a person against whom a petition in involuntary bankruptcy has been filed is entitled to have a trial by jury as to any act of bankruptcy alleged to have been committed, on filing a written application therefor at or before the time in which an answer may be filed, a bankrupt is entitled to demand a trial by jury of the question whether he has made a general assignment for creditors, on proper demand.

Appeal from the District Court of the United States for the Northern District of Alabama.

J. A. Estes, for appellant.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The Beck & Gregg Hardware Company, a corporation, and other creditors of J. R. Day, on August 10, 1901, filed a petition in involuntary bankruptcy against him. The petition averred the requisite amount of debts, and was in the usual form, but did not allege that the debtor was insolvent. The act of bankruptcy alleged was that J. R. Day, within four months next preceding the date of the petition, "made a general assignment for the benefit of his creditors to H. W. Sweet." A subpoena was issued on the petition on August 12, 1901, which fixed August 28, 1901, on which the defendant, J. R. Day, was to appear and answer. This was served on the defendant on the day it issued. On September 7, 1901, the defendant, J. R. Day, filed an answer in which he denied "each and every allegation of the petition filed against him in said entitled cause." He also alleged that he was solvent. He filed with his answer the following demand, signed by his counsel: "And for the trial of this case upon the issues tendered by the foregoing pleas, the said J. R. Day, respondent, demands a trial by jury." On the same day that this answer and demand were filed, the petitioners moved to strike them from the files. The court granted the motion, and on September 7, 1901, made an order adjudging J. R. Day to be a bankrupt. From this order Day has appealed to this court (30 Stat. 544, § 25), and it is assigned that the court erred in striking the answer and demand from the files, and in adjudging the appellant to be a bankrupt.

1. Among the acts of bankruptcy specified in the statute is that the debtor has "made a general assignment for the benefit of his creditors." 30 Stat. 544, § 3. Where the petitioners rely on this ground, it is not necessary to allege or prove that the defendant is insolvent. In such case the solvency of the defendant is no defense. *West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098.

2. The subpoena fixed August 28, 1901, as the return day. The bankrupt or any creditor may appear and plead to the petition within 10 days after the return day, or within such further time as the court

may allow. 30 Stat. 544, § 18b. If on the last day within which pleadings may be filed, none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition. Id. § 18e. In computing the time allowed the defendant to plead, the first day is excluded, and the last included. Id. § 31. Applying this rule, the respondent had until the expiration of September 7th in which to plead. If it be conceded that the answer of the defendant was properly stricken from the files because not verified, he or any creditor of the defendant was entitled to file a sufficient answer at any time before the expiration of the 7th day of September. If no answer at all had been filed within the time allowed, on the next day after the time for answer expired, or as soon thereafter as practicable, the judge could make the adjudication or dismiss the petition. It is premature to adjudge the defendant a bankrupt before the time for filing an answer has expired.

3. A person against whom an involuntary petition has been filed is entitled to have a trial by jury as to any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. Id. § 19. In this case the defendant was entitled to demand a trial by jury of the question whether he had made a general assignment for the benefit of his creditors. He was entitled to make such demand at any time within which he could file an answer. Id. § 19. The answer filed by the defendant on the 7th of September contained a denial of all the averments of the petition, including the allegation that he made a general assignment. He filed with his answer a demand for jury trial. The statute gives him this right.

Questions were raised as to the verification of the petition and the answer, which we need not consider. The parties would be allowed to amend their pleadings, if necessary, by having them duly verified as they may be advised.

The judgment of the court of bankruptcy is reversed. Reversed.

THE PRISCILLA.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 110.

1. MARITIME LIENS—LOSS OF PASSENGER'S BAGGAGE—DELIVERY TO VESSEL.

As regards liens upon a vessel for breach of a contract of affreightment, there is no distinction in principle between a contract for the transportation of a passenger with his baggage and one for the transportation of merchandise, and, by analogy with the rule in the latter case, no lien arises for loss of baggage unless at the time of such loss either the passenger had been received on board, or his baggage had been put into the custody or control of the vessel.

2. SAME—ADMIRALTY JURISDICTION.

By the custom of a steamship company, it received at its pier baggage sent there by passengers intending to take passage on its vessels, and kept the same until claimed by the passengers. By the rules of the company, the passenger was required to present a ticket, and have

his baggage checked, before it was received on board a vessel. Libellant sent baggage to the pier, where it was received; and he subsequently purchased a ticket for one of the company's vessels, which he presented to the baggage master, but his baggage could not be found. Prior to such time the company had no notice to whom the baggage belonged, or when or by what vessel it was to be shipped. *Held*, that whatever the liability of the company, as carrier or warehouseman, libellant had no lien for the loss of the baggage on the particular vessel for transportation upon which he afterward contracted, but which at the time of the loss had not entered on performance of the contract, which would support an action in rem in a court of admiralty.

Appeal from the District Court of the United States for the Southern District of New York.

Wm. Greenough, Jr., for appellant.

Washington E. Page, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The court below decided that a maritime lien was created against the Priscilla for the value of the libellant's baggage, lost while in the custody of the vessel's owner. 106 Fed. 739. Unless this conclusion was correct, the court had no jurisdiction of the action in rem. The Priscilla was one of a line of steamships operated by the New York, New Haven & Hartford Railroad Company, known as the "Fall River & Providence Line." The company was accustomed to receive at its pier in New York City the baggage sent there by passengers intending to take passage on its vessels, and keep such baggage until claimed by the passengers. Before the baggage is shipped, the rules of the company require the passenger to show a ticket, and have his baggage checked. Storage is charged on baggage after it has remained uncalled for for more than 24 hours. Until the owner comes to the pier and claims his baggage, it is held by the baggage master; and, until it has been checked, no baggage is received by the company on board a vessel.

On the afternoon of July 3, 1899, a trunk and a dress-suit case belonging to libellant were delivered by an expressman to the agent of the steamship company at its pier. Subsequently, on the same afternoon, the libellant came to the pier and purchased a ticket for Boston. He then went to the baggage agent, claimed his baggage, and presented the receipt of the express company, together with his ticket. The agent found the trunk, but the dress-suit case was missing. Before the Priscilla sailed, the baggage agent told the libellant that, if it was found, it would be forwarded on the next boat. The libellant had his trunk checked, and took passage by the Priscilla. The dress-suit case was never found.

A contract for the transportation of passengers by sea, like one for the transportation of merchandise, is a maritime contract, and there is no distinction in principle between them. The same liability attaches both to the owner and to the vessel for breach of performance. The *Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397.

When a vessel enters upon the performance of a contract of affreightment, she becomes pledged to its complete execution, and may be proceeded against in rem for any breach; but, when the

contract is purely executory, no lien attaches for the breach. *The Freeman*, 18 How. 182, 15 L. Ed. 341; *The Yankee Blade*, 19 How. 82, 15 L. Ed. 554. The question was carefully considered, and the authorities fully collated, in *Scott v. The Ira Chaffee* (D. C.) 2 Fed. 401. Later adjudications to the same effect are *The Prince Leopold* (C. C.) 9 Fed. 333; *The J. F. Warner* (D. C.) 22 Fed. 342; *The Vigilancia* (D. C.) 58 Fed. 698. In *The City of London*, 1 W. Rob. Adm. 88, Dr. Lushington inclined to the opinion that "if a seaman is engaged on board a vessel, and the owners think fit to abandon the voyage for which the seaman has been engaged, he would not be entitled to sue in admiralty for redress, but must seek his remedy by an action on the case." In *The Bella* (D. C.) 91 Fed. 540, it was decided that there is no lien on the ship for the enforcement of a contract for the carriage of a passenger who has not rendered himself on board for the purpose of being carried. In *The Eugene*, 31 C. C. A. 345, 87 Fed. 1001, the same proposition was decided by the circuit court of appeals. Following the analogy in the case of a contract of affreightment, we have no doubt that the lien does not arise until either the passenger has been received on board, or his baggage has been put into the custody or under the control of the vessel.

In the present case the baggage was lost before the company had notice that it belonged to the libelant, and apparently before the libelant had entered into any contract of carriage. It was in the custody of the company, in contemplation that he would become a passenger; but the relation of carrier and passenger was inchoate, and the custody was a matter preliminary, although accessory to a contract of carriage. When baggage is delivered, as it was in this case, without any directions as to its destination or time of shipment, the carrier cannot be expected to know to whom it belongs, or whether it is to be carried by any particular vessel of the line, or even whether it is to be carried at all. Under such circumstances, it is in no sense within the custody or control of any particular vessel or its officers.

It is unnecessary to consider whether the company assumed the liability of a carrier, or only that of a warehouseman, towards the libelant. It suffices that the breach of its obligation took place before it had entered upon the performance of any contract of carriage, and consequently did not create any lien upon the vessel.

The decree is reversed, with costs, and with instructions to the court below to dismiss the libel.

In re MILLER.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1902.)

No. 1,140.

ARMY—ENLISTMENT OF MINOR—PARENTS SECURING RELEASE.

Under Rev. St. U. S. §§ 1116-1118, providing that army recruits must be between 16 and 35 years old; no one under 21 years shall be enlisted without the consent of his parents or guardians; and that no one under 16 years old shall be enlisted,—one between 16 and 21 years

old, enlisting without consent of parents, on representation that he is of age, becomes a soldier, amenable to military jurisdiction for military offenses, and subject to release from service only on application of his parents, who cannot prevent his court-martial for past military offenses.¹

Appeal from the District Court of the United States for the Northern District of Texas.

Wm. H. Atwell, U. S. Atty., and Col. E. H. Crowder, Judge Advocate U. S. Army, for appellant.

R. M. Vaughan (F. P. Works and J. E. Clarke, on the brief), for appellees.

Before McCORMICK and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. Daniel Marshall Miller enlisted in the United States army on July 26, 1901, as a private soldier, at Austin, Tex. He represented himself to be 21 years of age, when in fact he was only about 17. His parents were both living, and were citizens of Texas, residing in Hill county, in that state. They did not consent to his enlistment. He was transferred from Austin, Tex., and attached to the 105th company, coast artillery. He received from the government \$15.02 pay as a private soldier, and drew clothing from the government of the value of \$35.36. He deserted on September 14, 1901, in California, and went to Hill county, Tex., where, on the 8th day of February, 1902, he was arrested as a deserter by the sheriff, and delivered into the custody of Capt. J. A. Dapray, the recruiting officer for the United States, stationed at Dallas, Tex. On the 15th of February, 1902, Col. Forbush, by special order, appointed a general court-martial to meet at Ft. Sam Houston, Tex., February 19, 1902, for the trial of such prisoners as may be properly brought before it, and a detail was made for the court. Charges, with proper specifications, were preferred against Miller: (1) Desertion, in violation of the forty-seventh article of war; and (2) for fraudulent enlistment, to the prejudice of good order and military discipline, in violation of the sixty-second article of war.

It is specified under the first charge that he deserted on or about the 14th of September, 1901, and remained absent in desertion until apprehended on or about February 12, 1902. It is specified by the second charge that he, being a minor, did fraudulently enlist as a soldier in the service of the United States by falsely representing himself to be 21 years of age, and that since his enlistment he received pay and allowance thereunder. On the 17th of February, 1902, Michael M. Miller and Lucy A. Miller, the parents of the prisoner, filed a petition in the district court of the United States for the Northern district of Texas, praying for the writ of habeas corpus, and seeking the discharge of Daniel Marshall Miller from further detention by the recruiting officer of the United States, and praying that he be restored to the custody and control of the petitioners. The enlistment of the prisoner, his desertion, arrest, and detention, are stated in the petition; and it is therein alleged "that the said Daniel Marshall Miller is now detained in the custody of the said recruiting officer on the charge of having de-

¹ See Army and Navy, vol. 4, Cent. Dig. § 92.

served the military service of the United States." The court ordered that the writ issue, directed to Capt. J. A. Dapray, recruiting officer for the United States, stationed at Dallas. The return to the writ recited the fact of Miller's enlistment, desertion, and arrest, and that charges had been preferred against him as herein stated, and that respondent held the prisoner, by authority of the United States, as a soldier in the United States army, charges having been preferred against him, and that he would be brought to trial as soon as practicable before a court-martial convened by the commanding officer of the department of Texas. It is also averred in the return that these offenses were committed by the prisoner, and the prosecution thereon begun, before the suing out of the writ of habeas corpus in this case, and that the jurisdiction of the military authorities had attached before the institution of this proceeding in the district court. The learned district court was of opinion that the parents of the prisoner had never lost, by reason of the enlistment of their son, the right to his custody and control, and that they were now entitled to exercise that control and custody. An order was made that the prisoner be released and restored to the custody and possession of his parents. An appeal was taken to this court, where the order discharging the prisoner is assigned as error.

The question to be decided is whether the court-martial has jurisdiction to try the prisoner on the charges preferred against him. If it has jurisdiction, the civil courts have no right to interfere. If it is without jurisdiction, it is the duty of the civil courts to discharge the prisoner. The contention in behalf of the petitioners is that, being under 21 years of age, the prisoner could not become a soldier without their consent, and that he cannot, therefore, be held for trial by the court-martial. This contention must be examined in the light of the statutes. "Recruits enlisting in the army must be effective and able bodied men, and between the ages of sixteen and thirty-five years, at the time of their enlistment." Rev. St. U. S. § 1116. "No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: provided, that such minor has such parents or guardians entitled to his custody and control." Rev. St. U. S. § 1117. "No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of (any criminal offense) (a felony) shall be enlisted or mustered into the military service." Rev. St. U. S. § 1118. It will be observed that recruits may enlist who are between the ages of 16 and 35, but, if under 16, they shall not enlist at all, but, if over 16 and under 21, and they have parents or guardians entitled to their custody, they shall not be enlisted without the written consent of such parents or guardian. The prisoner belonged to a class that could enlist. He was between the ages of 16 and 35. The only infirmity in his enlistment was that he was over 16, but under the age of 21, and enlisted without the written consent of his parents. If an officer had enlisted him without such consent of his parents, knowing them to be entitled to his custody, and knowing him to be a minor, he would, on conviction, be dismissed from the

service, or suffer such other punishment as a court-martial may direct. Rev. St. U. S. § 1342, art. 3. But the prisoner was enlisted on his assertion that he was 21 years of age. By section 3 of an act of congress approved July 27, 1892, fraudulent enlistment, and the receipt of any pay or allowance thereunder, "is declared a military offense and made punishable by court martial under the 62nd article of war." 27 Stat. 278. By the sixty-second article certain offenses to the prejudice of good order and military discipline, though not specially mentioned in the articles of war, are punishable according to the nature and degree of the offense, at the discretion of the court; and it provides that they are "to be taken cognizance of by a general or a regimental, garrison, or field-officers' court martial." Rev. St. U. S. § 1342. By article of war 47, any soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same in time of peace, may receive any punishment, excepting death, the court-martial may inflict. Rev. St. U. S. § 1342, art. 47. It is for a violation of these laws and articles of war that the prisoner is held for trial. The petitioners cite and rely on *In re Grimley*, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636. The point decided in that case was that enlistment is a contract between the soldier and the government, which involves a change in his status that cannot be thrown off by him at his will, and that, therefore, an enlisted soldier cannot avoid a charge of desertion by showing that at the time he voluntarily enlisted he had passed the age at which the law allows enlistment. After referring to these contractual relations, and saying that the soldier could not, of his own volition, throw them off, and renounce his relations, and destroy his status on the plea that, if he had disclosed truthfully the facts, the state would not have entered into the new relations with him, the court said:

"Of course, these considerations may not apply where there is insanity, idiocy, infancy, or any other disability, which, in its nature, disables a party from changing his status or entering into new relations. But where a party is *sui juris*, without any disability to enter into the new relations, the rule generally applies as stated."

This language is urged on our attention as being conclusive of the prisoner's right to be discharged. The case before the supreme court was one in which the circuit court had held that the contract of enlistment of a man over 35 years of age was absolutely void. In *re Grimley* (C. C.) 38 Fed. 84. The supreme court was combating this conclusion, and holding that the enlistment could not be avoided, after the commission of a military offense, so as to prevent trial and punishment for such offense. No other question was before the court. In using the word "infancy" in connection with the words, "insanity" and "idiocy," the court evidently had in view Rev. St. § 1118, which provides that no minor under the age of 16 years, and no insane person or intoxicated person, shall be enlisted or mustered into the military service. That section peremptorily forbids a minor under the age of 16 from being enlisted. Where the minor is over the age of 16, the preceding section authorizes his enlistment, providing, however, for the written consent of his parents or guardian, if he have such, that are entitled to his custody and con-

trol. The statutes make a difference between the position of the minor under 16 and the minor over 16 years of age. That the court did not intend to hold that a minor over 16 could not, without his parents' consent, make a contract of enlistment that would change his status from citizen to soldier becomes clear on reading *In re Morrissey*, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644, an opinion immediately following the one just cited. That case settles the important question of the status of a minor over 16 years of age who enlists without the consent of his parents. He is held to be "not only *de facto*, but *de jure*, a soldier, amenable to military jurisdiction." The soldier himself, and not his parents, applied for the writ. But we find nothing in the case to indicate that the parents could obtain the release of the minor soldier (over 16 years of age) after he had committed a military offense, and pending a prosecution against him for it. The statement of the minor's status that he is a soldier *de facto* and *de jure*, "amenable to military jurisdiction," seems to us in conflict with the contention of the petitioners in the case at bar. It cannot be, we think, that the court meant that he was, after committing a military offense, amenable to military jurisdiction only with the consent of his parents; that they could defeat the jurisdiction of the court martial by opposing his prosecution. That he could not, but that the parents could, secure his release from the contract of enlistment, seems clear from this and other authorities; but that is very different from obtaining release and immunity from a prosecution for an offense committed against law. In *McConlogue's Case*, 107 Mass. 154, 170, Gray, J., speaking for the court, said that "a minor's contract of enlistment is, indeed, voidable only, and not void; and if, before a writ of habeas corpus is sued out to avoid it, he is arrested on charges for desertion, he should not be released by the court while proceedings for his trial by the military authorities are pending." This view is sustained by many authorities. A few only will be cited: *Solomon v. Davenport*, 30 C. C. A. 664, 87 Fed. 318; *In re Cosenow* (C. C.) 37 Fed. 668; *In re Kaufman* (C. C.) 41 Fed. 876; *In re Spencer* (D. C.) 40 Fed. 149; *Church, Hab. Corp.* (2d Ed.) 72, note "c." A court-martial proceeding, within its jurisdiction, will not be interfered with, nor its judgment avoided, by the civil courts. *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601; *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538. The common law, unaided by statute, fully recognizes the parents' right to the custody and services of their minor child; but it has never been held that they could, by the writ of habeas corpus or otherwise, obtain his custody and his immunity when he was held by an officer of a civil court of competent jurisdiction to answer a charge of crime. His enlistment having made the prisoner a soldier notwithstanding his minority, he is amenable to the military law just as the citizen who is a minor is amenable to the civil law. The parents cannot prevent the law's enforcement in either case. It is not reasonable that a minor, of age to enlist, who secures the honorable and responsible position of a soldier in the United States army, could abandon his colors in the face of the enemy and on the eve of battle, and avoid trial and punishment for

desertion by the intervention of his parents, who had not consented to his enlistment, but who had taken no step to avoid it before the soldier's arrest for desertion; or that he could endanger the army by betraying its secrets to the enemy, and not be amenable to military jurisdiction, his parents objecting. We cannot approve a view that leads to such results. When an enlisted soldier is imprisoned by military authority upon a charge of desertion or other military crime, a civil court will not interfere on habeas corpus when such military authorities have jurisdiction; and if a minor, over the age of 16 years, enlisted in the service, is so charged and detained, a civil court will not, either on his own application or that of his parents or guardian, discharge him until he has been released from the prosecution pending against him.

The decision of this case will be without prejudice to the petitioners to renew their application after the prisoner has been released from the prosecution before the court-martial.

The judgment of the district court is reversed, with instructions to remand the prisoner to the custody of the United States military authorities. Reversed.

HEMINGWAY v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,108.

1. CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—RULE IN FEDERAL COURTS.

Where, in an action to recover for negligence resulting in death, the defendant claims contributory negligence, it is the rule of the United States courts, irrespective of the decisions in the courts of the state where the federal courts are held, that the burden is on defendant to show that the deceased was negligent and that his negligence contributed to the injury which resulted in his death.

2. SAME—WHEN QUESTION OF LAW.

Where, in an action to recover for personal injury, all the material facts touching the negligence of the person injured are undisputed, and admit of no rational inference but that of his negligence, the question of contributory negligence becomes matter of law only, and the court should direct a verdict.

3. SAME—WHEN QUESTION FOR THE JURY.

Where, in an action to recover for personal injury, the negligence of defendant is shown, and there is conflict in the material evidence as to whether the person injured observed ordinary care, or, where there is no such conflict, the facts are such that reasonable men might fairly draw different conclusions from them, the question of contributory negligence is for the jury.

4. RAILROADS—NEGLIGENCE—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

Plaintiff sued to recover for the death of his minor son, caused by the negligence of a railroad company. The accident occurred about dark at a street crossing in a village. The street approaching the crossing was for 100 yards in a cut 4 or 5 feet deep, and the railroad for 300 yards was on a curve, and in a cut 8 or 10 feet deep, with shrubs, a fence, and house between the street and track. The train was running 35 or 40 miles an hour, in violation of Laws Miss. 1896, p. 76, which prohibited a greater speed than 6 miles an hour through a city,

town or village. The evidence was conflicting as to whether the whistle was blown or bell rung continuously for 300 yards before reaching the crossing, as required by Ann. Code Miss. § 3547. Deceased, who was driving a team attached to a loaded wagon, in which were two other men, slowed to a walk as he approached the track. One of those men testified that he looked and listened all the way along for a train, and was facing the direction from which it came; that he was the first to see it, and as soon as he saw it he called out, and jumped from the wagon, and just as he struck the ground the engine struck the wagon. There was testimony that one approaching the track could not see a locomotive headlight coming from that direction until he was within 6 feet of the track and the engine was within 150 yards. The negligence of defendant was conceded, but the court directed a verdict for defendant on the ground of contributory negligence of deceased. *Held*, that the question should have been submitted to the jury.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

Wm. C. McLean, for plaintiff in error.

Edward Mayes (J. B. Harris and J. M. Dickenson, on the brief), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an action for \$11,100 damages, brought by Prince Hemingway, a citizen of the state of Mississippi, against the Illinois Central Railroad Company, a corporation chartered under the laws of the state of Illinois. The action is based on the alleged wrongful and negligent act of the defendant in causing the death of Frank Hemingway, the infant son of the plaintiff. Such right of action is given to parents for the death of the minor child, caused by the wrongful or negligent act of another, by the law of the state of Mississippi, where it is alleged that the wrong was committed. Laws Miss. 1898, p. 82, c. 65. By a law of that state approved March 18, 1896, all railroad companies having the right of way are allowed to run locomotives and cars through cities, towns, and villages at the rate of six miles an hour, and no more; and it is provided that "the company shall be liable for any damages or injury which may be sustained by any one from such locomotive or cars whilst they are running at a greater speed than six miles an hour through any city, town or village." Laws Miss. 1896, p. 76. By another statute each locomotive engine is required to be provided with a bell and a steam whistle, which can be heard distinctly at a distance of 300 yards; and it is provided that the company "shall cause the bell to be rung or the whistle to be blown at the distance of at least three hundred yards from the place where the railroad crosses over any highway or street; and the bell shall be kept ringing, or the whistle shall be kept blowing, until the engine have (has) stopped or crosses the highway or street." Ann. Code Miss. § 3547. The declaration charges that the defendant was running the engine and train in violation of these statutes, and that Frank Hemingway was killed by its train at a public crossing in the town of Como, Miss. The defendant pleaded: (1) That it was not guilty of the supposed wrongs and injuries charged; and (2) that

Frank Hemingway was guilty of contributory negligence, in that he failed to exercise ordinary care and prudence in going upon the railroad track without stopping the wagon, and without looking or listening for the approaching train, which he could have seen and heard, and that he thereby contributed to his own injury and death. Issue was joined, and the case tried on these pleas. After evidence had been offered by both the plaintiff and defendant, counsel for the defendant moved the court to instruct the jury to find a verdict for the defendant. The trial court granted this motion, instructing the jury to return a verdict for the defendant, to which action of the court the plaintiff duly excepted. A verdict was returned for the defendant, and a judgment entered thereon, and the case is brought to this court by the plaintiff on a writ of error. It is assigned here that the circuit court erred in directing a verdict for the defendant.

The facts may be briefly stated: On the 31st of March, 1900, Frank Hemingway, 18 years of age, while attempting to cross defendant's railway track, was run over and killed by a train controlled by defendant's servants. The accident occurred about dark, at a public crossing in the corporate limits of the town of Como, Miss. The highway or street on which the deceased was driving a wagon runs east and west, and crosses the railway which runs north and south. The train which killed deceased came from the south. Beginning south of the crossing, the railway curves eastwardly. For about 300 yards south of the crossing the track runs through a cut 8 or 10 feet deep. The street east of the crossing, for about 100 yards, is in a cut four or five feet deep. A traveler on the highway from the east, as he approached the crossing, would have between him and a train coming from the south some shrubs, a fence, and a house, and the train would be in the cut on the track when within 300 feet of the crossing, and the traveler in the cut in the highway. Such were the natural features of the place where the accident occurred. Frank Hemingway was standing up in the wagon, and driving. Heywood Robinson and John Davis were sitting in the wagon, one facing the rear of the wagon and one facing south. The wagon approached the crossing, the mules going in a trot. It had in it two "iron-toothed harrows, two baskets of clothes, a barrel of flour, and some meat, sugar, and coffee." As the wagon neared the crossing, "it slowed up to a walk," but did not stop. One of the occupants of the wagon, before nearing the crossing, said, "I reckon it is about train time," and deceased said "he didn't reckon it was, but didn't know exactly what time the train came." John Davis, who was sitting with his face towards the south, testified that his face was in the direction the train was coming from; that, as the wagon approached the crossing, he looked and listened for the train "all the way along," and also "just before he got there." The train approached the crossing through the cut at the rate of "35 or 40 miles an hour." As to whether the whistle was blown and the bell rung as the crossing was approached there is conflict in the evidence. Travis Taylor, who examined the crossing before testifying, said that a traveler must get within "about 6 feet" of the railroad before he could see an approaching train; that, after getting within 6 feet of the track, he could see

the headlight of an approaching engine "about 150 yards." John Davis was the first to see the train. "I was the first to see it. I said, 'Lord, there comes the train!' and about the time I said that I jumped out. * * * About the time I hit the ground the train struck the wagon." Heywood Robinson also jumped out, and was not hurt. The wagon was smashed, the mules killed, and Frank Hemingway so injured that he died in a few hours. It is conceded that the defendant was guilty of negligence in running its trains through an incorporated town at a speed forbidden by the statute. *Railroad Co. v. Toulme*, 59 Miss. 284; *Nelson v. Railroad Co.*, 40 C. C. A. 673, 100 Fed. 731.

The controlling question in the case is: Does the evidence show such contributory negligence on the part of the deceased as left nothing to be passed on by the jury, but required the court to instruct them as matter of law that the plaintiff could not recover? The burden of proof is on the defendant to show that the deceased was negligent, and that his negligence contributed to the injury which resulted in his death. *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Railroad Co. v. Volk*, 151 U. S. 73, 77, 14 Sup. Ct. 239, 38 L. Ed. 78; *Hough v. Railroad Co.*, 100 U. S. 213, 225, 25 L. Ed. 612; *Railroad Co. v. Harmon's Adm'r.*, 147 U. S. 581, 13 Sup. Ct. 557, 37 L. Ed. 284. This rule governs in the United States courts, irrespective of the decisions in courts of the state where the federal courts are held. 2 *Fost. Fed. Prac.* (3d Ed.) p. 880, § 375. In the absence of all evidence on the subject, it would not be presumed that the deceased did not exercise proper care, for he had the greatest incentive to caution to protect his own life. *Improvement Co. v. Stead*, 95 U. S. 161 (4), 24 L. Ed. 403. But the defendant can, of course, avail itself of the evidence offered by the plaintiff as tending to show the contributory negligence of the deceased. *Railroad Co. v. Horst*, 93 U. S. 291 (9), 23 L. Ed. 898. But on all the evidence the rule of the federal courts is that the burden of proof is on the defendant to sustain by a preponderance of evidence its defensive plea of contributory negligence. *Railroad Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; *Beach, Contrib. Neg.* § 426. In judging the deceased's conduct and considering whether it was prudent or negligent, it must be estimated in the light of all the circumstances surrounding him, and in view of what he had the right to expect of others. He is not blamable if the injury has resulted from the act of another, which he could not reasonably have anticipated. *Railroad Co. v. Van Steinburg*, 17 Mich. 99, 119. It would not be negligence in the deceased to act on the assumption that the defendant would not run its trains in violation of the state law. *Hasie v. Railway Co.*, 78 Miss. 413, 414, 28 South. 941. A railroad crossing a highway or street on the same level imposes duties both on the railroad company and the traveler on the highway. The train necessarily has the preference and right of way. It is required to give reasonable notice or warning of its approach, so that a wagon in the road near the crossing may wait for it to pass. What is reasonable and timely notice, if not fixed by statute, may depend on the speed of

the train and other circumstances of the particular case. One who is crossing the track must exercise diligence and ordinary care to ascertain whether a train is approaching and to avoid a collision. The track itself is a notice and warning to exercise such care. He is not required to exercise the greatest diligence or care, but only such as a prudent man would exercise under the circumstances of the case. He is not required, as matter of law, to stop before crossing the track, but his omission to do so is a fact to be submitted with the other facts to the jury. He is required to exercise such diligence and care as an ordinarily prudent man would exercise under the circumstances. *Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403; *Judson v. Railroad Co.*, 158 N. Y. 597, 53 N. E. 514. In *Railroad Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014, the court held that the peremptory instruction for the defendant should have been given. There the train that caused the injury was going at a rate not exceeding 20 miles an hour. At a distance of 40 feet from the crossing the approaching train could be seen 300 feet away. The deceased drove onto the railroad track in a slow trot, without changing gait. His eyesight and hearing were good, and there was nothing to impede his sight. He drove onto the track looking straight ahead. As he approached the crossing "the train was in full view." The court was of opinion that the testimony tending to show contributory negligence on the part of the deceased was so conclusive that nothing remained for the jury, and that the defendant was entitled to an instruction to return a verdict in its favor. But the court referred to a class of cases readily distinguishable "either by reason of the proximity of obstructions interfering with the view of approaching trains, confusion caused by trains approaching simultaneously from opposite directions, or other peculiar circumstances tending to mislead the injured party as to the existence of danger in crossing the track." In *Railroad Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274, the court held that the question of the plaintiff's contributory negligence was properly left to the jury. An important fact leading to that decision was that the highway on which she was driving proceeding towards the crossing passed into "a cut, and then there was no view of the railroad whatever to the south on account of the highway being cut down and the growing corn on that side." In *Nelson v. Railroad Co.*, 40 C. C. A. 673, 100 Fed. 731, Nelson was killed while crossing the track to carry mortar to a depot that was building. The court held that the question of Nelson's negligence was for the jury, it having been proved that a car on the side track obstructed the view of the approaching train, and that there was noise of escaping steam from a nearby engine, so that the sound of the train probably could not be heard. In that case the court laid stress on the fact that Nelson could not see the train because of a curve in the track, till it was within 330 feet of him; saying that, "if it was going at the rate of 40 miles an hour, it would go 330 feet in less than 6 seconds." In *Jones v. Railroad Co.*, 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478, the plaintiff walked out of the depot by the usual way, and was struck by a passing train be-

tween the wall of the depot and the platform. The circuit court directed a verdict for the defendant. The case was reversed on error, because the evidence tended to show that a car on the side track obstructed the plaintiff's view of the approaching train, and, although he had listened, there was so much noise about the place of exit from the depot that the sound of the advancing train could not be distinguished.

To review the many cases on this subject would serve no useful purpose. They make it clear that, if all the material facts touching the alleged negligence of the person injured be undisputed, and admit of no rational inference but that of negligence, the question of contributory negligence becomes matter of law only, and the court should direct the verdict. Such is the case when one possessed of hearing and sight walks or rides on a railroad track before a rapidly approaching train, when there is nothing to impede his sight or hearing. In such case it may be assumed that he did not look, or, if he looked, he did not heed the warning, but recklessly took his chance of crossing before the train could reach him. *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Railroad Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014. But when there is conflict in the material evidence relating to the alleged negligence of the person injured, or when there is no conflict, but the facts are such that reasonable men might fairly draw different conclusions from them, the question is one for the jury. Such is the case when one walks or drives along the highway and across a railroad and is injured, and, the negligence of the railroad company being shown, there is conflict in the material evidence as to whether the person injured observed ordinary care in crossing; or, where there is no conflict in the evidence, the facts are such that different conclusions might be fairly drawn from them as to whether the person injured showed a want of ordinary care, or did what a reasonably prudent man ought to have done under the circumstances. *Railroad Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; *Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. The difficulty in cases of negligent injuries is that it seldom happens the injuries are inflicted under the same circumstances, and therefore no common standard of conduct by prudent men under all circumstances can become fixed and known. And no rule of law can be formulated to apply to all cases. Said Mr. Justice Lamar, speaking for the court, in *Railroad Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 682, 36 L. Ed. 485:

"There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under the different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such

that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury."

When a judge decides as a matter of law that a plaintiff has been guilty of contributory negligence, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon what is his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. If the same question of prudence were submitted to a jury collected from the different occupations of society, and perhaps better competent to judge of the question of ordinary care, he might find them differing with him as to the ordinary standard. The question of negligence is usually one of fact for the jury, but, unquestionably, cases do occur in which it is the duty of the judge to direct the verdict. It is not possible to lay down a rule that will designate all such cases. While the principles are well settled, the application of them to particular cases causes much difference of judicial opinion.

There is evidence in the record which tends to show that the accident occurred after dark, and at a public crossing; that there were obstructions between the deceased and the approaching train; that the train was running at from 35 to 40 miles an hour in a town where the statute forbade it to be run faster than 6 miles an hour; that the whistle was not blown nor the bell rung as required by statute; and that the occupants of the wagon looked and listened, not stopping, but that they approached the crossing slowly. On this state of facts we must hold that the court erred in directing a verdict for the defendant.

Other questions were discussed at the bar and in the briefs, upon which we express no opinion, as they may not arise on the next trial on the same or similar pleadings and evidence.

The judgment of the circuit court is reversed and the cause remanded for a new trial. Judgment reversed.

PARDEE, Circuit Judge, dissents.

THE SCHOONER ROBERT LEWERS CO. V. KEKAUOHA.

(Circuit Court of Appeals, Ninth Circuit. March 17, 1902.)

No. 705.

1. WRONGFUL DEATH—RIGHT OF ACTION—LAWS OF HAWAII.

Act April 30, 1900, to provide a government for the territory of Hawaii (section 1), provides that the phrase "laws of Hawaii," as used in the act, shall mean the constitution and laws of the republic of Hawaii in force at the time of annexation. Section 6 provides that "the laws of Hawaii not inconsistent with the constitution or laws of the United States or the provisions of this act shall continue in force, subject to repeal," etc. The statutes of the republic of Hawaii (Civ. Laws Hawaii 1897, § 1109) provide that "the common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except

as otherwise expressly provided by the Hawaiian constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage." In 1860 the supreme court of Hawaii, authorized thereto by the laws of the kingdom, expressly rejected as a part of the common law of the islands the rule of the English common law that a civil action could not be maintained to recover damages for wrongfully causing the death of a person, and sustained the right of a widow to sue for the wrongful death of her husband; and the rule so adopted has never since been changed by statute or decision. *Held* that, by virtue of the above statutory provisions, such rule is still in force as a part of the common law of the territory, and that the right of action given thereby may be enforced in a court of admiralty as well as a court of law.

1. SAME—NEGLIGENCE—BREAKING OF SHIP'S TACKLE.

The breaking of a chain furnished and used by the officers of a ship in unloading a heavy article, of which removal they had sole charge, if unexplained, is prima facie evidence of negligence, which authorizes a judgment against the owners of the ship for damages for the death of a person caused thereby, in the absence of proof of contributory negligence.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Libellant's husband, a drayman, was killed while assisting to unload from a ship a heavy bedplate, weighing several tons. While the bedplate was suspended by the ship's tackle, a part of the tackle broke, and deceased attempted to avoid the danger by climbing onto the deck of the ship, but was caught and crushed between the bedplate and the ship's side. *Held*, that he was entitled to rely on the safety of the tackle, and was not chargeable with contributory negligence because, in the presence of imminent and unexpected danger, he did not act with deliberation.

Appeal from the District Court of the United States for the Territory of Hawaii.

William O. Smith and Abraham Lewis, Jr., for appellant.

T. McCants Stewart, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This is an appeal by the owner of the schooner Robert Lewers from a decree rendered by the United States district court for the territory of Hawaii awarding damages to the appellee for the accidental death of her husband, Enoke Kekauoha. The deceased was one of four draymen employed by Hustace & Co., of Honolulu, who had come on the wharf at that city, to which the schooner was tied, for the purpose of loading and hauling away a bedplate weighing 12½ tons, which had been taken to Honolulu from San Francisco by the schooner, and was then on board. The captain and officers of the schooner were engaged in removing the bedplate from the schooner onto trucks placed on the wharf by the draymen. The bedplate had been lifted from the schooner, and hung suspended by ropes and blocks attached to the main and mizzen masts of the schooner. A guy line or outhaul was fastened to an opening in the center of the bedplate, and carried to a large boiler lying on the wharf. By pulling on the outhaul the bedplate was drawn over the vessel's side, remaining suspended in the tackles, which were connected by falls to the main and mizzen masts. The lashings, lines, and fastenings were all of rope, with the exception of one chain around the

bedplate, and to which one end of the outhaul was fastened, and one chain around the boiler on the wharf, to which the other end of the outhaul was fastened. The tackle, lines, chains, and fastenings were the property of the schooner. Because of the position in which the truck had been placed by the draymen, the plate was not coming squarely down over the truck, and the drayman suggested that it be hauled out a trifle further. While it was in this position, one of the chains, about 15 feet in length, attached to the outhaul, broke, causing the bedplate to swing back to the vessel. At the time the chain broke, the deceased, in order to avoid the danger, ran to the vessel's side, and endeavored to get on the deck, but was caught by the plate and held up against the side of the schooner, thereby receiving injuries from which his death resulted. His widow thereupon filed in the court below a libel in personam against the owner of the schooner for damages resulting from the death of her husband, which she therein alleged was caused by the negligence of the officers of the ship. An answer was filed by the owner of the schooner, setting up that no cause of action lay in the court of admiralty for such damages, inasmuch as there was no act of congress or territorial statute giving any cause of action by reason of the decedent's death, and also denying any negligence on the part of the officers of the schooner, and averring contributory negligence on the part of the deceased. The court below held against the defendant on each point, and gave the libelant judgment for the sum of \$1,577.12, with costs.

It is insisted on the part of the appellant that no cause of action for damages will lie in a court of admiralty within the territory of Hawaii for the death of a human being. That by the common law no civil action lies for an injury which results in death is well settled, and is now not denied. And since the decision of the supreme court in the case of *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358, in which the theretofore conflicting decisions are referred to, and the question considered and determined on principle, it does not remain open to question that such an action will not lie in the courts of the United States under the general maritime law. In many jurisdictions, however, the rule has been changed by statute; and where by statute a right of action is given, whether arising on the land or on the sea, it is uniformly held that courts of admiralty, as well as courts of law, will entertain and enforce it. *The Harrisburg*, supra, and cases there cited; *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727; *The Willamette*, 18 C. C. A. 366, 70 Fed. 874, 31 L. R. A. 715; *Laidlaw v. Navigation Co.*, 26 C. C. A. 665, 81 Fed. 876; *Association v. Christopherson*, 19 C. C. A. 481, 73 Fed. 239, 46 L. R. A. 264. The death here complained of occurred within one of the territories of the United States,—that of Hawaii,—over which the court below confessedly had admiralty jurisdiction, including the suit of the appellee, if there was any right of action in her. That depends upon the law prevailing in that territory at the time of the death in question.

The first, fifth, and sixth sections of the act of congress of April 30, 1900, to provide a government for the territory of Hawaii, are as follows:

"Section 1. That the phrase 'laws of Hawaii,' as used in this act without qualifying words, shall mean the constitution and laws of the republic of Hawaii, in force on the twelfth day of August, eighteen hundred and ninety-eight, at the time of the transfer of the sovereignty of the Hawaiian Islands to the United States of America. The constitution and statute laws of the republic of Hawaii then in force, set forth in a compilation made by Sydney M. Ballou under the authority of the legislature, and published in two volumes entitled 'Civil Laws' and 'Penal Laws,' respectively, and in the Session Laws of the legislature for the session of eighteen hundred and ninety-eight, are referred to in this act as 'Civil Laws,' 'Penal Laws,' and 'Session Laws.'"

"Sec. 5. That the constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory as elsewhere in the United States: provided, that sections eighteen hundred and fifty and eighteen hundred and ninety of the Revised Statutes of the United States shall not apply to the territory of Hawaii.

"Sec. 6. That the laws of Hawaii not inconsistent with the constitution or laws of the United States or the provisions of this act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the congress of the United States." 31 Stat. 141.

Among the statute laws of the republic of Hawaii set forth in the compilation by Mr. Ballou is the following:

"Sec. 1109. The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage, provided, however, that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws." Civ. Laws Hawaii 1897, p. 447.

Turning to the decisions of the supreme court of Hawaii, we find that the precise right asserted and sustained in the present case was there asserted and sustained as early as 1860,—nearly 40 years prior to the passage of the act of congress of April 30, 1900. *Kake v. Horton*, 2 Hawaii, 209. The reasons for the decision are thus stated by the court in its opinion:

"By the common law of England, the action would not lie. In the case of *Baker v. Bolton*, 1 Camp. 498, which was an action against the defendants as proprietors of a stagecoach on the top of which the plaintiff and his late wife were travelling from Portsmouth to London, when it was overturned, whereby the plaintiff himself was much bruised, and his wife was so severely hurt that she died about a month after, Lord Ellenborough, C. J., held that the jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society and the distress of mind he had suffered on her account from the time of the accident until the moment of her dissolution, for that in a civil court the death of a human being could not be complained of as an injury, and the damages as to the plaintiff's wife must stop with the period of her existence. It is argued by counsel for the defendant that the common law of England is in force in this kingdom, and that therefore the action cannot be maintained in this court. In our opinion, this argument is not sound. We do not regard the common law of England as being in force here *eo nomine*, and as a whole. Its principles and provisions are in force so far as they have been expressly or by necessary implication incorporated into our laws by enactment of the legislature, or have been adopted by the rulings of the courts of record, or have become a part of the common law of this kingdom by universal usage, but no farther. The analogy sought to be set up between the Hawaiian Islands and the British colonies in North America (now a part of the United States) with reference to the common law of England is not, in our opinion, well sustained. We think the circum-

stances of the two countries are widely different. Whether or not the present action can be maintained in this court depends upon the construction to be given to certain provisions of the Hawaiian statutes. The provision contained in the 1116th section of the Civil Code touching the institution of suits to recover damages for injuries, direct or consequential, is very general in its terms, as, indeed, such a provision must be; it being impossible for the legislature to define and enumerate all the various causes for which an action of trespass or an action on the case will lie. Such causes are illimitable in their variety. And as has been repeatedly remarked, it is by no means a conclusive objection to an action on the case to say that an action never was maintained for the same cause before. When an action is brought under the general provision referred to, the question whether or not that particular action will lie is a matter for judicial determination,—not, certainly, according to the mere whim or fancy of the court or judge, but in accordance with legal principles. It is provided in the fourteenth section of the Civil Code, which forms a part of the chapter on the 'Construction of Laws,' that, in all civil matters where there is no express law, the judges are bound to proceed and decide according to equity; applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good conscience. And to decide equitably, an appeal is to be made to natural law and reason or to received usage, and resort may also be had to the laws and usages of other countries. We think reason and natural justice are clearly in favor of permitting an action to be maintained upon the grounds relied upon in this case; and upon a resort, for light, to the laws of those countries to whose authority and opinion we yield the highest veneration, we find that the old, harsh rule, which had its origin in feudal times, has been superseded by liberal statutory provisions, more in accordance with the sentiments and circumstances of an enlightened age. As we are not fettered by the English common-law rule on the subject, no legislative enactment is required to remove that obstacle to the maintenance of an action like the present in a Hawaiian court; and we think it ought to be permitted, as being consonant with natural law and reason, as well as with the laws of civilized countries. In the case of *Carey v. Railroad Co.*, 1 Cush. 480, 48 Am. Dec. 616, Metcalfe, J., intimated an opinion that by the civil law, and by the law of France and Scotland, whose jurisprudence is mainly based upon the civil law, actions like the present could be maintained. We regret that we have not had time to verify, by reference to the books, the opinion of so respectable an authority, because this would of itself afford a distinct and sufficient foundation for our decision. The several courts of record having the power, under the 823d section of the Civil Code, which is not a new provision in our statutes, but one which has been repeatedly acted upon by this court, to cite and adopt, at their discretion, the reasoning and principles of the common law, or of the civil law, so far as the same may appear to the court to be founded in justice, and not in conflict with the laws and customs of this kingdom, if, as is intimated in the case just referred to, the principles of the civil law would permit the institution of such an action as the present, we have no hesitation in preferring the doctrine of the civil law to that of the English common law upon this point, for we conceive the former to be pre-eminently 'founded in justice.' The principle which we now recognize will become, by judicial adoption, a valuable part of the common law of this kingdom. With regard to the objection that this action must be brought by the executor or administrator of the decedent, we think such an objection applies merely to the form of enforcing the remedy, and not to the merits of the claim, or the principle upon which it stands. We have some doubt whether, under our statute of practice, as it reads at present, an administrator could maintain the action, as such. The provision of the English statute referred to (9 & 10 Vict.), requiring the suit to be brought by the executor or administrator, is evidently intended for convenience, and to prevent a multiplicity of actions. But the damages recovered in such actions are not general assets in the hands of the administrator, being for the individual benefit of the widow, or other party entitled thereto, and it does not appear by any means indispensable that the suit should be brought

by the administrator. We think the suit in this case is well brought by the widow."

As will have been observed, the supreme court there expressly declared, "The principle which we now recognize will become, by judicial adoption, a valuable part of the common law of this kingdom." Such judicial modification of the common law the legislature of Hawaii expressly sanctioned and ratified by section 1109 of Ballou's compilation of the laws of that country, which, as has been seen, was, in turn, sanctioned and ratified by section 1 of the act of congress of April 30, 1900, above set out. There was therefore statutory authority for the right asserted, and sustained by the court below.

It is a mistake to say, as do the counsel for the appellant, that the case of *Kake v. Horton* was overruled by the later case of *Bishop v. Lokana*, 6 Hawaii, 556. That was an action of trespass *quare clausum fregit*, brought by the owner of the land trespassed upon, who subsequently died, and whose executors thereafter appeared in court and filed a suggestion of her death, and prayed that the suit might proceed to final judgment. The court granted a motion to set aside the appearance of the executors, saying, "Actions for injury to real estate do not survive to the executor or administrator, for the real estate passed to the heir or devisee, and not to the personal representatives." At the end of the opinion the judge delivering it said, "I notice in *Kake v. Horton*, 2 Hawaii, 213, that this court doubted whether an administrator could maintain an action for damage on the death of a person, but allowed the widow to maintain the suit." So far from the case of *Bishop v. Lokana* overruling the doctrine announced in the case of *Kake v. Horton*, the clause last quoted from *Bishop v. Lokana* indicates, rather, an approval of that ruling.

The only other questions presented by the record relate to the alleged negligence on the part of the defendant, and the alleged contributory negligence of the deceased. We think there is sufficient evidence to establish the alleged negligence on the part of the defendant. The officers of the ship were engaged in delivering the bedplate to the draymen, and had exclusive control in the premises. The ropes, chains, and other appliances were the ship's, for the sufficiency and good order of which its owner was responsible. That the accident occurred by reason of the breaking of one of the chains is not denied. The fact that the chain broke, resulting in the damage complained of, unexplained, is *prima facie* evidence of negligence. A portion of the chain in question was produced in court by the defendant, but not the link or part that broke. The part exhibited is characterized in the opinion of the trial court as "an old five-eighths of an inch chain," and the court added that it "certainly did not look strong enough for the purpose" for which it was used. J. F. Haglund, a sea captain, and witness on behalf of the defendant, testified that iron becomes brittle after it gets old, and that sea captains prefer ropes, "because," said the witness, "we can't always rely on a chain." We are of the opinion that the record contains sufficient evidence to justify the finding of the court

below of negligence on the part of the owner of the schooner. And we are further of opinion that the court below was quite right in holding that no contributory negligence on the part of the deceased was shown. He was not bound to anticipate that the chain would break. On the contrary, he was legally entitled to rely upon the supposition that it would not. And when the imminent danger unexpectedly arose, the fact that he did not run some other way than he did, in his effort to get out of harm's way, is wholly insufficient to show contributory negligence; for, as was well said by the court below, "in the presence of great and unforeseen danger no man is expected to act with deliberation."

The judgment is affirmed.

KING et al. v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Fifth Circuit. May 6, 1902.)

No. 1,129.

1. RAILROADS—BACKING TRAIN—STATUTORY REQUIREMENTS—PASSENGER DEPOT.

Under Code Miss. 1892, § 3549, providing that it shall be unlawful to back a train of cars into or along a passenger depot at a greater rate of speed than three miles an hour, and a train backed along such depot within 50 feet thereof shall, for 300 feet before it comes opposite such depot, be preceded by a servant of the railroad company on foot, not exceeding 40 or under 20 feet in advance, to give warning, and that, for every injury inflicted by a railroad company while violating such section, full damages may be recovered, without regard to contributory negligence, the 300-foot limit does not exceed 300 feet from the building, some part of which is used as a passenger depot, notwithstanding there may be a graveled walk extending along the track beyond the building, on which passengers alight from long trains.

2. SAME—NEGLIGENCE—PLEA OF CONTRIBUTORY NEGLIGENCE—WHEN AVAILABLE.

Where a man, just after stepping on a railroad track in the yards, was run over by part of a freight train backing at the rate of about eight miles per hour, while the conductor, who was on the rear car, was looking in the opposite direction to see if a switch was properly turned for a passing train, and none of the trainmen saw the man on the track, there was no such wanton recklessness or gross negligence as would render unavailable a plea of contributory negligence.

3. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Where a man in vigorous bodily and mental health, with good hearing and sight, with nothing to obstruct the vision, stepped on and walked along a railroad track on which part of a freight train was backing at a rate of eight miles an hour, and was overtaken and killed, he was guilty of contributory negligence.

4. SAME—LICENSE TO WALK ON TRACKS—DUTY OF LICENSEE.

The fact that persons were accustomed to walk along the railroad tracks at the place where an accident occurred, with the knowledge of, and without objection from, the railroad company and its servants, did not relieve such persons from the exercise of ordinary care while on the tracks.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

C. L. Sivley and T. U. Sisson, for plaintiffs in error.

Edward Mayes and J. B. Harris, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. On or about the 16th day of June, 1900, Calvin J. King was killed by a train of the defendant in error in the town of Durant, Miss. Between 11 and 12 o'clock noon, Mr. King was walking up the tracks of the railroad, approaching the depot building, and at a point 430 feet from the nearest part of the depot building was struck and killed by a part of a train of cars, consisting of a freight engine with three or four cars attached thereto, backing up a side track designated as the "passing track." Durant is an incorporated town of 2,000 inhabitants. The depot building and its connected platform run north and south. The main line of the railroad lies east of the depot, and next east of the main line lies the track called the "passing track," on which the accident occurred. This is a very long side track, extending a mile or more south of the depot building, as well as far north of it. It is perfectly straight, and located on substantially level ground, with no natural object to obstruct the view throughout its length. East of the passing track, and south of the depot, was a coal chute. East of the coal chute there was a switch line called the "loop," which connected with the passing track both north and south of the coal chute. West of the main line, and below or south of the depot building, was a switch line called the "scales track," and still west of the scales track was another switch line, called the "platform track," both located south of the freight depot building. Both of these lines of track are three or four hundred yards long, extending across Cedar street, and across another street further south. They run parallel with the main line. The east rail of the scales track is 9 feet from the west rail of the main line, and the east rail of the platform track is 23 feet from the west rail of the main line. The space between these tracks is clear throughout their whole length, and the gravel walk referred to later occupies all the space between the east rail of the scales track and the west rail of the main line to the engine room south of the coal bin, which is 90 feet south of the place where Mr. King was killed. The business part of the town of Durant, west of the railroad, extends to the north and south of the depot building, and Cedar street crosses the railroad at right angles five or six hundred feet south of the depot building. Along the line of the railroad, and on each side of its right of way, there are settlements south of Cedar street, and on the east side of the right of way is a fairly good sidewalk. The proof shows that persons settled in that locality and others were in the habit of passing up north along the railroad tracks to a public crossing just north of the depot building, and of going thence to the business portion or other part of the town lying west of the railroad. The engine which was propelling the cars described as backing northward on the passing track belonged to a freight train which had arrived at Durant a short time before 11 o'clock, and had stopped on the passing track north of the depot building, where the engine was disconnected from the train, and proceeded south on the same track to the coal chute, where it coaled, and then proceeded south to a connecting-link track between the passing track and the main line, on which it passed to the main line, and then,

in due course, backed off the main line onto a track west of the main line, and took up three or four freight cars, at least one of which was a box car, and pulled them onto the main line, and thence, by the connecting link, backed them onto the passing track, and was proceeding to back along the same to the part of the train which had been left on that track north of the depot building. There was no evidence tending to show that the engine or the cars it was pushing had been on the loop track, or on any track east of the passing track. The evidence is ample, clear, and uncontradicted that the engine and cars which ran over the deceased had not been on any of the tracks east of the passing track. Mr. King was seen by one witness approaching the railroad from the west on Cedar street at the point where it crosses the railroad. He turned to the north, walking for a few steps on the main line, then proceeding a few steps more between the main line and the passing track, then stepping onto the passing track, and proceeding north on it until he was struck and killed by the backing cars and engine. At this same time another south-bound freight train was coming down the main track, and the engine pulling it was within four or five car lengths of Mr. King, when he stepped off of the main track onto the space between it and the passing track, and stepped onto the passing track about the time the engine of this south-bound train got opposite him. A witness called by the plaintiff, named Cal Turner, testified that he lived in Durant, south of the depot; that on the day the accident occurred he had started home, and was walking slowly along the east side of the main line of the railroad, having crossed over to that side because he did not want any one to see him get on the freight train, which was then moving southward, and on which he wished to ride to his home, which was the fourth house south of Cedar street; that when the engine of the south-bound freight train was about even with him, at a point about 100 feet south of the public crossing north of the depot building, he saw Mr. King coming toward him from the south; that at the time he first saw Mr. King there was no train south of witness on the track on which Mr. King was killed; that witness did not get on the train, because before the caboose reached him the train was going too fast for him to get on with safety. He continued walking south along the track, and had, at the time of the collision, proceeded to a point about 200 feet north of where it occurred. By this time nearly all of the south-bound train had passed him. He thinks there were four cars attached to the engine which ran over Mr. King, but does not remember whether they were all box cars or not. He did not see the backing train before it struck Mr. King. His attention was attracted by hearing some one holla, and then he saw Mr. King under the front part of the box car. When witness first saw Mr. King, he was walking north on the main line. Mr. King got in between the main line and the other track when the engine was about four or five lengths from him. This witness did not see or hear any signals given by the backing train, did not hear any bell ring or whistle blow on that train, but did hear signals from the train that was on the main line, going south. Says the backing train was moving at the rate of six or eight miles an hour. Other uncontradicted evidence shows that the backing train,

or part of the train, had on it an engineer, a fireman, a brakeman, and the conductor of the train to which the engine belonged. They all testify that the engineer, the fireman, and the conductor were keeping the customary lookout; that the required signals were being given; that the most northern one of the cars in the backing train was a coal car; that the conductor was seated on the southeastern corner of this car, looking north. The conductor testified that just at that instant he was noticing to see if the switch connecting the link track, over which they had passed from the main track, was properly thrown, so that the south-bound train could pass on safely; that he did not see Mr. King. The engineer and the fireman both testified that they did not see him; did not know that he was on the track until they had passed over him, and their attention was challenged by the holloing, which at first they could not locate; that, at the instant they did ascertain what had been done, they stopped the backing train; that it was going at a rate not exceeding four or five miles an hour, and they did not know there was any occasion for stopping until after they had passed over the man.

The plaintiffs are the surviving wife and children of the deceased. Their action is for damages, in the usual form, charging that the death was occasioned by the negligence of the defendant's servants. The defense is a general denial of liability; that the company and its servants were not negligent; and, further, the company pleads negligence on the part of the deceased, which caused him to receive the fatal injury. To meet the plea of contributory negligence, the plaintiffs rely on section 3549 of the Mississippi Code of 1892, which is as follows:

"It shall be unlawful to back a train of cars, or part of a train, or an engine into or along a passenger depot at a greater rate of speed than three miles an hour; and every such train, part of a train, or engine backed into or along a passenger depot and within fifty feet thereof, shall for at least 300 feet before it reaches or comes opposite to such depot be preceded by a servant of the railroad company on foot, not exceeding forty nor under twenty feet in advance, to give warning. For every injury inflicted by a railroad company while violating this section, the party injured may recover full damages without regard to mere contributory negligence."

When evidence on behalf of the plaintiffs and on behalf of the defendant had been fully heard, and the hearing of evidence closed, the defendant, by written motion, requested the court to instruct the jury peremptorily to find for the defendant, which the court did, and there was a verdict and judgment in accordance therewith. The only error assigned which we deem it proper to notice is stated as follows: "The court erred in granting the peremptory charge asked by the defendant below wherein the jury was instructed to return a verdict in favor of the defendant below."

Considering the case without reference to the provisions of section 3549 of the Mississippi Code of 1892, it seems to us to be too clear for controversy that, while there is proof tending to show some degree of negligence upon the part of the defendant company, there is manifestly no proof tending to show such wanton recklessness or gross negligence as would render unavailable a plea of mere contributory negligence on the part of the deceased. It seems also

to us to be beyond controversy, and manifest from the proof, that the deceased was negligent in a manner that contributed directly to the receiving of the fatal injury. Deceased was not yet 50 years of age. Had been up to that time a man in vigorous bodily and mental health. His hearing and sight were good. It was midday. The track was straight and level, with no obstruction thereon. The backing train was more than 100 feet long, and, at the most, its rate of speed did not exceed eight miles an hour. It therefore became necessary for the trial court to decide whether the statute referred to applied to the conduct of the parties at the point where this injury was inflicted. The trial court was not charged with the impossible duty of giving the term "passenger depot" an abstract definition, that would mean the same thing wherever that term would be used or sought to be applied, or the almost equally difficult duty and useless labor of giving it a relative definition adjusted to all possible hypothetical cases. It was the duty of that court to determine by its construction of this section of the statute whether at the time and place when and where King was killed the defendant was backing a train of cars, or part of a train, or an engine, into or along a passenger depot. Some other provisions of the same Mississippi Code may be profitably considered in construing the language of section 3549:

"Sec. 4302. Necessary Depots to be Maintained. Every railroad shall establish and maintain such depots as shall be reasonably necessary for the public convenience, and shall stop such of the passenger and freight trains at any depot as the business and public convenience shall require; and the commission may cause all passenger-trains to permit passengers to get on and off in a city at any place other than at the depot, where it is for the convenience of the traveling public. And it shall be unlawful for any railroad to abolish or disuse any depot when once established, or to fail to keep up the same and to regularly stop the trains thereat, without the consent of the commission.

"Sec. 4303. Regulations for Passenger-Depots. The commission shall establish such rules and regulations for the arrangement and management of passenger-depots as will secure the comfort of passengers, and it shall cause a copy thereof to be posted in each passenger depot or reception-room.

"Sec. 4304. Bulletin-Boards. It is the duty of every railroad to keep conspicuously placed, as the commission shall direct, and of the form and size prescribed by it, at each reception-room or depot, a bulletin-board," etc.

"Sec. 4305. Commission to Visit Stations, etc. The commission shall from time to time, as far as practicable, visit all stations on the various lines of railroad, and investigate the manner in which bulletin-boards are posted and kept, how reception-rooms are arranged and kept," etc.

"Sec. 4309. Location of Station-Houses. The commission may designate the site or location of any new building or station-house which may be ordered erected in cases where the site selected by the railroad's officials is inconvenient or inaccessible; but every depot must be located with due regard to the interest of the railroad and the public convenience.

"Sec. 4310. Union Passenger-Depots. The commission, whenever the public convenience may require it, shall cause union passenger-depots and transfer-stations to be erected, and may designate the dimensions and sites thereof," etc.

"Sec. 4312. To Inspect Depots; Reception-Rooms. It is the duty of the commissioners to inspect the depots of all railroads from time to time, and of the commission to require comfortable and suitable reception-rooms for passengers, separate for the races, and, if it deem proper, for the sexes; and it may require such additions to or alterations in passenger-depots or station-

houses as may be necessary, in its judgment, to secure ample, comfortable, and suitable accommodations for all passengers. * * *

The supreme court of Mississippi has decided that section 3549 was designed to afford protection to all persons within the prescribed limits. *Railroad Co. v. McCalip*, 76 Miss. 360, 25 South. 166. The case just cited is the only one reported in which the supreme court of Mississippi has had occasion to consider and construe section 3549; and that case did not involve the question which now engages us, because in that case the injury was received by the plaintiff while attempting to cross the railroad track on a public street at the north end of the depot building, and was manifestly within the space limitations of the statute, whether or not the words "passenger depot" should be held to relate to the building alone. We note in the reporter's statement of the case: "The depots are situated opposite each other. The freight depot is on the east side of the tracks and the passenger depot is on the west side." In that case, as in this, the passenger depot seems to have fronted on a public crossing just to the north of the depot building. Here, in the case we are considering, both of the waiting rooms of the passenger depot are at the extreme north end of the structure, and the two rooms take in the width of the building. They open to the north. There is a rock deposit all around that end of the building on the north end of it. Immediately behind or south of the sitting rooms is the agent's office, and immediately behind or south of the agent's office is the baggage room, and immediately south of the baggage room is the freight warehouse. On the east and west sides, and immediately south of the freight warehouse, is a platform. The platform immediately south of the freight warehouse is as wide as the whole building, or any part of it. Then there is a cut-off down east, and a narrow transfer platform running south some distance, with a shed over it. This is used to transfer cars. The other platform is used for depositing parcels, such as boxes, lumber, or anything. It is not used for passenger purposes, and is about 3 feet off the ground,—too high for a man to get on, except he go to the end, and come up by the steps. The part of the building used as a freight warehouse, not including its platforms, extends north and south along the main-line track for a distance of 100 feet; and the part used for sitting rooms, agent's office, and baggage room extends about 60 feet along the line; making the whole length of the depot building, excluding from consideration the platforms, 160 feet. The point at which Mr. King was struck is 425 feet from the southeast corner (its nearest part) of the freight-depot building, is 395 feet from the southeast corner of the main platform around the freight warehouse, and is 525 feet from the extreme south end of that part of the building used in connection with passengers, and is only 237 feet from Cedar street crossing. As already mentioned, between the west rail of the main-line track and the east rail of the scales track a 9-foot space, uniform in width, was covered with a good gravel walk, extending more than 600 feet south from the most southern point of that part of the depot building used for passengers, and extends 90 feet beyond the

point at which the collision occurred. A like gravel walk extends north from the depot building about 600 feet; making, including the length of the building itself, a stretch of more than 1,350 feet covered by the southern and northern extensions of this gravel walk. It was put down for the convenience of receiving and discharging passengers on or from cars, in connection with any of the long through trains while standing on the main line, and was given the length it has in order to accommodate the longest trains going north or south on the main line. At the point where the collision occurred, passengers may have been received or discharged, and certainly were often received or discharged on such cars at points not many feet north of the place where the injury was received.

The contention of the plaintiffs is that, within the meaning of the terms of section 3549, every point on this extended gravel walk, throughout its whole length, is a part of the passenger depot, and that the language of the statute required that for a distance of 300 feet further south, and of 300 feet further north, from the respective extremities of this gravel walk (that is, for a distance of 1,950 feet), the railroad company, in backing a train of cars, or part of a train, or an engine, along any of its tracks located and running within 50 feet of this gravel walk, should not run at a greater rate of speed than three miles an hour, and that it should have every such train, part of train, or engine preceded by a servant of the railroad company, on foot, not exceeding 40 or under 20 feet in advance, to give warning. On the other hand, it is contended by the railroad company that the plain meaning of the language of the section in question requires that the words "a passenger depot," as used in that section, should be construed to apply to the building used for such depot in cases where there is a building to locate the depot.

We have noticed, in section 4302, that the railroad commission of the state of Mississippi "may cause all passenger trains to permit passengers to get on and off in a city at any place other than at the depot, where it is for the convenience of the traveling public." It is not necessary to hold that there could not be a passenger depot on a railroad without having in connection with it, and as its most conspicuous feature, some character of a house or building. But it seems to be very certain, from the comprehensive provisions of the Code of Mississippi defining the powers and duties of the railroad commission of that state, that no railroad in that state would be permitted to use such a passenger depot. While, in a certain sense, the term "passenger depot" embraces more than the mere building, in undertaking to survey and fix the limits of the space reservation made by this statute it is necessary that we should look for a reasonably definite point as a place of beginning. The limits are that the line of track must run within 50 feet of the passenger depot, and that a train, or part of a train, or engine, backing on this track into or along a passenger depot, shall, for at least 300 feet before it reaches or comes opposite to such depot, be preceded by a servant of the railroad company, etc., and be run at a rate of speed not greater than three miles an hour. Counsel for the plaintiffs calls to our attention section 3551 of the Code, which

concludes with this sentence: "A failure to observe this and the four last preceding sections shall cause a railroad company to be liable to a fine of fifty dollars for each offense;" and counsel say truly that "this penalty is therefore imposed for the violation of sections 3547, 3548, 3549 [the section we are construing], 3550, and 3551." The last sentence of section 3549 is also highly penal in its character: "For every injury inflicted by a railroad company while violating this section the party injured may recover full damages without regard to mere contributory negligence." Following the recognized canons for the construction of such statutes, and keeping well in mind that the purpose of this statute is to provide for the preservation of human life, we are unable to give the words "a passenger depot," as used in the section, the construction contended for by the plaintiffs' counsel, and are fully persuaded that in this particular case the language "a passenger depot" must be limited at least so as to include, at most, only the whole of the building, a part of which is used in connection with the passenger service, and therefore that the restrictions and limitations of the section were not laid upon the defendant at the time and place when and where the collision occurred which occasioned the death of Mr. King. We think the contention of the plaintiffs' counsel that Mr. King was a licensee on the defendant's tracks at the point where he was struck in no way favorably affects the plaintiffs' case. It is only claimed that he and others were in the habit of passing north along these tracks, between the rails of the different tracks, or between the different tracks, indifferently, without confining themselves to the gravel walk, and that this was known to the defendant and its servants, who are not shown to have made any effort to prevent it. The fact that such use of the tracks was permitted, either passively or expressly, would not relieve persons availing of it from the exercise of ordinary caution, and, so far from charging the servants of the company with any additional degree of care in operating its trains at midday, would have a reasonable and natural tendency to dull their attention in taking notice of people passing about or along the tracks at such a time, on account of its being a common occurrence, and the persons usually there being those who were accustomed to the place, and having knowledge of its dangers, and trusting in their own capacity to avoid injury in such use by timely stepping off a track on which a train, or part of a train, or engine was approaching.

From the most careful consideration of the whole proof, and of the language of section 3549, and of the other parts of the statutory law of Mississippi to which we have been referred, we are satisfied that the plea of contributory negligence was well taken, and was established by uncontradicted testimony, and that the trial judge did not err in directing a verdict for the defendant.

The judgment of the circuit court is affirmed.

COLTON v. RAYMOND.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 116.

1. STATUTE OF FRAUDS—SALES—PART PAYMENT OF PRICE.

Under the statute of frauds of New York, which provides that a contract for the sale of goods, where no note or memorandum in writing is made, shall be void unless the buyer shall receive some part of the goods, or "shall at the time pay some part of the purchase money," as construed by the courts of the state, in order that the receipt by the seller of a part of the consideration for goods, after the time when a verbal contract for their sale was made, shall render the contract valid, there must be, at the time of such payment and receipt, such action taken by the parties as amounts to the making of a new contract, either by the making and acceptance of the payment for the expressed purpose of complying with the statute and making valid the contract, recognized as previously void, or by substantially restating, reaffirming, and renewing its terms; and a delivery of such part of the consideration by the buyer, with the statement that it was "in compliance and fulfillment of the trade that we made" on a day stated, and the acceptance of the same by the seller in silence, does not amount to a renewal of the prior contract, or the making of a new one, but at most is an implied recognition of the validity of the former contract, and the payment is not made "at the time" within the statutory exception.

2. SAME—SUBJECT OF SALE—OFFICE OR AGENCY.

An office involving fiduciary duties or an agency in which the *delectus personæ* is the essence of the relation cannot be the subject of a sale or assignment; nor is an oral agreement to resign such an office or agency as part of the consideration for a promise by the other party a contract for the sale of "goods, chattels, or things in action," within the meaning of the New York statute of frauds, so that the delivery of such resignation will amount to a part performance to bind the other party.

In Error to the Circuit Court of the United States for the Southern District of New York.

A. Walker Otis, for plaintiff in error.

Wm. B. Hornblower, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error, who was the plaintiff in the court below, upon the trial of the action excepted to the rulings of the trial judge in directing a verdict for the defendant, and the principal assignments of error are addressed to that ruling. The case has been before this court on a former occasion upon a writ of error by the defendant from a judgment for the plaintiff entered upon the verdict of a jury, when the judgment was reversed upon the ground that the contract for breach of which the action was brought was invalid by the statute of frauds. The opinion is reported in *Raymond v. Colton*, 43 C. C. A. 501, 104 Fed. 219. Upon the present trial the facts proved were substantially those which were recited in that opinion, but some additional evidence was introduced in

behalf of the plaintiff, which will be referred to hereafter. Briefly stated, the agreement proved was one by which the plaintiff was to dispose of his interest in the concern of Vantine & Co., and the defendant was to pay him therefor in goods of the concern.

Vantine & Co. was a joint-stock mercantile association, with a capital stock divided into 2,500 shares, of which the plaintiff was the owner of 625 shares, and the defendant the owner of the remaining shares. Its business was carried on at New York and in Japan. The plaintiff was vice president and general manager of the concern, having a salary of \$10,000 per annum as vice president. His brother was the general manager of the concern in Japan, and his father was a nominal shareholder and a director. The defendant was the president. The plaintiff had pledged his 625 shares of stock to the defendant as collateral security for the payment of his promissory note to the defendant for the sum of \$165,000, with interest from January 1, 1897. He was also indebted to the concern in the sum of \$12,000. Although the concern was, in legal effect, a corporation, its business had been conducted by the parties as though it were a partnership in which the plaintiff had a one-fourth interest and the defendant a three-fourths interest. The agreement grew out of friction between the parties in their business relations, and was made August 3, 1898. The evidence in respect to it authorized the jury to find that the plaintiff on his part undertook to "get out," and deliver to the defendant his resignation as vice president and managing agent and the resignation of his brother; and the defendant undertook to pay him therefor the value of his interest in the concern, less the amount of his note to the defendant and his indebtedness to the concern, such interest to be ascertained as of January 1, 1898, from the books of the concern. The evidence also authorized the jury to find that it was understood by the parties that the agreement was to be regarded as final, but without prejudice to further negotiations for some other adjustment of their differences. The evidence also authorized the jury to find that such negotiations took place, but on August 15th the plaintiff terminated them by an interview, at which he handed to the defendant the resignations "in compliance and fulfillment of the trade that we have made," and stated that he wanted the defendant to give him his quarter interest in the business, as he had agreed, and that the defendant received and retained the resignations.

In our former decision, in referring to the agreement, we characterized it in the opinion in this language:

"All that the plaintiff had to sell, and all that the defendant could buy, were the plaintiff's shares in the association. The plaintiff could not sell, nor could the defendant buy, the directorships of the association. In legal effect, the agreement was one for the barter or exchange of the shares in the association for the goods, the defendant being the buyer of the shares, and the plaintiff the buyer of the goods."

The principal question considered in that opinion was whether the contract was void under the statute of frauds, or whether, though an oral contract, it was withdrawn from the operation of the statute because the plaintiff had "at the time" paid some part of the purchase

consideration. The question was not considered whether the contract was withdrawn from the operation of the statute, because the defendant had accepted and received some part of the property which was the subject of the sale.

As the statute of frauds is construed by the courts of this state, a payment made subsequent to the time of the original contract is to be deemed made at the time of the contract, if there was such a reaffirmation of the prior contract as to constitute a new contract. The majority of the court regarded the decisions of the state courts as holding that the reaffirmation is one which is made by express terms, and not one which arises from the making and the reception of the payment upon the tacit or implied understanding that the contract formerly made is in force; in other words, the majority adopted the language of the court of appeals in *Jackson v. Tupper*, 101 N. Y. 519, 5 N. E. 65, and held the payment ineffectual to validate the contract, because "there was no restatement of the terms of the prior oral agreement when the payment was made, and no express recognition thereof; nor was the payment made for the avowed purpose of binding the prior bargain."

To differentiate the present case from the former one, the plaintiff gave additional evidence in respect to the conversation which took place between the parties at the interview on August 15th. He testified that in speaking of the agreement at the interview he mentioned it as the agreement made August 3d. He narrated that interview as follows:

"I said: 'Mr. Raymond, I am going to give you my resignation, my father's resignation, and my brother's resignation, to take effect to-night at six o'clock, in compliance and fulfillment of the trade that we made on August 3d. I want you to give me my quarter interest in the goods, less the notes, as you promised to August 3d.' He said, 'Charlie, won't you regret it?' I said, 'No.' I think that closed the talk at that time."

He also testified that the certificate for the 625 shares had never been in his possession, but had always been in the possession of the defendant since it was issued. Further new testimony was given for the plaintiff by the witness Sproull, an attorney, who had been present when the contract of August 3d was made. This witness testified to a conversation with the defendant on August 19th, in which he stated to the defendant that the plaintiff had given up his resignation and his salary, and had made over to the defendant his stock, and asked the defendant: "Do you want anything further? Do you want an assignment of the stock?" And the defendant answered: "No, I have got them. He made them over. I can do as I please. * * * I want him to resign as trustee. When he has done that, I will give him his one-quarter interest in the concern in the shape of goods." Sproull then proposed to secure the plaintiff's resignation as trustee, and said to the defendant: "Colton, I know, will be willing to give it. I will report to him this conversation, and tell him that you will give him his interest in goods, and then he will give you his resignation as director and trustee." Sproull also testified that he communicated the request for the resignation to the plaintiff. It

was proved also that the plaintiff complied with Sproull's request by mailing to the defendant a resignation as trustee and director.

In directing a verdict for the defendant, the trial judge expressed the opinion that the contract was void by the statute of frauds, and that the evidence did not distinguish the case from the one previously considered by this court.

As the statute is a New York statute, it is the duty of this court to adopt the construction put upon it by the highest courts of this state in respect to the meaning of the words "at the time" of the contract. The statute declares any contract "for the sale of goods, chattels, or things in action" void, in the absence of a note or memorandum in writing, unless the buyer shall "accept and receive some part of the goods, or the evidences, or some part of such things in action," or "shall at the time pay some part of the purchase money." The former statute did not specify the time when either the goods were to be accepted or received, or a part of the purchase money was to be paid. The history of the legislation is given in *McKnight v. Dunlop*, 5 N. Y. 537, 55 Am. Dec. 370, where the court adverted to a decision of the supreme court of Massachusetts in *Thompson v. Alger*, 12 Metc. 435, where the meaning of the New York statute was considered. The Massachusetts case was one in which the court, speaking of the original verbal agreement, used this language:

"Had nothing further occurred, this verbal contract might have been restricted to that point of time. But such was not the case. On the contrary, these parties met again, and further declared upon the subject and they engaged that the defendant should on that day pay to Stone \$400 in part payment of the purchase money; and, if the defendant would thus pay that sum, that Stone would have the stock transferred, so that the defendant could have it the next time he should be in Hudson. Here was a new and further negotiation of the parties, a renewal of the contract, with a new agreement as to the time of the transfer of the shares. At the time of the making of this latter agreement,—which is the one that the plaintiff seeks to enforce,—the \$400 was actually paid as a part of the purchase money of these shares, which, by this agreement, were to be conveyed. These facts present a case of payment, which, we think, will bring this case within the third class of exceptions from the operation of the statute of frauds."

In *McKnight v. Dunlop*, referring to that decision, the court said:

"If the contract is not in law deemed to be made until the part payment of the purchase money, and a previous oral agreement is merely referred to to ascertain the terms of the subsequent valid contract, the decision of the supreme judicial court of Massachusetts can be regarded as sound."

The subsequent decisions of the courts of New York follow this interpretation of the statute. In *Bissell v. Balcom*, 39 N. Y. 275, the parties had made a verbal agreement for the sale of cattle at a price exceeding \$50, without any actual delivery or payment of any part of the purchase price, but the next day the plaintiff called upon the defendant for a payment to "bind the bargain, so that there will be no chance to back out," and for that purpose the defendant made a payment of a part of the price. After referring to the conversation which took place at the time of the payment between the parties, the court said:

"Here is a distinct intelligent reference by both parties to the negotiation of the previous day; a recognition by both of its want of binding force or validity, because no part of the stipulated price was paid; a declared intent to make the bargain valid and binding, assented to; a request for the payment of the money for that purpose, and a payment in compliance with that request."

In *Hunter v. Wetsell*, 57 N. Y. 375, 15 Am. Rep. 508, the contract (for the sale of hops) was made September 27th, and no portion of the purchase price was then paid. Subsequently the defendant paid the plaintiff \$300 upon the purchase price,—\$200 in November and \$100 in December,—to apply on the hop contract. There was no proof of what was said about the hops. In deciding the case the court said:

"There is no proof of what was said about the hops or the contract when these payments were made. The evidence does not even show that the contract was mentioned or referred to. It is simply that the payments were made towards the hops."

After reviewing the authorities, the court used this language:

"The following points may, however, be regarded as established: (1) Where a contract of sale has been made, good at common law, but void under the statute of frauds, and the parties subsequently meet, and for the express purpose of then complying with the statute and making the contract valid, a payment is made by the purchaser upon the contract, at the request of the seller, such payment is made at the time of making the contract, within the meaning of the statute. (2) Where, in case of such a void contract, the parties subsequently come together, and substantially restate, reaffirm, and renew its terms, so as then and there, by the meeting of their minds, to make a contract, and then payment is made upon the contract, the statute is complied with."

This case subsequently came before the court of appeals a second time (84 N. Y. 549, 38 Am. Rep. 544), and the court said:

"In the case as now presented, the difficulty, fatal before, is claimed to have been obviated. There is proof of a restatement of the essential terms of the contract at the time of the delivery of the check for \$200."

The court held the contract valid because payment was made at the time of such restatement of the terms of the contract.

These propositions have always been adhered to by the courts of New York. In *Jackson v. Tupper*, 101 N. Y. 515, 5 N. E. 65, where the payment was held insufficient to validate the contract, the court observed that the plaintiffs did not bring their case within these propositions, saying:

"There was no restatement of the terms of the prior oral agreement when the payment of May 1, 1880, was made, and no express recognition thereof, nor was the payment made for the avowed purpose of binding the prior bargain."

In the present case, treating the delivery of the resignations on August 15th as a payment made upon the contract of August 3d, it is not pretended that the payment was made for the purpose of validating the prior void contract. It purported to be made in execution of a valid prior contract, in the words of the plaintiff, "in compliance and fulfillment of the trade that we made on August 3d." Was there any

restatement of the substantial terms of the prior contract? The plaintiff said to the defendant: "I am going to give you the resignations in fulfillment of the trade that we made on August 3d. I want you to give me my quarter interest in the goods, less the notes, as you promised to August 3d." The defendant was silent, though, of course, by receiving the resignations he assented to the statements of the plaintiff. Nothing was said about the shares of stock, or as to the manner in which the plaintiff's interest was to be ascertained. It was understood, undoubtedly, that his interest was to be that as shown by the books of the company on the previous 1st day of January, viz., by ascertaining the inventory value of the assets and the state of the plaintiff's account with the concern on that day; but no mention was made of this substantial part of the prior contract. Nothing was said about the certificates for the plaintiff's shares then pledged to the defendant, and nothing about the cancellation or surrender of the plaintiff's note for which the shares were held as collateral. Nor was there any mention made of the vital and important conditions of the prior contract that the plaintiff was to "get out," or renounce his interest in the concern. Finally, throughout the interview there was merely a proposition or demand on the part of the plaintiff, a statement of what he proposed to do and wanted the defendant to do, and no verbal assent by the defendant. It seems preposterous to say that here was any restatement of the terms of the old contract. By implication they recognized that it was still existing, but they did not reassert its terms so as to agree upon a new one of essentially the same purport.

Did the subsequent conversation with Sproull on August 19th, and what took place pursuant to that conversation, amount to a payment at that time? If we treat the conversation as an interview between the defendant and the plaintiff himself, there are two reasons why it did not: (1) There was no restatement of the substantial terms of the contract, and (2) there was no payment of any part of the contract consideration. What was said by the defendant about the stock was merely his statement of what he conceived to be his rights in view of what had previously taken place. The resignation of the plaintiff's father as a trustee, or of the plaintiff himself as a trustee, was not a part of the consideration of the prior contract. The agreement was that the plaintiff should "get out," and hand in his brother's resignation and his own resignation as vice president and general manager. If in that conversation, or the previous conversation with the plaintiff, the defendant had stated that he would henceforth regard himself as the owner of the plaintiff's shares of stock, the circumstance would not have helped the plaintiff's case. The statute requires physical acts of delivery and acceptance, and words alone are useless. In the absence of any act of the defendant indicating an assumption of ownership of the shares, or of authority over them, what was said and what took place was of no importance. *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316; *In re Hoover*, 33 Hun, 555; *Caulkins v. Hellman*, 47 N. Y. 453, 7 Am. Rep. 461; *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619.

Upon principle, and logically, there can be no payment made at the time of the contract unless it is made as a part of the negotiations, or at the time when the negotiation is concluded; otherwise the statutory provision would be nugatory. If there is a new contract, in which the parties agree to reinstate a previous one for the purpose of validating it according to the statute, so that it is to take effect as a new agreement in substitution of the void one, and a payment is made at the time, the statute is satisfied. If they get together, and by words or implication say to one another, "We recognize that the bargain that we have previously made is not enforceable, but we are willing to stand by its terms upon the immediate payment of the purchase money, or a part of it," there is a new contract supported by a new consideration. But when they get together, and talk over a part of the terms of the original contract, but do not advert to some of the substantial conditions, and a payment is made, the old contract is not reinstated, but a new and different one is made, which, because of the payment, is valid within the statute. This contract may support an action for its breach, but it cannot support one for a breach of the original contract.

It has not been argued that there was an acceptance or reception by the defendant of "some part of the goods, or the evidences, or some part thereof, of such things in action," so as to bring the case within the other exception of the statute. In our former decision we pointed out that there could be no sale or purchase of the directorships or offices of the corporation, although the promise by the plaintiff to sell or deliver the resignations might be regarded as a part of the consideration of the defendant's promise. Neither could there be a sale of the agencies of the plaintiff and his brother. An office involving fiduciary duties, or an agency in which the *delectus personæ* is the essence of the relation, is not the subject of a sale or an assignment. *Devlin v. Mayor, etc.*, 63 N. Y. 8; *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246; *Delaware Co. v. Diebold Safe & Lock Co.*, 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674. Nor do they fall within the terms of the statute of frauds. They are neither "goods, chattels, nor things in action." It is the reception or acceptance of some of these things, or the "evidence thereof" to which the statute refers. The statute has no application to the contract for the sale or the purchase of an agency, and it is immaterial whether such a contract is in writing or is not. The delivery of the resignations was merely an act evidencing the plaintiff's renunciation of all further participation in the business of the concern.

We conclude that the court below ruled correctly in directing a verdict for the defendant, and the judgment is therefore affirmed.

DAWSON v. CHICAGO, R. I. & P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1902.)

No. 1,600.

MASTER AND SERVANT—DEATH OF BRAKEMAN—CONTRIBUTORY NEGLIGENCE.

Where a brakeman, going between two cars, which were moving quite fast, seized a grip iron on the end of a flat car, which was primarily designed to be used for making couplings, and, in attempting to step on a swinging brake beam to ride to a car which he had been directed to take up, was killed, and there were hand holds on the side of a box car next to the flat, which he might have used without any risk, if he desired to ride, he was guilty of negligence contributing to his death, and precluding a recovery.

Caldwell, J., dissenting.

In Error to the Circuit Court of the United States for the District of Kansas.

Thomas P. Fenlon (B. F. Endres, on the brief), for plaintiff in error.

W. F. Evans (M. A. Low, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was an action for personal injuries, in which the trial court, after hearing all the testimony, directed a verdict in favor of the defendant company. Whether such direction was proper is the sole question presented by the record, and the facts on which the decision must turn are few and simple. Alberta M. Dawson, the husband of Daisy Dawson, the plaintiff in error, was a brakeman in the employ of the Chicago, Rock Island & Pacific Railway Company, the defendant in error. On November 5, 1898, the freight train on which he was employed as head brakeman arrived at Narka, Kan., between 2 and 3 o'clock p. m.; having started from Phillipsburg, Kan., that morning, and being on its way to Fairbury, Neb. Arriving at Narka, his conductor ordered him to pick up a car which was standing on the house track, and place it in the train. With this purpose in view, the engine, with two cars attached,—the one next to the engine being a box car, and the other a flat car belonging to the Lake Shore & Michigan Southern Railway Company, and loaded with piling,—were accordingly detached from the train, and run forward eastwardly some distance from the station, beyond a switch, with a view of backing in on the house track, and picking up the car, which was standing from 130 to 150 feet west of the switch. Dawson and another person, by the name of Short, who was not in the employ of the defendant company, appear to have ridden on the flat car from the station to the switch, where Dawson jumped off for the purpose of throwing the switch. While so riding they stood on the swinging brake beam of the flat car, maintaining their footing thereon by means of two hand holds (one on each side of the drawhead) at the end of the car. When the engine backed down in obedience to the signal to pass in on the house track, Dawson, who was then standing near the switch, stepped in, or swung

himself in, as one witness says, between the box car and the flat car, seizing one of the hand holds at the end of the flat car, and stepped, or attempted to step, on the swinging brake beam, either with the intention of standing thereon and riding back to where the car was to be picked up, or with a view of climbing up on the flat car. The hand hold gave way because one of the screws by which it was held in place was screwed into wood that had become rotten; the result being that he fell across the track and was run over, sustaining injuries on account of which he died the succeeding day. The flat car to which the defective hand hold was attached, as before stated, was a foreign car, and had come into the possession of the defendant company at Phillipsburg, Kan., on the night preceding the accident. It had been placed in the train on which Dawson was a brakeman early in the morning of the day the accident occurred, and had been hauled in that train from Phillipsburg to Narka. The hand hold which proved to be defective was placed there in obedience to the act of congress of March 2, 1893 (27 Stat. 531, c. 196). The purpose of requiring grip irons or hand holds to be placed at the end of cars used in interstate commerce seems to have been to afford greater security for employes when they are in the act of coupling or uncoupling cars. One of the plaintiff's witnesses, who was nearest to the train when the accident occurred, testified that the engine and cars were backing in on the switch "tolerably fast," or "pretty swift," when Dawson swung in between the cars and stepped on the brake-beam, while another witness, who was farther away, said that they were moving slowly.

It is claimed on behalf of the plaintiff that the facts above recited, concerning which there was no dispute, would have warranted the jury in finding that the defendant company, in the exercise of ordinary care, ought to have discovered the defect in the hand hold or grip iron on the end of the foreign car prior to the accident, and that it was guilty of negligence in not making such discovery. It is also claimed that the facts would have warranted a jury in finding that Dawson acted with ordinary prudence on the occasion in question, and was not guilty of contributory negligence.

Relative to the first of these contentions, we observe that as the flat car to which the hand hold was bolted had been received by the defendant company on the evening previous to the accident, and had passed only one inspection point prior thereto; and as there does not seem to have been any outward evidence that the timber was rotten where one end of the hand hold was bolted, until the screw came out and disclosed that the wood was decayed, or "doty," as one witness says, it is at least questionable whether a jury could reasonably have found that the defendant company was guilty of culpable negligence in not discovering the defect. Short, who rode with Dawson from the station to the switch, and who had held on to the identical grip iron which subsequently gave way when Dawson seized it, says that it appeared to be in a proper condition until the screw came out and disclosed the defect in the timber, and so it may have appeared to the defendant's car inspectors. But it is unnecessary, we think, to express a definite opinion upon the question whether a jury of reasonable men

might have found that the defendant was guilty of a want of ordinary care.

Dawson went in between two cars, when, as the witness who was best able to judge says, "they were moving pretty swift," or "tolerably fast," seized the grip iron on the end of the flat car, which was primarily designed to be used by a brakeman for the purpose of making a coupling, and stepped, or attempted to step, on a swinging brake beam, with a view of standing and riding thereon for a distance of about 150 feet, until the car which he had been directed to pick up was reached. It appears that there were stirrups and hand holds on the side of the box car, which he might have used without any risk of injury, if he desired to ride rather than to walk, and that he could have walked to the place where the coupling was to be made without delaying the train for a minute. From any point of view, the risk which Dawson thus took was an unnecessary risk, that might as well have been avoided, and he ought to have avoided it. He was not confronted at the time with an emergency which called for instant and decisive action, such as sometimes confronts railroad men, and compels them to incur considerable risk. He was in a situation where he could have done what he desired to do in a perfectly safe way. He thought proper, however, to place himself in a position of great peril, where a slight misadventure meant instant death or serious injury. Conceding it to be true that brakemen sometimes take such risks without any sufficient cause or excuse, yet such acts should nevertheless be pronounced negligent. Such conduct on the part of brakemen and others ought, also, to be discouraged. If a man exposes himself to great risk unnecessarily, he is guilty of negligence, although it be shown that other persons have done the same thing and escaped unhurt. The inherent quality of an act is not changed, whether it is done by one or many. In the case of *Morris v. Railway Co.*, 47 C. C. A. 661, 664, 108 Fed. 747, 749, this court held, in substance, that where there is a comparatively safe way, known to a person, of doing an act, and there are no obstacles in the way of his employing the safe method, but he deliberately chooses a dangerous method, the perils of which are obvious, he is guilty of negligence, and thereby assumes the risks so incurred. See, also, *Loranger v. Railway Co.*, 104 Mich. 80, 86, 62 N. W. 137; *Carrier v. Railway Co.*, 61 Kan. 447, 451, 59 Pac. 1075; *Cunningham v. Railway Co.* (C. C.) 17 Fed. 882.

Our conclusion is, therefore, that, in view of the undisputed evidence in the case which this record contains, Dawson must be adjudged to have been guilty of negligence which immediately contributed to his death, and on this ground the lower court properly directed a judgment for the defendant. The judgment below is accordingly affirmed.

CALDWELL, Circuit Judge (dissenting). The act of congress provides that "it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grip irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." It will be ob-

served that the requirement of the act is that the grip iron or hand hold shall be "secure," and they are to be placed in the ends and sides of each car, for greater security to men in coupling and uncoupling cars. The act does not undertake to direct when the brakeman shall use the grip irons on the side, and when he shall use those on the end, of the car. They are placed near together. Sometimes it is more convenient to use one, and sometimes the other. They are used indifferently, except that when signals are to be given by the brakeman the end hand holds are preferred. On the subject of the use of these hand holds, experienced brakemen and other railroad men testified as follows:

"Q. Is it ever customary, or not, for a brakeman occupying the position that Dawson did, and about to perform the services which he was, to get upon a car while in motion, for the purpose of coupling it onto another car some distance from it? A. It is customary. Q. What is the usual and ordinary way of getting upon a car such as this one was, where they have a hand hold upon the end and also upon the sides of the car? A. They generally use the side when they get on the side, and use the hand hold when they get on the end, or sometimes both,—whichever is convenient."

In answer to this clear proof that the action of the deceased was in accordance with the custom and usage of brakemen under like circumstances, it is said:

"Conceding it to be true that brakemen sometimes take such risks without any sufficient cause or excuse, yet such acts should nevertheless be pronounced negligent. Such conduct on the part of brakemen and others ought also to be discouraged."

The court assumes to know more about the proper way for brakemen to discharge their duties than the brakemen themselves know, and levels its censures at them for not conforming to the court's idea of the proper mode of discharging their duties, but has no word of censure for the railroad company for carrying on its cars an insecure hand hold, certain to result in death or great bodily injury to any brakeman who attempted to use it in the discharge of his duties in the customary mode. It would seem that in such case, if the life and limb of a brakeman are esteemed of any consequence, and their protection thought to be desirable, it is the conduct of the railroad that ought to be "discouraged" by the court's decision, rather than to require the brakemen to adopt some novel and unusual mode of discharging their duties, prescribed by a court which has no more knowledge of the proper and customary mode of discharging those duties than the brakemen have of the intricacies and mysteries of special pleading. The decision in this case is, in effect, a license to the railroad company to carry a death trap on its cars for its brakemen, in defiance of the act of congress which requires them to provide their cars with "secure" hand holds. Manifestly, it were better the act of congress had never been passed, for a car without any sort of hand holds would be preferable to one with insecure hand holds,—hand holds that give way and send the brakeman to his death.

It is obvious from a consideration of the testimony that the brakeman was not guilty of contributory negligence in seeking to support

himself by taking hold of the end hand holds, instead of those on the side. In reference to the defense of contributory negligence it may be observed: First, in the courts of the United States this defense is one which the defendant must prove; second, the rule is that, to establish contributory negligence, "the evidence against the plaintiff must be so clear as to leave no room to doubt, and all the material facts must be conceded or established beyond controversy." *Field*, Dam. 519; *Beach*, Cont. Neg. § 447; *Railway Co. v. Sharp*, 27 U. S. App. 334, 11 C. C. A. 337, 63 Fed. 532; *Railroad Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281, 38 L. Ed. 131; *Bluedorn v. Railway Co.*, 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615; *Weller v. Railway Co.*, 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532.

The majority of the court seek to prescribe a rule of conduct for brakemen impracticable in practice, and contrary to the established usage and practice in such cases. The standard of care required of a brakeman is the brakeman's standard of care, and not the ideal standard of care of a judge reposing in security and comfort in an upholstered chair in his chambers. It is said the brakeman could have "walked to the place where the coupling was to be made, without delaying the train for a minute." If the hand holds are not to be used where the brakeman could walk to the place of coupling, it follows logically that he must refrain from using them when he could reach the place of coupling by running. Such a standard of care nullifies the act of congress altogether. If trains could only be operated and cars coupled and uncoupled by such ideal standards, a radical revision of railroad time-tables would be necessary. The remark of Lord Hatherly in delivering the judgment of the house of lords in *Overend & Gurney Co. v. Gibb*, L. R. 5 H. L. 494, is as applicable in this case as it was in that. He said:

"What I did intend to state in that case was that I could not measure—and I think it would be a very fatal error in the verdict of any court of justice to attempt to measure—the amount of prudence that ought to be exercised by the amount of prudence which the judge himself might think, under similar circumstances, he should have exercised."

But the opinion of the majority or minority of this court upon this question is quite immaterial. Whether the brakeman was guilty of contributory negligence, under the circumstances, was clearly a question of fact for the jury, and not one of law for the court. In the case of *Jones v. Railroad Co.*, 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478, the circuit court instructed the jury to render a verdict for the defendant upon the ground that the plaintiff had been guilty of contributory negligence, but the supreme court reversed the judgment. The court, speaking by Mr. Justice Miller, said:

"But we think these questions [of negligence] are for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as this as well as others. * * * Instead of the course here pursued, a due regard for the respective functions of the court and jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would have secured a sound verdict."

In the case of *Railroad Co. v. Ives*, 144 U. S. 409, 417, 12 Sup. Ct. 679, 36 L. Ed. 485, the court said:

"It is only where the facts are such that all reasonable men must draw the same conclusions from them that the question of negligence is ever considered one of law for the court."

The proof is overwhelming that the wood in which the hand holds were inserted was soft, black, and rotten. The only inspection of the hand holds, if any was made, was a mere perfunctory, visual inspection. Such an inspection does not satisfy the requirements imposed by law on a railroad company, either as to its own or foreign cars.

In *Railroad Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, the supreme court said:

"That it was the duty of the railway company to use reasonable care to see that the cars employed on its road were in good order and fit for the purposes for which they were intended, and that its employes had a right to rely upon this being the case, is too well settled to require anything but mere statement. That this duty of a railroad, as regards the cars owned by it, exists also as to cars of other railroads received by it, sometimes designated as 'foreign cars,' is also settled."

In *Felton v. Bullard*, 37 C. C. A. 1, 94 Fed. 781, it was assigned for error that the circuit court refused to give this instruction:

"If the defect was latent,—that is, one not visible,—the defendant is not liable, if the injury occurred for reason of such latent or invisible defects."

In overruling this assignment of error, the circuit court of appeals of the Sixth circuit said:

"The refusal to instruct in the words of the request is now assigned as error. There was evidence tending to show that neither the broken and rusted condition of one of the screws by which the grip iron was held to the wood of the car, nor the decayed condition of the wood surrounding this broken screw, was visible from the surface. Indeed, the evidence strongly indicated that no mere visual inspection would have disclosed the dangerous condition of this grip iron. But would a mere visual inspection of such an attachment be due and reasonable inspection of such an instrumentality? Was there no other ready means of ascertaining whether it was properly and safely attached, than a visual inspection? If the application of some force would disclose a dangerous weakness, ought not such a force to be applied? The grab iron was about two feet in length. If the weight of a man was thrown upon the end supported by the sound screw, it might hold. But if that weight was thrown upon the other screw, was it likely to indicate any firmness? The facts were not voiceless. They speak for themselves. The condition of the screw supporting one end, and of the wood into which it was screwed, was such, as disclosed by examination after the accident, as to make it obvious that any strain thrown upon that end would disclose the weakness with which it was attached. Did the inspection made involve any strain upon the weak end of this grab iron? If so, did he use it in such way as to really afford a test of the firmness of its attachment? If the inspection made did not involve such a physical test as was feasible, and calculated to disclose just such an infirmity as existed, would not a jury be warranted in finding either that no physical test at all was made, or that, if made, it was so carelessly made as to be useless?"

And in *Guttridge v. Railway Co.*, 105 Mo. 520, 16 S. W. 943, the supreme court of Missouri said:

"The fact that the wood is old and the screws are rusty would naturally suggest to an ordinarily prudent man the propriety of a thorough inspection.

We cannot concur in the contention that an inspector of a hand hold performs his duty, under all circumstances, by simply using his eyes to detect defects."

And after citing authorities the court continues:

"We quote these authorities to show that the master is not always, and under all circumstances, excused if he could not see a defect; and, if the conditions are such as would excite suspicion in a man of ordinary prudence, he must go further and apply other tests. We know that machinery, and the materials composing it, may be tested in various ways. What the ordinary tests, as applied to railroad appliances, are, is not disclosed by this record; but we feel satisfied that looking is not the only test. The master must use such reasonable tests to discover defects as ordinary prudence suggests. The amount of care required is measured by the circumstances of each case, depending upon the kinds of machinery used, the risks incident to its use, and the hazard of the business in which it is used. Whether the defendant could have discovered the defect in the hand hold in this case by the exercise of ordinary care was a question for the jury, and not for the court, to determine."

It is highly probable that the brakeman took hold of the end hand hold in order to be in the best position to signal the conductor. But whether this is so or not is quite immaterial. He was doing something he had an undoubted right to do, and that is customarily done by brakemen in the discharge of like duties. Moreover, it is certain his death was due solely to the insecure hand hold. There is no pretense that he would have been injured if the hand hold had not given way. The defective hand hold was the proximate cause, and the sole proximate cause, of the injury. Even if the deceased was guilty of any negligence, such negligence in no manner contributed to his injury, and the rule is well settled that "negligence which is not a proximate cause of the injury is not contributory negligence." *Railroad Co. v. Mansburger*, 12 C. C. A. 574, 65 Fed. 196. In *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, the supreme court say:

"Contributory negligence will not exonerate defendant if it be shown that defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of plaintiff's negligence."

If the brakeman had taken hold of the side hand hold, and it had given way, and he had been killed, as he might have been, the contention of the railroad company, doubtless, would have been that he should have used the end hand hold, as that was better adapted to the discharge of all his duties as brakeman, namely, riding, coupling, and signaling. But the question of contributory negligence, as well as that of negligence, is also one for the jury; and the evidence in the record in this case leaves no room to doubt that a jury would have found the railroad company guilty of negligence, and the brakeman not guilty of contributory negligence.

I again enter my protest against depriving suitors in this class of cases of their constitutional right of trial by jury, and, without here repeating the arguments and citing the authorities in support of my views, I refer to *Railroad Co. v. Ellis*, 4 C. C. A. 454, 54 Fed. 481, and my opinions in *Railroad Co. v. Whittle*, 20 C. C. A. 196, 74 Fed. 296, and *Myers v. Railway Co.*, 37 C. C. A. 137, 95 Fed. 406.

The judgment of the circuit court should be reversed, and the cause remanded, with instructions to grant a new trial.

PACIFIC COAST CO. v. REYNOLDS et al.

(Circuit Court of Appeals, Ninth Circuit. March 17, 1902.)

No. 696.

1. SHIPPING—LIMITATION OF LIABILITY—VALUE OF STRANDED VESSEL.

Where a ship was stranded on a reef and so injured as to terminate her voyage, in order to secure the statutory limitation of liability the owner, when the vessel is not surrendered, must pay her value as she lay upon the rocks, and the amount of her freight then pending, if any. Her value for such purpose is not affected by the result of any subsequent salvage operations, whether undertaken by the owner or others; and where at great risk, hazard, and expense the owner succeeded in releasing her and having her towed to a port where she was valued, there must be deducted from such valuation, for the purpose of fixing the measure of his liability in limitation proceedings, not only the expense incurred in her rescue, but also an allowance on account of the risk and hazard of the salvage undertaking, which clearly affected her value as she lay before such operations were commenced.¹

2. SAME—FREIGHT PENDING.

In respect to the pending freight, which must be surrendered by a shipowner in order to secure the statutory limitation of liability, the law is that freight pending is freight earned; and when the voyage is broken up by the wrecking of the ship before reaching her destination, there is ordinarily no freight earned, for, even though prepaid, in the absence of special contract, it may be recovered back by the shipper.

3. SAME—PASSAGE MONEY RECEIVED FROM PASSENGERS.

Where a ship, at the time she was stranded and the voyage terminated, was carrying passengers, who had prepaid their passage under contracts providing that in case of the loss of the vessel the passage money should not be refunded, such passage money must be considered the same as freight earned, and surrendered by the owner in proceedings for the limitation of liability; and no deduction can be made because certain of the tickets were given to the passengers by the shipowner, nor on account of a sum paid by such owner for the transportation of the passengers from the place of the stranding to their port of destination.

Appeal from the District Court of the United States for the Northern District of California.

Geo. W. Towle, Jr., for appellant.

Fred W. Fry, J. D. Jones, L. H. Wheeler, and Wm. J. Tuska, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The following statement of the case by counsel for the appellant is not questioned by counsel for the appellees: On and prior to the 23d day of January, 1898, the Pacific Coast Company, a corporation, was the owner of the American registered steel steamship Corona, 230 feet long, 35 feet beam, 14 feet mean draft of water when fully loaded, and of 1,492 gross, and 996 net, registered tons measurement. That steamer, on January 23, 1898, and while on a voyage from Seattle to Juneau, and elsewhere in Alaska, with a full cargo and 250 passengers, ran upon a then unknown reef

¹ Limitation of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.

of rocks near Lewis Island, in Arthur's Passage and British Columbia waters, where she thereafter lay, stranded and helpless, until rescued by her owners. The point where the steamer was stranded is in latitude 54 degrees north, and was exposed to the severe gales which, in the winter season, prevail in that locality. The reef upon which the steamer was stranded extends out from Lewis Island for a little more than 1,200 feet, and is, at ordinary low tide, entirely submerged. At the extreme run out, that is, at the full and change of the moon, one small point of the reef, about 3 feet in diameter, projects about 6 inches above water. Where the Corona lay there was 12 feet of water above the reef at low tide. The tide, at this point, always runs in the same direction, and rises and falls about 25 feet. Where the steamer struck was about 1,200 feet from the shore of Lewis Island, which is there precipitous, and within about 15 feet of the extreme end of the reef. The reef at that point is about 40 feet wide, with an abrupt drop, on the northerly side, of 30 feet, and on the southerly side of 35 feet. The position of the Corona on the reef was such that had she shifted her position slightly she might have capsized and gone out of sight. In stranding, the steamer seriously damaged her keel, frames, and plates, breaking jagged holes in her bottom and bilges, and she lay across the reef with her stern depressed at an angle of about 30 degrees, and with a port list of about 20 degrees the tide ebbing and flowing through the steamer, which was submerged, at high tide, to within about 30 feet of her stern, and at low tide to about amidships. The keel of the steamer at the stern, the lowest point outside the reef, did not touch bottom by some 8 or 10 feet. After the steamer was stranded her passengers were landed on Lewis Island and there cared for until another steamer, the Oregon, came along, when they were placed on board of that vessel, and, at an expense of \$2,500, forwarded to destination. The master of the Corona and her mate, a watchman, and four seamen remained by the Corona, living in a shack on Lewis Island,—all of the houses having been washed off the Corona in the heavy gales there prevailing,—until the arrival of Capt. C. M. Goodall, on February 15, 1898. Prior to going there Capt. Goodall, acting for the owner of the Corona, had, at an expense of \$17,000, procured a wrecking outfit, consisting of a small steamer, the Maude, and divers, engines, pumps, etc., at Victoria, B. C., but could not, owing to the Alaskan mining fever then on at Dawson, get a suitable steamer for the work, and for assistance was obliged to rely upon such Indians and squaw men as could be found near the wreck. With such assistance, and under such conditions, the work of rescue was prosecuted, with the result that the Corona was, on March 3, 1898, so far pumped out as to float, but she then listed so far over onto the steamer that was secured to tow her to the beach when she should float that the master of that steamer cut his lines and left the Corona to go where she would. So left, the Corona, by the greatest of good fortune, as it then appeared, swung around and landed longitudinally on the reef, with her stern resting about where her midships section had before rested, and her bow towards the shore of Lewis Island. On March 7, 1898, the water was again pumped from the Corona so that she floated, and, by the

assistance of two steamers, she was towed to Irving, on the Skeena river, six or seven miles distant, to get her in a more sheltered position, so that her cargo could be shifted and her patchwork made sufficiently secure to justify an effort to tow the Corona to Port Townsend. Towing to Irving was, as testified by Capt. Goodall, an extremely hazardous undertaking, as the holes in the bottom were only stopped with waste stuck through the bottom, and the slipping out of one piece of waste would probably have resulted in the total loss of the Corona. The cost of getting the Corona to Irving was \$19,500. At Irving the cargo was shifted, and the waste in the holes in the bottom strengthened by cement backings from the inside, and, a tugboat of sufficient power having been secured from Victoria, the Corona was towed to Port Townsend, where she arrived on March 17, 1898. At Port Townsend the Corona was still leaking so badly that the divers' services were there needed, and it was with difficulty that the steamer's pumps handled the water so as to keep her afloat. After reaching Port Townsend the Corona was placed on the dry dock, at Quartermaster Harbor, where a survey was had and such temporary repairs made as were necessary to enable the steamer, at considerable risk, to be towed to San Francisco, the only place where the needed repairs could be made. The cost of getting the Corona from her stranded position to Port Townsend was \$23,500, and the time consumed was from February 2 to March 17, 1898. The Corona was afterwards towed to San Francisco, and the total cost of getting the steamer from her stranded position to San Francisco was \$35,624.38. At San Francisco the hull, machinery, etc., of the Corona were thoroughly repaired, the steamer restored to her prior condition as far as possible at the Union Iron Works, at a cost for such repairs, exclusive of furnishings, of \$94,403.96, or a total cost, including expenses of raising and towing and temporary repairs, of \$130,028.34. There was also expended by the Pacific Coast Company, "for fittings, furniture, and supplies, to replace those lost by the stranding," the further sum of \$17,983.63. The value of the Corona after she was so repaired and refurnished was \$120,000. On April 6, 1899, many suits having been commenced against the Pacific Coast Steamship Company to recover damages for losses alleged to have been sustained as the result of the stranding, the last-named company and the Pacific Coast Company filed in the district court of the United States for the Northern district of California their several petitions for a limitation of their liability in the premises, and thereafter such proceedings were had, on notice, as provided by the court, to all parties interested, that on May 16, 1899, the said court, by its order, directed an appraisement of the Corona, and her freight pending, and of the several interests of the petitioners therein, to be made, and referred the matter of such appraisements to George E. Morse, Esq., as a commissioner to take testimony, make findings, and report thereon. Pursuant to that order the taking of testimony was commenced on July 10, 1899, and thereafter such proceedings were had that the said commissioner, on April 18, 1900, filed, in open court, his report and his supplemental report, in the premises, thereby finding and reporting that the cost of raising the Corona and towing

her to Port Townsend was the sum of \$23,500; that the cost of raising the Corona, temporary repairs at Port Townsend, and towing to San Francisco was the sum of \$35,624.38; that the total cost of raising, towing, temporary repairs, and permanent repairs made at San Francisco was the sum of \$130,028.34; that there was expended "for fittings, furniture, and supplies, to replace those lost by stranding," the further sum of \$17,983.63; that the value of the Corona, her engines, boilers, machinery, tackle, apparel, furniture, etc., after she was completely repaired and refurnished, was the sum of \$120,000; that the value of the Corona, at the end of her voyage, to wit, as she lay stranded, was the sum of \$9,500; that the value of the freight pending was the sum of \$11,637.47, and that the Pacific Coast Company was the sole owner. Thereupon, and on April 21, 1900, the Pacific Coast Company served and filed its exceptions to such report, and the appraisements thereby made, upon the grounds, among others, that the several appraisements of value therein stated were excessive. After a hearing had on such exceptions, the said court, on November 30, 1900, by its order entered in such proceedings, overruled all of such exceptions, and thereafter, on January 14, 1901, entered its final decree in the premises, whereby it was adjudged and decreed that the value of said Corona, as she lay stranded, was the sum of \$9,500, and that the value of her freight then pending was the sum of \$11,637.47, and that the limit of liability of the Pacific Coast Company, in the premises, is the sum of \$21,137.47, and thereby ordered the last-named company to give, within 30 days from the date of said decree, "a stipulation, with sufficient sureties to be approved by this court, for the payment of said sum of \$21,137.47, or any part thereof, into court whenever the same shall be required." From that decree, the stipulation ordered not having been given, this appeal has been prosecuted by the Pacific Coast Company, upon an assignment of errors therein.

The assignment of errors presents the questions: (1) What was the value of the steamship at the end of her voyage, that is, as she lay stranded on the reef? and (2) what was the value of her freight then pending? The law is well settled that in such cases as the present one the owner, in order to secure the limitation of liability provided for by the statute, must pay the value of the ship at the time her voyage was ended and the amount of her then pending freight. The City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134. "If," said the court in that case, "by reason of the loss or sinking of the ship the voyage is never completed, but is broken up and ended by causes over which the owners have no control, the value of the ship (if it has any value), at the time of such breaking up and ending of the voyage, must be taken as the owner's liability. In most cases of this character no freight will be earned, but if any shall have been earned it will be added to the value of the ship in estimating the amount of the owner's liability. These consequences are so obvious that no attempt at argument can make them plainer." 118 U. S. 492, 6 Sup. Ct. 1156, 30 L. Ed. 143. The court then proceeded to say:

"If this view is correct, it follows, as a matter of course, that any salvage operations, undertaken for the purpose of recovering from the bottom of the

sea any portion of the wreck, after the disastrous ending of the voyage as above supposed, can have no effect on the question of the liability of the owners. Their liability is fixed when the voyage is ended. The subsequent history of the wreck can only furnish evidence of its value at that point of time. And it makes no difference, in this regard, whether the salvage is effected by the owners or by any other persons. Having fixed the point of time at which the value is to be taken, the statute does the rest. It declares that the liability of the owner shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. If the vessel arrives in port in a damaged condition, and earns some freight, the value at that time is the measure of liability; if she goes to the bottom and earns no freight, the value at that time is the criterion. And the benefit of the statute may be obtained either by abandoning the vessel to the creditors or persons injured, or by having her appraisal made and paying the money into court, or giving a stipulation in lieu of it, and keeping the vessel. This double remedy given by our statute is a great convenience to all parties. It does not make two measures or standards of liability, for the measure is the same whichever course is adopted, but it enables the owner to lay out money in recovering and repairing the ship without increasing the burden to which he is subjected."

Turning now to the findings of the commissioner, approved and adopted by the court below, we find that the value of the ship at the time her voyage was ended was fixed by taking the lowest estimate of her value at Port Townsend, to which place she was towed from the place of her wreck, made by any of the witnesses, which estimate amounted to \$33,000, and deducting therefrom the actual cost of getting the ship to Port Townsend, which was found to be \$23,500, thus leaving \$9,500 as the value of the ship as she lay on the reef at the end of her voyage. It is manifest that this eliminated from the problem any and all risk or hazard attending the undertaking. The evidence in the case leaves no room for doubt that the risk and hazard were great. The position of the ship on the reef was itself the strongest sort of evidence of that fact. And there was risk that, in the event the vessel could be successfully floated and repaired, the cost might exceed her value when all of that was done. And the findings here expressly show that such cost actually did exceed the value of the ship when the repairs were completed by more than \$10,000. It is true that this subsequent history of the wreck is not conclusive evidence of the fact that she was of no value as she lay upon the reef, for the demand for ships at the time of the completion of her repairs and other considerations may have entered into the question of her then value. But that the subsequent history of the wreck does furnish some evidence of its value at that time was expressly decided by the supreme court in the case of *The City of Norwich*, supra. Added to this is the undeniable fact that the owner actually risked the \$23,500 that the findings show that it cost to get the ship from the reef to Port Townsend. This amount is more than double that fixed by the findings as the value of the ship as she lay upon the reef. Such cases admit of no exact rule for fixing values, but, the record in this case considered, we are of opinion that the latter amount should be reduced two-thirds; that is to say, that the value of the ship at the time of the termination of her voyage should be fixed at \$3,166.66.

In respect to the pending freight, the law is that freight pending is

freight earned. *Carv. Carr. by Sea* (2d Ed.) § 547; *The City of Norwich*, supra; *The Scotland*, 105 U. S. 24, 26 L. Ed. 1001; *The Main v. Williams*, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381; *The Abbie C. Stubbs* (D. C.) 28 Fed. 719; *In re Meyer* (D. C.) 74 Fed. 881. And freight is not earned until the goods are carried to and delivered at the place of destination. Authorities supra. And, further, freight paid in advance may, in the absence of a special agreement to the contrary, be recovered back if the voyage be broken up and the goods be not carried for any cause not imputable to the shipper. *In re Liverpool & G. W. Steam Co.* (D. C.) 3 Fed. 168; *Brown v. Harris*, 2 Gray, 359, cited with approval by the supreme court in *The Main v. Williams*, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381. It results that the item of \$3,867.47 for prepaid freight, wharfage, and advance charges must be deducted from the amount the petitioner should be required to pay in order to secure the benefit of the statute limiting its liability, even if all of the items entering into that charge can be properly regarded as freight.

Included, also, within freight pending, as found and decreed by the court below, is the item of \$7,770 prepaid passage money. It is insisted on the part of the appellant that passage money and freight are governed by the same rules, and that the passage money was no more earned by the *Corona* than was the freight. There is in this case, however, this important distinction between the two items: In the contract between the owner and the passengers there was this express stipulation, to wit, "In the event of the loss or detention of the steamer during the voyage, the vessel, her owners or charterers, shall not * * * refund the amount of passage." This was not, as argued by counsel for the appellant, a collateral contract, such, for instance, as a contract for insurance upon the vessel or freight which, it was held in the case of *The City of Norwich*, supra, and in other cases, need not be surrendered by the owner in a limited liability proceeding, but the stipulation here entered into and constituted a part of the contract of carriage itself. As therefore the passage money in question was prepaid under an express agreement that the owner of the ship should not refund it, notwithstanding a failure to deliver the passengers at the place of destination, we think it clear that it must be regarded as earned. It is urged, however, on the part of the appellant, that in any event there should be deducted from the amount of the prepaid passage money the \$2,500 expended by the owner in forwarding the passengers to their destination, as, also, the sum of \$475 claimed to have been refunded by the owner to some of the passengers. It is said that the decision of the supreme court in the case of *The Scotland*, supra, requires this to be done. In respect to the \$475 it appears from the evidence that the owner of the ship furnished to certain of its passengers tickets from Seattle to Skagway, aggregating that sum, taking from such passengers a receipt for the ticket declaring:

"This ticket is furnished me, not on account of any obligation of the company to me, but as a donation to assist me in returning to Alaska. I hereby accept same as above, and release said company from all liability for loss I sustained on steamer *Corona*."

The appeal to a court of justice of one who has made gifts, by which it is sought to make good the donations out of third parties, must always fall upon deaf ears. The judgment of the supreme court in the case of *The Scotland* did affirm that of the lower court in that case, wherein there was deducted from the prepaid passage money certain moneys returned to the passengers and certain money expended by the petitioner in taking care of them pending their reshipment. But in the case of *The Scotland* the contract of carriage contained no agreement, as does the contract in the present case, expressly stipulating that the passage money should not be refunded in the event of the loss or detention of the steamer during the voyage. The passage money in *The Scotland* case was therefore just as much subject to recovery by the passengers for failure to carry them to the place of destination as was the money prepaid for the carriage of property, since each are governed by the same rules, and in neither was the amount prepaid earned. In the present case the amount prepaid for passage was, by the express stipulation of the parties, made absolute and unconditional, and should, in our opinion, be regarded as earned.

For the reasons stated the findings and judgment of the court below must be so modified as to reduce the value of the ship at the time of the termination of her voyage to \$3,166.66, and the value of her then pending freight to \$7,770, making the full limit of the petitioner's liability \$10,936.66, and, as so modified, the judgment is affirmed.

UNITED STATES v. TISDALE, U. S. Marshal.

(Circuit Court of Appeals, Fifth Circuit. April 29, 1902.)

No. 1,008.

1. UNITED STATES MARSHALS—FEES—ACTIONS—FINDINGS OF FACTS.

In an action by a United States marshal against the United States to recover fees disallowed by the auditing department, a finding of facts by the trial judge, merely reciting the service, and that the marshal was entitled to recover therefor, but not sufficiently specific to enable the appellate court to determine the government's liability, is not a sufficient compliance with Act Cong. March 3, 1887, requiring the court in such cases to file a written opinion setting forth the specific findings of facts and its conclusions of law.

2. SAME—TRAVEL FEES—SINGLE TRIP.

Where a marshal makes a trip to arrest an offender, and also to subpoena witnesses, and serves both warrant and subpoenas, it constitutes one trip, for which he may charge either mileage to the furthest point traveled or his actual expenses, but he may not charge both, nor can he charge mileage for part of the trip and actual expenses for the other part.

3. SAME—TRAVEL IN ADJOINING DISTRICT.

A marshal traveling into a district adjoining his own to make an arrest may recover for mileage actually traveled in his own district, or for the distance traveled in the adjoining district, if he travel there with a warrant, and is deputized by the marshal of such adjoining district, who disclaims his fees in the case.

4. SAME—ENDEAVORING TO MAKE ARREST.

Where a marshal endeavors to make an arrest, or actually makes a trip with a warrant to arrest an offender, but fails, because the de-

defendant has fled, the marshal may recover his actual expenses, not exceeding \$2 per day for each day actually spent.

In Error to the Circuit Court of the United States for the Middle District of Alabama.

This suit was instituted under the act of congress entitled "An act to provide for the bringing of suits against the government of the United States, approved March 3, 1887," by William H. Tisdale, United States marshal for the Middle district of Alabama, to recover from the United States certain fees and expenses alleged to have been earned by the marshal and his deputies, which said fees and expenses had been disallowed by the proper auditing department of the United States. The petition is admitted to be in proper form, and is accompanied by a bill of particulars, more or less definite, showing the amounts claimed, and for what services. The answer of the United States denies each and every statement, charge, averment, and allegation in said petition contained, except certain formal averments not necessary to mention. On these pleadings, the court in due course entered the following findings of fact and law, to wit:

"(1) William H. Tisdale was the marshal of the United States for the Middle district of Alabama from the 12th day of June, in the year 1893, until the 24th day of September, in the year 1897, and during all of the time during which the services hereinafter mentioned were performed. Harry Adams, W. F. Adams, G. W. Black, G. L. Bender, Young Blake, — Cartwright, W. B. Clark, J. H. Draper, J. L. Domingus, J. A. Dudley, M. C. Gannt, H. R. Gay, Hiram Gibson, G. W. Haden, B. H. Hill, J. W. Harmon, F. N. Holly, O. M. Hill, J. M. Johnson, John W. Powell, A. J. Phillips, G. W. Phillips, W. L. Pool, W. O. Stribling, W. C. Starke, C. C. Shields, G. W. Stevens, C. E. Taylor, and J. A. Treadwell were deputy marshals, duly appointed, qualified, and acting under the said William H. Tisdale, marshal as aforesaid, and while acting as such deputy marshals performed the services and incurred the expenses hereinafter shown at the instance and request of the United States, for the said William H. Tisdale, marshal as aforesaid, as follows, to wit: In twenty-one different cases, the defendant was released on temporary bond pending an investigation. At the termination of said investigation in each of said cases, the defendant was required to give another bond for his appearance to answer the charge. The court finds that in each of said twenty-one cases a fee for taking the last bond mentioned, at fifty (50c.) cents for each bond, is allowable,—total, \$10.50. In fifty-one different cases, the deputy traveled with a warrant for defendant and subpoenas for witnesses to the place of arrest. After arresting the prisoner, he served the subpoenas beyond the place of arrest. He charged mileage on the warrant from point where warrant was received to place of arrest, and from the place of arrest he charged actual expenses in lieu of mileage in summoning the witnesses. The deputy actually expended money in serving subpoenas for the United States, for which no mileage has been allowed, and the amounts expended were, respectively, as follows: \$1, \$2.50, \$2, \$10.42, \$3.28, \$2.40, \$13.45, \$10.25, \$2, \$3.75, \$3, \$3.25, \$3, \$3.75, \$3.75, \$10.25, \$4.50, \$14.48, \$4.25, \$3.75, \$1, \$2, 60c., \$13.45, \$10.25, 75c., \$2.25, \$3, \$3, \$3.75, \$2, \$1.52, \$1.80, \$2.82, \$2.39, \$1.40, 60c., \$2.20, \$1.60, \$1.50, 80c., \$1.66, \$8.17, \$1.98, \$3.10, \$1.50, \$2.15,—making a total of \$195.10. In thirty-six different cases, warrants were issued in the Middle district of Alabama for defendants, who were arrested on said warrants by one of the above-mentioned deputies in another district, and brought before a commissioner in said Middle district, without a warrant of removal, the prisoners being willing to come without said warrant of removal. The marshal of said other district in each case deputized the deputy of Marshal Tisdale to make the arrest, and disclaimed all fees in each case. The mileage earned in each of said cases was, respectively, as follows: \$7.50, \$33.75, \$10.86, \$16.56, \$15.78, \$15.90, \$16.58, \$16.20, \$15.78, \$15.66, \$3.06, \$17.45, \$9.84, \$10.92, \$9, \$40.35, \$37.78, \$37.62, \$53.52, \$66.12, \$54.54, \$14.10, \$5.71, 78c., \$20.47, \$7.64, \$26.96, \$40.02, \$36.35, \$11.33, \$7.90, \$11.10, \$4, \$22.20, \$31.98, \$12.06,—making a total of \$757.25. In twenty-

two different cases, a deputy was engaged a number of days in endeavoring to make an arrest, and was in each case allowed for one day less than the court finds the deputy was actually engaged. The court finds that there were twenty-two days in which the deputies were engaged not allowed for by the treasury department, and the court allows the same at \$2 per day, making a total of \$44.00. In twenty-four different cases, the treasury department disallowed mileage in going to arrest and in returning with the prisoner, upon the ground that the route traveled was not the nearest practicable route. The court finds in each of said cases that the route traveled was the usual and nearest practicable route, and allows the mileage disallowed by the treasury department in said cases, respectively, as follows: 96c., \$6.76, \$6.24, \$6.76, \$6.76, \$3, \$1, \$2.43, \$3.96, \$2.92, \$2, \$2.08, \$2.34, \$3.73, \$4.48, \$5.98, \$5.20, \$3.87, \$3.01, \$5.82, \$3.48, \$5.10, \$9.50, \$2.13,—making a total of \$96.11. In twenty-seven different cases, the mileage was disallowed by the treasury department because of the belief that the prisoner, when arrested, was not carried before the nearest commissioner. The court finds in each case that the prisoner was carried to the nearest commissioner, and that the mileage in said cases, respectively, was: \$12, \$15, \$21.80, \$18.80, \$18, \$18.80, \$6.60, \$14.60, \$17, \$14.60, \$14.80, \$9.80, \$14.80, \$12.20, \$8, \$9.60, \$10.20, \$10.20, \$10.40, \$8, \$14, \$14.80, \$13.40, \$9.20, \$9.20, \$18.40, \$13.60,—making a total of \$350.60. The court finds that it ordered the marshal, in order to preserve order, to employ an additional bailiff, making four in all, and that this bailiff was employed and served 15 days, \$2 per day allowed,—\$30.00. In four different cases, the deputy actually made a trip with a warrant to arrest the defendant, but did not arrest because the defendant had flown. The defendant was afterwards arrested, and mileage for the number of miles traveled when the arrest was made was paid, but mileage when the deputy failed to arrest was disallowed. The court finds that mileage was earned on the trips made when the arrest was not made, viz., \$5.52, \$8.88, \$9.90, \$1.08, making a total of \$25.38. The court finds that a bench warrant, together with certified copy of indictment, was issued from the Southern district of Georgia, and sent to the marshal of the United States for the Middle district of Alabama to arrest a defendant at Lafayette, in said Middle district of Alabama. The deputy arrested the defendant at Lafayette, and carried him before a commissioner, at Opelika, Alabama, and thence, on order of removal issued by this court, to Georgia. The treasury department refused to allow mileage. The court finds that the mileage is allowable, viz., \$21.76. The court finds that for lodging and feeding prisoner there was actually expended on different occasions, respectively, 75c., 75c., \$1, \$1, 25c., 25c., 25c., 25c., 50c., 25c., \$3, 50c., \$2.25, making a total of \$11.00. The court finds that Deputy Powell was forced to place his prisoner in a calaboose of a town over night, and that the fees actually paid to the town authorities amounted to \$4. The amount allowed by the treasury department was \$1. The court rules that the actual expense should be reimbursed, and allows the balance, viz., \$3.00. The court finds that Deputy Black went from Montgomery with revenue officers for the purpose of raiding a distillery. The defendant was found actually running the distillery, and arrested by the deputy, and carried to Montgomery, where a warrant was issued. Mileage for the deputy and prisoner from the place of arrest to Montgomery is allowed, viz., \$14.40. The court finds that deputies attended on hearings before commissioners five separate days, for which nothing has been paid, and allowance at \$2 per day is made, \$10.00,—making a grand total of one thousand five hundred and fifty-eight dollars and sixty cents (\$1,558.60). The court further finds that not one of the items hereinabove mentioned and allowed has ever been allowed or paid in any manner, and that all of said items herein allowed and found to be due have been presented by said William H. Tisdale, as marshal as aforesaid, in his account, were regularly approved and allowed by the court and by the district attorney of the United States, but were disallowed by the accounting officers of the treasury of the United States. The court further finds that each and all of said services herein mentioned and allowed for were actually performed, and that each and all of the expenses herein mentioned and allowed were actually incurred, and the mileage actually earned, and that no part of the

same has ever been paid, and therefore the court files the following as its findings of law:

"(2) The court decrees and holds that under the provisions of the statutes of the United States regulating the fees to be paid and the expenses to be allowed to marshals of the United States in existence and in force at the time said services were rendered and said expenses incurred, the services and expenses hereinbefore mentioned and allowed for are, each and all, proper charges against the United States. It is therefore ordered, adjudged, and decreed by the court that the following judgment and this finding of facts and law be entered upon the minutes of this court as the decree of the court in this cause, viz.: It is ordered, adjudged, and decreed that William H. Tisdale, the petitioner, have and recover of and from the defendants, the United States of America, the full sum of fifteen hundred and fifty-eight dollars and sixty cents (\$1,558.60), together with the costs in this behalf expended.

"Rendered in term time, this 23rd day of May, A. D. 1901.

"John Bruce,

"Judge of the District Court of the United States for the Middle District of Alabama."

On the same day a bill of exceptions was allowed and filed, containing exceptions to the finding of facts as incomplete and obscure, and not a substantial compliance with the law, and also specifically excepting to every fact found on the same ground and to all the findings of law. The United States sued out this writ of error, assigning as errors substantially the same matters set forth in the bill of exceptions.

W. S. Reese and J. Sternfeld, for the United States.

Thos. H. Watt, Alexander Troy and F. G. Caffey, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The statute on which this suit is brought provides that "it shall be the duty of the court to cause a written opinion to be filed in the cause setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment therein." The first and second assignments of error are as follows:

"(1) The court erred in making the finding of facts of May 23, 1901, because it is incomplete, obscure, is not a substantial compliance with the law, and because it does not comply with the act of March 3, 1887.

"(2) The court erred in making up each and every finding of fact set out in the finding of facts made herein on May 23, 1901, because each item thereof is incomplete, obscure, is not a substantial compliance with the law, and because it does not comply with the act of March 3, 1887."

The finding of facts in this case is not sufficiently full and specific, in regard to many of the items allowed, to enable this court to determine, even by reference to the bill of particulars attached to the petition, whether any liability to the United States results therefrom; and the finding of facts as a whole is incomplete and obscure, and not, in our opinion, a substantial compliance with the law. Therefore the first and second assignments of error are well taken, and this renders it necessary to reverse the judgment of the circuit court and remand the cause for a new trial.

On a new trial many of the questions argued in this hearing may not arise, but, at the same time, we deem it proper to partially dis-

cuss some of the items allowed on the former trial; thus indicating certain facts necessary to be specifically found in order to determine the government's liability. The court found that in 51 cases the deputy traveled with a warrant and subpoenas for witnesses, and an allowance of \$195.10 is made, in addition to mileage, for expenses; but there is no specific finding as to the distance traveled, the mileage charged, nor the actual expense incurred,—these matters being covered by finding that “the deputy actually expended money in serving subpoenas for the United States for which no mileage has been allowed.” Where the marshal or his deputy travels with a warrant for the arrest of an accused person, and also with subpoenas for witnesses, and on the same trip serves both warrant and subpoenas, it constitutes one trip, for which the marshal may charge, at his option, either mileage to the furthest point traveled or his actual expenses, but he may not charge both; nor may he divide the trip and charge mileage for part and his actual expenses for the other part.

The court allowed \$757.25 for mileage in making arrests in adjoining districts on warrants issued in the Middle district of Alabama, without finding the travel in the adjoining district was on a warrant issued therein. The finding is not specific as to how much of the travel was within the Middle district of Alabama or how much was in the adjoining district. Where the marshal or his deputy, armed with a warrant for the arrest of an accused person, travels out of his district into an adjoining district, and there makes the arrest, he may recover his mileage for the distance actually traveled within his own district, and, further, for such distance as he may have traveled in the adjoining district, provided he there travels with a warrant and is deputized by the marshal of the adjoining district, who disclaims his fees in such case.

Two items are allowed for “endeavoring,”—one on the basis of mileage, and one as per diem, without finding actual expenses and number of days engaged in regard to either. Where the marshal or his deputy is engaged in endeavoring to make an arrest, or actually makes a trip with a warrant to arrest an offender, but does not arrest, because the defendant has fled, he may be allowed, for so “endeavoring,” his actual expenses, not to exceed \$2 per day each day actually engaged.

The judgment of the circuit court is reversed, and the case is remanded.

GRIFFIN V. AMERICAN GOLD MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. March 10, 1902.)

No. 712.

1. VENDOR AND PURCHASER—ACTION FOR PURCHASE MONEY—DEFENSES.

Plaintiff contracted to sell to defendant's assignor a mining claim, which he had located and to which he had made application for a patent, described in accordance with the survey thereof made by the government surveyor. He deposited a deed in escrow, and agreed to prosecute his application and obtain a final receipt before the purchase money became payable. A portion of the claim as so surveyed overlapped a placer claim owned by the purchaser, and to which it after-

ward received a patent. Thereafter it filed a protest against the issuance of a patent for such portion of plaintiff's entry, on the ground that there was no known lode or vein thereon at the time it was patented under the placer location. This issue was tried and decided by the land department in favor of the protestant, and plaintiff's entry was held for cancellation as to such portion of his claim, which included about one-half its surface area. *Held*, that such determination was conclusive, and, since his contract was entire, and he could not give title to the land sold and described in his deed, he could not maintain an action for the purchase money.

2. MINING CLAIM—CONTEST—ESTOPPEL.

The fact that defendant had contracted to purchase a mining claim from plaintiff, conditioned upon the obtaining of a patent therefor, did not deprive him of the right to contest the allowance of such patent as to a portion of the claim which overlapped a prior claim owned by himself.

In Error to the District Court of the United States for the District of Alaska.

R. F. Lewis, John G. Heid, and Alfred Sutro, for plaintiff in error.
Lorenzo S. B. Sawyer, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This action was commenced November 20, 1893, in the district court for the district of Alaska, by Martin W. Murray against the Nowell Gold Mining Company, to recover \$25,000, with interest, under and by virtue of a written contract entered into August 21, 1891, by and between Murray and a corporation styled "Silver Bow Basin Mining Company." By that contract Murray agreed and covenanted, for the considerations therein stated, to sell to the Silver Bow Company a certain mining lode claim, situated in the Harris mining district of Alaska, called the "Morris G," which the contract declared to be fully described "in the deed of the party of the first part [Murray] to the party of the second part [the Silver Bow Company] of even date herewith, conveying said premises, and also the field notes of the United States deputy surveyor as set forth in the application of the party of the first part for a United States patent to said location known as the 'Morris G,' which application bears date the 13th day of August, 1891." The contract contained a further covenant on the part of Murray "to prosecute said application for a patent in the land office to a final destination [determination], and upon the issuance of a receiver's receipt for said ground on said application for a patent, and upon the payment of the sum of twenty-five thousand dollars as hereinafter set forth, the party of the first part [Murray] hereby covenants and agrees that the deed heretofore mentioned and set forth, which by agreement of the parties is placed in escrow in the hands of A. K. Delaney, shall be forwarded, together with such receiver's receipt, to the commissioner of the general land office at Washington, with any necessary instructions of the party of the first part, to the end that the patent for said Morris G lode may be issued to the party of the second part [the Silver Bow Company]." The agreement on

the part of the Silver Bow Company to pay for the claim thereby agreed to be purchased was as follows:

"Five thousand dollars on the 1st day of June, 1892, and twenty thousand dollars on the 1st day of August, 1892, provided, that on the 1st day of June, 1892, the said party of the first part shall have successfully prosecuted in the land office his application for a patent for said premises, and shall have come into possession under and by virtue of such proceedings in the land office of a receiver's receipt, equivalent to a patent for said claim; but in case the party of the first part shall not have received said receiver's receipt for the 1st of June, 1892, then the whole sum of twenty-five thousand dollars shall be payable on the 1st day of August, 1892, provided, as before, that the party of the first part shall have successfully prosecuted his application for a patent for said premises and obtained said receiver's receipt. And it is further agreed that in case the proceedings upon said application for a patent shall not have been perfected, and the said receiver's receipt issued, by the 1st day of August, 1892, the party of the second part hereby agrees, at any time within one year from said date, to pay the said party of the first part the sum of twenty-five thousand dollars, the full consideration price of the said premises, whenever within that time the said party of the first part shall deliver to the party of the second part such receiver's receipt, together with the deed above mentioned and the said necessary instructions to the general land office, whereby the patent to the said premises may be issued by the general land office to the party of the second part."

And the contract concluded with this clause:

"This agreement is drawn in triplicate, and collateral thereto a deed of the party of the first part, conveying the said premises to the party of the second part, describing said premises by field notes of the United States surveyor, as set forth in said application for patent, and containing the usual covenants of warranty, and which said deed, together with one triplicate of this agreement, is placed in the hands of A. K. Delaney, in escrow, to be disposed of in accordance with the terms of this agreement, or returned to the said party of the first part in case such agreement is not finally perfected and carried out, and one triplicate of this agreement is delivered to each of the parties hereto, respectively."

The complaint alleged, among other things, that on the 14th day of December, 1891, the Silver Bow Company, in consideration of the sum of \$5, and of the assumption in writing by the defendant Nowell Gold Mining Company of all the contracts, debts, and obligations of the Silver Bow Company, the latter sold and conveyed to the Nowell Company all of its property, rights, and assets within the district of Alaska, in consideration of which the Nowell Company did, in and by a written agreement, annexed to and made a part of the complaint, assume, among other obligations, the contract of the Silver Bow Company with the plaintiff. Pending the action Frank W. Griffin was substituted as plaintiff, as successor in interest of Murray, and the American Gold Mining Company was likewise substituted as defendant, as successor in interest of the Nowell Gold Mining Company, and the case continued as between these parties, standing in the shoes, respectively, of the original parties to the action. Prior to the substitution of Griffin as plaintiff, an amended complaint was filed by Murray, in which it was alleged, among other things, that:

"Although said defendant has refused and still refuses to pay said sum of twenty-five thousand dollars, or any part thereof, nevertheless during the mining season of 1894 said defendant went upon said Morris G lode claim and took possession of the same, and worked and mined said Morris G lode

claim, and removed therefrom large quantities of earth and gravel containing gold and other precious metals, and still retains undisputed possession of said claim."

The averments last quoted were put in issue by the answer of the American Gold Mining Company to the amended complaint, as well as the allegations in respect to the assumption by the Nowell Gold Mining Company of the obligations imposed on the Silver Bow Company by reason of its agreement to purchase and pay for the Morris G lode claim. The only other defense interposed by the defendant American Gold Mining Company was that on the 30th day of June, 1894, Murray conveyed the Morris G lode claim to the present plaintiff, Griffin, who has ever since remained the owner thereof, and that—

"If it was ever bound, or could be held liable, on the contract between the plaintiff and the Silver Bow Basin Mining Company, yet it says that plaintiff ought not to have and maintain this suit against it, for that it is not true, as alleged by plaintiff, that he complied with all the terms and conditions of said contract, and defendant especially denies said allegation or performance by plaintiff; that in truth and in fact, while under the terms of said contract plaintiff was to obtain a receiver's receipt, and give such instructions and perform such acts as were necessary to enable the Silver Bow Basin Mining Company to obtain a patent, to about thirteen (13) acres of ground embraced within the exterior limits of the said Morris G lode as described in said contract, yet the receiver's receipt finally given and entry allowed only embraced about six (6) acres of said ground; that the said ground embraced in the exterior boundaries of said Morris G lode claim as described in said contract conflicted with prior valid mineral locations, to wit, with discovery claim, embraced in U. S. surveys Nos. 77, 78, 79, and 80, to the extent of about seven acres, which said prior locations were adjudged by the land department to have the prior and better right to said land so in conflict. The precise extent and nature of said conflict is shown in the plat hereto attached and made a part hereof."

The case was tried with a jury, and a verdict returned for the defendant by direction of the court. The assignments of error present the questions hereinafter considered, which are the only ones we deem it necessary to mention.

On the trial the plaintiff offered in evidence the written agreement of the Nowell Gold Mining Company, by which for valuable considerations it undertook to assume the obligations of the Silver Bow Basin Mining Company in respect to the purchase of the Morris G lode claim, which agreement was excluded by the court below on objections thereto interposed by the defendant. In that there was manifest error, not only because the alleged making of that agreement was one of the important issues in the case, but also for the reason that it was contemporaneous with, explanatory of, and, indeed, by express reference, was made a part of, the deed from Murray to the Silver Bow Company, which the court did admit in evidence. Whether or not the error so committed demands a reversal of the judgment depends upon the view taken of other questions in the case.

It appeared from the evidence that on the 4th day of October, 1880, the Discovery placer claim was located, by whom does not appear, and that an application for a patent therefor was filed in the local land office October 19, 1888. Meanwhile, to wit, June 4, 1881,

the Morris G lode claim was located by Murray, and so located as to include a portion of the surface of the prior placer location. Notice of the application for a patent for the placer claim was duly posted and published, and, no adverse claim being made, the claimant was on March 14, 1891, permitted to make mineral entry No. 32, embracing lots Nos. 77, 78, 79, and 80 of the government surveys, upon which entry a patent was issued September 18, 1891. Notwithstanding the fact that the Discovery placer claim included about 6.33 acres of what Murray located as the Morris G lode claim and contracted to sell to the Silver Bow Company, he interposed no adverse claim or protest against the application of the placer claimant for a patent therefor. August 13, 1891, Murray filed his application for a patent for the Morris G lode claim, notice of which was published from August 20 to November 12, 1891, during which time the claimant of the Discovery placer claim filed no adverse claim or protest, notwithstanding the fact that the Morris G lode claim, as surveyed, covered 6.33 acres of the ground embraced by lots 77, 78, 79, and 80 of the placer claimant. The result was that Murray was allowed to make mineral entry No. 39 for the Morris G lode claim. But on the 16th day of December, 1891, the Silver Bow Basin Mining Company, patentee of the Discovery placer claim, filed its protest against issuing a patent upon the mineral entry 39 for the Morris G lode claim; the ground alleged being that:

"There is no lode or vein or rock in place bearing the precious metals within the exterior boundaries of said part of said Morris G lode claim which overlaps said lots numbered 77, 78, 79, and 80, as above described, known to protestant, and no vein, lode, or rock in place bearing the precious metals was known at the time the said company, by its grantors, made application for patent for said placer claim."

That question of fact, the evidence showed, was determined in favor of the protestant by the land department, and accordingly Murray's mineral entry 39 was held for cancellation in so far as it conflicted with the prior Discovery placer location, and the subsequent entry and patent of the Morris G lode claim allowed only for about 7 of the 13 acres Murray bound himself to convey. That the determination of such questions of fact by the land department of the government is conclusive upon the courts has been so often decided as to render a citation of the cases unnecessary. There was, therefore, no error on the part of the court below in refusing to submit to the jury, at the request of the plaintiff, the questions:

"(1) Was the Morris G lode or vein in existence at the date of the application for patent for the Discovery placer claims, situated in Silver Bow basin, Alaska? (2) If so, was the Morris G lode or vein known to exist within the boundaries of said Discovery placer mining claims at the date of the application for a United States patent for said Discovery placer claims?"

The contention on the part of the plaintiff in error that he and his predecessors in interest were prevented by the wrongful act of the predecessor in interest of the present defendant from performance of the plaintiff's agreement cannot be sustained. The Silver Bow Company, in contesting the application of the Morris G lode claimant, was put protecting its own prior placer location, and

was under no obligation of any character to stand by and permit the claimant of the subsequent lode location to include therein a part of its ground. The case, in truth, was one in which the plaintiff below contracted to sell what he did not own and could not convey, and, as the contract was entire, there was nothing left for the trial court to do, as the case was presented, but to instruct the jury to return a verdict for the defendant. The error first pointed out became immaterial, and the evidence in support of the alleged taking by the defendant of earth and gravel from the lode claim was too indefinite and uncertain, even if material to the action brought.

The judgment is affirmed.

MEXICAN CENT. RY. CO., Limited, v. HENDERSON.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,118.

MASTER AND SERVANT—INJURY TO ENGINEER—INSPECTION OF ENGINE—DUTY OF ENGINEER—INSTRUCTIONS—WITHDRAWING CASE FROM JURY.

An engineer, prior to reaching repair shops, discovered a defect, which he indicated at the shop by entry in a work book kept for the purpose. Before starting out, according to the practice in the shops, he inspected the work book, to ascertain if the defects had been repaired, and discovered that the marks had been erased, which indicated that the needed repairs had been made. He assumed charge of his engine without an examination to determine if the repairs had been in fact made, though he stated it was an engineer's duty to see if his engine was in proper condition. The defect had not been repaired, and the engineer was injured thereby. *Held*, that it was error to refuse, as practically withdrawing the case from the jury, an instruction to find for defendant if the jury believed it was the engineer's duty to inspect his engine before starting out, and he did not make such inspection; that, had he made such inspection, as it was his duty to do, he could have discovered the defect, and avoided it; and that, by failure to make the inspection and discover the defect, he was injured.

Shelby, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Texas.

This action was brought by S. H. Anderson, the defendant in error (plaintiff below), to recover damages of the Mexican Central Railway Company, Limited, the plaintiff in error (defendant below), for personal injuries alleged to have been received by the plaintiff while in the service of the defendant, and to have been caused by the defendant's negligence in the manner as stated in the petition. The accident which it is alleged resulted in the plaintiff's injuries occurred in the republic of Mexico on August 20, 1899, at which time the plaintiff was an engineer in the employment of the defendant. Briefly stated, his petition claims that one side of the stirrup on the tender was broken, and that on arriving at Cardenas with his engine, in the daytime of August 19, 1899, he did, as was his duty to do, enter a memorandum on the work book, calling attention to the fact that the stirrup was out of repair; that he entered that memorandum on the work book for the purpose of notifying the defendant that the stirrup was out of repair, that it might be repaired before the engine was required again to be used; that at some time during the night of the same day, or early in the morning of the next day, while it was still night, he was called to go out on the same engine; that he went to the work book, and found that his memorandum had been erased, and he knew from that fact that the stirrup

had been repaired; that some time during that day, while out upon the road with his engine, he attempted to use the stirrup, and in making the attempt, by reason of one side being broken, it gave way, and he was injured.

The evidence on the trial which bears on the questions discussed in the opinion is the testimony given by the plaintiff, which the bill of exceptions shows substantially as follows: "Plaintiff, S. H. Henderson, after being duly sworn, testified in his own behalf as follows, to wit: Direct Examination by Buckler: " * * * I was employed by the Mexican Central Railway Company, Limited, in the capacity of locomotive engineer, about the 20th day of August, 1899, at which time my leg was injured. This took place at Canon water tank. We were going towards a place called Cardenas, in Mexico. I got off the tank on the left side of the engine. I then stepped around on the right side of the engine. The two front engines gave a lurch for the first engine to take water, and I went to jump on the tank. I noticed in the morning that the work I had reported on the work book had been marked off. I stepped on this stirrup, and it broke, and I went against the edge of the tank, and it took the flesh clean off the bone. I noticed that this stirrup had been broken before. I made a report of it on the work book. This work book is a book provided by the company for any work to be done on the engines. We write out our report on the work book, and then, when we come back to go to work, we generally always look and see what work is done. This had all been scratched out of the work book, and I supposed that this work had been done on this step, together with the other work I had reported. This work book was kept on the desk in the roundhouse at Cardenas. Cardenas is an inspection station. They have an inspector and master mechanic there, whose duty it is to see that these repairs are made before the engine goes out on the road again. This is the foreman's duty. He is appointed by the master mechanic. It is his duty to do this work. It is to be done by certain men, and it is his duty to see that the work is done. This is the duty of the master mechanic or those appointed by him. When I arrived there with my engine I discovered that one side of this step was broken, and I entered that fact upon the work book. I entered other memoranda at the time, to wit, that other work was to be done. The work book at that time was at the workshop, on the desk, in Cardenas, in the republic of Mexico. * * * Any work that was to be done on the engine was to be reported in this work book. When the work was done, they would erase the memorandum, so that any one examining the work book afterwards would know from the fact of the erasure of the memorandum that the work had been done. This was the custom established by defendant, and the way in which I always did my work. Whenever I got ready to go out, I consulted the work book, and the object of the erasure was to inform me that the step had been fixed. In this instance I saw the memorandum erased, and supposed from that that the work had been done, and, acting upon that supposition, I did not examine the step. Mr. Fulton was the master mechanic at that time. * * * I was employed by the Mexican Central Railway Company as an engineer. This was one of their Boggy engines. When I attempted to use this step of the Boggy engine I knew that the work had been erased off the book, and supposed it had been fixed. I did not know it had not been fixed. I made no examination myself. The engine was brought out to me in the night on the 19th of August at Cardenas. When I went to get on my engine at Canon water tank the train was moving back. I stepped on the stirrup, for the purpose of getting on the engine in the usual way, and when the train first jarred back I caught the handholds, and jumped it, as I usually would. I did this in the usual way of jumping on the train." Cross-examination by Davis: " * * * I could not tell you the exact time I left my engine at the roundhouse before I was injured, but it was on the 19th of August that I made out this report. I could not say as to the time of the day, but it was in the daytime. I went down the road on the night of the 19th, and came up on the morning of the 20th. I do not know when I left the roundhouse with my engine. The reason I did not look at the engine and the step, instead of the book, was that it had been fixed from an examination of the work book. I went to see where I was assigned. I went into the shop, and looked over the board

to see how many engines were going down. I first noted the book to see what work had been done. I looked on the book, and saw that this work had been erased, first by a pencil and then scratched. I don't mean that it was rubbed out by an eraser. The reason why I didn't look at it to see if the repair had been made was because I supposed the repair had been made. I didn't look to see whether it had been done. I could have seen whether or not the repair had been made had I made an examination of it. * * *

Q. Isn't it the duty of the engineer to look over his engine before going out on his run? A. The duty of the engineer is to look at his engine, oil her up, and get ready for the trip. It is his duty to look over it, and see that it is in proper condition, and to see that everything is all right. Q. Had you looked over your engine at that time, would you have seen whether or not the engine had been repaired? A. I didn't look over it this morning when I went down the hill. Q. If you had looked for it, could you have seen whether or not the work had been repaired? A. Yes, sir; but I saw that the work that was on the book had been scratched out of the book. I couldn't tell who did scratch it out. I could not tell you who ran the scratch through that, and whether it was done by mistake or accident." Re-direct examination by Buckler: "The object of erasing the memoranda was to show that the work was done to the engine. When I went to the memoranda I found that the same had been erased, the object of which was to inform me that the step had been fixed. This is the way the business was carried on there, and the way I always did my work. If anything occurred to any of the machinery on the road, I made a memorandum when I got to Cardenas, and it was my duty to enter it in the work book." Plaintiff, upon being recalled, testified as follows: Direct examination by Buckler: " * * * The repairs on the step that I reported should be done were such as were usually done at the shop in Cardenas. I entered there with my engine on the 19th. The engine was put in the shop. When I got ready to go out, the engine was brought out to me by the hostler, on the night of the 19th, and placed where I could go and get on it." Plaintiff again took the stand, and testified as follows: "When the engine was brought out upon the track by the hostler at Cardenas for me to take her out, it was fired up, watered, and so on, ready for the trip."

The bill of exceptions further shows: "All the evidence being in, and both parties having rested, the defendant then and there, before the jury had retired to consider of their verdict, requested the court to give the following charge: 'Defendant asks the court to charge the jury to find a verdict for the defendant herein,' which charge was refused by the court, and the defendant * * * duly excepted; * * * and the defendant then and there, and before the jury had retired to consider of their verdict, prepared and requested the court to give the following charge: 'The defendant asks the court to charge the jury as follows, to wit: Gentlemen of the jury, you are charged that if you believe from the evidence that it was the duty of the plaintiff to inspect his engine before starting out on the road; that he did not make such inspection; that had he made such inspection, as it was his duty to do, he could and would have discovered the defect in the step, and have avoided the injury; and that by reason of plaintiff's failure to make such inspection and discover said defect he was injured by said defective step,—you will find for defendant,'—which charge was refused with the following explanation: 'The foregoing charge is refused. In refusing it the court desires to make this explanation: While being satisfied that, as a general proposition, and under proper facts, the charge embodies the law, yet plaintiff's counsel having produced several authorities, among them Railroad Co. v. Nordell (Tex. Civ. App.) 50 S. W. 801, and Railroad Co. v. Amato, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 596, which appear to hold that under somewhat similar circumstances the question was one for the jury, I concluded to submit it, although inclining to the view that a peremptory instruction should have been given for the defendant. See, also, Railroad Co. v. Babcock, 154 U. S. 199, 14 Sup. Ct. 978, 38 L. Ed. 958. [Signed] T. S. Maxey, Judge.'"

'There was a verdict and judgment for the plaintiff, and the defendant brought this writ of error.

T. A. Falvey and Waters Davis, for plaintiff in error.
Millard Patterson and C. N. Buckler, for defendant in error.
Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The plaintiff in error assigns seven grounds on which it asks a reversal of the judgment of the circuit court. We deem it necessary to notice only two,—the third and fourth, as numbered in the assignment. The first of these submits that the court erred in refusing the first requested charge, namely, "The defendant asks the court to charge the jury to find a verdict for the defendant herein." The other is, "The court erred in refusing the second requested charge." It is shown in the statement of the case. The distinguished and able counsel who have submitted a brief on behalf of the plaintiff in error have argued these assignments together, and treated them as practically equivalent to each other; that is to say, in their argument they consider their second request for instructions as, in substance, a request to withdraw the case from the consideration of the jury, and to direct, peremptorily, a verdict for the defendant. The explanation given by the trial judge of his action in refusing the second of the requested charges seems to indicate that he was of opinion that this charge would practically withdraw the case from the jury. We have very carefully examined the cases to which the trial judge refers, namely, *Railroad Co. v. Nordell* (Tex. Civ. App.) 50 S. W. 601, *Railroad Co. v. Amato*, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 596, *Railroad Co. v. Babcock*, 154 U. S. 199, 14 Sup. Ct. 978, 38 L. Ed. 958, and agree with him that these cases hold, under similar circumstances to those presented by the instant case, that the case was one for the jury. But we cannot concur in the suggestions of counsel for the plaintiff in error, or in the view which appears, by implication at least, to have been taken by the trial judge as to the character and effect of the second request. It does not seem to us to withdraw from the jury the question that was vital on the trial, but, in our opinion, expressly and correctly submits it to the jury. Let us examine it. Its language is:

"You are charged that if you believe from the evidence that it was the duty of the plaintiff to inspect his engine before starting out on the road; that he did not make such inspection; that, had he made such inspection, as it was his duty to do, he could and would have discovered the defect in the step, and have avoided the injury; and that by reason of plaintiff's failure to make such inspection and discover said defect he was injured by said defective step,—you will find for defendant."

The insistence of counsel for the plaintiff in error is that the testimony of the defendant in error shut the jury up to the one conclusion,—that, under the circumstances in this case, the defendant in error owed the duty to himself and to his employer to make a different inspection from the one which his proof shows him to have made, and that it concludes him, as an admission made as a witness on the stand, that he did not make such an inspection as was his duty, under the circumstances, to make before taking out the en-

gine. If the matter had been submitted to them under this requested charge, the jury might have so considered the plaintiff's testimony. But it can hardly be claimed that, on a consideration of the whole testimony given by the defendant in error, no reasonable mind could reach a different conclusion, or that the evidence is such that the trial judge must have thought it to be his duty to award a new trial in case the jury had reached a different conclusion, and returned a verdict for the plaintiff. The only defect in the engine involved in this inquiry was the broken step. The plaintiff's testimony shows that he, while operating this engine, prior to reaching Cardenas on August 19th, had discovered this defect; that Cardenas was the place where such defects were to be repaired; that in the due and regular discharge of his duty he gave notice thereof, in the manner required by the rules and practice of the company, to the agent of the company, whose duty it was to have the defect corrected and the step properly repaired; that, in the regular discharge of his duty, and according to the ordinary and well-known practice in the shops of the plaintiff in error at Cardenas, he did, before starting out on the trip on which he was injured, look at the work book, to see if the defects which his inspection had discovered, and which he had reported, had been repaired, and that he thereby discovered, from the marks designed to show the fact to him, that the work had been done and the needed repairs made. In answer to a categorical question the plaintiff did, indeed, say: "The duty of the engineer is to look at his engine, oil her up, and get ready for the trip. It is his duty to look over it, and see that it is in proper condition, and to see that everything is all right." But this does not at all indicate that the plaintiff, as engineer, was under any rule of duty not applicable in railroad operation to other locomotive engineers, or other than was binding on Nordell and on Munro, the engineers, respectively, in the Nordell and in the Babcock Cases, *supra*. The jury had the witness before them. His testimony was expressed to them, not alone in the arbitrary characters which constitute the words he used, but also by his manner in their use. Whatever may be the fact, it does not unquestionably appear on the surface of the language in which his testimony is reported to us that he thought, or that he intended to admit, or believed that he was admitting, that he had not done, on the morning he started out with his engine, all that his duty as an engineer and the rules and practice of the company required him to do to satisfy himself that the step in question was in condition for use. We think the requested charge submits to the jury what the authority of the cases cited by the learned trial judge requires should have been submitted to them: that its tenor and effect was not to withdraw the case from them, and to direct a verdict for the defendant; and that it correctly states the law to be that, if they find from the proof that the plaintiff did not make such inspection of his engine as it was his duty to do, they must find a verdict for the defendant.

It follows that for the error in refusing the second requested charge the judgment of the circuit court must be reversed. As we have already said, we do not deem it necessary to consider now the

other matters suggested in the assignment of errors, as the questions presented may not arise on another trial.

The judgment of the circuit court is reversed, and the cause is remanded to that court with direction to award the defendant a new trial.

SHELBY, Circuit Judge (dissenting). I am constrained to dissent from the opinion in this case. The trial court refused to give the following charge:

"You are charged that if you believe from the evidence that it was the duty of the plaintiff to inspect his engine before starting out on the road; that he did not make such inspection; that, had he made such inspection, as it was his duty to do, he could and would have discovered the defect in the step, and have avoided the injury; and that by reason of plaintiff's failure to make such inspection and discover said defect he was injured by said defective step,—you will find for the defendant."

In view of the evidence given by the plaintiff as a witness, the court below construed the charge to be a peremptory instruction to find for the defendant, and therefore refused to give it. In the opinion of this court the charge does not take the case from the jury. This difference of opinion as to its proper construction tends to show that it was not a proper instruction to give to the jury. Construed in the light of the evidence to which it relates, it is obscure and ambiguous. A trial court should not be reversed for the refusal to give a charge that is susceptible of two constructions, one of which is a correct and the other an erroneous statement of the law. I think the charge is contradictory and repugnant. In the first paragraph it leaves the question of the plaintiff's duty to the jury,—“if you believe from the evidence that it was the duty of the plaintiff to inspect his engine,” etc.; in the second paragraph it is stated that it was the plaintiff's duty to inspect the engine,—“that had he made such inspection as it was his duty to do,” etc. The trial court should not be reversed for a refusal to give a charge which is either contradictory or ambiguous. The refusal of such instructions is always proper. In *U. S. v. Jones*, 8 Pet. 399, 414, 8 L. Ed. 988, in declining to reverse the trial court for refusing to give requested instructions, Mr. Justice Story said:

“The language used is equivocal, and admits of various interpretations; and it is certainly the duty of a party asking an instruction to express it with such certainty as may not mislead either the court or the jury.”

The cases from the state courts of last resort are to the same effect. *Proff. Jury*, 338, 345, 346; 11 Enc. Pl. & Prac. 140, 141; *Strohn v. Railroad Co.*, 99 Am. Dec. 127.

The charge in question here is construed by counsel and the trial court to be a peremptory instruction to find for the defendant. It may be conceded that this court is right in placing a different construction on it. But a charge that is so contradictory and ambiguous that it may fairly be susceptible of such different and conflicting constructions ought not to be given. When an instruction is so written that learned counsel and courts may fairly differ as to its meaning, it would probably be misleading, and confusing to the

jury. It is incumbent on a party seeking an instruction to put it in such clear, precise, and intelligible form as to leave no reasonable ground for misapprehension by the jury as to its correct meaning. Unless the charge is so written, I do not think it is error for the trial court to refuse to give it.

I therefore respectfully dissent from the opinion of the court.

ST. LOUIS & S. F. R. CO. v. FURRY.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1902.)

No. 1,577.

RAILROADS—NEGLIGENCE—FELLOW SERVANTS—FIREMEN—TELEGRAPH OPERATOR—CONSTRUCTION OF STATUTE.

Under Sand. & H. Dig. Ark. § 6248, declaring that the employes of a railway corporation shall not be considered fellow servants unless working together to a common purpose of the same grade and in the same department or service, a fireman, who was injured by a collision of trains caused by the failure of a telegraph operator to deliver orders received by him from the train dispatcher, was not a fellow servant with such telegraph operator.¹

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

This was an action by Warren G. Furry, a railroad fireman, who sued his employer, the St. Louis & San Francisco Railroad Company, the plaintiff in error, for injuries sustained in a collision between two freight trains on October 17, 1897. The circumstances which occasioned the collision were these: Train known as second 38, on which the plaintiff below was a fireman, arrived at Springdale, Ark., at 8:35 a. m. on October 17, 1897, and took the side track at that station to await the passage of a south-bound passenger train. The freight train (second 38) was running north, and was under orders to meet a south-bound freight train at Rogers, a station some 10 miles north of Springdale. When it took the siding at Springdale, it ran to the north end thereof, so as to be in a position to run out on the main track as soon as the passenger train went by, at which point the engine of the freight train was about one half a mile north of the station. While the freight train was standing on the siding, the telegraph operator at the station received an order directing the two freight trains to meet at Springdale instead of at Rogers, but the operator failed to notify either the conductor or the engineer of second 38 of this order, or to put up the customary red signal that orders were in his hands, as it was his duty to do. In consequence of such neglect on the part of the operator, second 38 proceeded north on the main track, as soon as the passenger train had passed by, and, about two miles north of Springdale, came into collision with the south-bound freight, which had received the order to meet at Springdale instead of Rogers. As a result of the collision Furry was horribly burned and otherwise injured, so as to cripple him for life. In consequence of these facts the jury awarded him damages in the sum of \$16,000. To reverse that judgment, the railroad company brought a writ of error.

¹ Who are fellow servants, see notes to Railroad Co. v. Smith, 8 C. C. A. 668; Railway Co. v. Johnston, 9 C. C. A. 596; Flippin v. Kimball, 31 C. C. A. 286.

L. F. Parker and B. R. Davidson, for plaintiff in error.

Samuel R. Chew and Joseph M. Hill (Henry Fitzhugh, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

On February 28, 1893, the legislature of the state of Arkansas passed an act, the material parts of which, as now contained in Sand. & H. Dig. St. Ark., are as follows:

"Sec. 6248. All persons engaged in the service of any railway corporations, foreign or domestic, doing business in this state, who are entrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the authority to direct any other employé, in the performance of any duty of such employé, are vice-principals of such corporation, and are not fellow-servants with such employé.

"Sec. 6249. All persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being entrusted by such corporations with any superintendence or control over their fellow employes, are fellow servants with each other; provided, nothing herein contained shall be so construed as to make employes of such corporation in the service of such corporation fellow servants with other employes of such corporation engaged in any other department or service of such corporation. Employes who do not come within the provisions of this section shall not be considered fellow servants."

This statute is the same, in substance, as one which was enacted by the legislature of the state of Texas on March 10, 1891, and it has since been adopted, in substance, by the legislature of the state of Utah (Rev. St. Utah, 1898, §§ 1342, 1343), and possibly in some other states. On the trial of the case it was admitted by both parties that the plaintiff and the engineer of his train were free from any fault or negligence contributing to the collision; that the defendant company's train dispatcher for the division of the road on which the collision occurred was likewise without blame; and that the disaster was occasioned solely by the neglect of the defendant's telegraph operator at Springdale to communicate to the conductor and engineer of freight train second 38 the fact that an order had been received directing that train to meet the south-bound freight train at Springdale instead of meeting it at Rogers. The question to be decided, therefore, lies within a narrow compass, the question being whether, under the aforesaid statute, Furry, the fireman, and the telegraph operator at Springdale, were fellow servants, as the defendant company contends, or whether, by reason of the statute, they cannot be regarded as occupying that relation; this latter being the view which was entertained by the trial court. In the decision of this question, which turns entirely upon the construction of the local statute and a consideration of the purpose which underlies it, it will not aid materially to consider what would be the relation of the two employes in the absence of the statute. We accordingly premit any discussion of that question, being willing to concede, as counsel for the defendant in error concede, that but for the statute they would

be fellow servants, within the federal adjudications on that subject and according to the doctrine which formerly prevailed in the state of Arkansas. The question now is, what rule did the legislature which enacted this statute intend to prescribe? What was the purpose of the enactment? When that purpose is discovered our duty is to give the statute the effect which it was intended to have, instead of nullifying it by construction.

It is well known to the profession that the fellow-servant doctrine, so termed, which was first enunciated in *Priestly v. Fowler*, 3 Mees. & W. 1, and in this country in *Farwell v. Railway Corp.*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339, and in *Murray v. Railway Co.*, 1 McMul. 385, 36 Am. Dec. 268, although generally followed in the United States, has been applied, in some states, with important qualifications not recognized in other states. For example, it was early held in some states, and the rule is still adhered to, that persons in the employ of the same master are not fellow servants, although the labor that they respectively perform tends to the accomplishment of the same general object or enterprise which the employer has in view, provided they work in different departments of the service and do a different kind or class of work, which does not bring them into habitual association with each other. This qualification had become ingrafted, in several states, on the fellow-servant doctrine, as it was first enunciated, prior to the adoption of either the Arkansas or Texas statute. *Railroad Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Stafford v. Railroad Co.*, 114 Ill. 244, 2 N. E. 185; *Railroad Co. v. Snyder*, 117 Ill. 376, 7 N. E. 604; *Cooper v. Mullins*, 30 Ga. 150, 76 Am. Dec. 638; *Railroad Co. v. Collins*, 2 Duv. 114, 87 Am. Dec. 486; *Madden's Adm'r v. Railway Co.*, 28 W. Va. 610, 621, 57 Am. Rep. 695; *Railroad Co. v. De Armond*, 86 Tenn. 73, 78, 5 S. W. 600, 6 Am. St. Rep. 816. The fellow-servant doctrine had also undergone a further modification in several states, prior to 1893, by the adoption in those states of what is known as the superior servant rule, in virtue of which two employes of the same master are not regarded as fellow servants if one is placed in a position of subordination under the other and is subject to his orders and control in such a way that the one exercising the power of control may reasonably be regarded as exercising the functions of the master. This doctrine once met with the approval of the supreme court of the United States (*Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787), and is upheld in many judicial opinions, as will appear by a reference to the cases cited under section 43 of *McKinney, Fel. Serv.* In view of the great contrariety of opinion prior to 1893, and the strong disposition manifested at that time, in some quarters, to modify the fellow-servant doctrine as at first enunciated, and in view of the fact that it had been modified in some states in the respects above mentioned, we have no doubt that it was the intention of the legislature of the state of Arkansas, when it enacted the statute above quoted, to adopt the departmental limitation of the fellow-servant doctrine, as well as the superior servant rule, to the full extent that these doctrines were then recognized in other states. No other reasonable view of the purpose of the lawmaker, in our judgment, can well be taken. Arkan-

sas was one of the states whose courts, up to the time that this statute was enacted, had declined to adopt the departmental limitation or the superior servant doctrine. *Railway Co. v. Triplett*, 54 Ark. 289, 298, 15 S. W. 831, 16 S. W. 266; *Fones v. Phillips*, 39 Ark. 17, 43 Am. Rep. 264; *Railway Co. v. Shackelford*, 42 Ark. 417, 420. The legislature evidently proposed to effect some change in the law as it had been previously declared and enforced by the courts of that state, as otherwise there was no need of further legislation; and our conclusion, based upon the aforesaid considerations, as well as upon the language of the statute itself, is that it intended to adopt the superior servant rule, also to approve and adopt the departmental limitation of the fellow-servant doctrine.

It follows from what has been said that, in determining whether Furry and the telegraph operator at Springdale were fellow servants within the meaning and intent of the Arkansas statute, we must perforce give special weight to the adjudications in those states that have adopted both of the modifications of the fellow-servant doctrine above mentioned. Our attention has only been directed to one case (*Railroad Co. v. Becker*, 67 Ark. 1, 53 S. W. 406, 409, 46 L. R. A. 814, 77 Am. St. Rep. 78), where the local statute has been referred to at length and construed by the supreme court of the state of Arkansas, whose construction of the statute, as a matter of course, is binding upon this court. In that case the question arose whether a fireman on an engine and an inspector and repairer of engines at a divisional point were fellow servants within the terms of the statute. It appeared that when the engine on which the fireman worked was at the roundhouse, where the inspector was stationed, he and the inspector were under the orders of the roundhouse foreman in the mechanical department, and that both had certain duties to perform with respect to the engine; but while the fireman was on the road, he was in the operating department, although even then he was subject to be discharged by the roundhouse foreman. With reference to their relation the court said:

"When Becker [the fireman] was at Thayer [the divisional point], his and Johnson's duties were different, and were not such as to associate and bring them together in their work, except casually, when they might work on Becker's engine at the same time, Becker cleaning and Johnson inspecting or repairing. They could not be said to have been working together, except when and so long as they were so casually engaged. Their working together was not sufficient to constitute them associates in labor any longer than it continued, no more than the casual meeting of individuals for short periods of time could constitute them associates. As they were not working together in the same department at the time the accident occurred, it follows that they were not fellow servants at the time when Becker was injured."

This extract from the opinion is important, in that it clearly indicates that, as the statute is understood and interpreted by the court which delivered the opinion, persons employed by a railroad corporation in the state of Arkansas are not fellow servants unless they habitually work together, that is, in juxtaposition, to a common purpose, nor unless they are employed in the same department. The language of the statute undoubtedly warrants this construction, because in one paragraph it declares that those are fellow servants "who are engaged

in the common service * * * and * * * are working together to a common purpose," while the proviso to the same section declares that "nothing herein contained * * * shall be so construed as to make employes * * * fellow servants with other employes * * * engaged in any other department or service." Better language than this could hardly have been chosen to formulate the doctrine which prevails in Illinois, sometimes termed the "doctrine of consociation"; namely, that two persons in the service of the same master are not to be esteemed fellow servants unless their duties are such as to bring them into habitual association with each other, so that they will exercise a mutual influence upon each other, tending to inspire caution and insure each other's safety. *Steel Co. v. Shields*, 134 Ill. 209, 213, 25 N. E. 569; *Railway Co. v. Moranda*, 93 Ill. 302, 315, 34 Am. Rep. 168.

Turning to decisions in the state of Texas, which was the first to adopt the Arkansas statute, and whose decisions upon the act must, for that reason, be regarded as very persuasive, we find it to be held (*Railway Co. v. Whitlock* [Tex. Civ. App.] 41 S. W. 407) that an engineer on a road engine who ran his engine into a yard that was under the control of a yardmaster, for the purpose of taking out a train which had been made up, and who was injured by reason of the negligence of those employes in the yard whose duty it was to make up trains, might recover against his company, because the persons working in the yard, under the direction of the yardmaster, were not fellow servants of the engineer, although, when the latter came into the yard with his engine, he passed, for the time being, under the jurisdiction of the yardmaster. This decision was based on the ground that the engineer and the persons employed in the yard were not "working together to a common purpose" in the statutory sense. In another case (*Railway Co. v. Harding* [Tex. Civ. App.] 33 S. W. 373), it was held that an engineer on a road locomotive, who was under the control of the yardmaster, and who ran into a railroad yard and was there injured, was not a fellow servant of employes in the yard, who were under the supervision of the yardmaster, because they did not work in the same department, and for the further reason that the engineer of the road engine and the yard men were not working together to a common purpose. It has also been held in that state that a member of a day crew, who were employed to unload ties which the members of a night crew removed, and who was injured by the falling of certain ties which the night crew had negligently left standing, was not a fellow servant of the members of the night crew, because they were not working together at the same time and place and to a common purpose. *Railroad Co. v. Echols* (Tex. Civ. App.) 41 S. W. 488, 491. See also *Railroad Co. v. Talley* (Tex. Civ. App.) 39 S. W. 206; *Masterson v. Railway Co.* (Tex. Civ. App.) 42 S. W. 1001; *Railway Co. v. Warner* (Tex. Sup.) 35 S. W. 364.

Our attention has been directed to the fact that the words "working together," as employed in the Arkansas statute, are supplemented in the Texas statute (vide *Laws Tex.* 1893, p. 120), by the further words "at the same time and place"; but we are not able to regard

this change of phraseology as warranting a different interpretation of the two statutes. It is most likely that the words "working together to a common purpose" were regarded as expressing the same rule intended to be expressed by the Texas statute, in a more concise form.

It is a circumstance worthy of notice that before the Arkansas statute was adopted it had been held in those states like Illinois, which accepted the fellow-servant doctrine only in a modified form, that a section man working on a railroad was not in the same department as a fireman or engineer, and hence that the two were not fellow servants (*Railroad Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Railroad Co. v. Erickson*, 41 Neb. 1, 59 N. W. 347, 29 L. R. A. 137); that a station agent is not in the same department as a conductor (*Railroad Co. v. Snyder*, 117 Ill. 376, 7 N. E. 604); and that a telegraph operator and an engineer are not in the same department, and hence are not fellow servants (*Madden's Adm'r v. Railroad Co.*, 28 W. Va. 610, 621, 57 Am. Rep. 695; *Railroad Co. v. De Armond*, 86 Tenn. 73, 78, 5 S. W. 600, 6 Am. St. Rep. 816). In a recent case decided by the supreme court of the state of Tennessee, it is held that a conductor of a freight train, who assists in switching cars at a station, is not a fellow servant of the station agent, because they are employed in different departments of the service. *Railroad Co. v. Jackson* (Tenn.) 61 S. W. 771. Moreover, it has been decided in Ohio, which has adopted a statute somewhat like the Arkansas statute, defining who are fellow servants, that, when the act speaks of "departments or branches of service," the term "department" should not be limited so as to include only those large divisions of work which may be created by a railroad company for its own convenience, but that the terms should be understood to refer to those more minute subdivisions of the work "which concern the daily duties of the employes"; and in accordance with that view it was held by the supreme court of Ohio that an engineer of one train was in a separate branch or department of the company's service from a brakeman of another train belonging to the same company. *Railroad Co. v. Margrat*, 51 Ohio St. 130, 37 N. E. 11, 14. See also *Railroad Co. v. Warner* (Tex. Sup.) 35 S. W. 364, 366, wherein it was said by the supreme court of Texas, "The words 'department' or 'service' [as used in the statute of that state] merely mean a subdivision of business, as running a train, clearing away a wreck, repairing a track," etc.

Without pursuing the subject at any greater length, we are forced to conclude that Furry and the defendant's telegraph operator at Springdale, by whose fault the collision was occasioned, were not fellow servants, because, within the meaning of the Arkansas statute, they were not "working together to a common purpose"; the work which they did being of an entirely different character, which only brought them together casually. We are also disposed to think that the two employes were not engaged in the same "department or service" of the corporation, within the true intent of the statute. As this was substantially the view which was entertained by the trial court, the judgment below is affirmed.

SANBORN, Circuit Judge (dissenting). I am unable to assent to the views expressed or the conclusion reached by the majority of the court, because in my opinion the local telegraph operator and the fireman were within the true meaning of the statute of Arkansas "working together to a common purpose,"—the purpose of operating the trains of the company,—and were engaged in the same "department or service," namely, the operating department or service, when the accident occurred. These are the reasons which have forced my mind to this conclusion:

1. The Arkansas statute was enacted in 1893. The terms "department" and "service" in that statute are obviously interchangeable, and have the same meaning. One who is in the same department is in the same service, and vice versa. The ordinary, usual, and accepted meaning of the term "department" in the state of Arkansas, when the statute was passed, as applied to the business of a railroad company, was one of the great natural divisions of that business, such as the operating department, the auditing department, or the legal department. It is probably not too venturesome a statement to say that, if all the people of that state had been separately requested to state the meaning of this term, more than 95 per cent. of those who answered at all, legislators and constituents alike, would have thus defined it. To the same extent the usual and accepted meaning of those employes who were "working together to a common purpose" for the same master was those who were working in the same department or service to accomplish the common end of the business of that department, to operate the railroad, to audit its accounts, or to protect the legal rights of the company.

2. This was the authoritative legal definition and meaning of these terms when this statute was enacted, a definition and a meaning which the decisions of the supreme court of the United States had expressly ascribed to them, while a decision of the supreme court of Arkansas had as clearly repudiated the theories of the courts of Illinois, Georgia, Kentucky, Tennessee, and Texas on this subject, which the majority now invoke. *Railroad Co. v. Baugh*, 149 U. S. 368, 384, 389, 13 Sup. Ct. 914, 37 L. Ed. 772; *Railway Co. v. Triplett*, 54 Ark. 289, 295, 296, 15 S. W. 831, 16 S. W. 266; *Railway Co. v. Conroy*, 175 U. S. 323, 337, 20 Sup. Ct. 85, 44 L. Ed. 181; *Railway Co. v. Peterson*, 162 U. S. 346, 355, 16 Sup. Ct. 843, 40 L. Ed. 994; *Oakes v. Mase*, 165 U. S. 363, 364, 17 Sup. Ct. 345, 41 L. Ed. 746; *Railway Co. v. Hambly*, 154 U. S. 349, 357, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Railway Co. v. Frost*, 21 C. C. A. 186, 74 Fed. 965, 967; *Railway Co. v. Camp*, 13 C. C. A. 233, 65 Fed. 952-964; *McKaig v. Railway Co.* (C. C.) 42 Fed. 288-291; *Wright v. Railway Co.* (C. C.) 80 Fed. 261. The supreme court of the United States had said:

"All enter into the service of the same master, to further his interests in the one enterprise. Each knows when entering into that service that there is some risk of injury through the negligence of other employes, and that risk, which he knows exists, he assumes in entering into the employment. * * * That the running of an engine by itself is not a separate branch of service seems perfectly clear. The fact is, all the locomotive engines of a railroad company are in the one department,—the operating department;

and those employed in running them, whether as engineers or firemen, are engaged in a common employment, and are fellow servants." *Railroad Co. v. Baugh*, 149 U. S. 384, 389, 13 Sup. Ct. 914, 37 L. Ed. 772.

The supreme court of Arkansas had carefully considered and repudiated the theories of departments and consociation promulgated by the courts of Illinois, Georgia, Kentucky, and Tennessee, because, as that court said, "it leads to confusion and possible absurdities." *Railway Co. v. Triplett*, 54 Ark. 289, 295, 15 S. W. 831, 16 S. W. 266.

3. When the statute was passed there was no definite meaning to the terms in question other than that ascribed to them by the supreme court and generally accepted. The decisions in Illinois, Georgia, Kentucky, Tennessee, and Texas on this subject are inconsistent, confused, and irreconcilable. No rational definition of those "working together to a common purpose" or of the "same department or service" can be conceived that will reconcile them. Witness the decisions that an engineer of one train is not in the same department as a brakeman of another train employed by the same company (*Railroad Co. v. Margrat*, 51 Ohio St. 130, 37 N. E. 11); that an engineer who runs his engine into a yard where the other employes in the yard are engaged with him under the direction of the same yardmaster in making up his train was not "working together to a common purpose" with them (*Railway Co. v. Whitlock* [Tex. Civ. App.] 41 S. W. 407); and that the members of a day crew and the members of a night crew engaged in unloading ties were not working together at the same time and place to a common purpose (*Railroad Co. v. Echols* [Tex. Civ. App.] 41 S. W. 488, 491). In view of these decisions would not two men engaged under the same master in unloading cord wood by each lifting and removing a stick alternately be in different departments working to different purposes, because they would not both be engaged in unloading the same stick at the same time? It seems to me extremely improbable that the legislature of Arkansas left the authoritative legal definition and the usual and accepted meaning in that state of the two terms it used in this statute, wandered into other states, and adopted the confusing and uncertain conceptions of their meaning disclosed in these decisions in Illinois, Georgia, Kentucky, Tennessee, and Texas,—conceptions so impracticable that the courts of the states of Virginia and West Virginia, which once attempted to follow and enforce them, have reversed their rulings and repudiated them. *Jackson v. Railway Co.*, 43 W. Va. 381, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337; *Railroad Co. v. Nuckol's Adm'r*, 91 Va. 193, 21 S. E. 342.

4. When this statute was enacted, then the ordinary, commonly accepted meaning in Arkansas, and the authoritative legal definition there, of the term "department," as applied to a railroad company, was: "One of the great divisions of its business; such as the operating department, the auditing department, the legal department,"—and the ordinarily accepted and the legal meaning of the term, "those employed by the same master, working together to a common purpose," was: "Those working together to accomplish the common end sought to be attained in the department in which they were em-

ployed." In the absence of other definitions in the legislation of a state, the legal presumption is that the legislature used and intended to use the words and terms found in a statute in their usual sense at the time and place that the legislation was enacted. *Corning v. Board*, 42 C. C. A. 154, 157, 102 Fed. 57, 60. This statute gives no other definition of the words or terms in question,—no evidence of any intention of the legislature to change or modify their accustomed meaning; and the ordinary presumption of law is strengthened by the fact that the authoritative legal definition of the terms was the same as their commonly accepted meaning. These considerations persuade me to believe that the legislature intended to use, and did use, them in this sense in this statute.

5. Indulging for a moment the permissible assumption that this local telegraph operator and this fireman were working in their respective positions on the day this statute became a law, they were, just before it was enacted, "working together to a common purpose," the purpose of operating the railroad, in the same "department or service," the operating department or service, and they were fellow servants. *Railroad Co. v. Camp*, 13 C. C. A. 233, 65 Fed. 952, 954; *Railway Co. v. Clark*, 6 C. C. A. 281, 57 Fed. 125; *Railway Co. v. Frost*, 21 C. C. A. 186, 74 Fed. 965, 967. The statute was passed, but it did not change their relation. It nowhere asserted or intimated that they should not continue to be "working together to a common purpose." On the other hand, it expressly declared that those who were "working together to a common purpose" were fellow servants; and the operator and the fireman were so working. Is not the conclusion irresistible that they continued to be fellow servants? And as they were working in the same way and to the same purpose when the accident occurred, they were then fellow servants, by the express declaration of this statute. Continuing the indulgence of the assumption, these men were in the same department or service when the law passed, and there was nothing in it to divide their department or service, or to place them in different departments or different services. The only suggestion the statute contains on this subject is a proviso that, "nothing herein contained shall be so construed as to make employés * * * fellow servants with other employés * * * engaged in any other department or service." This proviso had no application to these men, because they were in the same department or service, and were fellow servants, when it was passed. They were in the same department or service when the accident occurred, and neither the proviso nor the statute itself affected their relations to each other or to their master in this regard. For the reasons which have now been stated, this telegraph operator and this fireman were, in my opinion, fellow servants, within the true intent and meaning of the statute of Arkansas, when the fireman was injured, and the judgment below should be reversed upon that ground.

OLCOTT v. ENNIS-CALVERT COMPRESS CO.

(Circuit Court of Appeals, Fifth Circuit. April 29, 1902.)

No. 1,120.

APPEAL—REVIEW—FINDINGS OF FACT BY TRIAL COURT.

Where, in an action brought in the circuit court, a jury was waived, and the court found a judgment against the plaintiff, and at the request of the parties filed therewith findings of fact, which stated that the facts were the same as those in a certain case, and the case cited contained no specific findings of ultimate facts, but the opinion gave a statement of the issues, a ruling as to the title of property involved, a recital of the contentions of the parties as to the facts claimed as proved, and other matters of fact intermingled with conclusions of law, the circuit court of appeals will not review the decision.

In Error to the Circuit Court of the United States for the Northern District of Texas.

On the 26th day of October, 1900, plaintiff in error brought this suit against the Ennis-Calvert Compress Company, a corporation organized under the laws of the state of Texas, in trespass to try title and for the possession of a certain tract of land, being town lot property situated in the city of Waco. The defendant, after demurring, filed its original answer, pleading not guilty and the statutes of limitations of three, five, and ten years. The case was tried before the court (a jury being waived in writing), and the court found a judgment against plaintiff in said cause and adjudged the title to said property to the defendant; and filed contemporaneously therewith, at the request of the parties, findings of fact and conclusions of law, as follows:

"(1) The court finds the facts in this case to be the same as those in the case of *Houston & T. O. R. Co. v. Ennis-Calvert Compress Co.*, decided by the court of civil appeals, and reported in 56 S. W. 367, to which reference may be made as part hereof.

"(2) I find that on the 11th day of June, 1877, the Houston & Texas Central Railway Company conveyed the property sued for to the Waco Produce Company, with the following language in said deed: 'Now, the separate and independent conditions of this quitclaim deed are as follows, to wit: In case the said Waco Produce Company shall, within six months from date hereof,—and time is declared to be the essence of the contract,—construct a cotton compress and the necessary sheds upon the said tract of land herein conveyed, then, and in that event, this instrument is to take effect, and not otherwise: provided, nevertheless, that in case said Waco Produce Company, or any person holding or claiming under it, shall at any time thereafter make use of the tract herein conveyed, or of any part thereof, for any purpose or purposes than that hereinbefore specified, or shall fail or neglect to keep and maintain its compress in good working condition, or shall in any way forfeit its charter, or shall become insolvent, that on the happening of any one of said several contingencies, or upon the failure as aforesaid of any one of them, that the title and possession of said tract herein conveyed shall in consequence and by force thereof, and without the necessity of a reconveyance, ipso facto revert to and invest in said Houston & Texas Central Railroad Company, its successors and assigns, and thereupon this instrument shall become null and void as against said railway company, but shall be in force as an estoppel of all claims to title or possession as against said grantee herein.'

"(3) I find through various links the title of said property finally passed to the defendant in this suit through those under whom it holds under the H. & T. O. Railway Co., and that the same was occupied continuously, practically, by a compress thereupon, until on or about the year 1892, when the Ennis-Calvert Compress Company abandoned said property, and from said date the grantor, or its successors or assigns, became entitled to enter or sue for said property on account of the breach of the conditions subsequent.

"(4) I find that on the 4th day of May, 1888, all of the properties of the Houston & Texas Central Railway Company, including this property, was ordered to be sold under decree of the United States circuit court sitting at Galveston, in the case of Nelson S. Easton et al. v. The Houston & Texas Central Railway Company et al., and that Charles Dillingham was appointed master commissioner to sell the property, and on the 8th day of September, 1888, he sold all of its properties to Frederic P. Olcott, who became the purchaser at said sale, which sale was duly confirmed; and on the 18th day of January, 1889, the said Charles Dillingham, master commissioner, under orders of the court, executed and delivered his deed to Frederic P. Olcott, in which deed the Houston & Texas Central Railway Company joins, and the property conveyed in said deed is described as follows, to wit: 'The property so conveyed includes the railroads of said company from Houston to Denison and from Hempstead to Austin, with the roadbeds, rights of way, buildings, and improvements of every kind and description connected with the said railroads, or any part thereof, and all their appurtenances, and also all rolling stock and equipments, materials, supplies, and personal property of every kind procured for or in any manner connected with said railroads, or used thereon, or any part thereof; also all the chartered rights, liberties, privileges, immunities and franchises of said railway company of every kind and description whatsoever appertaining to said railroads; also all the lands which have been received from the state of Texas for the construction of its said railways, not including the lands covered by the said first mortgage on the said Waco and Northwestern Division; and also all other lands, town lots, or blocks, and real estate or interests in real estate, of every kind and description to which said railway company has title, claim, or equitable ownership; and also all the tolls, earnings, freights, receipts, and moneys of every kind and description of said railway company from said railroads, and all personal property, bonds, stocks, choses in action, assets, accounts, and claims of every kind of said railway company, appertaining to said railroads, saving and reserving such portions of said lands as have been heretofore and prior to May 4, 1888, sold to other purchasers, but including all securities for unpaid consideration of said sales, the amount of such sales included in this deed being estimated to amount, exclusive of the lands pertaining to the railways themselves, to about four millions three hundred and forty thousand three hundred and thirty-nine acres, and including all property of whatever character, description,' etc. That on the 1st day of April, 1890, the said Frederic P. Olcott sold part of said property so purchased by him to the Houston & Texas Central Railroad Company, the present corporation, using the following language, to wit: 'The railways formerly of the Houston & Texas Central Railway Company from Houston to Denison and from Hempstead to Austin, with the roadbeds, rights of way, buildings, and improvements of every kind and description connected with the said railways, or any part thereof, and all their appurtenances; and also all rolling stock, and equipments, material, supplies, and personal property of every kind procured for or in any manner connected with said railways, or used thereon, or any part thereof; also all the chartered rights, liberties, privileges, immunities, and franchises of said railroad company of every kind and description whatsoever appertaining to said railways; and also all the tolls, earnings, freights, receipts, and moneys of every kind and description of said railway company from said railways, and all personal property, bonds, stocks, choses in action, assets, accounts, and claims of every kind of said railway company appertaining to said railways,—it being the intent and purpose of these presents that there shall be hereby granted and conveyed to the party of the second part (the railroad company) all the railways, properties, rights, privileges, and franchises purchased by and conveyed to the party of the first part (Frederic P. Olcott) under such decree of foreclosure, excepting only town lots which formerly belonged to the Houston & Texas Central Railway Company, and lands derived by said last-mentioned railway company from the state of Texas, and not forming part of the right of way, or being appurtenant to or used in connection with the operation of the railways hereinbefore described, and except the right, title, and interest at law or in equity formerly belonging to said Houston & Texas

Central Railway Company to the lands and town lots standing on the 18th day of January, 1889, or originally standing of record in the names of A. Groesbeck and others, trustees, in the counties of Bastrop, Brazos, Brown, Collin, Caldwell, Dallas, Ellis, Fayette, Freestone, Falls, Grayson, Gonzales, Johnson, Kaufman, Limestone, Lee, McLennan, Navarro, Robertson, Washington, and Wharton, all in the state of Texas.'

"Conclusions of Law.

"(1) I find, as a matter of law, that the Houston & Texas Central Railway Company, or its assignee, Frederic P. Olcott, had the right to re-enter and take possession of said property upon breach of the conditions subsequent, which said premises were abandoned for compress purposes in the year 1892.

"(2) I further find that by reason of the language in said deed from Frederic P. Olcott to the Houston & Texas Central Railroad Company, conveying all 'chooses in action,' said Frederic P. Olcott conveyed to said Houston & Texas Central Railroad Company all his right, title, and interest in and to said land, and his right of re-entry on account of said conditions subsequent being broken.

"(3) I further find, by reason of the judgment in the suit of Houston & T. C. R. Co. v. Ennis-Calvert Compress Co., supra, and affirmed by the court of civil appeals, that the defendant in this case is entitled to recover the land sued for herein.

"I therefore find for the defendant herein, and direct the judgment to be entered accordingly.

"Edward R. Meek, Judge."

On this writ the assignment of errors attacks all the conclusions of law as found by the trial judge.

T. D. Cobbs, for plaintiff in error.

L. W. Campbell, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The first finding of fact is that the facts in this case are the same as in the case of Houston & T. C. R. Co. v. Ennis-Calvert Compress Co., decided by the court of civil appeals, and reported in 56 S. W. 367, to which reference may be made. If we turn to the said reported case, we find an opinion of the court of civil appeals reviewing a trial and judgment in the district court of McLennan county, Tex., in a suit for trespass to try title, involving the property herein in controversy. There was no specific finding of facts in the district court of McLennan county, nor is there any such finding in the report of the case as determined in the court of civil appeals; but we find in the opinion of the court a statement of the issues between the parties, the compress company's title, and a ruling as to the divestiture of title depending upon a re-entry by the original grantor, a recital of the contentions of the parties as to the facts claimed and the facts proved, and many other matters of fact more or less intermingled with conclusions of law; but nowhere in the opinion do we find, without much analysis and examination, any clear-cut finding of fact,—ultimate fact. This is not a finding of fact that we are called upon, or ought to be called upon, to consider, even if the report of the case to which we are sent to find facts had been recited in the record. On the waiver of a jury in a civil case in the circuit court the finding of facts by the court is strictly analogous to a special verdict, and should state the ultimate facts of the case. *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608; *Coddington v.*

Richardson, 10 Wall. 516, 19 L. Ed. 981; *Town of Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862. To the same effect is *Raimond v. Parish of Terrebonne*, 132 U. S. 192, 10 Sup. Ct. 57, 33 L. Ed. 309, which seems to be a case in many respects similar to this, and the court said:

"In the present case the pleadings present issues of fact. There is no bill of exceptions. The so-called statement of facts is mainly a recapitulation of evidence introduced by the parties at the trial. The case was not submitted to the decision of the court upon that statement only, but the court made a further finding as to what took place at the trial. That finding merely states that the parties admitted that, so far as the facts were stated in a certain reported opinion of the supreme court of Louisiana, they were a correct statement of the facts of this case; but that each party claimed that there existed additional facts, as to which there is no finding. On referring to that opinion, such facts as are there stated appear to be scattered through it, intermingled with statements of conflicting evidence and with the court's conclusions of fact upon that evidence, as well as with its conclusions of law. *State v. Police Jury of Terrebonne Parish*, 30 La. Ann. 287. In short, there is nothing in the present case which can be called, in any legal or proper sense, either a statement of facts by the parties or a finding of facts by the court; and no question of law is presented in such a form as to authorize this court to consider it. Judgment affirmed."

In the present case there is a bill of exceptions that purports to recite a part of the evidence, to wit, the transfer, through foreclosure proceedings, from the Houston & Texas Central Railway Company to F. P. Olcott, and from F. P. Olcott to the Houston & Texas Central Railroad Company, all as recited above in the fourth finding of fact; and the bill concludes with the finding of facts and conclusions of law as above given, so that this bill of exceptions does not in any respect aid the first finding of fact. The third and last conclusion of law contains the trial judge's reason for judgment, and is based upon the judgment in the case of *Houston & T. C. R. Co. v. Ennis-Calvert Compress Co.*, affirmed in the court of civil appeals, which is in the record only as referred to in the first finding of fact. This shows that the finding of facts, with the first eliminated, is partial and incomplete, and the case is in no condition for our review on the sole question involved; i. e., whether the facts proved and found warranted the judgment rendered.

The judgment of the circuit court is affirmed.

McNAMARA et al. v. PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK et al.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,118.

1. ACTIONS—INTERPLEADER—BILL—DEMURRER—EQUITY.

Where a bill is good as in the nature of a bill of interpleader, and shows equities in favor of complainant entitling it to relief, a demurrer thereto should be overruled, even though it be not good as a pure bill of interpleader.

2. SAME—DEFAULT—INJUNCTION—COSTS.

Where one defendant in a bill of interpleader establishes his title, and the other makes default, the court will decree payment of the fund, less

plaintiff's costs, to the former, and a perpetual injunction against the latter, and also that he pay the costs of the former, together with the costs paid plaintiff.

3. SAME—CROSS BILL—NECESSITY.

A cross bill in an interpleader suit is not necessary to sustain a decree for a successful defendant as against defendants who have defaulted.

4. SAME—DEFAULT IN DEFENDANTS—RIGHT TO QUESTION DECREE.

Defendants in an interpleader suit who have defaulted are not in a position to complain of a decree in favor of a successful defendant, as, if they are not to receive the fund or any part thereof, it is no concern of theirs how it is awarded.

5. SAME—INTEREST OF COMPLAINANT.

Where a life insurance company which issued a policy conditioned to pay a stated sum, less any indebtedness on account of the policy, on proof of death of the insured, filed a bill of interpleader against two defendants, each of whom claimed under the policy, setting forth in the bill all the facts, and that there was at the death of the insured a certain sum due for premium which was deducted from the face of the policy, and the balance, with interest, deposited in court, the existence of such indebtedness for premium, and deduction thereof in making such deposit, did not make complainant an interested party, so as to deprive the bill of its intended character as a pure bill of interpleader.

6. SAME—SOLICITOR'S FEE.

Where a life insurance company files a bill of interpleader against two adverse claimants under the policy, and deposits the amount due thereunder in court, it should be allowed a solicitor's fee, to be paid in the first instance by the prevailing defendant.

7. SAME—DECREE—HARMLESS RECITAL.

Where one defendant in a bill of interpleader demurred to the bill and declined to answer after his demurrer was overruled, a recital in the decree that "no demurrer, plea, disclaimer, or answer has been filed," except by the answering defendant, should be construed to mean that no valid demurrer, etc., had been filed, and, if such unnecessary recital was erroneous at all, it was harmless error.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

This cause is one wherein the Provident Savings Life Assurance Society of New York brings a bill against Ernest M. Loeb and the widow and heirs of Robert McNamara. The bill alleges the issue of a policy whereby the company promised to pay to Moses Schwartz, his executors, administrators, or assigns, the sum of \$10,000, less any indebtedness on account of the policy, within 90 days after receipt of satisfactory proof, at its office in New York, of the death of Robert McNamara; the death of McNamara; the furnishing of proofs of death by Ernest M. Loeb, assignee of Moses Schwartz, and also by Robert McNamara, claiming to be a son and a representative of the heirs of Robert McNamara, and each claiming to be entitled to the proceeds of the policy. The bill contains allegations that the complainant claims no interest in the subject-matter of the contention, viz., the amount due under the policy; has incurred no independent liability to either party; is perfectly indifferent between them, in the position merely of a stakeholder; that the amount due upon the policy is the sum of \$10,000, less certain premiums amounting to \$337.50, leaving due \$9,662.50. The bill further alleges a deposit of this money in court, with interest at 6 per cent. per annum from March 28, 1901, up to date of deposit, and the prayer of the bill that the defendants interplead and settle and adjust between themselves their rights or claims, or that they be restrained by injunction from prosecuting any action or actions at law or in equity against the complainant for the recovery of any amount due or to become due under the policy. To this bill an answer was filed by the defendant Loeb, claiming in his own right as assignee of Moses Schwartz the

entire amount of the deposit. The McNamaras appeared, and jointly filed a general demurrer. This demurrer was overruled, and 10 days allowed in which to further plead or answer. At the expiration of the 10 days a motion was made by the McNamaras asking for an additional delay of 5 days within which to answer, which motion was granted. This order was granted June 24th, and expired June 29th, but no further pleadings were filed. On July 18th, on motion of complainant, an order was entered taking the bill pro confesso against the McNamara defendants. The cause thereupon proceeded to final hearing as between the complainant and the defendant Loeb and the McNamara heirs.

The decree was in accordance with the prayer of the bill. It fixed the fees of the solicitor for the complainant, payable out of the fund in court, at \$150, perpetuated the preliminary injunction, and ordered that the residue of the fund in court, after payment of the costs of the complainant, should be paid over to the defendant Loeb, and that the other defendants should be condemned in solido to pay to the defendant Loeb his costs of court and also the costs allowed to the complainant out of the fund in court. From this decree the McNamara defendants have prosecuted an appeal.

The assignments of error may be condensed under four heads, as follows: First. Did the court err in sustaining the demurrer filed by the McNamara defendants? Second. Did the court err in rendering a final decree in favor of defendant Loeb in the absence of any cross bill filed by him or of any process in his behalf as against defendants? Third. Did the court err in allowing solicitor's fees to the complainant? Fourth. Did the court err in decreeing against the McNamara defendants as in default?

Robert J. Maloney and J. R. Beckwith, for appellants.

Solomon Wolff and E. B. Kruttschnitt, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). 1. Judge Parlange, in the circuit court, overruled the demurrer on the ground that the bill, if not good as a pure bill of interpleader, was certainly good as a bill in the nature of a bill of interpleader, and showing equities in favor of complainant entitling it to relief; citing *Groves v. Sentell*, 153 U. S. 485, 14 Sup. Ct. 898, 38 L. Ed. 785, and other authorities. This ruling is fully supported by the adjudged cases cited, and, so far as the demurrer to the bill is concerned, Judge Parlange's opinion, found in the record, needs neither to be amplified nor supported.

2. It is not contended in this court that the decree pro confesso against the McNamara defendants was erroneously taken, nor that said defendants were not actually in default. "If one defendant in a bill of interpleader establishes his title and the other makes default, the court will decree payment to the former, and a perpetual injunction against the latter." 2 Daniell, Ch. Pl. & Prac. (5th Ed.) 1494, note. To the same effect see 2 Beach, Mod. Eq. Prac. § 638. That this is correct practice is declared in many adjudged cases. See *Richards v. Salter*, 6 Johns. Ch. 445; *Plaster Co. v. White*, 44 Mich. 25, 5 N. W. 1086; *Badeau v. Rogers*, 2 Paige, 209.

Richards v. Salter was decided by Chancellor Kent on a review of the practice and authorities, and we quote, as conclusive on the subject, from his opinion, as follows:

"The defendant S. has answered, and set forward his right and title to the money, and the other defendants have not supported their claim. Upon this bill the question of right may be decided in favor of one defendant against

another. If one defendant establishes a title, and the other makes default, the court will decree payment to the former, and a perpetual injunction against the latter. This was so done in *Bolton v. Williams*, 4 Brown, Ch. 297; and also in *Hodges v. Smith*, decided by Lord Kenyon as master of the rolls (1 Cox, Oh. 357, and cited by Sir William Grant in *Angell v. Hadden*, 16 Ves. 203). The defendant S. is entitled to the fund, subject to the plaintiff's costs; and the other defendants, who have set up a groundless claim, and by that means compelled the plaintiff to resort to his bill of interpleader, and put the defendant S. to the necessity of defending this suit, ought to pay to the defendant S. his costs of this suit, as well as the costs of the plaintiff, which the defendant S. is, in the first instance, obliged to pay out of the fund in court."

The defendant Loeb asserted title in his answer, and established the same by full proof, and under the correct practice was entitled to a final decree, and no cross bill against the defendants in default was necessary. And this seems clear when we notice the fact that said defendants neither asserted title to the fund in court nor denied Loeb's title to said fund. We note, further, that said defendants so being in default, and necessarily so adjudged by the court, are in no position to complain of a decree in Loeb's favor. If they are not to receive the fund nor any part thereof, it is no concern of theirs as to how it is awarded.

3. In ruling on the demurrer, it was not necessary to determine whether the bill was a pure bill of interpleader or a bill showing equities in the nature of an interpleader; but, to review the allowance to the complainant of a solicitor's fee, it is necessary to go further, and consider the exact character of the bill. The bill was intended to be and it contains all the allegations necessary for a pure bill of interpleader, and if it is not such a bill it is because the complainant, notwithstanding his allegations to the contrary, has an interest in the subject-matter of the suit. No other objection has been presented. The contention is that as the complainant has not paid in the full \$10,000 named in the policy, but has retained the sum of \$337.50, the amount due for unpaid premiums as stipulated in the policy, the amount so retained is in contest, and to that extent the complainant is interested in the subject-matter of the suit. The policy expressly stipulates that on the death of Robert McNamara the insurance company shall pay to the legal representatives or assigns of said McNamara the sum of \$10,000, less any indebtedness on account of the policy. On the death of McNamara \$337.50 in unpaid premiums became due on account of the policy, and thereby the insurance company was bound by its contract to pay to the legal representatives and assigns of McNamara the sum of \$10,000, less said premiums, to wit, \$9,662.50; and this sum, still following the terms of the policy, became due on the 18th day of February, 1901, 90 days after proof of death was received, and it, together with 6 per cent. interest thereon from that day to the filing of the bill, was paid into court. As the contract was specific, and the amount due was certain (and that is always certain which can be made certain), there was no room for any contest as to the amount due under the policy, and any interest of the complainant in the subject-matter of the suit arising from the source indicated is too remote to be seriously considered. Just as well might we consider that the complainant

was interested in the subject-matter of the suit because the complainant only paid in 6 per cent. interest from February 18, 1901, instead of from November 19, 1900, the day proofs of death of McNamara were furnished, or even from October 23, 1900, the date of McNamara's death. The interest in the subject-matter of the suit sufficient to deny the complainant the right to bring a strict bill of interpleader must be a substantial, contested right; otherwise, no such bill, however meritorious the case, could ever be entertained. In this case, neither by the bill nor by any legitimate inference to be drawn from the evidence, does it appear that the complainant had any substantive or substantial interest in the subject-matter of the suit. Where no such interest is shown, and the complainant's acts in the premises have been free and above board, and conducive to equity, a solicitor's fee may be allowed. *Groves v. Sentell*, *supra*; *Lottery Co. v. Clark* (C. C.) 16 Fed. 20; *Trustees v. Greenough*, 105 U. S. 535, 26 L. Ed. 1157; *Spring v. Insurance Co.*, 8 Wheat. 268, 5 L. Ed. 614; *Daniel v. Fain*, 5 Lea (Tenn.) 258.

4. We understand that part of the first paragraph of the decree appealed from, which declares that "no demurrer, plea, disclaimer, or answer has been filed to said bill of complaint by any of the defendants herein other than said Ernest M. Loeb, to mean that the McNamara defendants filed no valid and sufficient demurrer, plea, disclaimer, or answer to said bill. The demurrer interposed by said defendants had been properly overruled, and for the purpose of the decree to be rendered was of no more force or effect than if it had never been filed. Besides, the recital in question was wholly unnecessary, and, if erroneous at all, it was harmless error.

We find the decree appealed from was in all respects in accordance with equity rules and practice, and the same is affirmed.

GOLDSMITH v. THURINGIA INS. CO. OF ERFURT, GERMANY.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1902.)

No. 1,645.

TRIAL—QUESTION FOR JURY—SUBSTANTIAL EVIDENCE—JUDGMENT OF REASONABLE MEN.

Where there is substantial evidence tending to establish each contention over an issue of fact, and reasonable men, in the exercise of a fair and impartial judgment, may well reach a conclusion sustaining either contention, the issue should be submitted to the jury.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Nebraska.

J. H. McCulloch (R. S. Hall and J. J. O'Connor, on the brief), for plaintiff in error.

H. C. Brome (A. H. Burnett, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff, Joseph Goldsmith, had a policy of insurance of the Thuringia Insurance Company, of Erfurt, Germany, for one year from September 10, 1897, on his stock of goods while located and contained in the brick building at No. 1401 Douglas street, in the city of Omaha, and not elsewhere. On the 24th and 25th days of May, 1898, he moved his stock from the building at 1401 Douglas street into the building at 1407 Harney street, in the city of Omaha, and at about 6 o'clock in the afternoon of the latter day it was damaged by fire. He sued the insurance company on the policy, and it defended on the ground that the goods described in the policy had been removed before the fire from the place in which they were insured, so that when it occurred they were not covered by the contract. At the close of the evidence the court instructed the jury to return a verdict for the defendant, and this ruling is the principal error assigned.

The evidence which conditions the correctness of this ruling disclosed these facts: Brennan, Love & Co. were the agents of the insurance company in Omaha. A. J. Love, a member of that firm, was the active manager of their insurance business, and Miss Dunn was their stenographer. Edward E. Howell was the agent of the plaintiff. He procured the policy for him from Brennan, Love & Co. originally. A few days before May 25, 1898, Love saw the goods of the plaintiff moving toward Harney street, and he told Howell that he would not consent to a transfer of this insurance to the goods in their new location. On the morning of May 25th Howell sent to the office of Brennan, Love & Co. the plaintiff's policy, with a removal slip attached, ready for the signature of Brennan, Love & Co., whereby they, as agents of the defendant, consented to the transfer of the policy and the insurance to the plaintiff's stock of merchandise in its new location, and, through his messenger, requested them to sign it. Mr. Love was not in the office. Miss Dunn received and kept the policy and slip. She replied to the request that she would rather refer the matter to Mr. Love before she let it go out of her hands, but that she would sign the permit if Mr. Love approved it. Miss Dunn and Mr. Love testified that the matter was not called to his attention, and that he did not know or approve of the transfer before the fire. During the day, and before the fire, Miss Dunn, however, signed the slip with the name Brennan, Love & Co., as she was authorized and accustomed to do when such transfers were approved by Love. She left the policy, with the removal slip thus signed, upon her desk. The next morning the office boy handed it to a messenger of Mr. Howell before Mr. Love or Miss Dunn had arrived at the office. Love testified that he first learned about this removal slip on the morning of May 26, 1898, the day after the fire. On that morning he went to the plaintiff's store, had an interview with him, said nothing about the expiration or lapse of his policy, and told him he would send an adjuster to investigate the fire. On the same day he wrote and sent to the plaintiff a letter in which he notified him that his policy would be canceled at noon on that day, "subject to a loss which occurred at 6:18 p. m. yesterday."

Would all reasonable men, in the fair exercise of their impartial

judgment, be compelled to conclude from this evidence that the agent Love did not know and approve of the transfer of the insurance before the fire? A careful review of the testimony fails to convince that this question should be answered in the affirmative, and it is only when it can be so answered that an issue of fact may be properly withdrawn from the jury. Mr. Love and Miss Dunn testify that he did not approve the transfer. But the acts and interpretations of parties to contracts before controversies arise are often as cogent and persuasive evidence upon the question of their existence and meaning as their testimony. Miss Dunn told the messenger she would sign the slip if Mr. Love approved it. She did sign it. Mr. Love knew she had signed it the next morning, and he knew the stock had been moved, but he did not question the existence and validity of the policy, or the liability of the company for the loss. On the other hand, he acknowledged the liability, and made the cancellation of the policy expressly subject to the loss. It is true that, if the transfer slip was not approved before the fire, he could not create a liability of the company by acknowledging or admitting it after the fire. But the signature of Miss Dunn to the slip, and Love's interview with the plaintiff, and his cancellation of the policy, subject to the loss, after the fire, are competent and persuasive evidence on the issue whether or not Love was aware of and approved the transfer. They may persuade some reasonable men that he had knowledge of it, and approved it, although the fact had slipped from his memory when he testified. This question should have been submitted to the jury under this evidence, and the judgment below is accordingly reversed, and the case is remanded to the court below for a new trial.

In re HAWK.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1902.)

No. 21, Original.

BANKRUPT COURT—SETTING ASIDE DISCHARGE—AMENDMENT OF SCHEDULE.

A court of bankruptcy is without jurisdiction to set aside a discharge, to reinstate a case, and to permit an addition of a creditor to the bankrupt's schedule more than a year after the adjudication in bankruptcy, without notice to the creditor.

(Syllabus by the Court.)

Petition for Review.

John E. Greene (H. F. Miller, on the brief), for petitioner.

D. G. Maclay (W. F. Ball and J. S. Watson, on the brief), for respondent.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. William J. Hawk was adjudged a bankrupt on June 21, 1899. On October 5, 1899, he received his discharge in bankruptcy. His estate produced no assets that were

not exempt from execution, and there were no dividends to his creditors. He owed the Van Dusen-Harrington Company, a corporation, upon his promissory notes, \$2,320.12 and interest from some date in the year 1896. He did not include this creditor or these notes in his schedule of liabilities, and this creditor was not aware of the proceedings in bankruptcy until some time in the month of August, 1900. During the month of June in that year Van Dusen, Harrington & Co. became indebted to Hawk through business transactions conducted in that month in the sum of \$1,944.77. On August 11, 1900, upon the application of the bankrupt, showing that he had forgotten to include the claim of Van Dusen-Harrington Company against him in his schedule, and without any notice to that creditor, the court made an order that he be permitted to amend his schedule by inserting the name of the Van Dusen-Harrington Company as one of his creditors, with a proper description of the nature and consideration of his debt to it, and directed that the discharge in bankruptcy be set aside, and the case be referred to the referee. On October 10, 1900, after hearing the creditor and the bankrupt, a new order was made to the effect that the order of August 11, 1900, be vacated and set aside, and that the discharge in bankruptcy of October 5, 1899, be reinstated. The bankrupt presents these facts and proceedings by petition for review, and alleges that the order of October 10, 1900, was illegally issued.

The court below granted the order of October 10, 1900, on the ground that it had no jurisdiction to make the original order of August 11th, because the term of the district court at which the bankrupt was discharged had expired in the preceding May. It is unnecessary to determine in this case, and we do not decide, whether or not the terms of the United States district court are the terms of the courts of bankruptcy established by the bankruptcy law of 1898, so that the ordinary rule at law and in equity that the court has no jurisdiction to vacate or modify its judgments in matters of substance after the expiration of the term is applicable. Whether the judgment of discharge was subject to this rule or not, the order of August 11, 1900, was clearly void upon another ground. The adjudication in bankruptcy was made on June 21, 1899. Section 57n provides that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication." The year within which the claim of the Van Dusen-Harrington Company against the estate of this bankrupt could be proved had expired on June 21, 1900. It had become indebted to the bankrupt, Hawk, in the sum of \$1,944.77, against which it had the legal and moral right to offset its claim upon the promissory notes of Hawk. The order of August 11th avoiding the discharge of the bankrupt, and permitting him to insert in his schedule of debts this claim of Van Dusen-Harrington Company, would, if effectual, deprive this creditor of \$1,944.77 without notice or hearing. It would, in the ordinary course of proceedings, result in the discharge of the bankrupt from liability on his promissory notes held by this creditor, while it would leave the creditor liable to the bankrupt for the debt of \$1,944.77 which it owed him. The court below had no jurisdiction

to make such an order without notice to the creditor, because its effect would be to deprive the creditor of a valuable right of property without due process of law (In re Rosser, 101 Fed. 562, 567, 41 C. C. A. 497, 502), and because the time within which a claim against the estate of the bankrupt could be proved had expired under section 57n of the bankrupt law.

There was no error in the order of October 10, 1900, which vacated and set aside the order of August 11, 1900, and it is approved and confirmed.

CINCINNATI, H. & D. R. CO. v. THIERAUD.

(Circuit Court of Appeals, Sixth Circuit. November 7, 1900.)

No. 661.

1. APPEAL—PRESUMPTIONS—FACTS NOT SHOWN BY RECORD.

It is not necessary in all cases that a bill of exceptions should expressly declare that it contains all the evidence or the whole case in order to repel the presumption that other facts may have been proven or other evidence given. It is enough if, from the frame of the bill, it is clearly implied that what is therein stated constitutes the whole of what took place on the trial.

2. MASTER AND SERVANT—INJURY OF SERVANT—EMPLOYER'S LIABILITY ACT OF INDIANA.

In the employer's liability act of Indiana (Laws 1893, pp. 294, 295), which provides that corporations shall be liable for damages for personal injury suffered by an employé through the negligence of co-employés, in certain cases, in the absence of contributory negligence, "and the person so injured obeying or conforming to the order of some superior, at the time of such injury, having authority to direct," the provision quoted, under the construction placed thereon by the supreme court of the state, does not require that the person injured should be acting at the time under any special direction of a superior, but is equivalent to a requirement that he shall be acting in the line of his duty as an employé; and a railroad engineer injured without negligence on his part while in charge of his engine, at a time and place when and where he had a right to be with his train, through the negligence of those in charge of another engine, must be presumed to have been at the time discharging the regular duties of his employment, and the case is within the statute.

3. SAME—CONSTITUTIONALITY OF ACT.

The Indiana employer's liability act is not in contravention of the fourteenth amendment to the federal constitution, as denying to corporations the equal protection of the laws by discriminating between them and individual employers.¹

4. JURISDICTION OF FEDERAL COURT—ACTION BY ADMINISTRATOR FOR WRONGFUL DEATH—CITIZENSHIP OF PARTIES.

The statute of Indiana (Burns' Rev. St. 1894, § 285) gives an administrator a right of action for the wrongful death of his intestate if the deceased, had he lived, might have maintained an action for an injury for the same act or omission, and provides that the damages recovered shall inure to "the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." *Held*, that an administrator in such an action sues as trustee, and not as a merely formal party, without interest, being vested by the statute with the legal title to the cause of action, and charged in his official capacity with the care and distribution of the amount recovered,

¹ See Constitutional Law, vol. 10, Cent. Dig. § 702.

and that his citizenship, and not that of the beneficiaries, must be considered in determining whether a federal court has jurisdiction of the action.

5. ADMINISTRATOR—VALIDITY OF APPOINTMENT—DOMICILE OF DECEDENT.

Under the statute of Indiana (Burns' Rev. St. 1894, § 2381), which provides that an administrator shall be appointed in the county—"First, where, at his death, the intestate was an inhabitant; second, where, not being an inhabitant, he leaves assets," a petition for letters of administration which was not controverted, and which alleged that the decedent left an estate in the county, was sufficient to authorize the appointment whether the deceased at the time of his death was a resident of the state or not.

6. WRONGFUL DEATH—ACTION FOR DAMAGES—RIGHT OF FOREIGN ADMINISTRATOR TO SUE IN OHIO.

Under Rev. St. Ohio, § 6133, which authorizes an executor or administrator duly appointed in another state to maintain an action in the courts of Ohio in his official capacity, "in like manner and under like restrictions as a nonresident may be permitted to sue," and section 6134a, which provides that a right of action for wrongful death accruing under the laws of another state may be enforced in Ohio "in all cases where such other state, * * * allows the enforcement in its courts of the statute of this state of like character," an administrator appointed in Indiana, where his decedent was killed, and who is given by the Indiana statute a right of action for the death in his official capacity, may maintain an action thereon in Ohio.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This is a suit brought by Thiebaud, the defendant in error, as administrator of Sweetman, against the Cincinnati, Hamilton & Dayton Railroad Company, to recover damages arising from the death of the deceased, occasioned by the negligence of the company. The right of the administrator to bring such an action is founded upon a statute of Indiana, where the accident and death occurred, which provides that: "When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages can not exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Burns' Rev. St. 1894, § 286. Sweetman was a locomotive engineer in the employment of the railroad company, and was killed in a collision with a freight engine on the defendant's railroad in Fayette county, Ind., between Longwood switch and Sautler's switch, on September 18, 1896, under the following circumstances: The deceased on that day was running an engine drawing the pay car of the defendant going eastwardly from Indianapolis, Ind., to Hamilton, Ohio. The defendant's freight train No. 95, also going eastwardly between those points, had been stalled near Longwood switch. The conductor of the freight train thereupon ordered part of the cars placed on the Longwood switch or side track, and proceeded with the balance of the train to Sautler's switch or side track, four and a half miles distant east, intending to come back to Longwood switch for the part of the train he left there. From Sautler's switch to Connersville is eight-tenths of a mile, and at said last-mentioned point a telegraph operator was stationed. Having placed said freight cars on the switch at Sautler's switch, the conductor and engineer of No. 95 started west with the locomotive and crew to get the cars which had been left at Longwood switch, and came into said collision with the deceased's locomotive east of Longwood switch. The conductor and engineer of freight train No. 95 had not left and did not leave a flagman or signals at Longwood switch, and did not go to Connersville to receive orders before proceeding westwardly to Longwood switch on the main

track; and in failing to leave a flagman or place signals at Longwood switch, or in not going to Connersville to receive orders before proceeding westwardly on said main track, were, it is conceded, negligent, and said negligence was the cause of the accident. The bill of exceptions states that it was proven on the trial, and not disputed, that the deceased was guilty of no negligence, and had the right to be with his train at the place where and at the time when he was killed, and also that the railroad at that place consisted of a single track. The deceased left a widow and children, to whom the damages recovered would, under the Indiana statute above recited, inure. By the employer's liability act of Indiana in force when the accident happened it was enacted: "That every railroad or other corporation, except municipal, operating in this state shall be liable for damages for personal injury suffered by an employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases: * * * (3) Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf. (4) Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, coemployé or fellow servant engaged in the same common service in any of the several departments of the service of any corporation, the said person, coemployé or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct." Laws 1893, pp. 294, 295. The plaintiff's appointment as administrator was made in Indiana by the court having probate jurisdiction there. The validity of the appointment is denied by the plaintiff in error in this court, and the rejection of an offer of proof made of certain matters in the court below mentioned in the opinion which follows is relied on to support an assignment of error. On the trial of the case the court, upon the foregoing facts appearing or being conceded, instructed the jury that the verdict should be for the plaintiff, leaving the amount of the damages to be settled by them. To this instruction counsel for the railroad company excepted. The jury returned a verdict for \$3,000 in favor of the plaintiff, whereon judgment was duly entered, and the case is brought here on writ of error.

Lawrence Maxwell, Jr., for plaintiff in error.

Harlan Cleveland and Charles M. Cist, for defendant in error. .

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

In support of the assignments of error, it is contended by counsel in behalf of the railroad company:

1. That the case is not within the scope of the Indiana statute fixing the liability of employés. The contention is that it applies only to persons who are "obeying or conforming to the order of some superior, at the time of such injury, having authority to direct"; and it is said (which appears to be the fact) that there was no proof that the deceased was acting at the time under any special direction, or otherwise than in the discharge of the general duty of his employment. It is insisted for the defendant in error that the bill of exceptions does not purport to contain all the evidence, and that we may presume that proof was made of such facts as would show that the deceased was under such direction. But, although the bill of exceptions does not, in

terms, state that it contains the whole case which the evidence tended to make out, yet it purports to state the facts which did appear by the evidence and the admissions of counsel, and it does this in such a way as to indicate that the whole case, so far as the parties deemed it material to the exceptions taken, is presented. It is not in all cases necessary that the bill should expressly declare that it contains all the evidence, or the whole case, in order to repel the presumption that other facts may have been proven or other evidence given. It is enough if, from the frame of the bill, it is clearly implied that that which is stated constitutes the whole of what took place upon the trial. *Ironwood Store Co. v. Harrison*, 75 Mich. 197, 42 N. W. 808; *Everett v. Clements*, 9 Ark. 480; *Leggett v. Grimmer*, 36 Ark. 500; *Robinson v. Hartridge*, 13 Fla. 505. We therefore think that the question under discussion must be considered upon the assumption of the fact that the deceased was not, at the time of the accident, in the execution of any special order or direction.

Counsel for the plaintiff in error contends that the clause in subdivision 4, requiring that the person injured shall have been acting in obedience to the order of some superior, is to be construed in immediate connection with each of the two preceding clauses which describes the classes of persons who commit the injury, and reference is made to two cases decided by the supreme court of Indiana involving the construction of the third and fourth subdivisions of section 1 of the act (*Laws 1893*, pp. 294, 295). *Railway Co. v. Little*, 149 Ind. 167, 48 N. E. 862; *Railroad Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301. The classification made by the learned judge who delivered the opinion in the case of *Railway Co. v. Little* of the cases taken out of the operation of the fellow-servant rule by subdivisions 3 and 4 of section 1 of the act seems to require a construction different from that contended for. But the only question pertinent here actually involved and decided in that case was whether a brakeman was included in the classes of persons by whose negligence the injury is committed. It was held that he was not. In the *Montgomery Case*, however, it was distinctly held that the concluding clause was to be read in connection with each of the two clauses describing the persons by whose fault the injury happened. We are required to follow the construction of the act given by the supreme court of that state. But under the obligation of the same rule we are also required by the decision in the last-mentioned case to hold, as was there held, that the requirement that the injured person should be acting in conformity to the order of some superior is equivalent to a requirement that he should be acting in the line of his duty as an employé. Having regard to the well-known order of business of railroad companies, of which the court must take judicial notice, it could not be otherwise than that a subordinate, such as a locomotive engineer, when acting in the line of his duty as such, would be acting under the order of some superior. It is stated in the bill of exceptions that the deceased was guilty of no negligence and that he had the right to be with his train at the time and place when and where the accident occurred. This can have no other reasonable meaning than that he was discharging the regular duties of his employment. The negligence of the conductor and en-

gineer of the other train being conceded, it would seem that a case was made out fulfilling the conditions of the Indiana statute, and, as the accident and death happened in that state, that is the law applicable to the case. *Railroad Co. v. Ihlenberg*, 43 U. S. App. 726, 21 C. C. A. 546, 75 Fed. 873; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439.

2. It was contended that this statute is in contravention of the fourteenth amendment to the federal constitution, which declares that "no state shall deny to any person within its jurisdiction the equal protection of the law," in that it discriminates between corporations and all other persons. But during the pendency of this case on writ of error this point has been distinctly ruled the other way by the supreme court in *Tullis v. Railroad Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192,—a case arising under the same statute.

3. It is insisted that the circuit court of the United States in Ohio did not have jurisdiction, because, as the petition alleges, the suit is brought for the benefit of the widow and children of the deceased, who are alleged to have suffered damages by his death; and the point is that, as Thiebaud, the administrator, who brings this suit as a citizen of Indiana, is a nominal party only, having no interest in the recovery, the citizenship of the beneficiaries, who are citizens of Ohio, is to govern in determining the question of jurisdiction, and that by that test, the railroad company being also a citizen of Ohio, it does not exist. It has been held in numerous cases that where the plaintiff in the suit has no interest, legal or equitable, in the recovery, but is put forward as a formal party in conformity to some statutory appointment made for the purpose, the citizenship of the real party will furnish the test of jurisdiction so far as that party to the case is concerned. *McNutt v. Bland*, 2 How. 9, 11 L. Ed. 159; *Huff v. Hutchinson*, 14 How. 586, 14 L. Ed. 553; *Maryland v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822; *Indiana v. Glover*, 155 U. S. 513, 15 Sup. Ct. 186, 39 L. Ed. 243; *Stewart v. Railroad Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. The case of *Blacklock v. Small*, 127 U. S. 96, 8 Sup. Ct. 1096, 32 L. Ed. 70, is also cited in the brief of counsel for the plaintiff in error. In this class of cases the nominal plaintiff has no title or interest in the subject of the suit, immediate or remote. He cannot control the litigation, and has no authority to meddle with it. On the other hand, it is well settled that where the plaintiff sues in the character of a trustee, being vested with the title to the subject of the litigation, even though it is destined to ultimately pass in due course to designated beneficiaries, it is his citizenship which is recognized in settling the question of jurisdiction. It is he who has the control of the action, and, so long as he faithfully discharges the duties of his trust, he is the only party to represent the interest he prosecutes. *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Knapp v. Railroad Co.*, 20 Wall. 117, 22 L. Ed. 328; *Morris v. Landauer*, 6 U. S. App. 510, 4 C. C. A. 168, 54 Fed. 23; *Popp v. Railroad Co.* (C. C.) 96 Fed. 465. These citations of cases on either side are by no means exhaustive of the decisions on this subject, but they are sufficient to explain the principle of the distinction. We will refer to one or two comparatively recent decisions, which are supposed to

be not in harmony with the rules above stated. In *Blacklock v. Small*, 127 U. S. 96, 8 Sup. Ct. 1096, 32 L. Ed. 70, the case involved a somewhat different question. The plaintiffs were two of three beneficiaries, and brought suit against the obligor in a bond assigned to their trustee, against the trustee himself and the other beneficiary, to set aside the payment of the bond, which had been made in treasury notes of the Confederate States, of no value. The trustee was charged with a breach of trust in accepting such payment. The beneficiary who was made defendant by her answer ranged herself with the plaintiffs, and prayed the same relief. It was held that she should be classed with the plaintiffs, and, as she was a citizen of the same state as the obligor in the bond, the court had no jurisdiction. The trustee was not suing. The beneficiaries were themselves the actors seeking direct relief, and it was therefore their citizenship which was to be considered in determining the jurisdiction of the controversy as between the parties before the court. In the case of *Stewart v. Railroad Co.*, 168 U. S. 449, 18 Sup. Ct. 105, 42 L. Ed. 537, much relied on for the plaintiff in error, the deceased was killed by the negligence of the railroad company in the state of Maryland. The statute of that state required that the action should be brought in the name of the state. The action was brought in the District of Columbia, in the name of an administrator appointed there, the law of the District requiring that such an action should be so brought. The supreme court of the United States held that the action being transitory, and under the law of both jurisdictions, the plaintiff in whose name the suit was required to be brought being a merely nominal one, the action might be maintained. It will be noticed that the statute of the district required the action to be brought "in the name of the personal representative." The short explanation of the case is that, as both statutes required the action to be brought in the name of a formal party, the action was regarded as that of the beneficiaries, and the employment of the name of the administrator was simply conforming to the law of the forum in respect to the mode of procedure. The statutes in the several states providing a remedy for the benefit of the family or next of kin of the deceased who dies from the wrongful act of another differ in the mode by which it is accomplished, and this difference greatly affects the subject we are considering. In some a remedy is given directly to the beneficiaries. Such is the law of Tennessee, which was involved in the case of *Railway Co. v. Hooper*, 35 C. C. A. 24, 92 Fed. 820, which came to this court from that state. There either the administrator or the beneficiaries may sue. In others the right of action is devolved upon his personal representative. It is true that the recovery is not turned over to creditors, but that is a matter which relates merely to the administration of the fund, and the legislature which creates the law is perfectly competent to direct in this, as it does with reference to the proper assets of deceased persons, who shall be the beneficiaries; and when this is done by vesting the right of action in the personal representative he takes it for administration in the general meaning of the word as much as when he takes other property to collect and distribute to those designated by law. It is included in the duties of

his appointment, and he is responsible for the fund. The Indiana statute provides that the administrator may maintain an action if the deceased, had he lived, might have maintained an action for the same cause. The damages, when collected, are distributed to the family or next of kin. It is obvious that the beneficiaries cannot bring the action. They have only the right to ultimately receive the proceeds when the administrator shall have executed his trust. And this is the interpretation which the supreme court of Indiana puts upon this statute. *Packet Co. v. Pikey*, 142 Ind. 304, 40 N. E. 527. It was held in that case that the administrator held the fund when collected as the trustee of an express trust for the benefit of the persons named. In *Yelton v. Railroad Co.*, 134 Ind. 414, 33 N. E. 629, 21 L. R. A. 158, the sole beneficiary had attempted to compromise the liability of the defendant while a suit by the administrator was pending. It was held that she (the widow in that case) had not the power to do this; and the court said:

"While actions under this section of the statute are prosecuted for the benefit of, and the damages inure to the exclusive benefit of, the widow and children of the deceased, yet it contemplates the collection of the damages by the administrator, and the turning of the same over to the widow and children on final settlement."

The statute as thus interpreted creates a trust, and names the trustee. We are unable to distinguish the case in this respect from those in which it has been repeatedly held by the federal courts that the trustee is the legal representative of the beneficiaries, and that his citizenship is the only one to be considered in determining the jurisdiction in respect to that side of the controversy.

4. The authority and jurisdiction of the probate court in Indiana, from which the administrator derived his appointment, is disputed, it being contended that Sweetman was not an inhabitant of Indiana, and left no assets there. And it is further insisted in this connection that the court below erred in excluding evidence tending to show these facts. We will deal with this last objection first. It is sufficient to say that this question is not presented by the record. It appears that, on a question being put to a witness in regard to the situs of certain personal effects of the deceased by counsel for the railroad company, objection was made that the appointment of the administrator could not be thus collaterally attacked. The counsel who put the question thereupon expressly disclaimed the purpose of attacking the appointment made by the court of probate, and stated his purpose to be to show that the claim for which the suit was brought was the whole of the estate, and that his purpose in doing this was to prove that the circuit court in which the case was being tried was without jurisdiction. There is nothing whatever in the record to show that the defendant below raised any question of the validity of the appointment so far as it related to existence of assets in Indiana. Then, as to the point that Sweetman was not an inhabitant of Indiana, the question raised relates to the effect of the record of the proceedings in the court of probate. The statute of Indiana (Burns' Rev. St. 1894, § 2381) relating to the granting of letters of administration provides that "such letters shall

be granted in the county; first, where, at his death, the intestate was an inhabitant; second, where, not being an inhabitant, he leaves assets." The record of the court of probate shows that a verified petition praying for the appointment of Thiebaud as administrator was filed in that court, showing that the deceased died in Fayette county, Ind., leaving a personal estate of the probable value of \$100, and that his widow and next of kin were not residents of that state. It further states that the petition was granted; that Thiebaud was appointed administrator; that he filed a proper bond as such, which was approved; that he took the oath of office, and that letters of administration were issued to him. Conceding that it inferentially appears from this and other recitals in the record that the court of probate assumed that Sweetman was an inhabitant of Fayette county, Ind., at the time of his death, and conceding also that he was not, but was an inhabitant of Ohio, still the petition, which was verified, and not disputed, showed that he left assets in the county, and that was sufficient whether he was an inhabitant of the county and state or not. If the court was in error in assuming one of the conditions to an appointment to exist, still, if other conditions existed, which, independently of the first, authorized the appointment, they would constitute a sufficient basis for the order. But there is not in the record anything which shows with positiveness that the letters were granted upon the assumption that Sweetman was such inhabitant of Indiana. All that we find upon that subject on which to base an inference that the court based the appointment upon the ground that the deceased was an inhabitant of Indiana is that he is described in the probate record as "Chris Sweetman, late of Fayette county." We perceive no sufficient reason for doubting that the appointment was valid. The question whether it was competent for the defendant in the court below to have proven that the conditions were such that the court of probate had no authority at all to appoint an administrator is, as we have said, not presented for our decision, and we therefore express no opinion upon it.

5. It is further contended that Thiebaud, having been appointed administrator in Indiana only, cannot maintain this action in Ohio. This would undoubtedly have been so at the common law. Story, *Conf. Laws*, 513; *Johnson v. Powers*, 139 U. S. 156, 11 Sup. St. 525, 35 L. Ed. 112. But the Revised Statutes of Ohio contain the following provisions:

"Sec. 6133. An executor or administrator duly appointed in any state or county may commence and prosecute any action or proceeding in any court in this state in his capacity of executor or administrator, in like manner and under like restriction as a nonresident may be permitted to sue."

"Sec. 6134a. Whenever death has been or may be caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory or foreign country, such right of action may be enforced in this state in all cases where such other state, territory or foreign country allows the enforcement in its courts of the statute of this state of a like character," etc.

The state of Indiana gives such right of action as is mentioned in section 6134a of the Ohio Statutes, as is shown by the cases of

Burns v. Railroad Co., 113 Ind. 169, 15 N. E. 230, and *Railroad Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67. This removes all objection which may have existed upon the ground of the public policy of Ohio. Section 6133 of the Ohio Statutes in very broad terms concedes to foreign administrators the right to prosecute "any action or proceeding" in the courts of the state in like manner "as any nonresident may be permitted to sue." The ground upon which it is proposed to restrict this privilege is that the intention was to accord it only to such action or proceeding as the administrator institutes for recovering the assets of the deceased. But, as we have already stated, under the Indiana statutes the plaintiff sues as administrator under a right of action vested in him as such. It seems to us that the statute of Ohio extends to all cases where the administrator is the actor, and sues for that which, in his official capacity, he is entitled to recover. It does not discriminate between the matters which, by the foreign law, may be intrusted to him by virtue of his office, provided the exercise of the privilege is not inconsistent with the interests of the public in the state of Ohio. The only restriction mentioned by the statute is that which is imposed upon any nonresident. We think there is no valid reason for excluding such an action as this upon the fact that the fund, after it comes to the hand of the administrator, is distributed to other persons than those to whom by another statute of Indiana the assets of the deceased are distributable. The case of *Transfer Co v. Wilson's Adm'r*, 16 U. S. App. 236, 8 C. C. A. 21, 59 Fed. 91, decided by this court, and cited for the plaintiff, is not opposed to this conclusion. It was there held that a foreign administrator could not sue in the courts of Kentucky to recover damages for a death occasioned by the fault of another under a statute of that state which authorized such administrator to "prosecute actions for the recovery of debts due to such decedents." The restriction was expressly made in the very terms of the grant of the privilege without which the foreign administrator could not sue in Kentucky. In no sense could such damages be called debts due the decedent. The dissimilarity between the Kentucky and Ohio statutes is obvious.

For the reasons stated, we are convinced that none of the assignments of error are maintainable, and that the judgment should be affirmed.

EDISON v. AMERICAN MUTOSCOPE CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1902.)

No. 75.

PATENTS—INVENTION—KINETOGRAPHIC CAMERA.

In the Edison patent, No. 589,168, for a kinetographic camera, claims 1, 2, and 3, which cover any camera apparatus which includes a stationary single lens and a tapelike film, and is capable of intermittently projecting, at such rapid rate as to result in persistence of vision, images of successive positions of an object or objects in motion, and any mechanism or device for so moving the film as to cause the successive images to be received thereon separately and in single-line sequence, without speci-

fyng the mechanisms to be employed, except functionally, are void, as broader than the actual invention of the patentee, which, in view of the prior art, was limited to the details of organization by which he accomplished such results, and which are not described. Claim 5, covering a tapelike photographic film having thereon equidistant photographs of successive positions of an object in motion, in straight-line sequence, is also void for lack of invention, as distinguished from nonpatentable improvement upon films previously known.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an appeal from a decree adjudging the validity and infringement of letters patent No. 589,168, granted August 31, 1897, to Thomas A. Edison, for a kinetographic camera. See 110 Fed. 660, 664.

Parker W. Page and Thos. B. Kerr, for appellant.
Richard N. Dyer and Fredk. P. Fish, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree sustaining the validity, and adjudging the infringement by the defendant, of letters patent No. 589,168, for a kinetographic camera, granted to Thomas A. Edison August 31, 1897. The patent contains six claims; the first, second, third, and fifth being the only ones in controversy. The assignments of error challenge the validity of the claims, and contest the infringement of the fifth claim.

The purpose of the patented invention is to produce pictures, "representing objects in motion throughout an extended period of time, which may be utilized to exhibit the scene including such moving objects in a perfect and natural manner by means of a suitable exhibiting apparatus," such as that described in Edison's patent No. 493,426, granted March 14, 1893. The specification states that the inventor "has found it possible to accomplish this end by means of photography." It further states that the photographic apparatus comprises means, such as a single camera, for intermittently projecting, at such rapid rate as to result in persistence of vision, images of successive positions of the object or objects in motion as observed from a fixed and single point of view, a sensitized tapelike film, and means for so moving the film as to cause the successive images to be received thereon separately and in single-line sequence. It further states that the movements of the tapelike film may be continuous or intermittent, but the latter is preferable, and that it is further preferable that the periods of rest of the film should be longer than the periods of movement. It further states that, by taking the photographs at a rate sufficiently high as to result in persistence of vision, the developed photographs will, when brought successively into view by an exhibiting apparatus, reproduce the movements faithfully and naturally. The patentee says:

"I have been able to take with a single camera and a tape film as many as forty-six photographs per second, each having a size measured lengthwise

of the tape of one inch, and I have also been able to hold the tape at rest for nine-tenths of the time; but I do not wish to limit the scope of my invention to this high rate of speed, nor to this great disproportion between the periods of rest and the periods of motion, since with some subjects a speed as low as thirty pictures per second, or even lower, is sufficient, and, while it is desirable to make the periods of rest as much longer than the periods of motion as possible, any excess of the periods of rest over the periods of motion is advantageous."

As more particularly described in the specification and shown in the drawings, the apparatus, which is inclosed in a boxlike casing, from which light will be excluded, except through the lens, embraces an ordinary adjustable camera having the lens end mounted in the side of the box. Two reels, inclosed in suitable cases, are located on opposite sides of the camera lens. The film is drawn from one of the reels onto the other across the lens. It is transparent or translucent, and tapelike in form, and is preferably of sufficient width to admit the taking of pictures one inch in diameter between the rows of holes on its edges. These holes are for engagement with the feed wheels for positively advancing the film. When the film is narrow it is not essential to use two rows of perforations and two feed wheels, one of such rows and one feed wheel being sufficient. The two feed wheels are carried by a shaft, and engage the film on one side of the camera opening. The power is supplied by an electric motor which drives a rotating shaft carrying the feed wheels through a pulley held in frictional engagement with the feed-wheel shaft. The take-up reel, or the reel which receives the tape after passing the lens, is also driven from the motor shaft through a pulley which is frictionally mounted upon the reel shaft. The shaft carrying the feed wheels is controlled by a stop or escapement movement which is driven positively by another shaft, so that, although the motor tends to drive the feed wheels continuously, they are only permitted to turn with an intermittent motion by the stop or escapement device; the pulley which drives the feed wheels slipping on the feed-wheel shaft while that shaft is held at rest by the stop or escapement device. A shutter consisting of a rotating disk having an opening in it is mounted directly upon the motor shaft, and revolves past the lens, so that the light from the lens is intermittently thrown upon and cut off from the sensitive surface of the film. The camera is shown as a single lens, and is arranged to project the image of the scene being photographed upon the film when the openings of the shutter disk are opposite the aperture between the lens and the film. In operation the apparatus is first charged with a tape film several hundred or even thousands of feet in length. The specification states that the parts are preferably proportioned so that the film is at rest for nine-tenths of the time, in order to give the sensitized film as long an exposure as practicable, and is moving forward one-tenth of the time, and that the forward movement is made to take place 30 or more times per second, and preferably at least as high as 46 times per second, although the rapidity of movement or number of times per second may be regulated as desired to give satisfactory results; and there should be at least enough so that the eye of the observer cannot distinguish, or at least cannot clearly or positively distinguish, at a glance, the difference in position occupied by the objects in the successive pictures.

The claims alleged to be infringed are as follows:

"(1) An apparatus for effecting by photography a representation, suitable for reproduction, of a scene including a moving object or objects, comprising a means for intermittently projecting, at such rapid rate as to result in persistence of vision, images of successive positions of the object or objects in motion, as observed from a fixed and single point of view, a sensitized, tapelike film, and a means for so moving the film as to cause the successive images to be received thereon separately and in a single-line sequence.

"(2) An apparatus for taking photographs suitable for the exhibition of objects in motion, having in combination a single camera, and means for passing a sensitized tape film at a high rate of speed across the lens of the camera, and for exposing successive portions of the film in rapid succession, substantially as set forth.

"(3) An apparatus for taking photographs suitable for the exhibition of objects in motion, having in combination a single camera, and means for passing a sensitized tape film across the lens of the camera at a high rate of speed, and with an intermittent motion, and for exposing successive portions of the film during the periods of rest, substantially as set forth."

"(5) An unbroken transparent or translucent tapelike photographic film, having thereon equidistant photographs of successive positions of an object in motion, all taken from the same point of view, such photographs being arranged in a continuous, straight-line sequence, unlimited in number, save by the length of the film, substantially as described."

According to the views of the expert for the complainant, the first claim covers every apparatus comprising—First, any means whatever capable of intermittently projecting, at such rapid rate as to result in persistence of vision, images of successive positions of the object or objects in motion, as observed from a fixed and single point of view; second, a sensitized, tapelike film; and, third, any means or mechanism or device for so moving the film, either continuously or intermittently, or both continuously and intermittently, as to cause the successive images to be received thereon separately and in a single-line sequence. According to his view, the scope of the second claim is identical with that of the first, except that it is limited to a single camera, with a single lens, as the means for projecting the images onto the sensitized surface, and the third claim differs from the second only in that it is restricted to the intermittent movement of the film, and to the exposure of the film during the periods of rest. We think this interpretation of the claims is the reasonable one, and the question of their validity is to be determined by giving to them this scope.

The photographic reproduction of moving objects, the production from the negatives of a series of pictures representing the successive stages of motion, and the presentation of them by an exhibiting apparatus to the eye of the spectator in such rapid sequence as to blend them together, and give the effect of a single picture in which the objects are moving, had been accomplished long before Mr. Edison entered the field. The patent in suit pertains merely to that branch of the art which consists of the production of suitable negatives. The introduction of instantaneous photography, by facilitating the taking of the negatives with the necessary rapidity to secure what is termed "persistence of vision," led to the devising of cameras for using sensitized plates and bringing them successively into the field of the lens, and later for using a continuously moving sensitized band or strip of

paper to receive the successive exposures. The invention of the patent in suit was made by Mr. Edison in the summer of 1889. We shall consider only those references to the prior art which show the nearest approximation to it, and are the most valuable of those which have been introduced for the purpose of negating the novelty of its claims.

The French patent to Du Cos, of 1864, describes a camera apparatus consisting of a battery of lenses placed together in parallel rows, and focused upon a sensitive plate; the lenses being caused to act in rapid succession, by means of a suitable shutter, to depict the successive stages of movement of the object to be photographed. Between the lenses and the plate is arranged a band having a series of openings in such manner that if the band is drawn upwards or downwards the various lenses in the battery will be exposed in succession, so that a large number of small pictures will be taken upon the plate. The patent does not describe the means for moving the plate so as to cause the successive images to be received thereon separately. In a certificate of addition to this patent, he describes an apparatus in which there is a short, endless band, passing over two parallel drums, upon which, as the band is moved by the rotation of the drums, one lens after the other will pass an aperture through which light is reflected from the object to be photographed. Back of the lenses is another band of fabric, passing over drums like the other band, and carrying either a series of sensitized plates or a surface of sensitized paper. This band has projections or pins, which, as the drums are rotated, engage with corresponding projections from the band carrying the lenses. By this apparatus the lenses are made to move in accord with the movement of the band, and as they pass the aperture they project successively upon the sensitized paper, which is moving at the same speed, impressions of the object to be photographed. Practically the images are reproduced from the same point of view,—the aperture through which the lenses operate. The expert for the complainant, Prof. Morton, concedes that the Du Cos camera would be capable of taking a series of photographs on a strip of sensitized paper, such as subsequently came into commercial use, at the rate of eight or ten a second, supposing them to be two or three inches square; but he insists that the dry paper then known was not sufficiently sensitized to permit this to be done.

Prior to January, 1888, a sensitive film better adapted for instantaneous impression was in commercial use with photographers, and in that month a patent was obtained in this country by Le Prince for a method of, and apparatus for, producing animated pictures. The apparatus included a camera for producing the negatives upon an endless strip of sensitive film, "or any quick-acting paper, such as Eastman's paper film." The camera apparatus was a series of lenses arranged in two or more rows, and two or more strips of film. Each strip of film is unwound from a supply spool, and drawn across the field of its row of lenses by a take-up spool. The lenses are provided with shutters which open and allow them to operate upon the film at the proper time. By means of mutilated guides upon a shaft operated by a crank or other motor, the two take-up spools are alter-

nately revolved, and draw first one film and then the other the required distance to receive its series of impressions, while by means of other guides connected with the driving shaft the shutters of the lenses are successively opened to permit an impression to be projected upon the film while it is at rest. Thus the apparatus is equipped with means for moving two strips of film alternately and successively, and with lenses and shutters which at the proper moment open and allow the lenses to operate upon the strips of film as they are successively brought to rest. Le Prince subsequently, and in 1888, obtained an English patent for the same apparatus, a complete specification of which was published December 8, 1888. This patent contains a suggestion that only a single lens may be employed, as follows:

"When provided with only one lens, as it sometimes may be, it is so constructed that the sensitive film is intermittently operated at the rear of said lens, which is provided with a properly timed intermittently operated shutter."

The mechanism adapted to co-operate with a single-lens camera is not described.

The camera apparatus of M. Marey, described in the *Scientific American* of June, 1882, and used by him, mounted in a photographic gun, to produce a series of instantaneous photographs, showing the successive phases of motion of birds and animals, describes a single-lens camera, and clock mechanism which actuates the several parts. The apparatus is shown in detail by woodcuts. M. Marey conceived the idea of equipping a gun with the apparatus from the astronomical revolver invented by Mr. Janssen for observing the last passage of Venus. He describes the apparatus as follows:

"The barrel of this gun is a tube containing a photographic objective. At the back end of this, firmly affixed to the butt, there is a wide, cylindrical breech piece, in which there is contained a clockwork, whose barrel is seen externally at B. When the trigger of the gun is pulled, the wheelwork begins its movement, and gives the various parts of the instrument the motion necessary. A central axis, making twelve revolutions per second, controls all the parts of the apparatus. First, there is an opaque, metallic disk, containing a narrow slit. This forms the cut-off or shutter, and allows the light emanating from the objective to enter only twelve times per second, and every time during $\frac{1}{120}$ th of a second. Behind this disk, and revolving freely on the same axis, there is another one which is provided with twelve openings, and behind this is placed the sensitive plate of circular or octagonal form. The disk must revolve in an intermittent manner, so as to stop twelve times per second opposite the fascicle of light that enters the instrument. This motion is obtained by means of an eccentric, E, which is placed on the axis, gives a regular to and from motion to a rod provided with a click, O, which at every oscillation engages with one of the teeth that collectively form a crown on the disk containing the apertures. A special shutter, O, cuts off all entrance of light into the instrument as soon as the twelve images have been obtained. There are other arrangements for the purpose of preventing the sensitized plate, owing to its acquired velocity, going beyond the position to which it is brought by the click, and at which it should be perfectly immovable during the duration of the luminous impression. A pressing button, b, rests firmly against the plate from the time that it is introduced into the apparatus; and it is through the influence of such pressure that the plate is made to adhere to the posterior surface of the disk containing the apertures. This surface is covered with black velvet to prevent slipping. Focusing is effected by shortening or elongating the barrel, thus moving the objective backward or forward. The focus is finally verified

by observing, through an aperture in the breech piece, the sharpness of the image received on a piece of ground glass."

He states that he has photographed with his apparatus horses, asses, dogs, and men on foot and on velocipedes, but he has not followed such experiments up, as they entered into the programme that Mr. Muybridge had carried out with so much success. He proposes especially to study by photography the mechanism of flight in different animals.

Mr. Levison, in an article published in the Brooklyn Eagle of June 14, 1888, describes a camera apparatus for taking a series of pictures of objects in motion, in which a single lens is employed to operate upon plates $3\frac{1}{4}$ by $4\frac{1}{4}$ inches in size. These plates are carried in compartments on a polygonal wheel, which is caused to move onward and rest by a peculiar screw motion, and while at rest an electromagnet, actuated by a suitable battery, operates the shutter and exposes the plate, then in proper position for the lens. He says the mechanism employed to drive the plate carrier could be employed to operate a continuous strip of paper or a film carrier, and by a simple modification of the contact switch the shutter may be operated indefinitely; and with a camera thus constructed a series of pictures, limited only by the length of the sensitive paper, may be taken. The mechanism of the apparatus is not detailed, except in the general way stated.

It is apparent from the references considered that while Mr. Edison was not the first to devise a camera apparatus for taking negatives of objects in motion, and at a rate sufficiently high to result in persistence of vision, the prior art does not disclose the specific type of apparatus which is described in his patent. His apparatus is capable of using a single sensitized and flexible film of great length with a single-lens camera, and of producing an indefinite number of negatives on such a film with a rapidity theretofore unknown. The Du Cos apparatus requires the use of a large number of lenses in succession, and both the lens and the sensitized surface are in continuous motion while the picture is being taken; whereas in the apparatus of the patent but a single lens is employed, which is always at rest, and the film is also at rest at the time when the negative is being taken. Nor is it provided with means for passing the sensitized surface across the camera lenses at the very high rate of speed, which is a feature, though not an essential feature, of the patented apparatus.

The Le Prince apparatus employs two or more rows of lenses, and two or more strips of film, which move alternately and successively, the lenses of each operating upon its appropriate strip, and the shutters of the lenses opening successively as the strips are brought to rest; and, although its devices permit the exposures for the production of successive pictures to be made in rapid succession, they require a slow movement of the film. Pictures taken in such apparatus are not taken from the "same point of view" as they are when taken from a single stationary lens. This would result in producing, when such pictures are subsequently combined for persistence of vision in their exhibition, a greater or less indefiniteness of outline and conformation as to movement. Again, the pictures are not taken in a

regular succession, as on a single strip, but a short series are taken on one strip, then a short succeeding series on another strip, and so on, with the result that to use these pictures for exhibition in any convenient way would require them to be cut up and rearranged, or apparatus would have to be employed for so moving and feeding them as to obtain the proper arrangement of their positives for the purposes of exhibition, which is indicated in the Le Prince patent. Those taken by the apparatus of the patent in suit can be reproduced by a precisely corresponding positive. The suggestion that one lens may be employed, implying, of course, the use of a single film, is quite enigmatical, and would seem to be impracticable, without altering the principle of his apparatus. The problem of dispensing with the other lenses would involve changing the mechanism so as to secure a rapid movement of the film. We are not satisfied that the apparatus is inoperative, but incline to the opinion that the alleged defects are merely in details of construction, which would be readily obviated by the skilled mechanic. The presumption arising from the grant of the United States patent must prevail in the absence of proof to overthrow it.

The Marey apparatus employs the same general combination of parts specified in the first and third claims of the patent, except the tape film, to produce the negatives; but it is not adapted to produce them upon the film of the patent, and it would require modifications to enable it to do so; but whether such as would involve invention, or merely mechanical skill, is a debatable question. It enables negatives of an animate object, showing the various phases of motion, to be produced by projecting images of the moving object, as observed from a fixed and single point of view, or from a fixed and successive point of view, upon the successively advanced portions of the sensitized surface, and in sequence thereon, and at such a rapid rate of succession that the movements can be naturally reproduced to the eye by bringing the developed photographs successively into view. It is capable of taking 12 pictures per second, each image requiring an exposure of $\frac{1}{120}$ th part of a second. Although his revolver was designed to get successive pictures for an analysis of the movements of objects, and not for the purpose of taking negatives for reproduction and use in an exhibiting apparatus, it seems manifest that it could have been adapted by changes in the parts, obvious to the skilled mechanic, to produce negatives suitable for reproduction and use in such an apparatus.

The Levison publication would not be of value were it not that the broad claims of the patent do not call for the employment of any specific operative devices, except the single camera and the sensitized tape film.

The important question is whether the invention was in such sense a primary one as to authorize the claims based upon it. The general statements in the specification imply that Mr. Edison was the creator of the art to which the patent relates, and the descriptive parts are carefully framed to lay the foundation for generic claims which are not to be limited by importing into them any of the operative devices, except those which are indispensable to effect the functional

results enumerated. It will be observed that neither the means for moving the film across the lens of the camera, nor for exposing successive portions of it to the operation of the lens, nor for giving it a continuous or intermittent motion, nor for doing these things at a high rate of speed, are specified in the claims otherwise than functionally. Any combination of means that will do these things at a high enough rate of speed to secure the result of persistence of vision, and which includes a stationary single lens and tapelike film, is covered by the claims.

It is obvious that Mr. Edison was not a pioneer, in the large sense of the term, or in the more limited sense in which he would have been if he had also invented the film. He was not the inventor of the film. He was not the first inventor of apparatus capable of producing suitable negatives, taken from practically a single point of view, in single-line sequence, upon a film like his, and embodying the same general means of rotating drums and shutters for bringing the sensitized surface across the lens, and exposing successive portions of it in rapid succession. Du Cos anticipated him in this, notwithstanding he did not use the film. Neither was he the first inventor of apparatus capable of producing suitable negatives, and embodying means for passing a sensitized surface across a single-lens camera at a high rate of speed, and with an intermittent motion, and for exposing successive portions of the surfaces during the periods of rest. His claim for such an apparatus was rejected by the patent office, and he acquiesced in its rejection. He was anticipated in this by Marey, and Marey also anticipated him in photographing successive positions of the object in motion from the same point of view.

The predecessors of Edison invented apparatus, during a period of transition from plates to flexible paper film, and from paper film to celluloid film, which was capable of producing negatives suitable for reproduction in exhibiting machines. No new principle was to be discovered, or essentially new form of machine invented, in order to make the improved photographic material available for that purpose. The early inventors had felt the need of such material, but, in the absence of its supply, had either contented themselves with such measure of practical success as was possible, or had allowed their plans to remain upon paper as indications of the forms of mechanical and optical apparatus which might be used when suitable photographic surfaces became available. They had not perfected the details of apparatus especially adapted for the employment of the film of the patent, and to do this required but a moderate amount of mechanical ingenuity. Undoubtedly Mr. Edison, by utilizing this film and perfecting the first apparatus for using it, met all the conditions necessary for commercial success. This, however, did not entitle him, under the patent laws, to a monopoly of all camera apparatus capable of utilizing the film. Nor did it entitle him to a monopoly of all apparatus employing a single camera.

We conclude that the functional limitations which are inserted in the claims do not restrict the patent to the scope of Mr. Edison's real invention. We cannot undertake to point out the differences between the scope of the real invention and the claims. The real

invention, if it involved invention as distinguished from improvement, probably consists of details of organization, by which the capacity of the reels and the moving devices are augmented and adapted to carry the film of the patent rapidly and properly. It suffices to say that the modifications required to conform old apparatus to the use of the tape film, and which would define the real invention, cannot be imported into the first and third claims without violence to their terms; and the second claim is broader than the third.

The fifth claim of the patent is obviously an attempt by the patentee to obtain a monopoly of the product of the apparatus described in the patent, so that in the event it should turn out that his apparatus was not patentable, or the product could be made by apparatus not infringing his, he could nevertheless enjoy the exclusive right of making it. A claim for an article of manufacture is not invalid merely because the article is the product of a machine, whether the machine is patented or unpatented; but it is invalid unless the article is new in a patentable sense,—that is, unless its original conception or production involved invention, as distinguished from ordinary mechanical skill. If it is new only in the sense that it embodies and represents superior workmanship, or is an improvement upon an old article in degree and excellence, within all authorities the claim is invalid. *Hatch v. Moffitt* (C. C.) 15 Fed. 252; *Wooster v. Calhoun*, 11 Blatchf. 215, Fed. Cas. No. 18,035; *Excelsior Needle Co. v. Union Needle Co.* (C. C.) 32 Fed. 221; *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566; *Locomotive Works v. Medart*, 158 U. S. 79, 15 Sup. Ct. 745, 39 L. Ed. 899. By the terms of the claim the length of the film is not defined, nor is the number of photographs which it is to represent defined. It is to be an unbroken transparent or translucent, tapelike photographic film; it is to have thereon equidistant photographs of successive positions of an object in motion; these photographs are to be arranged in a continuous, straight-line sequence; and the number of them is not limited, save by the length of the film. The film was not new, and if the other characteristics of the product are not new, or are new only in the sense that they add to the article merely a superiority of finish or a greater accuracy of detail, the claim is destitute of patentable novelty.

In determining the scope and patentable subject-matter of this claim, the proceedings in reference to its allowance in the patent office should be referred to. In the original application for the patent the sensitized surface was described as "in the form of a long gelatine tape film." April 18, 1896, the application was amended as to specification and claims so that the word "gelatine" was omitted from the description of the film. The substituted specification of that application contains this statement: "The sensitized surface is preferably in the form of a long tape, although it may be a cylindrical surface on which the photographs are taken in a spiral line;" and, in referring to the drawings, states that "3 indicates the transparent or translucent tape film, which before the apparatus is put in operation is all coiled on a reel," etc. In that application, for the first time, a claim was made for the product. After the claim, as originally phrased in that application, had been rejected by the patent office, it was amended by the applicant to read as follows:

"(8) An unbroken transparent or translucent tape film, having thereon a continuous series of equidistant photographs of an object in motion, arranged in a single straight-line sequence, substantially as set forth."

This claim was again rejected upon a reference to the Le Prince patent. As finally allowed by the office, it was allowed upon the statement as follows:

"As to claims 8 and 9, while as drawn they have been properly rejected on account of the Le Prince tape film, they can be distinguished therefrom by amending the claims to indicate that the number of photographs in the series is unlimited, except by the length of the film, as distinguished from the Le Prince film, in which the number in a straight-line sequence is limited to four, whatever the length of the film."

In view of these proceedings, and the acquiescence of the patentee in the limitations imposed upon the claim by the patent office, its novelty depends mainly upon the length of the film. This feature of the claim is satisfied by any film which is long enough to carry a sufficient number of successive pictures to reproduce, when properly used, some definite cycle of movements to convey the impression of reality to the observer. A film having this characteristic was not new, in the sense that its production involved invention. The Du Cos apparatus was capable of taking the requisite number of pictures in series suitable for using in an exhibiting apparatus. Prof. Morton, the expert for the complainant, in his testimony, conceded that a series of photographs of an object in motion could have been taken upon a paper strip by the camera of the certificate of addition of the Du Cos patent, and these negatives might have been transferred to a translucent paper strip, as a series of positives, and that it would have required no invention, in view of the instructions which Du Cos gives as to doing this, to prepare such a strip of paper with a series of pictures upon it. He differentiates the film of the claim from the film which could have been thus produced in the fact that the pictures, not having been taken from a single lens, would not all be taken from the same point of view. This conclusion, however, overlooks the fact that practically the images were produced from the same point of view in the Du Cos apparatus,—the single aperture through which the lenses operate,—and that it is quite immaterial whether the same point of view is obtained by the use of a single lens, or by the use of a number of lenses, for the purpose of meeting this characteristic of the claim.

We conclude that the court below erred in sustaining the validity of the claims in controversy, and that the decree should be reversed, with costs, and with instructions to the court below to dismiss the bill.

AMERICAN ORDNANCE CO. v. DRIGGS-SEABURY GUN & AMMUNITION CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 36.

PATENTS—INVENTION—BREECH LOADING ORDNANCE.

The Driggs & Schroeder patent, No. 300,798, for breech-loading ordnance, was not anticipated by the Storm patent, No. 132,740, nor by the Pieri British patent, No. 3,615, and describes a breech-block mechanism

for rapid-fire guns, both novel and useful. Claim 1 also *held infringed* by a gun constructed in accordance with the Driggs-Tasker patent, No. 613,185.

Appeal from the Circuit Court of the United States for the District of Connecticut.

Ernest Wilkinson, for appellant.

W. H. Singleton, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree adjudging the validity of the first claim of letters patent No. 360,798, granted April 5, 1887, to Driggs & Schroeder, for "breech-loading ordnance," and ordering an injunction against the defendant, and an accounting for infringement. 99 Fed. 996.

Error is assigned of the decision of the court below both upon the issues of the validity of the patent and its infringement.

The patent relates to the class of small cannon known as "rapid-firing, single-shot guns," which are a development of small arms; and the improvements described are designed for equipping the gun with breech-closing mechanism capable of rapid operation, and strong enough to resist the pressure caused by the discharge.

The gun of the patent is one in which the cartridge is inserted at the rear. In such guns the introduction chamber is a rearward prolongation of the powder chamber, and ordinarily is arch-shaped at the upper part, though not necessarily so. The upper part of the chamber of the patent is arch-shaped, and is provided with recesses or grooves extending downward below the center of the chamber. As shown in the drawings, there are two of these grooves, each encircling the upper half of the chamber. The breech block is provided upon its upper convex surface with projections or bands adapted to fit closely into these recesses. The breech block is actuated by mechanism which raises it upward and forward until the bands are brought near the recesses of the chamber, when it is given a further upward direction, which causes the bands to slide into the corresponding recesses. When thus interlocked, the bands and grooves form practically a mortise joint, extending over the top, and around the upper half of the chamber; and the breech block receives a solid support at the top, and as far downward as the recesses extend. The actuating mechanism consists of a horizontal rock shaft, extending through the breech below the bore of the gun, and an operating lever and cam so arranged that, when the shaft is turned in one direction, it will swing the breech block forward, then upward and forward, and upward again, into the locked position, and, when turned in the opposite direction, it will lower the breech block to an unlocked position, and then swing it backward and downward to below the introduction chamber.

The claim is as follows:

"(1) In a gun in which the breech block first moves downward in opening, and then swings backward and downward, the combination, with the gun breech provided with grooves in its upper wall, of the pivoted breech block, A, provided on its upper surface with bands or projections, a a', adapted

to fit in said grooves and hold said breech block firmly in place, and means for moving the breech block into and out of said grooves, substantially as described."

We agree with the court below that there was nothing new in the downward and backward and downward movements of the breech block, or in the construction and arrangement of the mechanism for giving these movements to the breech block, or for moving it in and out of the grooves. If there was any patentable novelty in the combination of the claim, it resided in employing with the other parts the peculiar recesses in the breech and projections upon the breech block which are described in the specification and shown in the drawings.

Of the numerous prior patents introduced in evidence for the purpose of defeating the novelty of the claim, those of one group disclose breech-closing mechanism in guns in which the cartridge is inserted at the rear of the cartridge chamber, and those of another group disclose such mechanism in guns in which the cartridge is inserted at the top of the cartridge chamber.

The most important of the anticipating references is the English patent to Pieri, of 1885. This patent belongs to the second group. If in this patent were disclosed the recesses and projections of the patent in suit, it would be a complete anticipation of the claim. The description and drawings of the patent leave some of the details of the construction of the parts to inference, but that its breech and breech block are provided with recesses and projections which measurably perform the functions of those of the patent in suit is not to be doubted. It shows on either side of the introduction chamber a short groove extending to the upper part of the chamber, but these grooves extend down the sides but a comparatively short distance. Between these recesses the chamber is not provided with an upper wall, the top being uncovered to admit the insertion of the cartridge, and necessarily the recesses do not extend across the upper part of the chamber. The breech block, instead of being rounded transversely at the top, is flat, and has no projections of any kind. It has a stud projection on each of its upper sides, conformed to fit closely into the grooves of the chamber. The studs have only a short vertical bearing, and any increase in the length of the bearing surface would necessitate a long and objectionable movement of the breech block, for locking and releasing it.

We have not referred to the other prior patents introduced by the defendant, partly because the more important of them are fully and satisfactorily considered in the opinion of the court below, and partly because the mechanism of the Pieri patent most closely approximates the construction of the claim in controversy. In none of the prior patents is shown a breech block provided with projections in the form of narrow, raised surfaces, like bands or ribs. In none of them are shown projections adapted to fill grooves extending completely around the upper surface of the chamber.

The real question, as regards the validity of the claim, is whether it involved invention to modify the form of the recesses and projections of the Pieri patent in order to reach the organization of the patent in suit. The improvements of the patent consist in an organization per-

fectly adapted for use with such a breech and breech block as are described therein. They are admirably adapted to release the breech block quickly, and hold it firmly when locked, and they are capable of indefinite multiplication if desired. That they supplied a stronger support for the breech block than the short grooves and studs of the Pieri patent is admitted by one of the experts for the defendant. It is important that the breech block be supported against the strain of discharge at other points than near the top, and so supported as to distribute the strain at all points as equally as is practicable. In order to do this, and to supplement the support given by the short grooves and studs, Pieri, as his patent shows, equipped his breech block with side cheeks at the rear, which bear opposite the bore of the gun when the breech is locked against extensions of the chamber. Although the grooves and bands of the patent in suit perform the same function of the short grooves and lugs of the Pieri patent, they do so more efficiently because the latter, lying wholly above the bore of the gun, do not furnish a sufficiently strong resistance to the discharge pressure. They can be unlocked when the breech block is lowered a distance much less than the length of its vertical supports. Their merit consists in allowing a long vertical bearing, together with a short and quick movement of the breech block in locking and unlocking. If the recesses and projections of the Pieri patent had been employed in a chamber having an upper wall, it would have been a simple, and perhaps an obvious, thing to join them by extending them across the upper wall, and to correspondingly extend the projections on the breech block; yet this would have only afforded a support for the breech block at and near the top. The question is, was there enough in the recesses and projections, as there used, to suggest the conception of the bands and grooves of the patent in suit? We think not, and conclude that these modifications of form and arrangement were new and valuable improvements, and involved sufficient inventive thought to sustain a patent.

We concur in the views expressed in the opinion of the court below upon the question of infringement, and do not deem it necessary to enlarge upon them.

The decree is affirmed, with costs,

STEARNS-ROGER MFG. CO. v. BROWN.

PORTLAND GOLD MIN. CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. April 21, 1902.)

Nos. 1,650, 1,651.

1. RIGHT OF APPEAL—TEMPORARY INJUNCTION—PARTY NOT RESTRAINED.

One who is not restrained from the performance of any act or from the pursuance of any course of conduct by an injunction is not legally aggrieved by the order granting it, and has no right to appeal from such order.¹

¹ See Appeal and Error, vol. 2, Cent. Dig. § 951 [j].

2. SAME—ORDER ISSUING DISCRETIONARY.

The right to exercise a sound judicial discretion in granting or refusing a temporary injunction is vested in the trial court, and not in the appellate court, and its orders should not be disturbed on appeal unless they are violative of the rules of equity which have been established for the guidance of the exercise of its discretion.

3. PATENTS—PRELIMINARY INJUNCTION—INFRINGEMENT—REVIEW ON APPEAL.

Where the determination of the question of infringement on the hearing of an appeal from an order granting a temporary injunction would not be final, but one of the parties to the suit would be entitled to a consideration and decision of the same issue at the final hearing, the appellate court will defer the decision of the question until after that hearing.

4. SAME—TEMPORARY INJUNCTION NOT GRANTED UNLESS INFRINGEMENT CLEAR.

It is the general rule that a temporary injunction should not be granted on ex parte affidavits in a suit for the infringement of a patent where the question of infringement is grave and difficult, and it is not clear that the defendant is guilty of infringement.

5. SAME—TEMPORARY INJUNCTION CONTINUED UNTIL FINAL HEARING ON PROPER BOND.

But in the appellate court the presumption is that the trial court rightfully found infringement, and even where that question is grave, and its decision doubtful, an order granting a temporary injunction will not necessarily be reversed, where the court below has required the complainant to give bond to protect the defendant against loss from the erroneous issue of the injunction; and a final determination of the question of infringement cannot be made until the final hearing, if no better scheme can be devised to protect both parties from loss in the interim.

6. LACHES—PATENTS—TEMPORARY INJUNCTION—REASONABLE DELAY.

Repeated willful trespasses confer no right to continue them; and mere delay, for any reasonable length of time, unaccompanied by such acts or conduct of the owner of the patent, and such facts and circumstances as amount to an equitable estoppel, will not deprive him, either on the ground of laches or of estoppel, of his right to a preliminary injunction, or to any other relief to which he would otherwise be entitled.

7. SAME—DELAY DURING LITIGATION OVER VALIDITY OF PATENT NOT LACHES.

Delay in prosecuting other infringers while the validity of the patent is in active litigation does not constitute laches.

8. PATENTS—PRELIMINARY INJUNCTION—CONTINUING INFRINGEMENT WARRANTS.

A continuing infringement on the complainant's monopoly is always a sufficient ground for a preliminary injunction in the absence of countervailing facts, because there is no other adequate remedy for the loss which constantly repeated trespasses entail.

(Syllabus by the Court.)

Appeals from the Circuit Court of the United States for the District of Colorado.

These are appeals from an order granting a motion for a preliminary injunction to restrain the Stearns-Roger Manufacturing Company, a corporation, from manufacturing or selling the Pearce turret ore-roasting furnace until the final hearing of this suit. After a spirited and protracted litigation, Horace F. Brown, the complainant, had established the validity of the first claim of letters patent No. 471,264, for improvements in ore-roasting furnaces, which had been issued to Mary C. Brown on March 22, 1892, and assigned to him. *Extraction Co. v. Brown*, 104 Fed. 345, 43 C. C. A. 563; *Id.*, 110 Fed. 666, 49 C. C. A. 147. The Stearns-Roger Manufacturing Company had long been engaged in manufacturing and selling the Pearce turret ore-roasting furnaces, which were constructed in substantial conformity to the description contained in letters patent No. 488,797, issued to Richard Pearce on December 27, 1892. Brown had notified Pearce in 1893 that these furnaces were infringements of his patent, and had requested him to cease infringing, but Pearce had

denied that his furnaces constituted infringements of Brown's patent, and had continued their manufacture and sale. The Portland Gold Mining Company is a corporation engaged in mining and milling ore. It is not a manufacturer or vendor of furnaces. In July, 1900, the Stearns-Roger Manufacturing Company made a contract with the Portland Gold Mining Company to construct in a large mill for the reduction of ore which the mining company was about to build, three Pearce turret ore-roasting furnaces for the sum of \$45,000. The manufacturing company was engaged in performing this contract, and the mill, which was to cost about \$600,000, and the furnaces, which were indispensable to its operation, were approaching completion. When the complainant, Brown, exhibited his bill in the court below, alleged that these Pearce turret furnaces infringed upon his patent, and prayed for the usual injunction and accounting. The defendants answered that the Pearce turret furnaces were not infringements upon the complainant's monopoly; that the Stearns-Roger Company was manufacturing and selling them, and that it was building three of these furnaces for the mining company, which the latter was about to use in its new mill. The mining company also pleaded that a preliminary injunction would compel it to install other furnaces in its mill; that this would delay the completion and the commencement of the operation of the mill for several months, and would entail upon it a loss of \$1,200 a day during this delay. Upon these pleadings and upon affidavits a motion for a preliminary injunction was heard and decided by the circuit court, and the order of that court was that upon the filing by the complainant of a bond in the sum of \$10,000 a temporary injunction should issue restraining the Stearns-Roger Company until the final hearing of this case from manufacturing or selling any Pearce turret ore-roasting furnaces except the three furnaces in process of construction for the Portland Gold Mining Company. No injunction was granted against the completion of these furnaces or against their use by the mining company.

Leonard E. Curtis and Lucius M. Cuthbert (Henry T. Rogers and Daniel B. Ellis, on the brief), for appellants.

Douglas Dyrenforth and Philip C. Dyrenforth, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The primary question on an appeal from an order granting a temporary injunction is whether or not the injunction evidences an error in the exercise of its sound judicial discretion by the court which issued it. There are established legal principles for the guidance of that discretion, and where they are violated the action of the court below should be corrected. But, unless there is a plain disregard of some of the settled rules of equity which govern the issue of injunctions, the orders of the courts below on this subject should not be disturbed. The law has placed upon these courts the duty to exercise this discretion. It has imposed upon them the responsibility of its exercise wisely, and has left them much latitude for action within the rules which should guide them; and, if there has been no violation of those rules, an appellate court ought not to interfere with the results of the exercise of their discretion. The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the

wide latitude permitted them, and violated the rules of law which should have guided their action.

The complainant applied, upon an adjudicated patent, for an injunction to restrain the Stearns-Roger Manufacturing Company and the Portland Gold Mining Company from constructing and using their Pearce turret ore-roasting furnaces which the manufacturing company was building under a contract with the mining company, and which the mining company intended to use when they were completed. He also asked for a general injunction against the manufacture, sale, or use by the defendants of any of the Pearce furnaces. The court refused to issue any injunction against the mining company. It refused to enjoin either company from constructing and using the three furnaces in process of erection. But upon the execution and filing of a bond in the sum of \$10,000 to indemnify the manufacturing company for any damages it should sustain if the preliminary injunction was subsequently dissolved or modified, it enjoined the manufacturing company from making or vending any more Pearce furnaces until the final determination of this suit. This does not seem to be an unjust or an unreasonable course of action. The mining company took and has prosecuted a separate and independent appeal from the order granting the injunction against the manufacturing company. But as the injunction does not restrain the mining company from doing any act either alone or jointly with the manufacturing company, the mining company could not have been legally aggrieved by the order, and it had no right to appeal from it. Its appeal is accordingly dismissed.

The remaining question is whether or not the order enjoining the manufacturing company during the pendency of this suit from building and selling more Pearce furnaces after it installed the three that were contracted to the mining company was an unlawful exercise of the discretion of the circuit court. Counsel for the manufacturing company insist that this order was violative of the established rules of equity jurisprudence, because the Pearce furnace was not an infringement upon the patent to Brown, because the complainant had been guilty of such laches that he was not entitled to an ad interim injunction, and because there was no proof that the complainant would sustain such injury from the continued infringement as would warrant an injunction. The crucial question in this case—the question which must ultimately determine it on the merits—is whether or not the manufacture, sale, and use of the Pearce furnace is an infringement upon Brown's monopoly. There are cases in which the question of infringement may be finally determined on appeals from orders granting temporary injunctions, and where this can be done it is always competent, and often prudent, for an appellate court to consider and decide it on such an appeal. But this is not one of those cases. The complainant properly joined the manufacturing company and the mining company as defendants in this court, because they were jointly making and preparing to use the three Pearce furnaces which they were about to install in the new mill of the mining company. The mining company has answered that these furnaces do not infringe upon the patent to Brown, and it is entitled to a decision of that issue upon the evidence and testimony

which will be presented at the final hearing of this case. It had no right to appeal from the order granting the injunction, and its appeal has been dismissed. It would not be estopped by any decision of the question of infringement which this court might make on the *ex parte* affidavits presented on this appeal, but it would still be entitled to a later hearing and decision of the same question in this very case after the various witnesses have been subjected to examination and cross-examination in the usual course of a preparation for a final hearing. It is therefore reasonably certain that the question of infringement cannot be authoritatively decided upon this appeal, and that it must, in any event, be finally considered and determined upon other evidence which will be produced at the hearing. In view of this fact, and also because testimony taken under examination and cross-examination is much more satisfactory and far more reliable than the *ex parte* affidavits which this record contains, and because the affidavits might lead to one conclusion and the testimony to another, this court declines to enter upon a consideration and determination of the question of infringement upon this appeal.

Counsel for the manufacturing company invoke the conceded rule that, where it is not clear that the defendant is guilty of infringement, and that question is grave and difficult, a temporary injunction should not be granted on *ex parte* affidavits. *Sprague Electric Ry. & Motor Co. v. Nassau Electric R. Co.*, 95 Fed. 821, 37 C. C. A. 286; *Hatch Storage Battery Co. v. Electric Storage Battery Co.*, 100 Fed. 975, 976, 41 C. C. A. 133, 134. But while this rule prevails in all its force in the trial court, it is met in the appellate court by another of great cogency,—by the rule that where the court below has considered a question, and made a finding on conflicting evidence, its conclusion is presumptively correct, and it ought not to be disturbed unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the facts. *Kinloch Tel. Co. v. Western Electric Co.*, 113 Fed. 659; *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.*, 106 Fed. 693, 716, 45 C. C. A. 544, 567; *Mann v. Bank*, 86 Fed. 51, 53, 29 C. C. A. 547, 549, 57 U. S. App. 634, 637; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; *Warren v. Burt*, 58 Fed. 101, 106, 7 C. C. A. 105, 110, 12 U. S. App. 591, 600; *Plow Co. v. Carson*, 72 Fed. 387, 388, 18 C. C. A. 606, 607, 36 U. S. App. 448, 456; *Trust Co. v. McClure*, 78 Fed. 209, 210, 24 C. C. A. 64, 65, 49 U. S. App. 43, 46; *Exploration Co. v. Adams*, 104 Fed. 404, 408, 45 C. C. A. 185, 188. The court below has considered this question of infringement on the conflicting evidence which the affidavits present, and has concluded that the trespass of the defendant is clear. Moreover, the rule which the defendant invokes does not apply with nearly as much force to a case like that at bar, in which the complainant furnishes ample security to indemnify the defendant against any loss which results from an erroneous issue of the injunction, as it does to one in which such a bond has not been given. It is by no means obvious that the court below was or that it was

not in error in its decision of the question of infringement on the evidence before it. Whether it was so or not can be determined only by an examination and study of the evidence and a comparison of the two furnaces,—a study and comparison which we should not hesitate to make were it not for the fact that it would be practically futile, and that it might result in contradictory and confusing decisions upon different states of facts in the same case. No opinion is expressed upon this question of infringement. But the injunction should not be dissolved on the ground that this issue is doubtful, because the order and the bond furnish as complete protection to both parties against loss as can be devised, because the presumption is that the finding of the trial court is right, and because a final determination of the question of infringement cannot be made in this case on this appeal, and a decision of it might lead to confusing and contradictory opinions upon different states of facts in the same case.

It is contended that the complainant was guilty of such laches that he was not entitled to a preliminary injunction. The patent in suit was issued on March 22, 1892. In May, 1893, the owner of the patent notified the manufacturing company or its predecessor that its Pearce furnace was an infringement, and in June that charge was denied. On January 4, 1897, Brown brought his suit against the Metallic Extraction Company, in which, after a protracted and expensive litigation, the validity of his patent was finally established on October 8, 1900. *Extraction Co. v. Brown*, 104 Fed. 345, 43 C. C. A. 568. The bill in this suit was exhibited on April 24, 1901. The doctrine of laches is an equitable principle, which is applied to promote, never to defeat, justice. It is a branch of the principle of equitable estoppel. Where a patentee, by deceitful acts, silence, or acquiescence, lulls an infringer into security, and induces him to incur expenses or suffer losses which he would not otherwise have sustained, courts of equity apply the doctrine of laches on the principle that one ought not to be permitted to deny the existence of facts which he has intentionally or recklessly induced another to believe to his prejudice. There is nothing of that character in this case. The manufacturing company was informed that Brown claimed its furnace was an infringement in 1893. It then had the option to retire from its manufacture and sale, or to proceed with it, and take the chances. It chose the latter alternative. Brown did not induce it to make this choice. The company made its own choice with its eyes open, and with full notice of Brown's claim, and it has ever since continued to follow it against the protest and in spite of the notice of Brown to it to desist. One who, with full knowledge of a patentee's claim of infringement, and against his protest, continues to trespass, cannot, on the ground of the estoppel or laches of the patentee, successfully defend a suit for infringement brought, or a motion for a preliminary injunction made, within any reasonable time. Repeated willful trespasses establish no right to their continuance. And mere delay by a patentee to bring his suit or to apply for his preliminary injunction for any reasonable length of time after an infringer is informed of his trespass, unaccompanied with such acts of the patentee and such facts and cir-

cumstances as amount to an equitable estoppel, will not deprive him, either on the ground of laches or of estoppel, of his right to a temporary injunction or to a recovery. Moreover, delay in prosecuting other infringers during the time while the validity of a patent is in litigation does not constitute laches. *American Bell Tel. Co. v. Southern Tel. Co.* (C. C.) 34 Fed. 795, 802; *Edison Electric Light Co. v. Sawyer-Man Electric Light Co.*, 3 C. C. A. 605, 53 Fed. 592; *Green v. Barney* (C. C.) 19 Fed. 420; *Norton v. Can Co.* (C. C.) 57 Fed. 929, 933. The complainant was therefore guilty of no laches between January 4, 1897, and October 8, 1900. There was no unreasonable delay after the decision of October 8, 1900, was filed. The complainant exhibited his bill within seven months after the determination of the validity of his patent. There were no acts or conduct of the complainant, no facts or circumstances between the issue of his patent in 1892 and the commencement of his suit against the Metallic Extraction Company, on which to base an equitable estoppel in favor of the Stearns-Roger Manufacturing Company. It knowingly exercised its option to make and sell its furnaces in spite of Brown's patent and his notice to them to desist. Brown was guilty of no laches in this case that deprived him of his right to the preliminary injunction.

Finally, it is contended that the order granting the injunction should be reversed because there was no proof of such threatened irreparable injury to the plaintiff as would warrant it, while there was evidence that the manufacturing company was solvent, and that the issue of the injunction would cause it great loss. A continuing trespass is always good ground for the issue of an injunction in the absence of countervailing considerations, because a multiplicity of suits for damages is never an adequate remedy for the loss which constantly repeated trespasses entail. Upon this ground, in the absence of other considerations, the complainant was entitled to his injunction. *Manufacturing Co. v. Booth*, 78 Fed. 878, 24 C. C. A. 378. In a litigation like this it is impossible for either party to escape without some loss. All that the courts can do is to make such orders and to pursue such a course as will enable the parties to reach a determination of their respective rights with as little loss as possible. The affidavits in this case have been carefully considered, and the damages likely to result to the respective parties from the issue of and the refusal to issue this injunction have been thoughtfully balanced, in vain, to find a more just and equitable order for the protection of the rights of the parties to this suit than that which was made by the court below. It permitted the completion and use of the furnaces in process of construction, thus preventing any loss to the mining company. It restrained the manufacture and sale of other infringing furnaces, thus protecting the rights of the complainant. And it required the complainant to make a bond for \$10,000 to indemnify the manufacturing company against possible loss from the erroneous issue of the injunction, thus securing the latter company as far as possible against damages from the chances of the litigation. It was a wise and provident exercise of the judicial discretion of the court below, and it is affirmed.

MARVEL CO. v. PEARL et al

(Circuit Court, S. D. New York. February 20, 1902.)

1. PATENTS—ESTOPPEL.

A patentee, and likewise a corporation, which it organizes and controls, are estopped to assert the invalidity of the patent as against an assignee thereof.

2. SAME—INFRINGEMENT—PRELIMINARY INJUNCTION.

There being dispute as to the equities, preliminary injunction in suit for infringement of patent will not issue, defendants giving a bond to respond for profits or damages ultimately found, and filing statements of sales.

Motion for Preliminary Injunction on Design Patent No. 30,023, January 17, 1899, and Mechanical Patent No. 616,963, January 3, 1899.

Philip Manro, for the motion.

Henry B. Brownell, opposed.

LACOMBE, Circuit Judge. The design patent sued on in this cause is another instance of a perversion of the statute. Patents for designs are intended to apply to matters of ornament, in which the utility depends upon the pleasing effect imparted to the eye, and not upon any new function. *Rowe v. Blodgett & Clapp Co.* (Nov. 14, 1901) 50 C. C. A. 120, 112 Fed. 61. Syringes of this sort are not bought because of their artistic beauty, but because they are mechanically useful. However, the defendant Tullar Pearl, who is himself the patentee and assignor to the complainant, cannot be heard to assert the invalidity of his patent, nor can the defendant company, which he organized and controls. There seems, however, to be no infringement of the design shown. As patentee and assignor of the mechanical patent; defendant Tullar cannot be heard to dispute its validity; and his corporation is in the same situation. They cannot controvert the statement in the specification that the patentee was "the first to provide a syringe wherein the water is discharged by the compression of a bulb with a stationary deflector held in the end thereof, and formed of a disk having radial slits therein extending from a point near the center, and the portions between the slits bent to form wings, which are disposed at such an angle as to present inclined or spiral passages to the discharge or flow of the liquid." In the alleged infringing device inclined or spiral passages for the discharge or flow of the liquid are presented in the shape of the inclined or slanting perforations, which seem to be a fair equivalent of the slits with slanting wings.

Inasmuch as there is some dispute as to the equities, preliminary injunction will not issue if defendants, within 10 days, give a bond for \$2,000 to respond for profits or damages ultimately found, and file within 20 days a full sworn statement of all of the alleged infringing devices sold down to and including February 28th and within the first week in April, and in each succeeding month file a similar sworn statement covering sales of the preceding month. In the event of failure to comply with these conditions, preliminary injunction under the mechanical patent may issue.

In re SWIFT et al.

Ex parte HARRIGAN.

(District Court, D. Massachusetts. March 21, 1902.)

No. 2,745.

1. BROKERS—BREACH OF CONTRACT TO DELIVER STOCKS—SUFFICIENCY OF DEMAND.

A broker who was carrying stocks for a customer, which he had bought on a margin, made a general assignment; and a few days afterwards the customer wrote him, asking the amount of his account, which he did not know, and stating that he would remit the amount and take up the stocks. No action was taken by the broker or assignee on such letter, the stocks having been previously pledged by the broker and sold by the pledgee; and the broker was subsequently adjudged a bankrupt. *Held*, that the letter constituted a demand, the failure to comply with which was a breach of the contract, and gave the customer an immediate right of action; it being shown that he was able and willing to pay the amount due from him to the broker.

2. SAME—MEASURE OF DAMAGES.

The measure of damages for the breach of a contract by a broker to deliver stocks on demand of a customer, for whom he had bought the same on a margin, is to be determined according to the highest intermediate value of the stocks between the default and a time after the customer has notice thereof reasonably sufficient to enable him to replace the stocks.¹

In Bankruptcy. On review of decision of referee.

Robert K. Dickerman, for creditors.

Freedom Hutchinson, trustee, pro se.

LOWELL, District Judge. The creditor was a customer of the bankrupts in their business as stockbrokers. The bankrupts had bought, and were carrying for the customer, certain stocks, worth more than the customer's debt to the bankrupts. These stocks had been pledged by the bankrupts to other creditors. On December 27, 1899, the bankrupts made a general assignment, and the creditor had notice of it at the time it was made. On December 30th the creditor wrote to the bankrupts as follows:

"Lowell, Mass., Dec. 30th, 1899.

"E. C. Hodges & Co., Exchange Bldg., Boston—Gentlemen: I have on account with you two hundred shares Isle Royal Mining Co., one hundred shares Butte & Boston Mining Co., C. F. S., and fifty shares Tamarack Mining Co., J. S. H., and fifty shares Tamarack Mining Co., C. H. H. Will you please send me a statement of the amount I owe on these stocks, and I will send funds sufficient to cover the amount due, and will take up the certificates.

"Very truly,

Geo. M. Harrigan."

The following circulars were sent by the common-law assignee, and received by the creditor:

"Boston, January 10, 1900.

"To the Creditors of E. C. Hodges & Co.—Gentlemen: E. C. Hodges, Frederick Swift, and E. F. Lowry, doing business under the firm name of E. C. Hodges & Co., did on the 27th day of December, 1899, execute

¹ See *Brokers*, vol. 8, Cent. Dig. §§ 27 [d], 36 [a, i, j].

to me an assignment of all their property, in trust for the benefit of their creditors, without preference or priority except as provided by law. I have accepted the trust. A general meeting of the creditors will be called at an early day, of which you will receive notice. To expedite a settlement of affairs, I ask you to send me a statement of your account, made up to this date, and also to sign and mail to me as soon as possible the inclosed assent to the assignment.

"Yours respectfully,

"53 State Street, Room 823.

Geo. C. Dickson,

Assignee of E. C. Hodges & Co."

"Dear Sir: On Saturday, Jan. 13, 1900, I mailed you a statement of the assignment of E. C. Hodges & Co., with the request that you assent to said assignment; and, not having received a reply, I beg to advise you as follows: More than one-half of the creditors have assented. At the same time, I do not feel justified in continuing under the assignment unless it is assented to by all parties in interest. In other words, if the creditors prefer to petition the firm into bankruptcy, it is within their power, and it would seem to be time wasted to continue under the present arrangements if this is the wish of any of the creditors; but, from the examination that I have been able to make of the affairs of E. C. Hodges & Co., I believe it to be for the best interests of the creditors to assent to the assignment, and, when the condition of the affairs of Hodges & Co. are presented before them, if it should then be the wish of the creditors to petition the firm into bankruptcy, they can do so without any loss of their rights. My position as assignee is simply to hold the property until the creditors meet and decide what is best to be done. Under this assignment no persons' rights can be prejudiced in any way, but all are alike protected. I make the above statement, believing it will be for your best interests to sign the within assent; and, not receiving a reply to this letter, I will understand that, as far as your claim is concerned, you prefer that the firm be petitioned into bankruptcy.

"Very truly,

[Signed] G. O. Dickson, Assignee."

The creditor took no further action until after the adjudication, May 7, 1900, which was made on an involuntary petition filed April 6th. The stocks carried were sold by those creditors of the bankrupts to whom they were pledged on December 27 or 28, 1899. Their value was greater on April 6th than on December 27th or 28th. The question here raised concerns the amount of proof to be allowed. Of what date is the value of these stocks to be taken? In *Re Swift* (D. C.) 105 Fed. 493, affirmed as *Hutchinson v. Dee* (C. C. A.) 112 Fed. 315, it was held that the value of the stocks carried for another customer of these bankrupts was to be taken as of April 6th. The court has here to determine, therefore, if the facts of this case differ materially from those of *Hutchinson v. Dee*. In that case there was correspondence which, in the opinion of the court of appeals, "makes it clear that both the bankrupts and Dee, in effect, agreed to regard the assignment as not definitive, and that each held everything in abeyance until the decisive blow was struck by the proceedings in bankruptcy." "Voluntary assignments," said the court, "are frequently resorted to as expedients to tide debtors over their difficulties, and intended to be merely temporary; that the letters referred to indicate that this case falls within that observation; and that the parties waived, for the time being, insistence on the performance of the existing contracts. Therefore the rights of the parties, as fixed by the law, necessarily relate to the bankruptcy proceedings." 112 Fed. 315, 320. In its opinion this court said, "As no demand was made in this case by the customer after the general

assignment, it follows that no right of action accrued to him." 105 Fed. 500. In *Weston v. Jordan*, 168 Mass. 401, 405, 47 N. E. 133, 134, it was said by the supreme court of Massachusetts:

"After Wheatland had parted with the control of the shares, and after repeated demands for them by Jordan, and refusals by Wheatland to deliver them, Jordan had a valid ground of action against Wheatland either for breach of contract or for a conversion. It matters not which. If Wheatland had refused on demand to deliver the shares when they were high, and they had afterwards fallen in value, we cannot accede to the defendant's contention that Wheatland could still have compelled Jordan to take them up and pay the balance of the cost."

There is nothing in *Chase v. City of Boston* (Mass.) 62 N. E. 1059, to modify the earlier Massachusetts cases in their application to the case at bar.

Did the creditor in this case make upon the bankrupts a "demand," in the sense in which that word is used in the cases above cited? No formal tender was made, but none could be made, for the creditor did not know just how much he owed the bankrupts. It seems that his demand was like that made in *Weston v. Jordan*, and relied on by the court in deciding that case. When either broker or customer "has made a voluntary assignment for the benefit of creditors, or gone into bankruptcy, or perhaps when he has committed some other notorious act of insolvency," said the circuit court of appeals in *Hutchinson v. Dee*, "he has parted with the control of his assets; and the law assumes, as is the fact, that his ability to perform his contracts has terminated, and that a demand and tender would be futile, and ordinarily an action may at once be brought." 112 Fed. 320. If this be true, a fortiori demand and tender need not have that formality which is required in some other cases. It was found as a fact that the creditor was both able and willing to pay the bankrupts his debt due them on December 30, 1899, when his letter was written. I am of opinion, therefore, that in this case the creditor has not "waived, for the time being, insistence on the performance of the existing contracts," but that, on the contrary, he has demanded the delivery of the shares carried for him, and has exercised his election to treat the contract as broken. His failure to notice the assignee's letters does not indicate that he modified his position as definitely declared in his letter of December 30th. Had the shares fallen in price between December 28, 1899, and April 6, 1900, the broker could not have compelled the creditor to take their reduced price in satisfaction of his claim.

It remains to be determined if the value of the shares should be taken as of December 28, 1899, or as of some date thereafter, but prior to April 6, 1900. The rule of damages stated in *Galigher v. Jones*, 129 U. S. 193, 200, 9 Sup. Ct. 335, 32 L. Ed. 658, binds this court, even though it be shown that some of the text-books and cases there relied on lay down a rule quite the opposite of that which they are cited to support. Following *Galigher v. Jones*, this court has to determine what is a "reasonable time" for the purchase of the stocks in question. These appear to have been of the "active" sort, and doubtless could have been bought at any time. If there was a

rise in their price within a day or two after December 30th, the creditor may, perhaps, be entitled to the benefit of it, and the referee may receive evidence on that point.

The judgment of the referee is reversed and the matter of the claims of Harrigan, Sullivan, Harris, and Hansen is referred back to him, with instructions to proceed in accordance with this opinion. In the case of Lyons the correspondence was not precisely the same as that quoted above, but the difference is not material to the decision. The same order must be made in this matter as in the rest.

UNITED STATES v. WEBER et al.

(Circuit Court, W. D. Virginia. March 25, 1902.)

1. INJUNCTION ISSUED BY DISTRICT JUDGE—LIFE OF.

Rev. St. § 719, providing that an injunction issued by a district judge as one of the judges of the circuit court shall not continue longer than to the circuit court next ensuing, unless so ordered by the circuit court, was intended to limit the life of injunctions issued by district judges acting as judges of the circuit court, only when issued in vacation.

2. LABOR UNIONS—ILLEGAL PURPOSES AND MEANS—LIABILITY OF MEMBERS AS CONSPIRATORS.

If the object of a labor union is unlawful, or if the methods employed by it either to induce acquisitions to its ranks or to accomplish its ulterior purposes are unlawful, all persons who combine in such efforts are conspirators.

3. SAME—LEGALITY OF OBJECT—STRIKES—INTIMIDATION OF EMPLOYEES.

Though the right of persons employed by receivers of a mining corporation to voluntarily join a union having only legal purposes cannot be denied, nor the right of others to induce such action on their part by legal methods and fair moral suasion, they have no right to combine for the purpose of securing control of all mining operations, including those under the management of the receivers, with the intent of forcing compliance with their demands by means of strikes, nor have they the right, by threats and intimidation, to compel others, who do not desire to join the union, to quit work.

4. SAME—ORDERING EMPLOYEES OF RECEIVERS TO QUIT WORK—EFFECT.

Action on the part of a union composed of mining employes in ordering persons employed by receivers of a particular mining corporation to quit work is in itself a direct violation of the order of court directing the receivers to operate the plant.

5. SAME—VIOLATION OF INJUNCTION.

An order made October 28th, specifically requiring of two named parties that they "desist from any interference with the employes of the said receivers, so as to affect the conduct of the business by the receivers," was shown to have been violated where it appeared that they addressed a number of the employes on March 2d following, and were about to address another crowd on the 12th when arrested, and that one of them then called out to the men to "continue their work" (of intimidation), and afterwards in a printed interview stated that they had advised the men to quit, and also that he had told a party that he had violated and intended to violate the order.

Contempt Proceedings.

Bullitt, Kelly & Hull and Blackford, Horsley & Blackford, for the United States.

H. M. Ford and Harrison & Long, for defendants.

Before SIMONTON, Circuit Judge, and McDOWELL, District Judge.

McDOWELL, District Judge. The defendants Weber and Haddow have been attached and brought before the court on a charge of violations of orders of this court made in the case of the Morton Trust Company against the Virginia Iron, Coal & Coke Company. The defendants Tom Braley, Cass Braley, and David Clarkson have been summoned by rule to show cause why they should not be held guilty of contempt for violations of these same orders. All the defendants have, in effect, denied the charges made against them. Both the attachment and the rule were issued upon information contained in a verified petition filed by the receivers appointed in the above-named cause.

It is well in the outset to state that the court fully recognizes the limitations on its powers as to contempts committed neither in the presence of the court nor so near thereto as to obstruct the administration of justice. Rev. St. § 725. That there must have been disobedience of, or resistance to, some order of the court is essential to constitute contempt in the case at bar.

By the first order entered in the case of the Morton Trust Company against the Virginia Iron, Coal & Coke Company the receivers thereby appointed were directed to take possession of and to operate the properties of the defendant company. By an order entered by the late Judge Paul, district judge, on February 12, 1901, certain named persons (not including any of these defendants), and "all other parties concerned whose names be hereafter ascertained," were enjoined from entering upon the property of the Virginia Iron, Coal & Coke Company, from trespassing thereon, and from intimidating or coercing, or attempting to intimidate or coerce, or in any manner interfering with the employés of said receivers with intent to induce them to quit the service of said receivers, and from entering into any conspiracy or combination for the purpose of hindering or obstructing the said receivers in the operation of their business at the "Looney Creek Lease." The Looney Creek Lease is the same operation that is now alleged to have been obstructed and crippled by the acts of these defendants.

As to the last-mentioned order, the point is made by counsel for the defendants that, as the order was made by a district judge, it ceased to be operative long before the acts here complained of are alleged to have been committed, because of section 719, Rev. St. The statute referred to was intended to limit the life of injunctions issued by district judges, acting as judges of the circuit courts, only when issued in vacation. 1 Bates, Fed. Eq. Proc. § 528; *Vulcanite Co. v. Folsom* (C. C.) 3 Fed. 509. But upon inquiry of the clerk at Abingdon, where this cause is docketed, it appears that the October term, 1900, of the circuit court was adjourned sine die on October 13, 1900. The next regular term there commenced by law in May, 1901. It follows, therefore, that said order ceased to be effective before the commission of the acts here complained of, and consequently the said order is not of moment in this discussion, except in so far as it served as a warning that the plant at Inman was under the charge of the court, and that

interference with the employés with intent to induce them to quit the service, or intimidating them to that end, had been regarded by the court as a violation of its orders.

With the petition for the attachment is filed, as Exhibit A, a printed poster giving, in effect, the terms of the above order. It appears that many copies of this poster had been conspicuously displayed, and that the defendants Weber and Haddow knew its contents. In fact Haddow testified that he knew the terms of the poster so thoroughly that he could repeat it almost verbatim. On October 26, 1901, one of the circuit judges of this circuit issued an order by which the defendants Weber and Haddow, by name, were ordered to show cause why they should not be attached for contempt in attempting to interfere with the conduct of the business of the receivers in the management of the properties intrusted to their hands by former orders of this court. And, further ordering, "that the employés of said receivers be enjoined from conspiring and agreeing with any person or persons whomsoever in attempting to interfere with the conduct of the business of the receivers. In the meantime, and until the further order of this court, that the said Haddow and Weber desist from any interference with the employés of said receivers, so as to affect the conduct of the business of the receivers." A writ of injunction, issued in pursuance of said order, was served on the defendant Weber, and knowledge of the contents of the writ appears to have been brought home to the defendant Haddow. But it does not appear that further action was then taken by the court. This was in November, 1901. It appears that all the defendants knew that the plant at Inman—the "Looney Creek Lease"—was being operated by the receivers of this court; that Weber and Haddow knew the purport of the injunction orders above mentioned; and it is entirely improbable that the other defendants were ignorant of the purport of the injunction order issued by Judge Paul.

Having thus set out the orders of this court, some or all of which are alleged to have been disobeyed or resisted by the defendants, it may further tend to clearness of thought to briefly consider some questions of law involved in this matter. It is admitted by defendants Weber and Haddow that they are officers of the organization known as the "United Mine Workers of America"; that their duties consist in part in organizing mine workers into local lodges of said order; that they came to Virginia both in October, 1901, and March, 1902, for the purpose of organizing such lodges among the miners working for the receivers at Inman and at Tom's Creek, as well as among miners working at other nearby plants. It appears from the evidence that in Western Pennsylvania, Ohio, Indiana, and Illinois the coal miners are so nearly all members of the organization that said regions may be considered as "union" territory. Further, that in West Virginia and Virginia a great many—perhaps a majority—of the miners are not members of the union. It also appears that when, on a former occasion or occasions, a general strike was ordered, the hopes of the organization were in some measure, at least, defeated because of the fact that the miners in West Virginia continued at work, and the coal thus produced went into the markets that would otherwise have been largely dependent upon the output of the union territory. Hence, it

seems, that the object in organizing lodges in the Virginias is to bring the Virginia mines under the control of the organization.

The right of the employes of the receivers to voluntarily join a union that has only legal purposes in view cannot be denied. Moreover, the right to induce, by legal methods and fair moral suasion, the employes of the receivers to join such an organization is not denied. But if the object of the union is illegal, or if the methods employed by it, either to induce acquisitions to its ranks or to accomplish its ulterior purposes, are illegal, it appears to be well settled that the persons who combine in such efforts are conspirators. In Bish. Cr. Law (7th Ed.) § 171, it is said:

"Conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end."

In 24 Am. & Eng. Enc. Law (1st Ed.) p. 131, under the head of "Strikes," is a quotation from Com. v. Shelton, 11 Va. Law J. 324, in which the court of appeals of Virginia said:

"The authorities seem to agree that the gist of the offense is the conspiracy, and that a conspiracy is a confederacy to do an unlawful act, or a lawful act by unlawful means, whether to the prejudice of an individual or the public. But by 'unlawful' it is not intended to mean that the acts agreed to be done must be criminal; it is enough if they be wrongful and with improper or evil intent. Thus, it has been held that threats, intimidation, or any forcible means, other than lawful competition, are unlawful. To threaten another in order to deter him from doing some lawful act * * * has always been considered a misdemeanor at common law."

See, also, Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895, which contains much valuable learning on the subject of conspiracy, and is indirectly authority for the proposition that a combination for the purpose of effecting a legitimate object by illegitimate means is a criminal conspiracy.

It is an equally well-settled doctrine that each of the confederates is liable for all such illegal acts of the others as may be reasonably anticipated as incidental to the intended act. An excellent discussion of this question is appended to the report of *In re Doolittle* (C. C.) 23 Fed. 549. See, also, *U. S. v. Kane*, Id. 748; *Mitchell's Case*, 33 Grat. 845; 1 Bish. Cr. Law (7th Ed.) § 636.

In the first place, it is hardly open to serious question that the ultimate purpose of the union is not legal. This purpose is to secure control of mining operations, including those under the management of the receivers of this court. Confessedly, control is desired for this purpose: If the union miners in some other state make complaint of grievance,—the justness of the complaint to be judged solely by the union,—the union will be in a position to enforce compliance with their demands by ordering and carrying into effect a general strike.

Can this court rightfully surrender control of the works under its charge to the United Mine Workers? On authority it is clear that it cannot. See *In re Higgins* (C. C.) 27 Fed. 445; *In re Wabash R. Co.* (C. C.) 24 Fed. 217; *In re Doolittle* (C. C.) 23 Fed. 544; *Thomas v. Railroad Co.* (C. C.) 62 Fed. 803. On reason, also, it is equally clear. But a discussion of the reason for this rule, involving sociological questions of much interest, cannot now be entered into.

To go further, it appears from the evidence that, in order to perfect the control desired by the union, it is necessary that practically all mine workers be members of the organization and subject to its directions. In other words, it is necessary that nonunion men—men who do not desire to join the union—be compelled to quit work. This is one of the avowed means to the desired end. That this is illegal and not to be tolerated needs no argument. Hence, even if it were conceded that the ultimate purpose is legal, yet, as a means intended to be used to effect the ultimate purpose is illegal, it follows that a combination to effect the purposes of the union is a conspiracy.

It is proven here beyond all reasonable doubt that until very recently there were between 600 and 700 employés at work at the Inman plant, and that at the time the witnesses left there to attend court the number of men at work had fallen off to about one-third of that number; thus restricting the output of the plant, and materially reducing the income derived from its operation.

It was further proven that on the night of Sunday, March 9, 1902, sundry notices, each bearing the impress of the seal of the local lodge or union of the United Mine Workers, were conspicuously posted about the works. Two of the notices produced here read:

"Local No. 1,763: I hereby notify you coke pullers and loaders to stop work.
U. M. W. of A."

The other read:

"Notice.
"Inman. No. 1,763.
"U. M. W. of A. March 9, 1902.

"To All Miners and Mine Workers: You are notified that your works are suspended, and we ask that all of you come out and assist us in this struggle for freedom. To one and all.

"Yours for success,
U. M. W. of A."

It is also a fact that many, if not all, of the Hungarians employed at the plant had been intimidated and prevented from work because of threats that if they worked they would be shot. That others of the employés had been intimidated was also proved. Some of the witnesses introduced by the government gave visible evidence while on the witness stand that they stood in great fear of the union. In fact, no one hearing the testimony and observing the demeanor of many of the witnesses could well doubt that at least some of the employés had been intimidated and induced to quit work because of fear, and that others had been forced to join the union by the same method. That the seal impressed upon the notices above mentioned is the seal of the local lodge at Inman was admitted. Two of the defendants—Cass Braley and David Clark or Clarkson—are proved to have been members of the union, and to have posted some of said notices.

It is earnestly contended that the defendants Weber and Haddow never participated in, sanctioned, or advised any of the illegal acts traced to some members of the union. But the act of the union in ordering the coke pullers and loaders to stop work is in itself in direct contravention of the order of this court directing the receivers to operate the plant. In other words, such acts are illegal. Coupled with the known intimidation of some of the employés, the above no-

tices can hardly be considered otherwise than an order, not to be disobeyed with impunity, to stop work. Again, the notices containing the statement that the "works are suspended" is itself in contravention of the orders of this court.

There is no necessity to consider these notices in so far as they may be treated as a mere request or invitation to the nonunion men to quit work. The announcement that the works are suspended carries with it by implication something sinister, and something altogether different from a mere invitation to quit work.

It therefore seems, to say the least, probable that the union, in order to carry out its ultimate purpose, resorted in the case at bar to threats and intimidation of the nonunion laborers. But, even if not, certainly the union, by some member or members having control of its seal, did resort to direct violations of the orders of this court in order to carry out its purposes. The union has never disavowed the responsibility for the issuance of the notices above mentioned. In their bearing on the statement that the union intended to use unlawful means to secure its end, the addresses made by the defendants Weber and Haddow at the meeting on Sunday, March 2, 1902, are of importance. At that meeting much that was said by these organizers was proper and unobjectionable. But, even from the testimony of these defendants themselves, it appears that intimations were thrown out that if the nonunion men did not join, and if the plant did not become subject to the union, the product of the mines might be boycotted, as such a thing had been done and might be done again. According to the witness George Kilgore, who seemed to be disinterested, what was said was that in the event mentioned the product of the mines would be boycotted, and all nonunion miners would be blacklisted and denied work at any unionized mines.

There is another fact developed in the evidence that has its bearing just here. It appears that there is another mining operation, "Stonega," located near the Inman plant, which is operated by the Virginia Coal & Iron Company. Extraordinary efforts seem to have been made by this company to keep organizers of the Mine Workers from coming on the property, notwithstanding which they went on the property. However, mere visits by one or a few organizers did not produce the desired result. Hence a plan was formed by Weber, and apparently also by Haddow, to march a body of 150 union men to the Stonega plant. This plan failed because of some accident. The court cannot close its eyes to the probable effect of such a demonstration. It would almost surely have resulted in intimidating men at Stonega who did not wish to join the union. Can the organizers of this intended demonstration be considered as innocent of knowledge that their confederates at Inman would adopt similar methods of intimidation? Under the rule of law as to conspiracy, each of these defendants is guilty of the above-mentioned illegal acts of the others done in pursuance of the common design.

So far the question has been discussed without particular reference to the order of October 26, 1901. This order specifically requires of Haddow and Weber that they "desist from any interference with the employes of the said receivers so as to effect the conduct of the busi-

ness of the receivers." Under attachment from this court, these defendants were arrested on the evening of March 12th inst. They had addressed a number of the employes on Sunday the 2d, and were when arrested on the cars at Appalachia, a depot near Inman, whence they had come for the purpose of again addressing the men. Between the 2d and 12th the works at Inman had been greatly crippled by the acts of the union. Upon being arrested, the defendant Weber, according to disinterested witnesses that cannot be disbelieved, put his head out of the car window, and, speaking to a crowd of union men there collected, advised them to "continue their work," and not to agree to anything until he and Haddow returned. The "work" the union was then engaged in, certainly in part at least, consisted of intimidating nonunion men who wished to work. Again, after having been brought to Lynchburg, a reporter of an afternoon Lynchburg paper interviewed the defendants. According to the printed interview, Weber said to the reporter, in substance, that he and Haddow had advised the men to quit work unless the men that had been discharged were reinstated. No satisfactory denial of the correctness of this interview was made. The witness Baldwin testified that Weber told him that he had violated the order of October 26, 1901, and intended to violate it. This witness had no interest to misstate the facts in this respect. The conclusion is forced upon the court that both Weber and Haddow knowingly and intentionally disobeyed the said order.

An order will be entered punishing the defendants for their contempt: Tom Braley, one month's imprisonment; Cass Braley, two months' imprisonment; David Clarkson, two months' imprisonment; John Haddow, six months' imprisonment; Wm. Weber, six months' imprisonment.

SIMONTON, Circuit Judge. Having carefully read the evidence in this case, I hereby fully concur in the reasoning of the district judge and in his conclusion.

Order.

This cause came on to be heard upon the petition of Henry K. McHarg and A. A. Phlegar, receivers of the Virginia Iron, Coal & Coke Company, on attachments against Wm. Weber and John Haddow; and on the rules to show cause issued against Thomas Braley, Cass Braley and David Clarkson, and the returns of the said respondents, hearing the same, and the testimony produced before the court, and considering the arguments of counsel thereon, it is adjudged, ordered, and decreed that the said attachments and the said rules issued against the said respondents Wm. Weber, John Haddow, Thomas Braley, Cass Braley, and David Clarkson be made absolute, and that the said respondents are in contempt of the orders of this court. It is further ordered that the said Wm. Weber and John Haddow be each imprisoned in the jail of the city of Lynchburg for the term of six months each; and Thomas Braley be imprisoned in the jail of Wise county, in the state of Virginia, for the term of one month; and that Cass Braley and David Clarkson be each imprisoned in the county jail of Wise county aforesaid for the term of two months each. It is further ordered that capias be issued for each of the respondents

Thomas Braley, Cass Braley, and David Clarkson; and that the terms of imprisonment herein provided for each of the said parties shall begin as to each of them, respectively, when he is lodged in the jail as provided in this order; that this order be signed in duplicate, one to be entered in the office of the clerk of this court at Abingdon, and the other to be placed in the hands of the marshal of this court for action thereon.

In re METZGER TOY & NOVELTY CO. et al.

(District Court, W. D. Arkansas, Ft. Smith Division. April 28, 1902.)

BANKRUPTCY—PREFERENCES.

Bankr. Act, § 60a, provides that "a person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Claimant recovered judgment against a bankrupt partner, and execution issued thereon. Thereafter the parties agreed that the sheriff should place a cashier in charge of a store belonging to the partnership, and that the proceeds of each day's sales should be paid to the sheriff, and applied on the execution, pursuant to which arrangement certain payments were made to claimant, who had no knowledge that the partner was bankrupt at the time. *Held* to constitute a preference within the act, which would have to be surrendered before the balance of the claim could be proved.

In Bankruptcy

On the 31st of December, 1901, the Metzger Toy & Novelty Company, a partnership composed of Rudolph Metzger, Sr., Rudolph Metzger, Jr., and Mary Metzger, filed a petition in bankruptcy as such partnership, and also as individuals; and on January 3, 1902, the partnership, and each of said partners individually, were adjudicated bankrupts. In an adversary suit between the Bloch Queensware Company and Rudolph Metzger, Sr., the former on the 30th of November, 1901, in the supreme court of the state of Arkansas, recovered a personal judgment against the latter for \$983.92, with interest on \$902.22 at 6 per cent. from August 3, 1898; and on the 19th day of December, 1901, an execution was issued out of said court, directed to the sheriff of Sebastian county, and came to his hands on the following day. The sheriff immediately notified Rudolph Metzger, Sr., and the latter begged time from day to day, in order that he might borrow the money and pay off the execution. Failing in this, on the 23d of December Rudolph Metzger, Sr., agreed with the sheriff and the attorneys of the Bloch Queensware Company that a cashier might be placed in the store of the Metzger Toy & Novelty Company by the sheriff, and the proceeds of each day's sales be turned over by said cashier to the sheriff in satisfaction of said execution. This method was followed up, and it continued until and including Christmas day; and, as the result of that arrangement, \$479.09 was paid to the sheriff on the execution. At the time the sheriff received the money under the arrangement heretofore stated, and up to and including the time when the execution was levied, the uncontradicted proof shows that the Bloch Queensware Company and its attorneys all believed that Rudolph Metzger, Sr., was solvent. On the 26th of December following, the sheriff levied upon the stock of goods of the Metzger Toy & Novelty Company, and also certain real estate, and on the same day paid to the attorneys of the execution creditor the sum of \$472.70; retaining the sum of \$6.29 for his costs and commissions. Upon a proper application, this court enjoined the sheriff, on January 3, 1902, from proceeding further under said execution, and the

unsold assets of the Metzger Toy & Novelty Company subsequently passed into the hands of the trustee in bankruptcy. It is agreed that the Metzger Toy & Novelty Company and Rudolph Metzger, Sr., were at the time the execution was issued, and the aforesaid payment made, insolvent. On the 31st of January, 1902, the Bloch Queensware Company filed its claim, probated in proper form for allowance, against the individual estate of Rudolph Metzger, Sr., for the sum of \$738.37; retaining the \$429.09 realized by the sheriff on said execution. To this claim A. A. McDonald, as trustee for the estate of the copartnership of the Metzger Toy & Novelty Company, and A. C. Cunkle, as attorney for several of the creditors of the Metzger Toy & Novelty Company, filed objections to the allowance of said claim, alleging that the Bloch Queensware Company had received the payment within four months next before the institution of the proceedings in bankruptcy, and while said Rudolph Metzger, Sr., was insolvent, and that said payment was made out of the assets of the Metzger Toy & Novelty Company, and constituted a preference, which should be surrendered before said claim was allowed. The referee in bankruptcy sustained the exceptions, holding that the payment referred to constituted a preference, and that the Bloch Queensware Company's claim should be disallowed, unless within five days it surrendered to the trustee of the Metzger Toy & Novelty Company the \$472.70 received by said Bloch Queensware Company from the sheriff under the execution. From this order of the referee the Bloch Queensware Company appealed and the referee has certified the case to this court for review.

Mechem & Bryant, for Bloch Queensware Co.

A. A. McDonald and A. C. Cunkle, for the trustee and objecting creditors.

ROGERS, District Judge (after stating the facts as above). It is insisted by the attorneys for the claimants that the \$472.70 having been received by the claimants under an execution, and in a strictly and purely adversary proceeding, and with no knowledge of the insolvency of Rudolph Metzger, Sr., upon the part of the claimant, said payment was not, therefore, such a payment as, under the bankrupt law, constituted a preference, which should be surrendered before the balance of the claim was allowed; and in support of this doctrine is cited the case of *Wilson v. Bank*, 17 Wall. 473, 21 L. Ed. 723, and other cases following and approving that decision, under the bankrupt law of 1867. In the opinion of the court, the question is settled in the following cases: *Pirie v. Trust Co.*, 182 U. S. 439, 21 Sup. Ct. 906, 45 L. Ed. 1171; *Wilson v. Nelson*, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. —, 7 Am. Bankr. R. 142.

The question involved in this case turns upon the meaning of the words "procured or suffered," and the meaning of the word "transfer," as contained in section 60a of the bankrupt law of 1898; and Mr. Justice McKenna, in the former case, in considering the meaning of the word "transfer," as used in that section, has used this language:

"'Transfer' is defined to be not only the sale of property, but 'every other mode of disposing or parting with property.' All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished,—a preference enabling a creditor 'to obtain a greater percentage of his debt than any other creditors of the same class.'"

But the question at bar is more fully and completely discussed in the second case cited, and to that little can be added. It points out

the distinction between the bankrupt law of 1867 and the bankrupt law of 1898, and specifically declines to follow *Wilson v. Bank*, 17 Wall. 473, 21 L. Ed. 723, and for reasons stated in the opinion. That authority is binding upon this court, and I am constrained to believe, by the force of its reasoning, announces the correct principle of construction of that section of the bankrupt law under consideration.

The action of the referee is therefore affirmed, and the order will be that unless the Bloch Queensware Company surrenders the sum of money received by it from the sheriff of Sebastian county, to wit, the sum of \$472.70, to the trustee of the Metzger Toy & Novelty Company, within ten days, its claim be disallowed, and that, if the same be surrendered within 10 days from the date of this order, the referee enter an order allowing the Bloch Queensware Company's claim for the full amount.

Ex parte GREEN.

(Circuit Court, W. D. Kentucky. May 2, 1902.)

1. TAXATION—INTERSTATE COMMERCE.

A city ordinance imposed a license tax of \$5 per day on "each itinerant person or peddler traveling from residence to residence soliciting orders for, or selling directly or indirectly, goods, wares or merchandise to, the consumer," etc. Petitioner was agent for a party living in another state, and solicited orders for various goods from persons in the city, the goods ordered being shipped direct from the other state to the purchaser. *Held*, that petitioner was not liable for the tax, and could not be imprisoned for nonpayment thereof, as in so far as the ordinance applied to him it was a tax on interstate commerce, and invalid.¹

2. HABEAS CORPUS—RIGHT TO DISCHARGE.

Petitioner, having been imprisoned under a judgment of the police court for a violation of such ordinance, was entitled to his discharge on habeas corpus, though he had not taken an appeal.

Joel C. Clore and Edmund T. Clayton, for petitioner.
Augustus E. Willson, for respondent.

EVANS, District Judge. The petitioner, Chester Green, a citizen of Kentucky, was an agent of A. J. Conroy, who, under the name of A. J. Conroy & Co., carried on business in the city of Cincinnati, in the state of Ohio. The method of conducting business in this state by the petitioner as agent for Conroy was this: He, traveling from residence to residence, solicited orders for goods, wares, and merchandise of various sorts, including lace curtains, clocks, silverware, etc., belonging to Conroy, from persons in Lebanon, Ky., and when orders therefor thus taken by him were accepted by Conroy the merchandise was then shipped by the latter from the state of Ohio direct to the purchaser in Kentucky, and was not shipped in any instance to the petitioner, nor were any of the goods shipped from any point in Kentucky, nor were any of them manufactured in Kentucky. Payments for the goods thus ordered and shipped were to be made in installments. The petitioner collected the first installment thus due, and

¹ See *Commerce*, vol. 10 Cent. Dig. § 111.

other agents of Conroy collected the balance of the agreed price. The city of Lebanon, in this state, attempted to impose a license tax on the business thus conducted and carried on by the petitioner. This attempt was made under an ordinance enacted by the board of council, the applicable provisions of which are in these words:

"Be it Ordained by the Board of Council of the City of Lebanon, Kentucky:

"Section 1. That from and after April 30, 1900, all companies, corporations and persons desiring to exercise any privilege, sell any article or engage in any business, hereinafter mentioned, in this city, shall before doing so procure a license therefor and pay a tax thereon as follows: * * * To each itinerant person or peddler traveling from residence to residence soliciting orders for, or selling, directly or indirectly, goods, wares, or merchandise to the consumer, per day, \$5.00. To each itinerant person or peddler traveling from residence to residence soliciting orders for, or selling, directly or indirectly, clocks, watches or plate ware to, the consumer, per day, \$5.00."

The petitioner, having refused to pay the license or taxation thus imposed upon the business he thus conducted in Lebanon, was arrested, tried, and convicted in the police court of that city for a violation of the said ordinance, and a fine of \$10 was imposed upon him therefor. Upon his refusal to pay the fine thus imposed by the court he was confined and imprisoned in the station house. Alleging in his petition for the writ of habeas corpus issued in this case that such imprisonment is in violation of his rights as a citizen and of the constitution and laws of the United States, he asks to be released, and, the causes of his imprisonment and detention being ascertained to be as stated, the court must determine the questions presented.

Since the decision of the cases of *Brennan v. City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311; and *Robbins v. Taxing Dist.*, 120 U. S. 490, 7 Sup. Ct. 592, 30 L. Ed. 694,—it has not been supposed that any possible question was left open for discussion in such cases. Those cases in their substantial features are precisely like the one before us, and they and many others of like character have left no room for doubt upon the subject. The lower courts of the United States have also many times passed upon such questions, but I shall refer to only one case, namely, *In re Tinsman* (C. C.) 95 Fed. 648. Indeed, if any propositions have been conclusively settled by the courts they are—First, that such attempted impositions, though under the guise of licenses and police regulations, constitute, nevertheless, nothing but taxation upon interstate commerce; and, second, that no state or municipality can tax such commerce at all. Why it should still occasionally be attempted in the face of such explicit rulings by the supreme court of the United States might be considered matter for curious speculation.

It is quite true that the terms of the ordinance in this instance are wide enough and general enough to cover cases of state commerce as well as those of interstate commerce, but with the former we have nothing to do; for, as indicated in many of the opinions of the supreme court, if a state or a local community desires to tax its own commerce it has a clear right to do it, and whether it is injurious or not to its in-

terests is a matter for that state or local community to determine for itself, but no state or municipality has the right, while taxing domestic commerce, also to tax interstate commerce. That taxation by any state or locality in any form is forbidden by the supreme law of the land. A tax upon interstate commerce is the only sort of tax sought to be enforced against the petitioner in this instance, and it makes no difference whether the petitioner is or is not called a "peddler." The result is the same. True, there are circumstances under which the police power of the state may be exercised in a way which involves impositions and exactions upon the citizen which are substantially equivalent to taxation; but the supreme court in the cases referred to has left no room for controversy that the case of this petitioner, and the attempted exertion of authority under which he is imprisoned, is not one which involves the mere exercise of the police power for the protection of the morals or health of the community, but is a direct tax upon interstate commerce itself.

It may be pertinent to remark that no clause of the federal constitution has been promotive of greater advantage and benefit to the country at large or of the general welfare than has that provision which gives to congress the exclusive right to regulate commerce between the states, and none has been more clearly and sedulously guarded by the courts of the United States against local encroachments of every character. This judicial course is so plainly demanded by every consideration of constitutional policy in our federal form of government that we need not enlarge upon the subject. The attempt to tax interstate commerce, even in a small way in this instance, must fail, as every other attempt to do so has heretofore failed.

It is insisted that the petitioner should be remanded to the station house, because there has been no appeal from the judgment of the police court. Ordinarily, such a contention, being addressed to the discretion of the court, might be a strong one; but in a case so palpable as this, and where the constitutional law governing it has been so conclusively adjudicated and determined by the highest court, and where the injustice and hardship (pending a perfectly unavailing and useless retrial in a state court of the law questions involved) of the petitioner's being for a time in prison, or being subjected to other practical inconveniences and expenses altogether disproportionate to the amount of the fine imposed or the money involved, are so plain and manifest, the discretion of the court should not be easily moved in the direction of delay in denying to the petitioner his unquestionable constitutional rights. Such rights in so plain a case should be vindicated at once, instead of waiting until an appeal could be prosecuted in the state courts, and especially where the right to such appeal might admit of doubt. It may possibly be true that such a case as that against the petitioner in the police court for the mere purpose of an appeal from that court to the state circuit court would come within section 3519 of the Kentucky Statutes, instead of section 3518 thereof, or section 362 of the Criminal Code of Practice, which deny appeals where the fine is less than \$20, though it may not be entirely clear how much scope would be given to the phrase "testing the legality" of an ordinance under section 3519; but, at all events, the petitioner

being in custody, and being detained therein in plain and manifest violation of the constitution and laws of the United States, is entitled to be now discharged therefrom, and his discharge is accordingly ordered.

THE VICTORIA.

(District Court, E. D. New York. December 28, 1901.)

CARRIERS—INJURY TO FREIGHT.

A carrier, having received in good condition a large block of deeply veined marble, which, after notice to the officer of the ship in charge of the stowage "that it was a weak-looking block; that it wouldn't take much to break it,"—was stowed so that it supported overlying cargo, with no support for itself, except pieces of dunnage near each end, with one end resting unevenly on the dunnage,—is liable for the break at the end, extending partly through a vein.

Paul N. Turner, for libellant.

Wing, Putnam & Burlingham, for claimant.

THOMAS, District Judge. A piece of unfinished marble was found broken in New York, after transportation by the steamship Victoria from Leghorn. As the marble was received in apparently good condition, its delivery in an injured state raises a presumption of negligence on the part of the carrier. The evidence confirms this presumption. Garrow, the second officer (a witness called by the claimant), states that it was his duty "to look after the stowage, and see that they [the marbles] were properly stowed, and take the numbers and marks of the stones as they went aboard." He gave the following evidence:

"Q. Do you think that this break in this marble was caused by the fact that it had these veins in it? A. Oh, yes, sir; if it had been a solid block, without the veins, it would never have broken. Q. You realized that when you packed it? A. Yes, sir; I pointed it out to our agent in Leghorn. Q. Did you point it out to the man that testified before you? A. Yes, sir; pointed it out. We all admitted that it was a weak-looking block; that it wouldn't take much to break it. * * * Q. When you saw it there in Italy, did you think there was any danger in stowing marble above it? A. I did, myself. Q. Why? A. Because it was so thickly veined. Q. Have you had any experience with thickly veined marbles? Have you seen it break before? A. No; but you can tell by the look of the marble with the veins through it. It looks like cracks. Q. If you had thought there was danger, why didn't you report it? A. So I did. I reported to both the chief officer and to the agent. Q. When? There? A. Yes."

The marble was veined, as stated, and the break extended about one-third of its length through a vein, and two-thirds through the other portion of the block, although it does not appear where the break started. The upper side of the marble was level, but under the broken end the face was shelving in part, so that the dunnage placed under it, unless adjusted to the uneven surface, would give uneven support. There was dunnage at the opposite end of the block, but the block was 17 feet long, 5 feet wide, and 2 feet thick; some 14 feet of it having no central support. Above the block in question others were placed, with intermediate layers of dunnage. The

evidence tends to show that marble of this kind, on account of the veins in it, is more fragile, and subject to breakage. Hence the carrier, accustomed to such freight, stowed a deeply veined piece of marble, known to be subject to breakage on that account, and of unusual dimensions, after notice to the second officer in charge that "it was a weak-looking block; that it wouldn't take much to break it,"—so that it furnished the support for overlying cargo, and with no other support for itself than the piece of dunnage, placed at about two feet from each end, and with one end resting unevenly on the dunnage. This was not a sufficiently careful disposition of property committed to a carrier, and for the damage resulting from this negligence the libellant should recover.

In re LEWIS.

(Circuit Court, N. D. Florida. April 12, 1902.)

1. HABEAS CORPUS—PRACTICE.

Where the cause of imprisonment fully appears in the application for habeas corpus and the exhibits thereto, it is proper to issue an order requiring the officer to show cause why the writ should not issue, and dispose of the case without first issuing the writ itself.

2. SAME—GROUNDS FOR DISCHARGE—TECHNICAL OBJECTIONS.

Habeas corpus will not issue unless the court under whose warrant an accused is held is without jurisdiction; and mere objections to the indictment against him as too vague and general, and not sufficiently informing him of the offense charged, cannot be considered.¹

3. PEONAGE—ACT ABOLISHING—CONSTRUCTION.

Though the system of peonage in New Mexico was the moving cause for the enactment of the statute (14 Stat. 546; Rev. St. U. S. §§ 1990, 1991, 5526, 5527) abolishing and prohibiting peonage, its title and the senate debates showing that to be the fact, the act does more than merely abolish an existing system, and makes criminal certain acts which would tend to sustain or re-establish such a system, section 5526 providing for the punishment of any person who holds, arrests, returns, or causes to be returned, any person "to a condition of peonage."

4. SAME—CONSTITUTIONALITY.

Under Const. Amend. 13, providing that "neither slavery nor involuntary servitude, except as a punishment for crime, * * * shall exist in the United States," and that "congress shall have power to enforce this article by appropriate legislation," congress has power to make laws against involuntary servitude in the form of peonage.

5. HABEAS CORPUS—GROUNDS FOR DISCHARGE.

Objection that a system of peonage such as once existed in New Mexico must exist before the statute prohibiting peonage will apply goes to the sufficiency of the indictment or the evidence to be offered on the trial for violating the statute, and will not be determined on an application for habeas corpus.

6. SAME.

Failure to make an indictment good against demurrer, even though it contains a statement of particular facts which is not sufficient, the indictment also using the words of the statute, will not entitle accused to discharge on habeas corpus, especially where at the conclusion of his trial he can avail himself of the defect by writ of error.

¹ See Habeas Corpus, vol. 25, Cent. Dig. § 92; 1897 Dig. § 11 [k].

Habeas Corpus.

B. C. Tunison, for petitioner.

John Egan and William Wirt Howe, U. S. Attys.

SHELBY, Circuit Judge. At the March adjourned term, 1901, of this court, the grand jury indicted Robert W. Lewis, Benjamin J. Douglas, and Joseph Thomas for conspiring to return one George Walker to a condition of peonage. It is charged that in pursuance of the conspiracy Robert W. Lewis did assault, beat, and wound the said George Walker, and force him to return to his creditor's place of business, and that this was done for the purpose of compelling Walker to work for R. W. Lewis and others,—“to work out a debt claimed to be due them.” The second count in the indictment charges that the same defendants did conspire to cause to be returned and aid in returning to a condition of peonage one George Walker, by forcibly and against his will returning him to work for R. W. Lewis and others, to be held by them to work out a debt claimed to be due them; and that in pursuance of the conspiracy the defendants Douglas and Thomas did, by threats and force, compel Walker, against his will, to accompany them to the place of business of Robert W. Lewis and others, and did assault and beat and wound the said Walker. At the same term the grand jury returned another indictment against the same defendants, charging that they did unlawfully and knowingly return one George Walker to a condition of peonage by forcibly and against his will returning him to work for R. W. Lewis and others, naming them, to be held by them to work out a debt claimed to be due to them by him, the said Walker. These indictments are copied in the margin.¹

These cases coming on for trial in the circuit court, the defendants filed separate motions to quash each of the indictments, assigning, among other grounds, that the indictments charged no offense against the laws of the United States. It is also alleged in the motion as to the first indictment that the objects and purposes of the alleged conspiracy were not set forth; that the alleged conspiracy is not such as is prohibited by law; and that the defendant Robert W. Lewis is therein charged with two distinct, independent offenses. The circuit court (Judge Swayne presiding) overruled these motions to quash, and the defendant Lewis thereupon filed this petition for the writ of habeas corpus. It is averred in the petition that he is unjustly and unlawfully detained in prison at Pensacola by Thomas F. McGourin, United States marshal for the Northern district of Florida, by order of the circuit court of the United States for that district. It appears from the petition that the petitioner is held to answer the two indictments, which are made exhibits to the petition. The motions to quash and the court's ruling thereon are also shown by the petition. The petitioner prays for the writ of habeas corpus to be directed to the marshal, and he seeks to be discharged from custody because (1) neither of the two indictments shows any acts to have been committed by the petitioner which violate any law of the

¹ See note at end of case.

United States, and (2) the United States circuit court for the Northern district of Florida has no jurisdiction of any offense charged in the indictments.

This petition was presented to a judge of this court on March 15, 1902, and an order was made on that day that T. F. McGourin, United States marshal for the Northern district of Florida, show cause on April 1, 1902, why a writ of habeas corpus should not issue as prayed for in the petition. It was also ordered that a copy of the petition be served on the marshal and on the United States attorney for the Northern district of Florida. This order provided that it was not to prevent the circuit court's proceeding with the trial of the case. On April 1st, at the hearing, the marshal filed an answer to the petition and the rule showing that he held the petitioner under the indictments which were annexed to the petition; that the motions to quash the indictments were argued and considered by the court, and duly overruled, the court holding the indictments good and sufficient; and, the petitioner having been surrendered by his bondsman, it was ordered by the court that he be held for trial; and he was duly committed to the custody of the marshal, and is held by him under the regular process of the court issued on the indictments.

1. The usual course on the application for the writ of habeas corpus is to issue the writ, and, on its return, to hear and dispose of the case. But when, as in this case, the cause of the imprisonment fully appears by the petition and the exhibits thereto, the practice prevails for the court to determine whether, on the facts presented in the petition, the prisoner if brought before the court would be discharged. *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281. And where the hearing is had without issuing the writ an order may be made requiring the officer or person holding the prisoner to show cause why the writ should not issue. *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274. Where the return to the rule shows all the essential facts, the case may be disposed of as fully as if the writ had issued.

2. The question to be decided is one of jurisdiction. If the prisoner is charged with a misdemeanor or crime of which the United States circuit court for the Northern district of Florida has jurisdiction, he cannot be discharged on habeas corpus. The indictments are for acts alleged to have occurred in that district, so we have only to see if there are any statutes to support them.

If two or more persons conspire to commit any offense against the United States, and one or more of them do any act to effect the object of the conspiracy, all the parties to the conspiracy are liable to indictment and penalties. Rev. St. U. S. § 5440. Under section 5526, Id.:

"Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both."

In one of the indictments it is charged that the prisoner conspired with others to violate the provisions of the statute last quoted. A

learned argument is submitted in behalf of the petitioner to show that the indictment is defective; that it is too vague and general; that it does not inform the accused of the nature and cause of the accusation, and so forth. Objections of this kind cannot be considered on this application. The circuit court has overruled a motion to quash the indictment which raises those questions. If it be conceded that the court erred (a question not considered or decided), the error could not be corrected on this application. It has become a familiar general rule that habeas corpus will not issue unless the court under whose warrant the prisoner is held is without jurisdiction. *In re Chapman*, 156 U. S. 211, 215, 15 Sup. Ct. 331, 39 L. Ed. 401.

3. The learned attorney for the petitioner also contends that the circuit court has no jurisdiction of the case made by the indictment, because it is contended the purpose of the statute (14 Stat. 546; Rev. St. U. S. §§ 1990, 1991, 5526, 5527) was only to abolish the system of peonage in the territory of New Mexico and prevent its recurrence there or elsewhere. Section 5526 of the Revised Statutes, which is taken from the act cited, provides that every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return, of any person "to a condition of peonage," shall be punished as therein provided. This statute clearly makes the acts condemned a criminal offense. The existence of the system of peonage in New Mexico doubtless caused the passage of the act. Its title, as well as the debate in the senate on its passage (Cong. Globe 1866-67, Pt. 3, p. 1571), show that the system in New Mexico was the moving cause for the legislation. But the act does more than to merely abolish an existing system. It makes criminal certain acts, which would tend to sustain or re-establish such a system. One of the indictments is for a conspiracy to violate the provisions of the statute and the other is for a violation of the statute. As has been shown, the question of the technical sufficiency of the indictments is not to be considered in this proceeding.

4. The thirteenth amendment to the constitution provides that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction," and that "congress shall have power to enforce this article by appropriate legislation." "Involuntary servitude" is forbidden as well as slavery. The supreme court said in the *Slaughter House Cases*, 16 Wall. 36, 72, 21 L. Ed. 394, that, "while negro slavery alone was in the mind of the congress which proposed the 13th article, it forbids any kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void." The congress unquestionably has power to make laws against "involuntary servitude," whether it be peonage, vassalage, serfage, or villeinage. The statute in question makes it an offense to hold or return one to a condition of peonage. The word "peonage" as used in the statute includes cases of involuntary servitude to work out a debt. But every case of such servitude may

not be within the statute. A peon is "a species of serf, compelled to work for his creditor until his debts are paid." Cent. Dict. The statute contains words pointing to this definition, for it refers to the service or labor of persons "as peons in liquidation of any debt or obligation." 14 Stat. 546; Rev. St. U. S. § 1990.

It is contended that a system of peonage like that once in force in New Mexico must exist before the statute will apply. That question need not now be decided. The statute, by its terms, embraces the case of the return of a single person to "a condition of peonage." But whether the person held in, or returned to, such condition is within the statute, unless he and others are also held under a system, pretended law, or custom, is a question relating rather to the sufficiency of the indictments or the evidence to be offered on the trial, questions not involved on this application.

It is true, as claimed, that it is not always sufficient for an indictment to follow the words of a statute. Sometimes the pleader must do more,—descend to particulars. Without expressing any opinion as to the sufficiency, on demurrer, of the indictments in question, I may say that a failure to make an indictment technically good in that respect, even when there is a statement of particular facts that is not sufficient, the indictment also using the words of the statute, would not entitle the defendant to be discharged on habeas corpus; certainly not when, at the conclusion of his trial, he could avail himself of the defect by writ of error.

I think the circuit court has jurisdiction of the cases made by these indictments, and that the petitioner is not entitled to the writ of habeas corpus. An order will be made denying the writ.

Writ denied.

NOTE.

Omitting the captions, the indictments are as follows:

"The grand jurors of the United States, chosen, selected, and sworn in and for the Northern district of Florida, and Western division, upon their oaths present that heretofore, to wit, on the twenty-seventh day of June, in the year of our Lord one thousand nine hundred and one, Robert W. Lewis, Benjamin J. Douglas, and Joseph Thomas, late of the Western division of the Northern district of Florida, did then and there unlawfully and feloniously conspire, confederate, and agree together to knowingly and willfully return to a condition of peonage one George Walker by forcibly and against the will of him, the said George Walker, returning him, the said George Walker, to work to and for R. W. Lewis, R. N. Lewis, and S. E. Lewis, copartners doing business under the firm name and style of Lewis Naval Stores Company, to be held by them, the said Lewis Naval Stores Company, to work out a debt claimed to be due them, the said Lewis Naval Stores Company, by the said George Walker, and afterwards, to wit, on the day aforesaid, in pursuance of and for the purpose of effecting the object of said conspiracy, the aforesaid Benjamin J. Douglas and Joseph Thomas did, by threats and force, compel the said George Walker, against his consent and will, to accompany them to the place of business of said Lewis Naval Stores Company, and the said Robert W. Lewis did assault, beat, and wound him, the said George Walker, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States. (2) And the said grand jurors aforesaid, upon the'r oath aforesaid, do further find and present that one Robert W. Lewis, Benjamin J. Douglas, and Joseph Thomas, heretofore, to wit, on the twenty-seventh day of June, in the year of our Lord one thousand nine hundred and one, 'n and within the district aforesaid, and within the jurisdiction of this

court, then and there did unlawfully and feloniously conspire, confederate, and agree together to knowingly and willfully cause to be returned and aided in returning to a condition of peonage one George Walker, by forcibly and against the will of him, the said George Walker, returning him, the said George Walker, to work to and for R. W. Lewis, R. N. Lewis, and S. E. Lewis, copartners doing business under firm name and style of Lewis Naval Stores Company, to be held by them, the said Lewis Naval Stores Company, to work out a debt claimed to be due them, the said Naval Stores Company, by the said George Walker; and afterwards, to wit, on the day aforesaid, in pursuance of and for the purpose of effecting the object of said conspiracy, the aforesaid Benjamin J. Douglas and Joseph Thomas did, by threats and force, compel the said George Walker, against his consent and will, to accompany them to the place of business of said Lewis Naval Stores Company, and the said Robert W. Lewis did assault, beat, and wound him, the said George Walker, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States."

The second indictment:

"The grand jurors of the United States, chosen, selected, and sworn in and for the Western division of the Northern district of Florida, upon their oaths present that heretofore, to wit, on the twenty-seventh day of June, in the year of our Lord one thousand nine hundred and one, Robert W. Lewis, Benjamin J. Douglas, and Joseph Thomas, late of the said Western division of the Northern district of Florida, did then and there unlawfully and knowingly return one George Walker to a condition of peonage by forcibly and against the will of him, the said George Walker, returning him, the said George Walker, to work to and for R. W. Lewis, R. N. Lewis, and S. E. Lewis, copartners doing business under the firm name and style of Lewis Naval Stores Company, to be held by them, the said Lewis Naval Stores Company, to work out a debt claimed to be due to them, the said Lewis Naval Stores Company, by him, the said George Walker, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States. (2) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the twenty-seventh day of June, in the year of our Lord one thousand nine hundred and one, Robert W. Lewis, Benjamin J. Douglas, and Joseph Thomas, late of the said Western division of the Northern district of Florida, did then and there, unlawfully and knowingly, cause and aid to be returned one George Walker to a condition of peonage, by forcibly and against the will of him, the said George Walker, causing and aiding him, the said George Walker, to be returned to work to and for R. W. Lewis, R. N. Lewis, and S. E. Lewis, copartners doing business under the firm name and style of Lewis Naval Stores Company, to be held by them, the said Lewis Naval Stores Company, to work out a debt claimed to be due to them, the said Lewis Naval Stores Company, by him, the said George Walker, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States."

In re HENSCHHEL

(District Court, S. D. New York. May 6, 1902.)

1. APPEAL—DECISION OF APPELLATE COURT—EFFECT.

Where the circuit court of appeals on an appeal in bankruptcy proceedings directed costs and disbursements to be taxed against the respondents, such decision is not reviewable by the district court on a subsequent motion to amend the order directing the entry of judgment.

2. PARTNERSHIP—PROOF.

Where a firm appeared in bankruptcy proceedings, and filed proof of debt, in which a sworn declaration of the persons composing the firm was made by it, such declaration was sufficient proof of the persons

composing the firm to sustain a judgment directing such persons to pay costs and disbursements of an appeal.

2. BANKRUPTCY COURT—JURISDICTION—TERMS—EFFECT OF TERMINATION.

A federal court sitting as a court of bankruptcy is regarded as always open, and does not, therefore, lose jurisdiction to alter or modify interlocutory orders by reason of the termination of the term at which they were entered.

In Bankruptcy. Amendment of order after expiration of term of district court.

See 109 Fed. 861.

Joseph Fried (F. M. Czaki, of counsel), and Black, Olcott, Gruber & Bonyng, for the motions.

Myers, Goldsmith & Bronner, opposed.

ADAMS, District Judge. These are motions on behalf of certain petitioning creditors to amend an order entered herein on the 14th day of February, 1902, by directing the clerk to enter a judgment against Orrill H. Hayes and Lambert Huntington, composing the firm of O. H. Hayes & Co., for the respective sums of \$203.03 and \$32.95, and that the petitioners have execution therefor, etc.

It appears that the petitioning creditors successfully prosecuted an appeal to the circuit court of appeals from a decree entered in this court on the 3d day of August, 1901, confirming the appointment of a trustee by the referee. In re Henschel (C. C. A.) 113 Fed. 443. In the proceedings in the appellate court costs were taxed against the respondents in favor of the appellants, respectively, in the sum of \$203.03 and \$32.95. Upon the mandates from the appellate court the costs were accordingly taxed in this court. Subsequently a motion was made in the appellate court on behalf of Hayes & Co. for a resettlement of the orders upon which the mandates were issued, asking that the costs and disbursements of the parties be borne by and paid out of the estate, and that O. H. Hayes & Co. be relieved from any liability therefor, on the ground that they did not participate in any of the proceedings beyond voting in common with many other creditors, and that, if they were obliged to pay the costs and disbursements, their dividend in the estate would be extinguished. It was shown in the opposing affidavits on this motion that O. H. Hayes & Co. were the parties supporting the action of the referee and the court in the appointment of the trustee, and the real respondents in the appeal. The motion for resettlement was accordingly denied.

The purpose of the present motion is to supply an omission of the proper direction to the clerk relative to the judgment entered on the mandates so that the successful creditors can have the benefit of the decisions in the appellate court. The motion is opposed on three grounds: (1) That it is inequitable to compel these creditors to pay the costs of the litigation; (2) that it does not appear on the record who composed the firm of O. H. Hayes & Co., and that such a fact cannot be determined in this motion; and (3) that, as the term of this court during which the order sought to be amended was made ended

the Monday preceding the first Tuesday of March, the court is without power to grant the relief.

1. The question as to the propriety of taxing the costs and disbursements on the respondents in the case has been determined by the appellate court, and its decision is binding here.

2. It appears in the records of this court by the proof of debt filed before the referee on the 14th of May, 1901, that O. H. Hayes and Lambert Huntington composed the firm of O. H. Hayes & Co. No more complete and conclusive proof could be furnished than the sworn declaration of the parties.

3. The question respecting the power of the court, in view of the lapse of time, is more serious. There can be no doubt that courts lose control of their final decrees after the expiration of the term during which they were rendered, unless steps be taken during the term, by motion or otherwise, to set aside, modify, or correct them. *Phillips v. Negley*, 117 U. S. 665, 673, 6 Sup. Ct. 901, 29 L. Ed. 1013. It is there said:

"In this country all courts have terms and vacations. The time of the commencement of every term. If there be a half a dozen in a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all courts of the United States." 117 U. S. 672, 6 Sup. Ct. 904, 29 L. Ed. 1013.

The terms of this court as a district court of the United States are fixed by statute. It is provided:

"Sec. 572. The regular terms of the district courts shall be held at the times and places following: * * * In the Southern district of New York. In the city of New York, on the first Tuesday in every month." Rev. St. pp. 98, 100.

In the bankruptcy act of 1867 it was provided:

"Sec. 4973. The district courts shall always be open for the transaction of business in the exercise of their jurisdiction as courts of bankruptcy; and their power and jurisdiction as such courts shall be exercised as well in vacation as in term time." Rev. St. p. 962.

In construing this section, the supreme court held in *Sandusky v. Bank*, 23 Wall. 289, 292, 293, 23 L. Ed. 155:

"A proceeding in bankruptcy, from the time of its commencement by the filing of a petition to obtain the benefit of the act until the final settlement of the estate of the bankrupt, is but one suit. The district court, for all the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. Its proceedings in any pending suit are, therefore, at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation."

In the present act the explicit language used in the act of 1867, to the effect that the court shall always be open, is not employed, but I regard the quoted language of *Sandusky v. Bank* entirely applicable. The present act, in establishing the district courts as courts of bankruptcy, provides that they shall exercise their jurisdiction "in vacation, in chambers and during their respective terms" (section 2); "close estates * * * and reopen them whenever it appears that they were closed before being fully administered" (sec-

tion 2, cl. 8); "set aside discharges and reinstate the cases" (section 2, cl. 12); "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act" (section 2, cl. 15). And it is further provided that "nothing in this section shall be construed to deprive a court of bankruptcy of any power it would possess, were certain specific powers not herein enumerated" (end of section 2), and that compositions may be set aside within six months (section 13), discharges revoked within a year after they have been granted (section 15), allowed claims reconsidered before the closing of the estate (section 57k), and, generally, the powers of the court are such to secure justice, that none other than an imperative, unmistakable, and governing rule should be permitted to operate as a bar to equitable relief. The parties here are actually in the midst of a hotly-contested bankruptcy proceeding, which will doubtless only finally terminate with the distribution of the estate, though the particular phase of the controverted matter relative to the appointment of a certain trustee is finally disposed of. The case of *In re Ives* (D. C.) 111 Fed. 495, has been cited as an authority for the contention that this court has lost jurisdiction of the matter by reason of the expiration of the term. The question involved there was one of setting aside an adjudication several terms after it was filed, and I do not think the decision affects the matter in hand. This court is in session practically all the time, and I am not prepared to hold that control is lost of its orders with the termination of the first Monday of every month, unless such orders are beyond question the final orders or decrees in the whole case, and thus within the rule which has been invoked.

Motion granted.

Since preparing the foregoing, my attention has been called to the disapproval of *In re Ives*, supra, by the circuit court of appeals for the Sixth circuit, with respect to this point. 113 Fed. 911.

THE EAGLE POINT.

(District Court, E. D. Pennsylvania. March 7, 1902.)

No. 73.

1. COLLISION—STEAMERS CROSSING—EXCESSIVE SPEED IN FOG.

In a suit for a collision in the night between the Atlantic steamships *Biela* and *Eagle Point*, 150 miles east of Sandy Hook, while on crossing courses, the evidence and surrounding circumstances considered, and *held* to sustain the contention of the *Eagle Point* that there was a fog at the time and place of collision so dense that the two vessels could not see each other until within 250 yards, and that the *Biela* was therefore in fault for maintaining full speed and failing to give fog signals.

2. SAME—SPEED PERMISSIBLE IN FOG—"MODERATE SPEED."

Under article 16 of the international navigation rules, which provides that "every vessel shall, in a fog, mist, falling snow or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions," the term "moderate speed" is a relative one and

the time and place and all other circumstances and conditions must be taken into account before judgment can be pronounced on a given rate. Where a vessel with a normal full speed of 12 knots reduced to 8 knots or less in a fog, it will be held a moderate speed, where it is shown without contradiction that, owing to her having little cargo and being very light, she could not be properly controlled at a lower rate of speed.

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham, for libelant.

Butler, Notman, Joline & Mynderse, for respondents.

J. B. McPHERSON, District Judge. This is a libel against the British steamship *Eagle Point*, wherein damages are claimed for a collision that occurred in the early morning of October 1, 1900; the result being that the steamship *Biela* was sunk, and her cargo was lost. The facts are as follows: The collision took place on the Atlantic Ocean, about 150 miles east of Sandy Hook. The *Eagle Point* was bound westward from London to Philadelphia. She is a steamship of 5,222 gross tons, 3,307 net tons, 410 feet in length, 51 feet in breadth, and 31 feet deep. Her cargo capacity is 7,700 tons dead weight, but upon this voyage she was carrying only 300 tons. After leaving port she had taken in some water ballast, but most of this had been discharged shortly before the collision took place, and at that time she was drawing about 16 feet. The *Biela* was a British steamship of 2,182 gross tons, 1,344 net tons, 316 feet in length, nearly 35 feet in breadth, and about 29 feet in depth. She was bound eastward on a voyage from New York to Liverpool, loaded with a general cargo. Both vessels were properly manned, equipped, and supplied. The *Biela* left New York Sunday morning, September 30th, passing Sandy Hook at 8:45 a. m., and reaching Fire Island light-ship at 1:10 p. m., New York time. The *Eagle Point* passed Nantucket Shoals light-ship on Sunday evening about 6:30 or 7 o'clock. The light-ship was not seen because of a dense fog, but her whistle was heard off the starboard beam, distant apparently about two miles. The collision took place shortly before, or shortly after, 1 o'clock on Monday morning, October 1st, and the injury to the *Biela* was so serious that she sank in less than half an hour; her crew and passengers escaping by the boats, and reaching the *Eagle Point* in safety. The bow of the *Eagle Point* was severely damaged, but she was able to proceed upon the voyage, and reached Philadelphia in due course.

There is no substantial dispute concerning the place upon the high seas where the collision occurred, the hour of the collision, nor the courses upon which the vessels were sailing. It is agreed, also, that the night was dark, wet, and overcast, and that the sea was smooth. Upon essential matters, however, the respective accounts given by those on board the two vessels are, as might be anticipated, wholly irreconcilable. These accounts are outlined accurately in the brief of counsel for the claimant:

"The *Biela* asserts in her libel that the night was 'dark and wet,' but so that lights were readily visible; some of her witnesses claiming that it was starlight and moonlight, and perfectly clear to the southward. She claims that ten minutes before the collision she discerned the masthead light of

the *Eagle Point* about three points on the port bow, distant three or four miles; that in about two minutes the green light on the *Eagle Point* appeared; that the approaching steamer made no change in her course, and that when she was distant about two lengths the *Biela*, which had been proceeding at full speed, making between nine and ten knots per hour, stopped and reversed her engines, and gave a signal of three blasts, which was answered by the *Eagle Point*; that while the engines of the *Biela* were still backing she was struck a terrific blow on her port side by the *Eagle Point*. The witnesses indicate that the blow was at nearly a right angle.

"The *Eagle Point*, on her part, asserts that at the time of the collision there was a dense fog, through which she had been running for several hours before the collision, the entire voyage from London having been more or less foggy; that she had reduced her speed to between seven and eight knots, her full speed being nearly twelve knots per hour, and was giving fog signals regularly; that while proceeding through this dense fog the *Biela's* masthead light was dimly discerned about a point on the starboard bow of the *Eagle Point*; that the officer in charge of the *Eagle Point*, then being in the act of sounding the fog signal, gave such signal; that immediately thereupon the red side light of the *Biela* came into view, distant probably not more than 250 yards, the light being discovered as soon as the character of the light and the density of the fog permitted; that, immediately the wheel of the *Eagle Point* was put hard a-port, a signal to that effect being given by whistle, the engines of the *Eagle Point* were reversed full speed, and a signal of three blasts blown; that there was no apparent effort on the part of the *Biela* to avoid the collision; and that the vessels came into contact at an angle of between three and four points between the port sides of the two steamers."

It is apparent from this quotation that the decision of the case depends upon the answer to the question, whether there was a fog at the time and place of collision so dense that the vessels could not see each other farther away than, say, 250 yards, or whether the night, although dark and overcast, was nevertheless clear enough to permit the lights of each vessel to be seen from the other at a distance of several miles. It would be amazing, if collision cases did not continually present the same state of affairs, to find that, without exception, every witness on board the *Eagle Point*—more than 30 in number—declares that the fog was dense, and that the steamship was continuously giving the proper fog signals; while, with equal unanimity, every witness from the *Biela*—only a few less than the other company—declares that the night was clear enough to permit the lights of the *Eagle Point* to be seen for several miles, and that no fog signals whatever were blown. It would be both wearisome and profitless to give even a brief summary of the voluminous testimony. It is sufficient to say that I have considered it with care, and have come to the conclusion that the foregoing account given by the *Eagle Point* is the more probable of the two. I adopt it as the finding of the court, and I also find as a fact that the *Biela* was steaming at full speed through the fog, without giving the signals required by the international rules. It follows, therefore, that the *Biela* must be held to have been in fault.

Upon this question of fog, I have not disregarded, but have taken into account, the testimony of two witnesses to which the libellant asks the court to give much weight. They were the captain and second officer of the *Elise Marie*, a German tank steamship which left New York in company with the *Biela*, and is alleged to have been near the place of collision about 1 o'clock. If it appeared

satisfactorily that the Elise Marie had been in the neighborhood at the time of the accident, it is, no doubt, true that the testimony of disinterested witnesses concerning this material point would receive much attention. But I think it is clear that the Biela, which was much the faster vessel, was more than 15 miles ahead of the Elise Marie at midnight,—out of sight, as the second officer testified,—and that it would be unsafe to assume that both vessels were encountering the same weather at the same moment of time. Besides, both these witnesses testify that about midnight they began to meet fog,—“showers of fog,” as they describe it,—which continued until Monday at noon, and that these showers were dense enough to require fog signals to be given. This would seem to indicate plainly that the Biela must have found the fog an hour or two before, and throws serious discredit upon many of her witnesses who swore positively that there had been no fog at all up to the instant of the collision.

It remains to inquire whether the Eagle Point was also negligent, and upon this point nothing is still to be considered except the admitted speed at which she was going. Her full speed is about 12 knots, but several hours before the collision she had reduced this rate to 8 knots, or somewhat less. It is argued by the Biela that this was too high, assuming that the fog was dense, and considering the fact that the Eagle Point was approaching a frequented part of the Atlantic Ocean. Whether this speed was proper or not depends upon the surrounding circumstances, for it is manifest from the international regulation upon this subject that no hard and fast rule can be laid down. Article 16 is, in part, as follows:

“Every vessel shall in a fog, mist, falling snow or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.”

Under this article, “moderate speed” is clearly a relative term. Time, place, and all other circumstances and conditions, must be taken into account before judgment can be pronounced upon a given rate. In the present case the undisputed evidence proves that the Eagle Point was very light, carrying only about 300 tons of cargo, and that such a ship, carrying so small a load, could not be properly controlled at a lower rate of speed than the rate at which she was proceeding. Positive testimony to this effect was given on behalf of the Eagle Point, and no witness was offered in denial. This is, in effect, an admission that the testimony on this point is true; and I find, therefore, that the speed at which the Eagle Point was steaming was a moderate speed,—not greater than was proper under the surrounding circumstances. I see no ground upon which it can be held that she was guilty of negligence that contributed to the collision. The remaining questions raised by the claimant need not be discussed.

The libel will be dismissed, with costs.

OLDS et al. v. CITY TRUST, SAFE DEPOSIT & SURETY CO. OF
PHILADELPHIA.

(Circuit Court, D. Massachusetts. April 25, 1902.)

No. 1,197.

REMOVAL OF CAUSES—TIME FOR FILING PETITION—PLEA TO JURISDICTION—
EFFECT.

The time within which a petition for the removal of a cause from a state to a federal court may be filed is not extended by the filing of a plea to the jurisdiction of the state court.

John B. O'Donnell, for plaintiffs.

William G. Bassett, for defendant.

LOWELL, District Judge. The plaintiff is a citizen of Connecticut. The defendant is an insurance company incorporated under the laws of Pennsylvania, and it has created the insurance commissioner of Massachusetts its agent to accept service of process, as required by Pub. St. Mass. c. 119, § 202. The plaintiff sued the defendant in the superior court for Hampshire county on a writ which set out that the defendant had its usual place of business in that county. The writ was entered April 1st. On April 5th the defendant appeared specially and pleaded in abatement that "the plaintiffs are nonresident, and defendant neither lives nor has a place of business in said county of Hampshire; that no property of defendant has been attached; and that, if defendant can be held to answer plaintiffs in an action in this commonwealth,—which it does not admit, but denies,—it is in the county of Suffolk, and not elsewhere." On May 13th the defendant filed a petition for removal to this court, which petition was allowed, and the case was duly entered here. Exceptions were taken by the plaintiff to the order of removal made by the superior court, which exceptions were argued before the supreme court of Massachusetts, and by it were sustained. *Olds v. Surety Co.*, 61 N. E. 223. The plaintiff has now filed a petition in this court to remand the case to the superior court. The argument in this court is not precisely that addressed to the supreme court of the commonwealth. The defendant now admits that the petition for removal was filed too late, unless the fact set up in its answer in abatement, viz., that no proper service was made upon it, extended the time for filing the petition for removal. Defendant's contention is now substantially this: No sufficient service was ever made upon it, because it was not suable in Hampshire county; hence the time within which it was required to answer or plead never began to run, and consequently had not expired when its petition for removal was filed. If the defendant's contention is correct, it could have filed a valid petition for removal at any time during the progress of the suit, or even after judgment. The defendant thus contends that, in order to determine if this action has been properly removed to this court, this court must first hear and determine the plea in abatement. If the plea is sustained, the case has been properly removed, because in that case the time within which the

defendant was required to answer in the state court never began to run. If, on the other hand, the plea in abatement is overruled, and the service is held sufficient, it follows that the action must be remanded to the state court, because, in that event, this court will have determined that the defendant was properly served, and that its time to answer or plead began to run at the time the writ was entered. Moreover, it would seem to follow, under the defendant's contention, that it could await a decision by the state court on the plea in abatement, and accept the decision, if that was favorable, but remove the case to this court if the decision was unfavorable. This cannot be. The defendant is entitled, by a seasonable removal, to take the decision of this court on its plea in abatement, but the fact that its plea is to the jurisdiction does not enable it to experiment with the state court first and with the federal court afterwards.

The defendant's contention is supposed to be supported by the case of *Tortat v. Manufacturing Co.* (C. C.) 111 Fed. 426. Without admitting that the defendant is right in supposing that the case just cited supports its contention, this court is of opinion, after consideration of that case, that the contention is inadmissible. The case of *Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431, decided that a defendant, by filing a petition for removal did not bar himself from setting up in the circuit court, after removal, an original want of jurisdiction in the state court. That case did not decide that the time for filing the petition for removal was indefinitely extended by a plea to the jurisdiction.

For these reasons, and without attempting to pass upon numerous other difficulties which beset the defendant's contention here, the case must be remanded to the state court.

THE DRUMMOND (two cases).

(District Court, E. D. Pennsylvania. April 14, 1902.)

INJURY TO STEVEDORE—DEFECTIVE CHAIN—INSPECTION.

A chain used for unloading a ship, and which broke, injuring a stevedore, while a load weighing a ton was being raised, its capacity in good condition being from three to four tons, and which had been used for several years, without needing repair, except that shortly before a link broke and was replaced with a new one, was inspected, so as to relieve the ship from negligence; two of the ship's officers having, just before it was used, examined it link by link, and the break being at the side of a link, and due to imperfect welding, and the defect not being discoverable without the application of strain by a testing machine, or the use of acid and a microscope, which was not required by the facts known about the chain.

John Cadwalader and Charles Sinkler, for libellant Gallagher.
Francis C. Adler and John L. Lewis, for libellant McCormick.
Henry R. Edmunds and N. Dubois Miller, for The Drummond.

J. B. McPHERSON, District Judge. These two actions grow out of the same accident and need not be considered separately. The libellants were stevedores, and on August 8, 1901, were helping to unload a

cargo of iron ore from the steamship Drummond, then lying in the port of Philadelphia. They were at work in the hold; their duty being to fill the iron buckets that were successively lowered at the end of a chain that was rigged in the usual way. About eight hours after they had gone to work, the chain broke about 50 feet from the bucket, and fell through the hatch into the hold, striking the libelants and doing the injuries of which they complain. The chain was large and strong, eleven-sixteenths of an inch in diameter, and had been in use upon the ship for several years without needing repairs, except upon one occasion shortly before the accident now being considered. Upon that occasion also a link broke, but a new link was at once substituted, and the present break was at a different place. The link now in question was slightly worn at each end; but the break occurred, not at the end, but at the side,—there being first a jagged break upon one side, and then a clean fracture upon the other. The load that the chain was carrying was about a ton; but there is no doubt that the capacity of such a chain in good condition is from three to four tons, so that the load under which it broke was clearly not excessive under ordinary circumstances. I think the break was due to imperfect welding. So it was testified by several witnesses, and I accept this explanation as the most likely. The ship, which furnished and rigged the chain, is claimed to have been negligent in using an insufficient appliance, and in failing to properly inspect it before it was put up. I am clearly of opinion that the testimony does not sustain this charge. Before the chain was rigged to the winch, it was laid out upon the deck, and was examined link by link by two of the ship's officers. It was afterwards gone over again by a seaman, who was ordered to grease it, and it therefore passed through the hands and under the eyes of three persons, two of whom examined it with care, link by link, for the express purpose of discovering whether it was fit for use. This, I think, was all that could be required of the ship under the circumstances. No other test was called for. The former break had been repaired, and the chain had done its work satisfactorily since that time. Moreover, I am satisfied that, if there was any external imperfection in the link at the point where it afterwards broke, the defect could not have been discovered without the application of strain by a testing machine, or the use of acids and a microscope. Such an examination was not required by the facts that were known about the chain, and I therefore think that the full duty of the ship was performed by the inspection that I have described. As there was no negligence on the part of the ship, it follows that the injury done to the libelants was the result of an unavoidable accident, which is much to be regretted, but gives them no right to shift the consequences to other shoulders than their own.

In each case the libel will be dismissed, but without costs.

THE THYRA.

(District Court, D. Oregon. April 29, 1902.)

No. 4,577.

SHIPPING—WORKMEN ENGAGED IN REPAIRING—OPEN HATCH—LIABILITY OF VESSEL.

The act of a master and a crew of a vessel in failing to provide artificial light, and in permitting a hatch to remain open, will not subject the vessel to libel by the administrator of a person who was employed in repairing the vessel by one having charge of the work, and who fell through the hatch and was injured.

H. M. Cake, for claimant.

Dan J. Malarkey, for libellant.

BELLINGER, District Judge. The deceased was injured while making certain repairs on the steamer by stepping or falling through a small hatch in the way, or near it, along which he was required to pass, the forward cover of which had been removed. It is alleged that the master and crew of the vessel negligently suffered and permitted this cover to be and remain off the hatch, and negligently failed to provide artificial light, the place being insufficiently lighted. These are the acts of negligence charged. It is alleged that the deceased was employed by the person who had charge of the work of repairs to assist therein. The rule is well established that a vessel in charge of charterers, stevedores, or other contractors is not liable to the employés of such persons for injuries, unless the vessel has relation by contract to the injured person, or owes him a duty arising out of the fact that it is being navigated; and I believe the rule of liability is extended to all cases where the injured person is engaged in some work that requires his presence where he is at the time, and the injury results from the neglect of some maritime duty on the part of the officers or crew, such as a duty necessary to be performed to enable the ship to receive her cargo, or to carry it in safety, or when the injury is the result of faulty navigation. But there is no duty on the part of the ship to provide light for the convenience of employés of contractors, nor to guard them against the risk resulting from an open hatch, referred to by Judge Benedict in *Gerrity v. The Bark Kate Cann* (D. C.) 2 Fed. 241, as "that common, and at most times necessary, feature of a ship deck while in port."

The exceptions to the libel are allowed.

GLENCOVE GRANITE CO. v. CITY TRUST, SAFE DEPOSIT & SURETY CO.

(Circuit Court, E. D. Pennsylvania. April 21, 1902.)

No. 65.

FORMER JUDGMENT—CONCLUSIVENESS.

Where, in an action in a state court to recover on a lien bond, plaintiff, a foreign corporation, was defeated because of its failure to produce the evidence required by statute of its right to do business and sue in such state, the judgment in such action is a bar to a recovery for the same

cause of action in a federal court, though the plaintiff there produces evidence that it had the right to do business and sue in such state at the time the former action was tried, which evidence was in its possession at the time of the trial in the state court.¹

Motion by Defendant for Judgment on Reserved Point Notwithstanding the Verdict.

Horace L. Cheyney and James J. Macklin, for plaintiff.
Lincoln L. Eyre, for defendant.

J. B. McPHERSON, District Judge. The questions presented upon the trial of this case were (with one exception) precisely those that were passed upon by the circuit court of appeals in the opinion reported in 113 Fed., at page 177. The defendant added nothing essential to the record that was then before the court of appeals, and the plaintiff offered one additional paper only, about which I shall speak in a moment. Since, therefore, the court of appeals has decided that the record then presented to that court disclosed a prima facie defense, and since the recent trial of the case before me did not explain or remove the apparent obstacle to recovery which the decision declared to exist, it seems to me to follow inevitably that the prima facies must prevail, and that the defendant is entitled to judgment. My own opinion was different, and, if I may say so respectfully, still is different; but, of course, I obey cheerfully the ruling of the appellate tribunal.

The defendant, therefore, is entitled to judgment on the reserved point, unless the paper to which I have referred as having been offered in evidence by the plaintiff ought to lead to a contrary conclusion. This was a certificate, dated February 18, 1897, from the office of the secretary of state of New York, and is as follows:

"State of New York, Office of the Secretary of State, Albany.

"It is hereby certified, that Glencove Granite Company, which appears from the papers filed in this office on the 18th day of February, 1897, to be a foreign stock corporation organized and existing under the laws of the state of Maine, has complied with all the requirements of law to authorize it to do business in this state, and that the business of such corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business.

"Witness my hand and the seal of the office of the secretary of state, at the city of Albany, this 18th day of February, 1897.

"[Seal of New York.]

J. M. Palmer, Secretary of State."

As is shown by its date, this certificate was in existence at the time of the trial in New York on December 7, 1899, and it was for failing to prove that such a certificate had been issued that the New York court decided that the granite company could not recover against the trust company upon the bond now in suit. Why the certificate was not produced at that trial does not appear in proof, nor is the reason material. In the view I take of the matter, the first point for consideration is not, what effect, if any, should the certificate be allowed to have in the present action? but, can the certificate be considered at all? Under well-settled principles of the law of *res judicata*, if the trial in

¹ See Judgment, vol. 80, Cent. Dig. § 1241.

New York was upon the merits, the judgment rendered there is conclusive, and nothing that was then in controversy, or that might have been put in controversy, can ever be re-examined in another suit between the same parties. As was said in *Dowell v. Applegate*, 152 U. S. 345, 14 Sup. Ct. 618, 38 L. Ed. 463:

"The judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented."

And in *The Haytian Republic*, 154 U. S. 129, 14 Sup. Ct. 995, 38 L. Ed. 930, the following statement of the rule was approved:

"An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense."

See, also, *Dimock v. Copper Co.*, 117 U. S. 566, 6 Sup. Ct. 855, 29 L. Ed. 994, and *Harshman v. Knox Co.*, 122 U. S. 317, 318, 7 Sup. Ct. 1171, 30 L. Ed. 1152.

Now, that the trial in New York was upon the merits is expressly declared by the circuit court of appeals, as will appear by the following quotation from the opinion:

"The finding that the plaintiff, a foreign corporation, had failed to show that it had procured the certificate required by law to authorize it to do business in the state of New York undoubtedly was a finding responsive to an issue tendered by the pleadings as between the Glencove Granite Company and the City Trust, Safe Deposit & Surety Company. Moreover, that finding went to the merits of the case. It related to a substantial matter. It sustained a defense which involved the rights of the parties. It went to the plaintiff's right of action."

This being so, I am of opinion that the certificate now under consideration, which undoubtedly might have been given in evidence at the trial in New York, and, if offered, would, with the other evidence, have required the court to enter judgment in favor of the plaintiff against the trust company, cannot be considered, or, if considered, be allowed now to have any effect whatever. It was a defense that might have been taken then, and is therefore now irrevocably gone. This particular paper is said to have been mislaid, and therefore unavailable at the trial in New York, but no reason is perceived or has been suggested why a duplicate could not have been obtained.

It is true that the court of appeals, in the concluding portion of its opinion, uses the following language:

"Again, if the statutory inhibition against doing business operates only on the remedy, and may be lifted if the delinquent corporation is able to procure, out of time, the issuance by the secretary of state of the required certificate, it may be competent for the plaintiff to show here that it obtained such a certificate since the former trial, or even before. Upon these questions we intimate no opinion."

This may be thought to intimate that such a certificate might still be admissible in spite of the New York judgment, but I do not so understand the court. Such an intimation would directly conflict with the previous declaration that the judgment was upon the merits, for

the effect of such a judgment must, of course, have been well known, and the express reservation of the court's opinion shows, I think, that something else must have been in mind. I see no escape from the conclusion I have just stated, namely, that, since the finding in New York was upon the merits of the case, no further inquiry concerning that subject can be had in the present suit.

It is therefore ordered that judgment be entered for the defendant on the reserved point, notwithstanding the verdict.

ERNST et al. v. AMERICAN SPIRITS MFG. CO. et al.

(Circuit Court, S. D. New York. April 28, 1902.)

REMAND—SEPARABLE CONTROVERSY.

Where it is doubtful whether or not there is a separable controversy, and citizens of the state are on both sides of the cause, it will be remanded.

Motion to Remand.

A. J. Dittenhoefer, for the motion.
Alexander & Greene, opposed.

LACOMBE, Circuit Judge. Waiving all consideration of the presence of Reeves as a plaintiff,—and this court does not find in the cases cited any sufficient ground for disregarding his presence,—we nevertheless have citizens of New York on both sides of the controversy. As was intimated upon the argument, it is a doubtful question whether or not there is a separable controversy. That being so, the proper course is to remand the cause.

DUDLEY et al. v. SANDERS MFG. CO.

(Circuit Court, S. D. New York. May 8, 1902.)

ATTORNEY AND CLIENT—ACTION FOR SERVICES.

In an action by an attorney to recover for services rendered under an express contract, where the evidence showed that defendant employed an attorney to perform services, and he deputed his partner to take the matter up, and he employed another attorney, and promised to pay him as remuneration one-half of the compensation he should receive, but there was no agreement shown between defendant and any of the parties to pay a specified compensation, the cause of action was not established.

James L. Bennett, for plaintiff.
Nichols & Bacon, for defendants.

WALLACE, Circuit Judge. In May, 1898, the defendant, being desirous of securing contracts or orders from the government of the United States for supplies required by the war department, employed Mr. Wilson, a son-in-law of its president, to assist in procuring them. Mr. Wilson was the law partner of Mr. Chadsey, and deputed him to take the matter up. Mr. Chadsey employed Mr. Mich-

ener, an attorney at law at Washington, and one of the law firm of Dudley & Michener, the plaintiffs, and promised to pay him as remuneration for his services one-half of any compensation he should himself receive from the defendant. Michener interested himself in behalf of the defendant, and interviewed the officers of the war department, and partly through his assistance the defendant was enabled to obtain contracts and orders for supplies during the summer and fall of 1868 aggregating in amount about \$97,000. There was no agreement between Chadsey and the defendant, or between Michener and the defendant, whereby the defendant was to pay a commission of 10 per cent. upon the amount of supplies furnished to the government, or for the payment of any specified commission or compensation. Chadsey may have expected to receive a 10 per cent. commission from the defendant, or an equivalent compensation, and may have so represented to Michener; but the evidence does not authorize the finding that he ever promised Michener that the latter's compensation should be one-half of a 10 per cent. commission, or any other specified amount. The defendant understood that Chadsey had employed Michener, and that Michener was acting in its behalf from time to time, pursuant to instructions from Chadsey; and also understood that Chadsey was to compensate Michener out of any fee or remuneration he should himself receive for the services rendered.

As the complaint proceeds upon the theory of an express contract by which the defendant undertook to pay to the plaintiffs one-half of a commission of 10 per cent., and not upon a quantum meruit, the cause of action is not established, and there must be a judgment for the defendant.

It is accordingly so ordered.

REVANS v. SOUTHERN MISSOURI & A. R. CO. et al.

(Circuit Court, S. D. New York. February 5, 1902.)

CORPORATIONS—SERVICE OF PROCESS.

Where the president of a foreign railroad corporation was resident in the state, and had an office therein, in which he performed his duties as such president, and had done so for many years past, the service in an action against the corporation arising without the state on complaint within the state was properly made upon such president.

Wilmot & Gage (Mr. Vanderpoel, of counsel), for complainant.

Dittenhoefer, Gerber & James (I. M. Dittenhoefer, of counsel), for one of the defendants.

THOMAS, District Judge. The bill is filed by a resident of the state of New York against the defendant the Southern Missouri & Arkansas Railroad Company for certain relief respecting its railroad, which is exclusively within the state of Missouri. The service of the bill was made upon Newman Erb, the president of such railroad company, who is a resident of the state of New York, and who has an office in such state, where he performs his duties as

president of such company, other than such duties as take him without the state. It is apparent that for some years past he has continuously acted as the president of such company within this state, and that he has an office in this state for that purpose. The cause of action arose without the state, the complainant resides within this state, and its president has an office and acts as the president of such company within this state. Under such state of facts, service was properly made upon the president, and so far forth the jurisdiction was properly acquired. *Steamship Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964. The question now is not whether the suit may be finally maintained, for reasons not at this time presented, but whether a proper service has been made to bring in the single company that now disputes the jurisdiction.

THE WILLIAM P. HOOD.

(District Court, D. Rhode Island. March 29, 1902.)

No. 1,083.

SALVAGE—AMOUNT OF AWARD.

Libellant's tug towed a schooner from a pier, near which coal pockets were burning, out into the stream. The service occupied but a few minutes, and was attended with no danger. There was evidence tending to show that the schooner was not in serious peril, and, having an engine, could have moved out by her own power. *Held*, that while the service was a salvage service, and the tug was entitled to better pay than for mere towage, an award of \$50 was sufficient compensation.¹

In Admiralty. Suit to recover for salvage services.

Matteson & Healy, for libellant.

Dexter B. Potter, for claimant.

BROWN, District Judge. This libel is for salvage services of the tug *Carrie A. Ramsey* to the three-masted schooner *William P. Hood*, in towing her into the stream from the Wilkesbarre pier, and from the vicinity of burning coal pockets, on the morning of December 18, 1900. The service occupied probably not more than 10 or 15 minutes, and was without the slightest risk, or even discomfort. The tug and her crew did nothing more meritorious or perilous than in the ordinary course of work in moving a schooner from the dock to the stream. The only question is as to the peril of the *Hood*, and whether, but for the assistance of the *Ramsey*, she would have been seriously damaged. I am of the opinion that the libellant has failed to show by a preponderance of evidence that the *Hood* was in serious peril, which was averted by the *Ramsey*. Had she remained where she was, the *Hood* would have been seriously damaged; but the claimant produced seven witnesses (two from the *Hood*, and five from the *Alice Maude*, which lay near the *Hood*, on the same side of the dock) who swore positively that the *Hood*, which was provided with an engine, moved under her own power. This evidence

¹ Salvage awards in federal courts, see note to 30 C. C. A. 280.

I cannot disregard, though there is direct evidence, with some circumstances, to the contrary. The master and crew of the *Alice Maude* had the better opportunity for observation, and some of them testified not only that the Hood moved, but that they assisted in moving her by shifting her lines. If the Hood moved once, she could move again, and escape the fire. The *Alice Maude*, however, was between her and the end of the dock; and, while it probably was not absolutely necessary for the Hood to get out into the stream, that it was the judgment of the mate in charge that she should be towed out is evident from his request to the master of the tug. Though he testifies that he thought it was simply a case of ordinary towage, I think the present case is of the general class of cases represented by *The Carondelet* (D. C.) 36 Fed. 714, wherein \$50 was allowed, and *The Bessie Whiting* (D. C.) 35 Fed. 79, wherein \$25 was allowed. While services of this character are entitled to better pay than ordinary towage, double or treble towage would ordinarily be sufficient, and extravagant claims for salvage in cases of this character should be discouraged.

I am of the opinion that the sum of \$50 is a liberal compensation in this case, upon the view which must be taken as to the preponderance of proof. However, as there was reasonable ground for the contention that the Hood had not moved, and was unable to move, and as no tender appears to have been made, I think the libellant is entitled to its costs. A decree may be presented accordingly.

JONES v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. May 8, 1902.)

No. 15.

INJURY TO EMPLOYE—NEGLIGENCE—EVIDENCE—JUDGMENT NON OBSTANTE VEREDICTO.

Where, in an action against a railroad company for negligence resulting in the death of an employé, the evidence disclosed the general conditions and surroundings of the place of the accident to be such as to reasonably admit of the inference that due care was not exercised by the company to provide for the safety of its employés at that point, and the question as to whether the deceased had knowledge of the situation, and appreciated the hazard he incurred in consequence, was fairly open to controversy, and no complaint was made of the instructions, defendant's motion for judgment notwithstanding a verdict for plaintiff should be denied.

S. Morris Waln and J. W. Westcott, for plaintiff.
John Hampton Barnes, for defendant.

DALLAS, Circuit Judge. The only questions which were raised in defense of this action were referred to the jury, with instructions which, if they should have been submitted at all, are not complained of. But it is insisted that a verdict for the defendant ought to have been directed. I cannot assent to this. The evidence upon the subject of defendant's negligence disclosed the general condition and surroundings of the place of the accident, including the means pro-

vided for stopping cars at the end of the trestle, to be such as to reasonably admit of the inference that due care was not exercised by the defendant company to provide for the safety of its train hands at that point; and the question whether Jones, who was killed, had knowledge of the situation, and appreciated the hazard he incurred in consequence, was fairly open to controversy upon the evidence, and was therefore for the jury's determination.

The amount of the damages, if any, to be awarded, was left to the jury, and it is not asserted that it was in any manner misled by the court. I do not think that its assessment should be disturbed.

The defendant's motion for judgment non obstante veredicto is denied. The plaintiff's rule for a new trial is discharged. Judgment for plaintiff will be entered upon the verdict.

TWEEDIE TRADING CO. v. JAMES P. McDONALD CO.

JAMES P. McDONALD CO. v. TWEEDIE TRADING CO.

(District Court, S. D. New York. March 29, 1902.)

CONTRACT—IMPOSSIBILITY OF PERFORMANCE—ACTS OF FOREIGN GOVERNMENT.

Libellant and defendant entered into a contract in the United States by which libellant agreed to make four trips with its steamship from Barbadoes to Colon, to transport laborers for defendant, which contracted to pay a stated sum for each trip. The contract, when made, was legal and valid where made, and also at the places of performance; but after two trips had been made a regulation of the colonial government of Barbadoes was promulgated forbidding the future embarkation of laborers, by reason of which defendant was unable to furnish any more for transportation. *Held*, that such fact, which did not affect the legality of the contract where made, did not constitute a defense to an action to recover the hire of the ship for the remaining voyages at the contract price.

In Admiralty. Action for breach of contract, and cross action to recover money paid thereunder.

Wheeler & Cortis, for the Tweedie Company.

Cary & Whitridge, for the McDonald Company.

ADAMS, District Judge. The first of these actions is for the recovery of \$8,400 as damages for breach of contract to furnish certain laborers to be carried from Barbadoes to Colon on the last of four consecutive trips, and for \$731.62 demurrage at Colon. The second action is for the recovery back of \$8,400, the amount paid in advance by the McDonald Company to the Tweedie Company to carry laborers by the third trip, for which it is claimed no services were rendered.

The controversies arose out of a contract made between the parties on the 23d day of April, 1901, the material parts of which are as follows:

"Second. The contractors hereby contract for the passage of about twenty-eight hundred (2,800) laborers to be taken from some safe port in Barbadoes where the steamer can always lie safely afloat, by the steamer Catania, to Colon; to be carried on four consecutive trips, with a minimum of seven hundred (700) passengers upon each trip."

"Sixth. The contractors shall be allowed a total period of twenty-four (24) hours at all ports in which to embark the laborers, at one or more ports of embarkation, on each trip; and at the port of destination the laborers are to go ashore, on arrival, in such manner as the authorities may direct."

"Ninth. The time allowed for debarkation shall be six hours after the arrival of the vessel at dock, or twenty-four hours after arrival if landed by lighters. The contractors shall not be liable for any demurrage which may be caused at any port of embarkation or destination after notification given to the agent, or after the arrival of the steamship at the port of embarkation, by reason of the fact that the condition of the sea may be such that the laborers can neither be embarked or disembarked, or by reason of the fact that the local authorities may fail to deliver to the contractors the necessary permits for embarkation or debarkation.

"Tenth. In full payment for the services so to be rendered, the contractors will pay the carrier eighty-four hundred dollars (\$8,400) per trip, and at the rate of twelve dollars (\$12) per capita for any excess over seven hundred (700) laborers carried, if the contractors desire to ship in excess of that number, and the carrier is lawfully empowered to carry such excess; such payment by the contractors to cover all charges whatsoever.

"Eleventh. Payments are to be made as follows: Eighty-four hundred dollars (\$8,400) upon the arrival of the Catania at Colon on her present trip, and eighty-four hundred dollars (\$8,400) upon her arrival at Barbadoes on each trip thereafter, until four trips have been paid for; the final service to be rendered without further payment, except for such laborers in excess of seven hundred (700) as may be carried upon any such trips. All payments to be made by the contractors at the office of the carrier in New York, on notification to the contractors by the carrier that the steamer has arrived at Colon or Barbadoes, as the case may be, and is in readiness to embark laborers.

"Twelfth. Demurrage, if any is incurred under this contract, shall be fifty (50) pounds British sterling for each day or fraction thereof.

"Thirteenth. The contractors are not to be liable for any expense for port, dock, navigation, or landing charges; and the contractors agree to hold the carrier free from any capitation or other tax upon the exportation or importation of laborers."

"Fifteenth. The carrier is to obtain any certificates or authority required by the law of Barbadoes in relation to the carriage of laborers or otherwise to fulfill the obligations of the carrier under this agreement."

"Seventeenth. Should the steamer at any time be quarantined at Barbadoes, the contractors, when notified that steamer is ready to receive them there, are to send the laborers out to the quarantine station, and there put them on board the steamer, thus avoiding any detention in quarantine; and for any such detention in quarantine over the agreed lay days, contractors to pay demurrage."

The facts in the case have been agreed upon in writing as follows:

"First. The Tweedie Trading Company (hereinafter called the "Tweedie Company") is a New Jersey corporation, with an office in New York City.

"Second. The James P. McDonald Company (hereinafter called the "McDonald Company") is a West Virginia corporation, with an office in New York City.

"Third. The Tweedie Company entered into an agreement with the McDonald Company, on the 23d day of April, 1901, at New York City, of which a copy is annexed to the pleadings.

"Fourth. At the time this agreement was entered into, the Catania, the vessel therein mentioned, was on the way from Puerto Rico to Colon, on the second of four intended consecutive trips, under an agreement between the same parties of earlier date, which was superseded and rescinded by the agreement of April 23d, as set forth in the recital of the said agreement.

"Fifth. The Catania sailed from Colon on the first voyage, under said agreement of April 23d, on April 25, 1901, and arrived at Bridgetown, Barbadoes, on the 3d day of May. According to the terms of the contract, the first payment of \$8,400 was made by the McDonald Company, at New York.

on April 26th, on being informed by the Tweedie Trading Company that the vessel had started on said first voyage; and the second payment of \$8,400 was likewise made on the 4th day of May, at New York, by the McDonald Company, on being informed by the Tweedie Company that the vessel had arrived at Barbadoes.

"Sixth. On arriving at Barbadoes, the captain at once sent a registered letter to the McDonald Company agent, informing him of the arrival of the vessel, and a note by messenger to the same effect, which reached him about 11 o'clock on May 3d. The Catania sailed at 6:30 a. m. on May 8th, and arrived at Colon on May 14th at about 11:30 a. m., and all passengers were disembarked at 2 p. m. of the same day. A copy of the statement of the McDonald Company's agent, dated May 7, 1901, is annexed and marked 'Exhibit 1.'

"Seventh. The vessel started from Colon on her second trip at about 11 a. m. on May 16th, having been delayed by lack of orders from McDonald Company, and reached the Barbadoes at about 1:30 p. m. on May 23d. The captain of the Catania served notice of his arrival on the McDonald Company's agent that afternoon, and at five o'clock on the following day, May 24th, the vessel started on its return trip to Colon. The third payment of \$8,400 was made on May 23d, at New York, by the McDonald Company, according to the contract, on notice that the vessel had arrived at the Barbadoes the second time. The Catania arrived at Colon at 6:35 in the evening of May 30th, and at once reported on shore that she was ready to unload. The McDonald agent, however, was not then at Colon. The Panama Railroad Company refused to allow the vessel to unload until the McDonald Company agent had arrived. He came to Colon as soon as possible, and reached there at eleven o'clock on May 31st, and at 2 o'clock on that day the passengers were all unloaded.

"Eighth. In the meantime a regulation of the colonial authorities in Barbadoes, acting under instructions of the foreign office of the British government, had been put in force, by which the British foreign office had forbidden future embarkation of laborers from the Barbadoes, by a decree published in the Barbadoes on the 24th day of May, before the sailing of the Catania; such decree to take effect on the following day. This decree was known to the captain of the Catania and to the McDonald Company agent, and materially hastened the sailing of the vessel, which went off on its second voyage with only 73 passengers. The agent of the McDonald Company did everything in his power to obtain a reversal of this decree, but was unsuccessful, and on the 31st day of May the order was confirmed and reaffirmed by a second telegram from the foreign office of Great Britain to the colonial authorities of the Barbadoes. The regulation is still in force in Barbadoes.

"Ninth. The McDonald Company agent cabled its New York office on the 31st day of May that the enactment of the above regulation had been confirmed, whereupon the McDonald Company on the same day wrote the Tweedie Company that the above-mentioned embargo had been confirmed. This notice was read over the telephone to the Tweedie Company, and then mailed to them, and was received on the 1st of June. Later a demand was made that the third payment of \$8,400 be returned.

"Tenth. The Catania remained at Colon until June 4th. She then proceeded to the Barbadoes, by order of the Tweedie Trading Company, where she arrived on June 12th, and gave the regular notice of arrival to the McDonald Company's agent. The Catania remained at Barbadoes until July 12th, when the vessel sailed to Puerto Rico to take on board a load of sugar for New York, after having notified the McDonald Company, in New York, that she was about to do so.

"Eleventh. No objection was ever made by the colonial authorities to the use of the Catania for carrying passengers on the ground of the vessel's lack of fitness for that purpose. Acting upon the letter of May 31, 1901, from Messrs. Cary & Whitridge, requiring the Tweedie Trading Company to provide the certificate 'required by the law of Barbadoes in relation to the carriage of laborers,' the latter company cabled the captain of the Catania to obtain such a certificate. Application was made for the same, and the cap-

tain informed that no such certificates were given, and a certified copy of an extract of the Barbadoes passenger act (1891) was furnished by the authorities. Said extract is annexed, marked "T, Ex. 12."

"Twelfth. The right is reserved to both parties to put in formal proof of the reason for the enactment of the British regulation above mentioned, provided a resubmission of the case with this additional evidence is desired by the Tweedie Trading Company. Should the court require any additional facts for a proper determination of the rights of the parties, they shall be stipulated, or, if not agreed upon, proved by evidence in the ordinary way.

"Thirteenth. Copies of correspondence are annexed, and admitted correct.

"Fourteenth. The British law, which is also the law of Barbadoes, is a fact in the case, which may be proved by reference to reports, and the submission of briefs by counsel.

The exhibits and correspondence alluded to in the agreement, where relevant, and the facts shown by them are not covered by the agreement, bear principally upon the question of demurrage; and it is not necessary to further allude to them in connection with the principal question, which is whether the facts in the case excuse performance on the part of the McDonald Company.

The contract was valid in its inception, both at the place of making and the place of performance, and was capable of being performed until an event intervened which was not in the contemplation of the parties when the contract was made. It seems to be settled that an impossibility of performance, arising from natural causes, in a case of this kind, cannot be recognized as a defense, but that one arising from a governmental act which would render performance illegal would be an excuse. It is contended here by the Tweedie Company, however, that the excuse cannot prevail, because, though performance was prevented by the law, such law, being foreign, was merely a fact, and the case should for that reason fall within the general rule. On the other hand, it is urged by the McDonald Company that the law of the place of performance governed the contract, and, as such law made fulfillment impossible, the contract was dissolved. The question really is, do the legal acts of the agents of a foreign government, which prevent the full performance of a contract of this character, control the rights of the parties? Contracting parties are subject to the contingencies of changes in their own law, and liable to have the execution of their contracts prevented thereby; but it is on the ground of illegality, not of impossibility. Prevention by the law of a foreign country is not usually deemed an excuse, when the act which was contemplated by the contract was valid in view of the law of the place where it was made,—*Pol. Cont.* 363; *Abb. Shipp.* (13th London Ed.) 755; *Carv. Carr. by Sea* (3d Ed.) § 255; *Clifford v. Watts*, L. R. 5 C. P. 577, 586; *Duff v. Lawrence*, 3 Johns. Cas. 162, 172; *Spence v. Chadwick*, 10 Q. B. 517, 530; *Jacobs v. Credit Lyonnais*, 12 Q. B. Div. 589,—and a fortiori when it was also then valid at the place of performance. It was intended that this contract should be performed. The law of the place of performance, in the absence of evidence of a contrary intention, ordinarily governs the incidents of a performance; but I do not think that the principle can be successfully invoked to relieve a party, otherwise liable, from the effect of such an interruption of performance as happened here. The McDonald Company urges that, by the terms of the contract,—referring to the ninth and fifteenth claus-

es,—the parties had the Barbadoes law in view, and that it should control in all respects. It is evident that the existing law there was in view so far as it affected the performance of the contract in the necessity for the obtaining by the vessel of the mentioned permits and certificates, but those clauses do not tend to establish that the parties intended that the shipowner should take the risk of a change in the law which would prevent any embarkation or carriage of the laborers whatever. The difficulty did not arise from the absence of the permits and certificates, which would, in the ordinary course, have been obtained by the steamer, if necessary.

The determination of the question involved adversely to the McDonald Company disposes of its claim for a return of the third payment.

It appears that some demurrage is due to the Tweedie Company by reason of the default of the McDonald Company to give the vessel the dispatch it was entitled to at Colon.

Decree for the Tweedie Company, with a reference to ascertain the amount of damages and demurrage. The libel of the McDonald Company is dismissed.

BARRY v. FRIEL

(Circuit Court, D. Nebraska. April 30, 1902.)

No. 435t.

1. BUILDING AND LOAN ASSOCIATION—LOAN—COMPUTATION OF AMOUNT DUE—PAYMENTS ON STOCK, ETC.

In ascertaining the amount due on a mortgage to an insolvent building and loan association, executed by one of its stockholders, the mortgagor's stock, or what he has paid thereon, either as payments, or as fines, dues, or penalties, should not be considered.¹

2. SAME—PREMIUMS.

Premiums paid by the mortgagor on account of his loan should be credited thereon, but without allowing him interest on the premiums.

3. DECREES—CONCLUSIVENESS.

A decree canceling a mortgage executed to an Illinois building and loan association by one of its stockholders, obtained in an action brought against the association and its receiver in a Nebraska state court,—notice of the suit being by publication, and neither the association nor the receiver having knowledge thereof, and no permission being given to make the receiver a party,—was not an adjudication, and did not bind a federal court in a subsequent action to foreclose the mortgage, brought by the receiver.

In Equity.

Greene, Breckenridge & Kinsler, for complainant.

L. E. Kirkpatrick, for defendant.

McPHERSON, District Judge. The Interstate Building & Loan Association of Bloomington, Ill., was incorporated under the laws of that state. In the circuit court of McLean county, Ill., at the suit of the state auditor against the corporation, a decree was rendered declaring the corporation insolvent, and appointing complainant herein the receiver, who by due proceedings was later on appointed by this court

¹ See Building and Loan Associations, vol. 8, Cent. Dig. §§ 62, 63, 66 [f, i].

as receiver. Defendant is both a stockholder, on account of which he paid dues, fines, and penalties, and a mortgagor or borrower, on account of which loan he has paid premiums and interest. This is a bill in equity to foreclose the mortgage, after ascertaining the amount due. What is the amount due? is the principal question in the case. And that is readily ascertained when the basis for making the computation is established. That the authorities are in conflict need only be stated; and it is no purpose of mine to discuss them, or to attempt to work out the differences, and show why the one rule is to control, and not the other.

I do not think defendant's stock, or what he has paid thereon, either as payments, or as fines, dues, or penalties, is entitled to enter into consideration of any question in this case. The capital stock is a trust fund. It is contributed by the stockholders on account of their holdings as stock. This trust fund is used, in whole or in part, for the payment of the debts of the corporation. After the debts are paid, then the stockholders are creditors of the corporation; and they will participate in the division of such trust fund according to their holdings, and the payments on account of stock. But such division of the trust fund or capital stock will be when the corporate debts are paid, and will be done under the supervision of the courts in Illinois. And in no event can defendant now and in this court participate in sharing of the trust fund created by the capital stock. This cannot be allowed. But a very different question arises as to defendant now and here being credited with the premiums he has paid on account of his loan. The agreement was that defendant have certain money. This he received. He agreed to pay a stipulated rate of interest. In addition, he agreed to pay a premium for this money. This was done by making a bid therefor, which was accepted. The money thus borrowed was to be, and was, secured in part by a real estate mortgage, and also by pledging his corporate stock. Taking defendant's bond and his mortgage and his stock and the by-laws of the corporation all together, and it is reasonably plain that the premium on the loan was to be met, or nearly so, by the increase in value of the stock. So that if the concern had been kept going, and the management anything like honest, the stock, in a given time, would have matured, and, when matured, would have been surrendered to the company, and defendant's bond and mortgage delivered to him as canceled. At least, this is the theory, and it is said by experts that it will work out. Of course, as every one knows, and as many admit, it does not generally work out. A few years ago this craze broke out, and took hold of the ignorant people from one end of the country to the other. And many apparently (and otherwise) intelligent people were made to believe that both the stockholder and the borrower could easily get rich; that immense profits could be made by taking money from the left-hand pocket and putting it in the right-hand pocket. And such fallacies were, no doubt, believed by defendant herein. But that it was a fallacy does not, of itself, entitle defendant to relief. But I find that the spirit of the agreement was that defendant's premium was to be met by the growth of his interest in his stock. The corporation being insolvent, his stock will never mature. Whatever his stock is worth, if anything, will be paid to him.

But this is no reason why he should not be credited with his premiums on his loan. I think the recent case by the circuit court of appeals for the Fourth circuit, of *Coltrane v. Blake*, 113 Fed. 785, is sound, and, as much as any other case, leads me to the conclusion I adopt.

But I cannot agree, as the special master finds, that defendant should be allowed interest on the premiums thus paid. My conclusions are that the defendant should be charged with the following sums: (1) The amount of his bond; (2) the interest thereon for the full time. But not with any fines. He will be credited: (1) With all interest by him paid; (2) the premiums by him paid. These payments will be applied according to the principle of partial payments. An attorney's fee will be allowed, according to the contract. Complainant brings this action as though a trustee. *Dodge v. Tulleys*, 144 U. S. 451-456, 12 Sup. Ct. 728, 36 L. Ed. 501.

After the insolvency of the corporation, and the appointment of the receiver by the Illinois court, the defendant herein, as plaintiff, brought an action in a Nebraska state court against the corporation and the receiver, resulting in a decree canceling the mortgage now in suit. Notice of the suit was by publication, and neither the corporation nor the receiver had any knowledge of the suit, and neither appeared. And there was no permission given to make the receiver a party. That decree was not an adjudication, and is not binding on this court in this action.

There will be a decree for the plaintiff on the basis of this opinion.

COPPER KING, Limited, v. WABASH MIN. CO. et al

(Circuit Court, S. D. California, N. D. April 10, 1902.)

No. 36.

1. MINES—WATERS—RIGHT TO DIVERT.

Where a mining company has acquired the exclusive right to the use of the water of a certain creek in working its mines, another company has not the right, in developing its mine by means of a shaft near the creek, to cut off and divert the waters flowing into it.

2. SAME—SHAFT—NOTICE OF CONSEQUENCES.

Where a mine owner, at the time of commencing a shaft which cut off the waters flowing into a creek which another mine owner had acquired the exclusive right to use, was cautioned by the latter against cutting off such water, he is bound with notice of the consequences of his acts.

3. SAME—TEMPORARY INJUNCTION—WHEN GRANTED.

Where, in an action to restrain defendants from diverting water from a creek which plaintiff has acquired the exclusive right to use, the rights of the parties are in dispute, and a temporary injunction will work less hardship than its refusal, it should be granted.

In Equity. On application for temporary injunction.

Myrick & Deering, F. P. Deering, M. K. Harris, and William A. Harris, for complainant.

F. H. Short and W. E. Dunn, for defendants.

WELLBORN, District Judge. The bill alleges, in substance, among other things, that complainant is the owner of the Copper King mine,

situated on a natural water course known as "Dog Creek," in the county of Fresno, state of California, and for a number of years has been and now is engaged in the business of developing and working said mine and extracting ores therefrom, and for more than five years has diverted and appropriated for said business and domestic purposes all of the water of said creek, and by virtue of said appropriation has acquired an exclusive right to the use of said water, and that the whole of it is necessary for the business and purposes aforesaid, and, if complainant should be deprived thereof, its said business would be ruined and destroyed; that one of the defendants, the Wabash Mining Company, about June 20, 1901, commenced to sink a vertical shaft in the ground, about 50 feet from the channel of said creek, and that said shaft is 5 feet wide, 7 feet long, and 60 feet deep, and that by means thereof defendants have diverted and are diverting the water of said creek, and, unless restrained by this court, will continue to divert the same, and thereby cause the complainant great and irreparable injury. The prayer of the bill is that defendants be enjoined from maintaining said shaft, or otherwise diverting said water, etc. Defendants have filed an answer, denying all of said allegations, except as to the sinking of a shaft, and concerning that matter they admit that said Wabash Mining Company, at the time alleged in the bill, did sink a shaft of the dimensions therein stated, about 130 feet from the channel of said Dog creek, but claim that said shaft was sunk in the development of a mining property of said company, situate across the channel of said Dog creek, and deny that by means of said shaft, or at all, respondents have diverted any of the waters of said creek. Various affidavits have been filed, in support of both the bill and answer, by the respective parties. I shall not undertake to review in detail these affidavits, but will simply state, so far as may be necessary to the pending hearing, the conclusions which I have drawn therefrom.

A temporary injunction in this suit would probably work less hardship than its refusal, and, where the title to property is in dispute, such a circumstance is often, on preliminary hearing, determinative in favor of the complainant. 1st Beach, Inj. §§ 307, 308; High, Inj. (3d Ed.) § 1508; Hicks v. Compton, 18 Cal. 206; Real Del Monte Consol. Gold & Silver Min. Co. v. Pond Gold & Silver Min. Co., 23 Cal. 83; Hunt v. Steese, 75 Cal. 620, 17 Pac. 920; Paige v. Akins, 112 Cal. 401, 44 Pac. 666. Defendants, however, contend, among other things, that the shaft complained of was sunk, by the Wabash Mining Company, one of the defendants, in good faith, for the lawful development of its mining claim, without knowledge, actual or constructive when begun, that it would encounter subterranean water, and therefore, if they were to concede all the other matters in dispute, the sinking of said shaft was not, nor will its maintenance be, an actionable injury,—citing Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Cross v. Kitts, 69 Cal. 217, 10 Pac. 409, 58 Am. Rep. 558; Ditch Co. v. Crane, 80 Cal. 184, 22 Pac. 76; Painter v. Water Co., 91 Cal. 82, 27 Pac. 539; Railroad Co. v. Dufour, 95 Cal. 616, 30 Pac. 783, 19 L. R. A. 92; Sullivan v. Zeiner, 98 Cal. 351, 33 Pac. 209, 20 L. R. A. 730; Hargrove v. Cook, 108 Cal. 79, 41 Pac. 18, 30 L. R. A. 390;

Gould v. Eaton, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201; Ocean Grove v. Asbury Park, 40 N. J. Eq. 450, 3 Atl. 168; Trustees v. Youmans, 50 Barb. 319; Haldeman v. Bruckhardt, 45 Pa. 521, 84 Am. Dec. 511; Appeal of Lybe, 106 Pa. 634, 51 Am. Rep. 542; People's Gas Co. v. Tyner, 131 Ind. 280, 31 N. E. 59, 31 Am. St. Rep. 435; and Wheatley v. Baugh, 64 Am. Dec. 721.

This contention requires present settlement, because, if true in fact and sound in law, it forbids a temporary injunction. Is the contention true in fact? W. H. Daily, who for three years has been complainant's managing agent, states in his affidavit that, about the time the shaft was begun, he cautioned the superintendent in charge of said work not to cut the complainant's water flowing in Dog creek. This statement is uncontradicted, and, if the sinking of the shaft has produced the consequences against which the defendants, as shown by said statement, were cautioned, they are chargeable, I think, with prior notice of said consequences. With reference to the law of said contention, two things are to be observed:

First. It is a singular coincidence that, in *Trustees v. Youmans*, supra, strongly relied on by defendants, the court announces a doctrine subversive of their contention, namely:

"If the defendant's excavation or ditch drew the water from the plaintiff's spring, instead of stopping the flow of water from the defendant's land to such spring, then the defendant would be liable in this action." *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Dickinson v. Canal Co.*, 7 Exch. 282; *Cooper v. Barber*, 8 Taunt. 99.

Second. While the diversion of water from a well or spring owned by one person, through its percolation into a shaft sunk on the land of another person, may be *damnum absque injuria*, such is not the case where, to the prejudice of antecedent rights, a like diversion is made from a natural water course. This distinction seems to be recognized in the following extract:

"This is, in fact, the pioneer case of its kind, so far as this court is concerned. There have been cases here in which injunctions were sought to prevent owners of land from digging or trenching or tunnelling in their own premises, upon the ground that they were cutting off the subterranean sources of springs and streams, and they have been uniformly decided in accordance with the accepted doctrine as to rights in percolating waters,—the doctrine which defendants contend is applicable here. Those most nearly in point and most relied on are *Hanson v. McCue*, 43 Cal. 178, *Railroad Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92, and *Gould v. Eaton*, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201. But in none of these cases was there any evidence comparable to the evidence here of an underground stream. *Gould v. Eaton*, supra, comes nearer to this case than either of the others; but in that case it was found by the lower court that the portion of the water as to which there was any controversy was merely feeding the stream by percolation. And even in that case, which went as far as any case has ever gone in favor of the doctrine that percolating waters are a part of the soil and belong to the owner of the land, it was conceded, if not decided, that no water can be abstracted from a surface stream by tunneling beneath it, notwithstanding the water must pass from stream to tunnel by percolation or filtration through the soil. In this case there is a great amount of evidence tending to prove that the defendants could not take any material quantity of water out of their land without abstracting an equivalent amount from the surface stream; the reason being that the water of the surface stream would necessarily sink into the loose porous material underneath to

fill the voids occasioned by the drawing off of the water from below of *Los Angeles v. Pomeroy*, 124 Cal. 634, 57 Pac. 585.

The reason for the distinction probably is that the waters of: or well supplied by percolation are not subject to statutory appropriation or adverse user, while those of a water course may be acquired in either way.

In *Railroad Co. v. Dufour*, supra, the court holds, quoting the syllabus:

"Where a spring is fed solely by percolating waters, which seep from swamp or wet land surrounding the same, and not by any stream of water, there is no water at such spring to which the right can be acquired, either by statutory appropriation or by adverse use; no action will lie in favor of one who has collected the water at the spring in a reservoir, and transmitted it by a pipe for use, against one who has diverted the water from the reservoir on his own land for irrigating domestic use."

In *Trustees v. Youmans*, supra, the court says:

"The evidence tends to show that some of the plaintiffs had used the land in question for a period of more than 20 years, so that the plaintiffs claim a prescriptive right to its continued use in the same manner as they have heretofore enjoyed such use. But reason and authority are hostile to such a claim as applied to this case. There can be no prescription where there is no adverse user, and there can be no adverse user without creating a right of action. Now, the use of the plaintiffs in this case is of no sense adverse or hostile to the defendant. It took nothing which he had any right to use or enjoy. It gave him no right of action. He was in no respect injured, nor was any right of his encroached upon. The defendant could not prevent the plaintiffs from using the waters that ran from the springs. Consequently no grant could be presumed from his silence or acquiescence. *Chasemore v. Richards*, 2 Hurl. & N. 183; *Dexter v. Aqueduct Co.*, 1 Story, 393, Fed. Cas. No. 3,864; *Dickinson v. Canal Co.*, 7 Exch. 282; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 852; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Frasier v. Brown*, 12 Ohio, 311; *Haldeman v. Bruckhardt*, 45 Pa. 519, 84 Am. Dec. 511."

Most, if not all, of the cases cited by defendants relate to wells or springs, although in *Chasemore v. Richards*, supra, a leading English case, the diversion was of percolating waters supplying a river. That decision, however, cannot be followed here, since the supreme court of California has declared the law differently, and as follows, quoting from the syllabus:

"The owners of the soil cannot divert any part of the underflow of subterranean water forming part of the stream, whether such water would or would not reach the surface stream of the river; nor can he divert percolating water, if the effect would be to cause the water of the stream to leave its bed to fill the void caused by such diversion." *City of Los Angeles v. Pomeroy*, supra.

A temporary injunction against the acts covered by the restraining order previously made herein will be issued upon complainant's giving a bond in the sum of \$2,500, with good security, to be approved by the clerk of this court.

In re NACHMAN et al.

(District Court, D. South Carolina. May 5, 1902.)

BANKRUPTCY—EXAMINATION—CRIMINATING TESTIMONY.

The provision of Const. U. S. Amend. 5, that no person shall be compelled in any criminal case to be a witness against himself, may be invoked by a witness under examination in bankruptcy proceedings; Bankr. Act 1898, § 7, providing that no testimony given by bankrupt on examination concerning conduct of his business shall be offered in evidence against him in any criminal proceeding, being a protection only against use of his testimony in a prosecution in a federal court.¹

In Bankruptcy.

Mitchell & Smith, for petitioning creditors.
Holman & Legare, for bankrupt.

BRAWLEY, District Judge. G. H. Nachman, a member of the firm of Nachman Bros., which firm had been adjudicated as a bankrupt in involuntary proceedings, being under examination as a witness, certain questions were asked him to which the counsel for said witness objected, on the ground that the answers thereto might tend to incriminate the witness. The referee overruled the objection, and upon request of counsel has certified the same to me for settlement, the reference having been adjourned awaiting an opinion on the question submitted.

Upon the part of the creditors it is contended that, under section 7 of the bankrupt act, it is the duty of the bankrupt to submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, and that the provision contained in said section that "no testimony given by him shall be offered in evidence against him in any criminal proceeding" is a sufficient protection against any prosecution and penalty, if under such examination, and under the compulsion of this section, he should give criminating testimony. The case of *Mackel v. Rochester*, 4 Am. Bankr. R. 1, 42 C. C. A. 427, 102 Fed. 314, is relied upon in support of this view. This case, which was decided in the circuit court of appeals for the Ninth circuit, would seem to be entitled to more weight than the conflicting views of several of the district courts, but, inasmuch as it is not of controlling authority, I feel compelled to examine the question, and to decide it according to my own views. The witness relies on that portion of the fifth amendment of the constitution which declares that "no person * * * shall be compelled in any criminal case to be a witness against himself." In *Counselman v. Hitchcock*, 142 U. S. 562, 12 Sup. Ct. 198, 35 L. Ed. 1110, it is said: "It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases, but it is not limited to them. The object was to insure that a person should not be compelled, in acting as a

¹ See Bankruptcy, vol. 3, Cent. Dig. § 400.

witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard," and the principle is well established that this constitutional provision, which has long been regarded as one of the safeguards of civil liberty, should be applied in a broad spirit, to secure to the citizen immunity from every kind of self-accusation. A literal construction would deprive it of its efficacy. I am compelled to conclude, therefore, that the constitutional provision may be invoked by witnesses under examination in bankruptcy proceedings, and the only question for decision is whether the proviso that "no testimony given by him shall be offered in evidence against him in any criminal proceeding" deprives him of his constitutional right. This proviso can have no other effect than to protect him against the use of his testimony in any prosecution in the courts of the United States. It would be no answer to a prosecution which might be instituted in the state courts, which are not created by acts of congress, and which prescribe their own rules of proceedings independently of congress. Testimony thus given under compulsion might be used to search out other testimony which could be used against him, a clue to which might not otherwise be obtained, and the immunity provided by the constitution would thus be frittered away. No act of congress can deprive a citizen of the privilege afforded by the constitution unless it supplies a complete protection from all perils against which the constitution was intended to provide. Section 7 of the bankrupt act, cited above, does not provide such complete protection. The supreme court of the United States in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, held that the provision of the interstate commerce act which was in the following words, "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding," did not afford complete immunity, and hence did not take away the privilege of the witness to refuse to answer questions which would tend to incriminate. This interstate commerce act was thereafter amended, it is supposed, in consequence of this decision, and it was provided in the amended act that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence, documentary or otherwise, before said commission"; and the case of *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, arose under this amended act. This case is cited by the circuit court of appeals of the Ninth circuit in the support of its conclusion that the witness should be compelled to answer. It will be found upon examination that the provision of the bankrupt act is almost identical with that provision of the interstate commerce act which was under review in the case of *Counselman v. Hitchcock*, and that case seems to be of more controlling authority than *Mackel v. Rochester*, which relied upon the later case of *Brown v. Walker*. It may be well contended that the object designed to be accomplished by section 7 of the bankrupt act, which requires the bankrupt to

submit to an examination concerning the conduct of his business, will be defeated, if the witness is thus permitted to refuse to testify concerning his dealings with his creditors and others, and such undoubtedly is the unfortunate result; but it is for the congress to provide, if it can, against such contingencies. It might well provide that a witness who refused to answer questions concerning his business should be deprived of his right to a discharge. That would be within its right. The courts cannot deprive a citizen of the constitutional right invoked by him for his protection upon any consideration of inconvenience or for the purpose of administering what it may regard as a salutary and useful law.

My conclusion, therefore, is that a witness, under examination before a referee in bankruptcy, cannot be compelled to answer a question the answer to which he claims will tend to criminate him, and the case will be remanded to the referee, with directions to conduct the examination in conformity with this opinion.

In examining the testimony sent up by the referee, it appears that the witness Nachman was examined concerning the contract made with the Virginia-Carolina Chemical Company, a copy of which was offered in evidence and admitted, and to the question, "Did you send them a list of the notes and collaterals up to the 1st of May, 1901?" objection was made by counsel for the bankrupt on the ground that this contract makes it a breach of trust, practically, for Mr. Nachman not to have sent in his funds to the Virginia-Carolina Chemical Company. It does not appear that the witness objected to answering this question on the ground that it would tend to criminate him, and the witness answered that he "sent them a list of the parties to whom he had sold the fertilizers"; and to the further question, "Did you say this list is the correct list sent by you?" counsel for bankrupt likewise objected on the ground that the answer to the question would tend to incriminate the witness. The court does not perceive that the answer to this question would have the effect to incriminate the witness. It would infer from the general course of the examination that the counsel for the bankrupt apprehended that the tendency of these questions might lead to an inquiry as to what the witness had done with funds collected upon these notes, and as the conversion of such funds would be a breach of trust on the part of the witness, and subject him to a prosecution for larceny under the state law, counsel endeavored to prevent any inquiry whatever concerning the conduct of the witness in his relation to the Virginia-Carolina Chemical Company. Under the provisions of section 7, the witness is compelled to give testimony concerning his business, and he cannot interpose objections which will shut out all light whatever from his creditors. The constitutional immunity can only be invoked to protect him from answering a question the answer to which might subject him to prosecution. In the further conduct of the examination the referee is directed, whenever a question is propounded, to notify the witness that he is not required to answer it if the answer would tend to criminate himself. It is only questions of that nature that he may refuse to answer. He is not to be permitted to interpose his constitutional

immunity as a shield to every inquiry concerning his business, nor is his counsel to be permitted to delay or obstruct inquiry by making objections for him. If he claims that the answer to any question propounded would tend to criminate him, he cannot be compelled to answer. This claim, to be effective, should be made by the witness himself, but the referee should notify him that a statement that such answer would tend to criminate him would, if false, subject him to a prosecution for perjury, as would any other false oath.

In re MINER.

(District Court, D. Oregon. May 6, 1902.)

No. 267.

1. BANKRUPTCY—ASSIGNED CLAIMS.

Assignment of a claim against bankrupts entitles the assignee to share in the bankrupt estate, if the assignor is estopped from making the same claim.

2. SAME—RIGHT TO DISCHARGE—FALSE STATEMENTS.

Discharge will not be denied a bankrupt because he made oath that he had no money deposited anywhere, when he did have \$8 deposited with one to whom he was indebted.

3. SAME.

Bad faith, depriving a bankrupt of right to discharge, will not be inferred because of slight understatements and overstatements of debts, counteracting each other.

4. SAME.

A bankrupt does not lose right to discharge because stating that he has no interest in real estate and no policies of insurance, though he has a contract to purchase land, on which a payment equal only to accrued interest has been made, and which a vendor has a right to cancel for non-performance, and though he has a life policy on which he has made one payment, it not appearing to have any surrender value.

In Bankruptcy.

Cotton, Teal & Minor and W. C. Bristol, for creditors.

Lionel R. Webster, for Mrs. Miner.

BELLINGER, District Judge. Mrs. Miner presents a claim against her husband's estate for \$2,000. This claim is made up of money loaned by claimant's father, Smith, to the bankrupt, merchandise furnished, and a note of the bankrupt to a third party paid by said Smith, upon which an account was stated in 1898, showing \$2,000 due Smith, which claim and account was assigned to the claimant. The existence of these items of account, and the settlement between Smith and the bankrupt, two years prior to the proceedings in bankruptcy, are substantially proved. The creditors now object to the allowance of this claim—

"Because it affirmatively appears from the affidavit and papers composing the proof of said claim that the same are contradictory as between themselves, and that such moneys as were received by the said Miner were not received from the claimant, but from one G. W. Smith, though as to such parts of said claim as proved which are not moneys, that those parts were also received from one G. W. Smith; because it appears from Exhibit A, at

tached to said claim, that \$500 thereof is for a note to one Mrs. Uerling, and which as appears from said proof was paid by G. W. Smith, and there is no showing by said proof by the said Jennie Miner how title to this item of the claim passed to her; because there is nothing to show in said proof the relation of debtor and creditor between the bankrupt and his wife, Jennie Miner; because there is nothing to show in respect of said claim any agreement upon the part of the bankrupt to repay the moneys, the subject of claim, to Jennie Miner, his wife; because it affirmatively appears that certain items of said claim are made up of negotiable notes which the said Miner had given to third persons, or had become liable thereon, and the title to his said note to a third person, paid by said Smith, has not passed to Jennie Miner by sale or gift and indorsement; because there is no proof that the bankrupt received the money in trust for his wife, or in any other manner than for the use and benefit of either or both of them; because it appears from the testimony heretofore taken in this cause and given by the bankrupt that such moneys as are now the subject of said claim were moneys obtained and used by the bankrupt in his business for the joint use of both himself and his wife."

These objections are technical in their character. It is immaterial that the money payments entering into the claim were made by Smith, or that notes included in it were paid by Smith. If Smith had a claim, it was his to bestow upon his daughter if he saw fit. Nor is the assignment from Smith to the claimant required to be of technical strictness. All that need be shown as to that is such a state of facts as will estop Smith from making the same claim made by his daughter. Smith does not himself make any claim on account of these items, and his assignment to the claimant of the demand due him on the account stated is in the record. As to the proof that the relation of debtor and creditor existed between claimant and the bankrupt, that relation is shown by the proof of the particular demand, nor is it necessary that an agreement to pay by the bankrupt should be shown. The law implies such agreement, and, furthermore, the statement of account is sufficient proof of it. It is not required to be proved that the bankrupt received the money in trust for his wife. What he received, he received from Smith. He was Smith's debtor in the amount claimed, and this debt Smith gave to the claimant in a distribution he was making of property among certain of his children. If Smith had not made this gift, but had presented his claim on the statement of account between himself and the bankrupt, none of these objections would have been made. The condition of the estate and the rights of the other creditors are not in the least affected by the fact that the claimant, and not her father, is permitted to prove this debt. The findings and decision of the referee expunging this claim are reversed and set aside, and the claim is allowed.

Various objections are made to the bankrupt's discharge, involving charges against him of perjury, failure to keep books, and of concealing property. It is specified that in the bankruptcy proceedings he made a false oath in alleging that he had no money on deposit in any banking institutions or elsewhere, save the sum of \$52 in the hands of the sheriff of Klamath county; the fact being that he had \$7.76 in the hands of A. Schilling & Co. in San Francisco. Among the creditors making this objection are A. Schilling & Co., whom the bankrupt could not have hoped to deceive by the alleged false oath,

and in whose hands he could not have hoped to conceal this money. The bankrupt, being indebted to the firm, may have thought, as is argued in his behalf, that their right to apply the balance on deposit on their debt left him nothing there. These circumstances and the amount in question preclude even a suspicion of a sinister purpose on the bankrupt's part in omitting to mention this \$7.76 in the alleged false oath. It is also specified that the bankrupt made a false oath before the referee that he kept a check book showing the amounts of money kept by him with said A. Schilling & Co., etc.; that he made false oaths as to his indebtedness to various persons, omitting to schedule a debt of \$532.70 and one of \$60; that he stated that he owed one Henry Hilp \$167, whereas in truth he owed him only \$121.83; that he stated his liability to Rosenthal, Feeder & Co. to be \$143.93, whereas it was in fact greater than this sum by \$88.46; that he gave his liability to Adams-Booth Company at \$124.23, while the debt was \$159.97; that he stated that he owed Anna Uerling \$500, when he owed her nothing. Where the bankrupt stated his indebtedness to be less than it in fact was or omitted to schedule a debt it is charged that this was done to conceal his true financial condition from his creditors; where the statement complained of overstated the debt or included what was not a debt no motive is assigned for the alleged false oath. Where there are understatements and overstatements of debts counteracting each other, no inference is warranted that the bankrupt was trying to misrepresent the condition of his estate. There could be no adequate motive in concealing obligations which the bankrupt owed. This could not smooth his way through bankruptcy, and would, if the deception was successful, prevent his discharge as to the omitted creditors. Moreover, a debt, however scheduled, would necessarily be proved at the amount actually due. No possible advantage could be gained by misstating the amount of the debt listed, and there is nothing in the facts stated to warrant an inference of bad faith against the bankrupt.

With reference to the check book, it is explained in the bankrupt's behalf that instead of a check book he kept some blank checks, with which he preserved a memorandum of the checks drawn. The discrepancy between the averment and the fact is not material.

It is charged against the bankrupt that in his petition and schedule he stated that he had no right, title, or interest in any real estate, whereas he had an interest in real estate to the extent of \$265, and that he stated he had no policies of insurance, except a policy on the merchandise in the store, although he has a policy in a life insurance company payable to his estate. As to the real estate, it seems that he had a contract of purchase of a house and lot upon which he had paid \$265, being not much more than the accrued interest on the purchase price. The bankrupt testifies that in his opinion the property was not his, since it was not paid for, and it was at the option of the party with whom he had contracted to cancel the contract of purchase for nonfulfillment on the bankrupt's part. This seems to be the fact. In any event, such an opinion would not be unnatural under the circumstances, and it is a sufficient explanation of the omission complained of, when taken with the fact that the

contract of purchase was left by the bankrupt with his papers. As to the life insurance policy the bankrupt testifies that only one year's premium had been paid, and he did not know whether it had any surrender value or not. In order to justify an inference of fraud from this omission, it ought to be shown that there was reasonable ground for the belief that the policy had a surrender value, and it does not appear that in fact it had such value.

It is charged that the bankrupt valued his merchandise at \$3,500, and that there is merchandise of the value of \$1,614.14 unaccounted for. No other goods are found or traced than what was turned over to the trustee. The conclusion that merchandise has not been accounted for is reached by figuring up the merchandise account from different ledgers. It is one of the specifications against the bankrupt that he failed to keep books of account of the amounts of merchandise purchased and sold by him. If he did so fail to keep books, then the conclusion reached from the books as to a definite amount of merchandise unaccounted for is of no value. It seems that he did keep books of merchandise bought and sold. As to the reliableness of these books, that is another question. From these books the objecting creditors figure goods unaccounted for as stated, amounting to above \$1,600, upon the basis of the invoice taken, while the bankrupt's attorney figures from the same books that the goods accounted for are of a value more than \$1,700 greater than the estimate given by the bankrupt.

Upon such consideration of these objections as I have been able to give them, and of the other objections not specifically referred to, I conclude that the facts and circumstances relied upon by the objecting creditors are not sufficient to justify an inference of purpose on the part of the bankrupt to misrepresent the true condition of his affairs or to secrete any of his property. In my opinion, the objections are not sustained by the evidence, and the findings and order herein will conform to this opinion.

SWARTS v. SIEGEL et al.

(Circuit Court, E. D. Missouri, E. D. May 3, 1902.)

No. 4,426.

1. BANKRUPTS—WHO ARE CREDITORS—ACCOMMODATION MAKERS OF NOTES—PREFERENCES.

Bankr. Act, § 60a, provides that "a person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors." *Held*, that an accommodation maker on a note executed by a bankrupt was not in any sense a creditor of the bankrupt, where he had not been called on to pay the note, or any part thereof, and could not be deemed to have received a preference merely because the bankrupt had, within four months of the adjudication, paid the amount of the note to the payee.

2. SAME—PREFERENCES—RECOVERY BACK—PERSONS LIABLE.

Bankr. Act, § 60b, providing that "if a bankrupt shall have given a preference within four months before the filing of the petition * * *

and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person," does not authorize the recovery from an accommodation maker on a note executed by the bankrupt of a payment made thereon by the bankrupt of his own accord, and not at the instigation or with the knowledge of such accommodation maker, though the payment was made within four months of the adjudication.

Sale & Sale, for plaintiff.

Stewart, Cunningham & Eliot, for defendants.

ADAMS, District Judge. This is a demurrer to a complaint in an action at law instituted by the plaintiff, as trustee of the estate of Siegel-Hillman Dry Goods Company, in bankruptcy, against Ferdinand Siegel and Joseph Siegel. The demurrer is addressed to the second and third counts of the complaint, but, as all the legal questions raised can be determined by consideration of one of them, attention will be confined to the demurrer to the second count. The count charges, in substance, that the bankrupt corporation was indebted to the Corn Exchange Bank of New York upon divers notes, aggregating the sum of \$20,000; that these notes were signed by the bankrupt and by the defendants as co-makers, and, so signed, were delivered to the Corn Exchange Bank in settlement of the indebtedness of the bankrupt corporation; that the defendants were mere accommodation makers for the bankrupt; that, within four months before filing of a petition in bankruptcy against the corporation, it, while insolvent, paid the Corn Exchange Bank the amount due on the notes. There is no allegation that the bank knew of the insolvency of its debtor at the time it received the money, or that it had any cause to believe that it was intended by such payment to give any preference, within the meaning of the bankruptcy act. Neither is there any allegation showing that the defendants had any participation in, or knowledge of, the payments, as and when they were made to the bank. There is, however, an allegation that the bankrupt, at the time of making the payments to the bank, intended that the same should operate as a preference to the defendants. The legal conclusion is then pleaded that the payments so made were made for the benefit of the defendants, and operated to give them a preference, and were so intended by the bankrupt, and that the defendants at the time of receiving such preference had reasonable cause to believe that by such payments to the bank it was intended to give them a preference, within the meaning of section 60b of the bankruptcy act. This suit was accordingly brought to recover from the defendants the amount so paid by the bankrupt to the Corn Exchange Bank.

Stripped of verbiage, the question presented, as I understand it, is whether the payment by an insolvent debtor, within four months of bankruptcy, of notes on which the debtor is liable as principal, entitled the trustee of his estate in bankruptcy to recover the amount of payments so made to the creditor, from an accommodation maker of the notes, who was jointly liable to the creditor for their pay-

ment, but who neither participated in, nor knew of, the payment when made to the creditor, on the sole ground that the necessary result of such payment was to relieve the accommodation maker from his obligation to pay the same.

Section 60a of the bankruptcy act defines a preference thus:

"A person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The important and essential element of a preference is that a creditor of the bankrupt must have obtained a greater percentage of his debt than any other of such creditors.

Subdivision "b" of section 60 provides for recovering preferences from the persons who have received them. It is as follows:

"If a bankrupt shall have given a preference within four months before the filing of the petition * * * and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

It is not contended in this case that the person actually receiving the preference, or his agent acting therein, is liable for the same; but it is contended that the persons "benefited thereby," namely, the accommodation makers, have received a preference, and are therefore liable to restore the same to the trustee in bankruptcy. I am unable to agree with plaintiff's counsel in their contention that the accommodation maker of a note, before he is called upon to pay the same, is in any sense a creditor of the principal debtor, within the meaning of the bankruptcy act, until he has paid the obligation, or some part of it, for which he has become surety for the debtor. He has no claim or demand against the principal in the note, and certainly he has none provable in bankruptcy. This, I think, is the necessary meaning of section 57, subd. "i," of the bankruptcy act. It is as follows:

"Whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part, he shall be subrogated to that extent to the rights of the creditor."

In other words, an accommodation maker must discharge the undertaking, in whole or in part, before he can be subrogated to the rights of the creditor. Until he discharges such undertaking in whole or in part, the principal debtor owes him nothing; and he cannot, within the purview of the bankruptcy act, occupy the attitude or assert any rights of a creditor against the estate of the bankrupt. If such is the case, he clearly ought not to be subjected to the obligations imposed upon creditors, as such, in other provisions of the act.

From the foregoing legislative construction, as well as from common learning with respect to the nature of the contract and obliga-

tion of a surety, I conclude that no liability can rest against these defendants on the ground that they, as creditors of the bankrupt corporation, have received a preference from the corporation.

The foregoing conclusion might dispose of the demurrer under consideration, as the theory of the complaint undoubtedly is that the defendants occupied such a position with respect to the bankrupt that they, as creditors of the bankrupt, had received a preference, within the meaning of section 60, supra, by reason of the payment made to the Corn Exchange Bank. But the argument took wider scope, and was based largely upon the following proposition: That a transfer of property to "any one" of the creditors might be recovered back, not alone from the creditor who received the transfer, but from any other person who might have been incidentally "benefited thereby." This contention necessarily requires a construction to be placed upon the language employed in section 60, subd. "b." As I understand the provisions of the bankruptcy act (section 60a, supra), it is only a creditor of the bankrupt who may receive any preference. The act, in all its provisions, clearly contemplates this. Section 60a, in defining what a preference is, in substance says that it must enable one creditor to get a greater percentage of his debt than any other creditor of the same class. Section 57, subd. "g," dealing with the same subject, provides as follows: "The claims of creditors who have received preferences shall not be allowed," etc. Section 60, subd. "c," in language, provides "that if a creditor has been preferred, and afterwards in good faith gives the debtor further credit," etc. All of these sections, taken together, to my mind clearly indicate that congress intended to limit the class of persons to whom preferences might be made to creditors of a bankrupt only. Section 60, subd. "b," neither changes the elements of a preference as defined by subd. "a," nor does it enlarge the class which may be preferred. It simply provides for the recovery of the preferential payments from a person who may have been preferred, and is predicated upon the existence of a preference as defined in the preceding subdivision. It superadds, however, as a condition to the right of recovery, knowledge, or, rather, reasonable cause to believe, on the part of the recipient of a preference, that the payment to him was intended by the bankrupt to be such a preference. The language relied upon by plaintiff's counsel as enlarging the class of recipients of preferences so as to include accommodation makers or indorsers of the bankrupt's paper, before legal liability is fixed against them, is as follows:

"If a bankrupt shall have given a preference [as defined in subdivision "a"], and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The language thus employed does not in terms purport to enlarge the class which might be the recipients of unlawful preferences. That matter is fixed and determined in the preceding section. *"If * * * the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe," etc.* This language

seems to have been employed for the purpose of subjecting any creditor, who may have received or been benefited by a preference, to liability for return of preferential payments,—not if he who actually or manually received it alone had knowledge that a preference was intended, but if he or any one else acting for him had such knowledge. The words underscored above, instead of enlarging the class of recipients of unlawful preferences, seem to have been inserted, *ex industria*, to bind any creditor who may have received such preference to any knowledge which his agents had of the bankrupt's intention, and were intended to impute that knowledge to the benefited creditor himself. The final words of the section, which provide for recovering the amount of the preferential payment from "such person," obviously refer to such person as might, under the law, have received a preference, and who either actually received it, or was benefited thereby, namely, a creditor of the bankrupt.

The foregoing, in my opinion, presents a correct analysis, and shows the true meaning of the sections of the law in question. To hold that an accommodation maker of the commercial paper of a bankrupt, against whom no liability was fixed, and who was at the time of the institution of the proceedings in bankruptcy in no manner a creditor of the bankrupt, and who never became such, was so incidentally benefited by the payment of the notes by the principal debtor, with which he had nothing to do, and which he could not prevent, as to subject him to liability to the trustee because of such payment, would, in my opinion, be an unwarranted perversion of the provisions of the bankruptcy act. It would eliminate all those carefully inserted provisions qualifying and defining what is a preference within the meaning of the act, and would work a palpable injustice. The conclusion thus reached is, in my opinion, fortified by a consideration of the provisions of the bankruptcy act of 1867, and adjudications thereunder. Section 35 of that act provides as follows:

"If any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, * * * makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally,—the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, * * * having reasonable cause to believe such person is insolvent, and that * * * payment, pledge, assignment or conveyance is made in fraud of the provisions of this act,—the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited."

Section 39 of the act of 1867 is, in part, as follows:

"If any person who being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer of money, or other property, estate, rights or credits, or give any warrant to confess judgment, or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are, or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent by such disposition of his property, to defeat or delay the operation of this act," shall be deemed to have committed an act of bankruptcy, "and if such person shall be adjudged a bankrupt, the assignee may recover back the money or other

property so paid, conveyed, sold, assigned, or transferred contrary to this act: provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended and that the debtor was insolvent."

Without analyzing the foregoing provisions of the act of 1867, it is at once observed that their scope with respect to preferences is much broader than is found in the act of 1898. The class who might have received a preference is not, in terms, limited to creditors, but specifically comprehends any person who is under any liability for the bankrupt. Any payment or transfer of money or property by an insolvent with the intent to give a preference to his creditors, or "to any person or persons who are or may be liable for him as indorsers, bail, sureties or otherwise," or with intent "to defeat or delay the operation of the act," was by section 39 made an act of bankruptcy, and, by the same section, entitled the assignee to recover the amount thereof. The particular features to which I wish to attract attention are those which contemplate, in direct and positive terms, the contingency of preferences being given to persons under any liability for the bankrupt, or to persons liable for him as indorsers, bail, sureties, or otherwise, and also to that provision permitting recovery from the persons receiving preferences when the same were made in fraud of the provisions of the act. There were certain adjudications under the act of 1867 holding, in substance and effect, that, even under the broad and comprehensive provisions of that act, recovery could not be had against an indorser or surety under facts and circumstances similar to those involved in the present case. In the case of *Thomas v. Woodbury*, Fed. Cas. No. 13,916, it was held by the United States district court of Maine (Fox, J.), that the payee and indorser of a note paid by the insolvent maker to the holder, in the usual course of business, within four months of bankruptcy of the maker, was not chargeable with taking or receiving a preference, where the indorser neither received the money, nor actually procured, suggested, or aided its payment, even though he knew the maker was insolvent. To the same effect, also, is the case of *Singer v. Sloan*, Fed. Cas. No. 12,899, decided by this court (Treat, J.). So far as I am aware, in all the cases decided by the district courts under the act of 1867, in which an indorser was held liable to restore money to the assignee in bankruptcy, it was because he had actively procured the payment to be made, or actively participated in the receipt of the money or property from the bankrupt's estate in such a way and manner as to constitute a fraud upon the provisions of the bankruptcy act. Such is the effect of the following cases: *Ahl v. Thorner*, Fed. Cas. No. 103; *Sill v. Solberg* (C. C.) 6 Fed. 468; *Scammon v. Cole*, Fed. Cas. No. 12,432; *Id.*, 12,433; *Cookingham v. Morgan*, Fed. Cas. No. 3,183. Accordingly I think it may be safely said that even though the cases relied upon by plaintiff's counsel might have been authority for holding an indorser or surety to liability under the act of 1867, whereby a transfer to any person under liability for the bankrupt, as indorser, bail, surety, or otherwise, in known fraud of the act, might be recovered from the person receiving it or to be benefited by it, they afford no

authority for recovery against such person under the present bankruptcy act, which contains no provision in terms avoiding the preference to the person under liability for the bankrupt, such as indorser or surety, and which contains no provision for recovery of money paid in known fraud of the act. Moreover, I am persuaded that congress, by eliminating the provisions just referred to from the present act, and doing so with full knowledge of all the provisions of the act of 1867, manifested a clear intention not to subject indorsers or sureties to the liability now sought to be enforced against them under the facts of the present case. The present bankruptcy act, as is well known, was distinctly a compromise measure. For a long time before its enactment, congress had under consideration bills and amendments relating to bankruptcy legislation. They had for years received critical consideration in congress, and after much discussion there, and much general public debate, the present act became a law. Its provisions in relation to preferences, and the right of recovery of the same from a creditor only, must be treated, in the light of the former more drastic act, and in the light of the facts just alluded to, as the deliberate expression of the legislative will; and accordingly no interpretation should be put upon the same which would impute uncertainty to the legislative mind on this subject, and certainly no interpretation ought to be indulged which would embody in the present act any of the provisions of the act of 1867 industriously omitted by congress.

The foregoing observations are made with special reference to the case in hand, wherein it appears that the defendants, as sureties for the bankrupt, had no knowledge of, or participation in, the payment of the debt by the bankrupt to the creditor, and are not intended to express any opinion upon a question which might arise in case the surety had officiously interfered to procure the payment of the debt in order to secure his own immunity. Such facts might or might not create a liability against him on grounds unnecessary now to be discussed.

Attention is called by counsel for plaintiff to the case of *Bartholow v. Bean*, 18 Wall. 635, 21 L. Ed. 866, and it is claimed that that case is controlling of the one now before the court. A careful consideration of it, however, convinces me that it has no applicability. The point in judgment in that case was whether the fact that a creditor who received payment of his debt at a time and under circumstances constituting a preference, within the meaning of sections 35 and 39 of the act of 1867, could escape liability therefor on the sole ground that there was an indorser on his paper, against whom liability was fixed. It was contended by the defendant that he was compelled to receive payment when tendered by the principal debtor, or lose recourse over against the indorser, and for that reason that he was not liable to return the preference to the assignee in bankruptcy. The suit against Bartholow was based on the charge that he had received a preference, and had received money in fraud of the bankruptcy act. The court held that a refusal of payment by the creditor under such circumstances would not have discharged the indorser,

and that was the only question in judgment. In the opinion, however, the court took occasion to say:

"The statute, in express terms, forbids such preference, not only to an ordinary creditor of the bankrupt, but to any person who is under any liability for him; and it not only forbids payment, but it forbids any transfer or pledge of property as security to indemnify such persons. It is, therefore, very evident that the statute did not intend to place an indorser or other surety in any better position in this regard than the principal creditor, and that, if the payment in the case before us had been made to the indorser, it would have been recoverable by the assignee."

So far, it seems to me, the court based its observation upon that peculiar provision of the act of 1867 forbidding preferences to any person who is under any liability for the debtor; but the court goes on as follows:

"If the indorser had paid the note, as he was legally bound to do, when it fell due, or at any time afterwards, and then received the amount of the bankrupt, it could certainly have been recovered of him."

Such is undoubtedly true both under the old law and the present law, because, under such circumstances as are disclosed in the case, the indorser would have been the creditor of the bankrupt. The court then goes on as follows:

"Or if the money had been paid to him directly, instead of the holder of the note, it could have been recovered, or if the money or other property had been placed in his hand to meet the note, or to secure him, instead of paying it to the bankers, he would have been liable."

In the last-mentioned observation the court, in its hypothesis, makes the indorser an active participant in securing the payment of the debt in order to relieve him from liability; and accordingly, under the provision of the act of 1867, he was liable, because he was a person under liability for the bankrupt, who had received a preference by receiving an amount of money sufficient to exonerate him from liability. I fail to find in this decision anything whatever which disturbs the conclusion hereinbefore reached in the present case. The court there was dealing with a case under a different statute, invoking a different provision from the one now found in the present bankruptcy act, and, in its hypothetical cases, assuming a state of active participation by the indorser, resulting in a direct pecuniary benefit to him. The conclusion reached by the supreme court of Rhode Island in the recent case of *Landry v. Andrews*, 6 Am. Bankr. R. 281, 48 Atl. 1036, relied upon by plaintiff's counsel, was not the result of any independent reasoning by that court, but was based upon what it, in my opinion, improperly interpreted *Bartholow v. Bean*, *supra*, to teach, and therefore has no persuasive influence.

For the reasons hereinbefore given, the demurrer to the second and third counts of the petition must be sustained.

In re GUTMAN et al.

(District Court, S. D. New York. May 8, 1902.)

1. BANKRUPTCY—POSSESSION OF PROPERTY.

The trustee being vested with the title of bankrupt as of date of the adjudication (Bankr. Act 1898, § 70), and possession of his property being then constructively in the bankruptcy court, the mortgagee of bankrupt, who thereafter takes possession of the mortgaged property, does not get legal possession, and no right of his is invaded by the trustee taking possession.¹

2. SAME—INJUNCTION AGAINST ACTION IN STATE COURT.

A court of bankruptcy, under the power given it by Bankr. Act, § 2 (15), and General Order 12, cl. 3 (32 C. C. A. xvi, 89 Fed. vii), to stay proceedings in a state court, will enjoin action against the trustee, where it is clear the taking by him of bankrupt's property from plaintiff was not wrongful, as alleged, and continuance of the action will embarrass the administration of the estate.²

In Bankruptcy. Motion by trustee for injunction against action in state court.

Blumenstiel & Hirsch, for the motion.

David E. Grossman, opposed.

ADAMS, District Judge. This is a motion upon a petition by Robert A. Inch, formerly receiver and now trustee of the bankrupt estate, to restrain the prosecution of an action brought against him in a state court by Morris D. Kopple. The action is for the recovery of \$800, damages alleged to have been caused to the plaintiff by the wrongful taking and carrying away from his possession of certain chattels which the plaintiff alleges were mortgaged to him on the 27th day of December, 1901, to secure a loan, and thereafter duly taken possession of by him under the terms of the mortgage. The action was not brought against Inch in his official capacity, but merely demanded a personal judgment.

The defendant seeks the protection of this court upon the allegation that he took possession of the property by virtue of his appointment as receiver by this court, and that leave of this court has not been obtained to sue him. He also alleges that the alleged mortgagee consented that the receiver should take possession of the property and sell the same, provided that it realized more than the amount of the claim of \$800, and the fund should be subject to a lien for that amount. The petitioner also alleges that the property realized more than the stipulated amount, was turned over by him as receiver, and now held by him as trustee subject to the order of the court. The plaintiff in the action opposes the motion, denying the consent as alleged.

The fact that the petitioner was a receiver of a court would not ordinarily afford him immunity for a tortious act, such as is alleged here (*Curran v. Craig* [C. C.] 22 Fed. 101; *Barton v. Barbour*, 104

¹ See Bankruptcy, vol. 6, Cent. Dig. § 193 [e].

² Restraining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575.

U. S. 126, 134, 26 L. Ed. 672; Beach, Rec. § 654); and even if he were sued for his official acts, being a federal receiver, his contention that leave of court should first have been obtained could not be sustained (24 Stat. 552, c. 373; 25 Stat. 433, 436, c. 866; *Railway Co. v. Cox*, 145 U. S. 593, 601; 602, 12 Sup. Ct. 905, 36 L. Ed. 829). But the statutes which permit such actions without leave of court provide that they should be subject to the general equity jurisdiction of the court in which the receiver was appointed, so far as the same shall be necessary to the ends of justice. The question here is whether the petitioner is entitled to invoke the equity powers of a bankruptcy court upon the facts as presented.

It appears that Gutman and Wenk were adjudicated involuntary bankrupts on the 4th day of January, 1902. On the next day the plaintiff Kopple took possession of the mortgaged property. The loan was not due at the time, and the justification for the act was alleged to be found in a clause in the mortgage to the effect that the mortgagee might take possession of the property at any time if he should deem the security afforded by the mortgage unsafe or at any risk, and sell the property according to law. It is evident that Kopple did not obtain legal possession of the chattels by his act. At the time of the filing of the petition and the adjudication in bankruptcy, the possession was in the bankrupt, and the trustees, to be subsequently appointed, became vested with the title of the bankrupt as of the date of the adjudication (Bankr. Act 1898, § 70). The filing of the petition was in effect a caveat to all the world, and an attachment of all the bankrupt's property (*In re Vogel*, 7 Blatchf. 18, 20, Fed. Cas. No. 16,982; *Bank v. Sherman*, 101 U. S. 403, 406, 25 L. Ed. 866; *Mueller v. Nugent*, 7 Am. Bankr. R. 224, 22 Sup. Ct. 269, 46 L. Ed. —; *In re Krinsky* [D. C.] 112 Fed. 972), and the property was constructively in the possession of the court when the plaintiff's alleged possession was obtained. It would seem clear that, as the plaintiff had no right of possession, there was no invasion of any of his legal rights, and that no cause of action really exists against the petitioner in the matter. It was the duty of the receiver to take possession of all the bankrupt's property, and it is now in the custody of this court, where such claim as the plaintiff may have upon the property will be enforced. Section 720 of the Revised Statutes, prohibiting the granting of injunctions to stay proceedings in any court of a state, expressly excepts "cases where such injunctions may be authorized by any law relating to proceedings in bankruptcy." Under the act of 1898, among the powers specifically given to the court of bankruptcy are (section 2): "(15) Make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." And by clause 3 of the twelfth general order (32 C. C. A. xvi, 89 Fed. vii) it is provided: "Applications * * * for an injunction to stay proceedings of a court or officer of the United States or of a state shall be heard and decided by the judge" (*White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183); and it seems to be the clear intent of the act that the administration of the bankrupt estate by the bankruptcy courts should not be un-

duly interfered with. Ordinarily, where the receiver of the court has merely general directions to take into his possession the property of the bankrupt, and there is a claim that he has taken the property of a third person, the court, in conformity with general principles, would leave him to answer in any proper forum for his individual acts (*Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; *McNulta v. Lochridge*, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796; *Central Trust Co. v. East Tennessee, V. & G. Ry. Co.* [C. C.] 59 Fed. 523; *High, Inj.* § 298; *Hale v. Bugg* [C. C.] 82 Fed. 33); but where it appears without dispute, as it does here, that the third party cannot possibly have any legal rights to be established by the litigation in the state court, and the result of permitting it to be continued would not only suffer an injustice to the receiver, but indirectly tend to embarrass this court in administering the estate, the equitable powers of the court should be exercised, both for the prevention of the injustice and to protect the court's full jurisdiction (*Dietzsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497; *Chapman v. Brewer*, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83; *Garner v. Bank*, 16 C. C. A. 86, 67 Fed. 833; *James v. Trust Co.*, 39 C. C. A. 126, 98 Fed. 489; *Mueller v. Nugent*, supra).

Motion granted.

In re ED. W. WRIGHT LUMBER CO.

(District Court, W. D. Arkansas, Texarkana Division. April 30, 1902.)

1. BANKRUPTCY—EXECUTION OF MORTGAGE.

A debtor who, knowing that he is insolvent, executes a deed of trust to secure a creditor on a pre-existing debt, commits an act of bankruptcy, within Bankr. Act, § 8a, par. 2, providing that acts of bankruptcy by a person shall consist of his having "transferred while insolvent any portion of his property to one or more creditors with intent to prefer such creditors over his other creditors," and this irrespective of whether the creditor knew, or had reasonable ground to know, that the bankrupt intended to prefer him.

2. SAME—PREFERENCES.

Bankr. Act, § 60a, provides that a person shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property the enforcement of which will enable any creditor to obtain a greater percentage of his debt than other creditors of the same class. A bankrupt owed a bank \$1,945, and claimant \$940. The bank was threatening suit, and the bankrupt's father procured claimant to execute to the bank a demand note for the amount of the bankrupt's debt to it, and also two accommodation notes for \$1,000 each, to enable the bankrupt to take a trip to recuperate his failing health. To secure the bank debt of \$1,945, and his debt to claimant for \$940, and the accommodation notes, the bankrupt executed a deed of trust on his property for claimant's benefit. *Held*, that claimant had received a preference, and would have to surrender the mortgage.

Intervention of A. L. Alphin for \$1,945 as a preferred claim.

Snead & Powell, for A. L. Alphin.

T. E. Webber, for the trustee.

ROGERS, District Judge. Prior to November 13, 1901, Ed. W. Wright, doing business under the firm name of the Ed. W. Wright Lumber Company, was insolvent. The Eldorado Bank held a claim against him, in the form of overdrafts, for \$1,945. He was also indebted to the claimant, A. L. Alphin (who was a stockholder and director in said bank), in the sum of \$940, which had been past due for several months. The Eldorado Bank, through counsel, was vigorously pressing its claim for collection and threatening suit. Ed. W. Wright himself was in ill health, and his father had come to his rescue in order to manage the business of the company. Ed. W. Wright made out a pencil statement of his condition, showing his solvency, and placed it in the hands of his father, John C. Wright, and requested him to go to Eldorado and see Mr. A. L. Alphin, and see if he could get the money. (This statement shows the liabilities to be about \$7,500, and assets \$12,000, whereas the liabilities were over \$14,000.) This the father did, and the result of this interview was that Mr. Alphin executed to the bank his demand note for the amount of Ed. W. Wright's indebtedness, and delivered to him his accommodation notes at 60 and 90 days for a thousand dollars, which Ed. W. Wright, it is stated, expected to use in making a trip to Hot Springs in the effort to recuperate his health. The 60 and 90 day notes were given because Alphin could not spare that amount of cash from his business at that time, being engaged in buying cotton. To secure the bank debt of \$1,945, and his own debt of \$940, and the thousand dollar notes, Ed. W. Wright executed a deed of trust to E. O. Mahoney, as trustee for A. L. Alphin, upon all his personal property. Before the transaction was entered into, Ed. W. Wright's father informed the claimant, Alphin, that his son owed the bank the \$1,945, and that the Ruston Bank had a mortgage on the machinery of E. W. Wright for \$2,500. The deed of trust from E. W. Wright to E. O. Mahoney, in trust for Alphin, shows that all the personal property described in the mortgage was already incumbered. This mortgage the claimant, Alphin, did not demand as security, but it was offered by the bankrupt through his father.

It is now insisted that neither the bank nor Alphin had reason to believe that Ed. W. Wright was insolvent. I cannot assent to this view of the testimony. It is not reasonable to ask the court to believe that Ed. W. Wright had no more knowledge of his business than to suppose that his indebtedness was only one-half of what it really was. It may be, and it is probable, that the father of the bankrupt did not know that he was insolvent. For the purposes of this case it is immaterial whether he did or not. He was the agent of his son, and the representations that he made to the claimant, Alphin, were made at the request of his son. The court is of opinion that the son knew that the statement his father made was not approximately correct. Indeed, it is shown by the proof, by the father of the bankrupt, that, if he had failed to get the money to pay off the Eldorado Bank from the claimant, Alphin, the mill would have been immediately shut down; so that it is not altogether clear, by any means, that the father of the bankrupt did not himself know that his son was in failing circumstances. The bankrupt knew of his insol-

vency, and executed this mortgage to secure the pre-existing indebtedness of the Eldorado Bank which had been assumed by the claimant, Alphin, and also the pre-existing indebtedness of Alphin himself. The execution of this mortgage was therefore an act of bankruptcy, being in direct violation of section 3a, par. 2, of the bankrupt law, which is as follows:

"Sec. 3a. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portions of his property to one or more of his creditors with intent to prefer such creditors over his other creditors. * * *

If it be said that the testimony shows that the bankrupt did not intend to prefer claimant, the answer is that he was insolvent, and he knew it, and he must be held to have intended that which was the necessary consequence of his act. He cannot be heard to say that he did not intend to do a thing when the necessary and logical consequence of his act was to do that very thing. It is not necessary, therefore, in order that the execution of this mortgage be an act of bankruptcy, that the claimant, Alphin, knew, or had reasonable grounds to believe, when he accepted the mortgage, that the bankrupt intended to prefer him over other creditors. Section 60a of the bankrupt law is as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The word "transfer" is defined in section 1, par. 25, as follows:

"Transfer shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

That section of the bankrupt law (60a) has been twice construed by the supreme court of the United States. In *Pirie v. Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, Mr. Justice McKenna made use of this language at page 444, 182 U. S., and page 908, 21 Sup. Ct., 45 L. Ed. 1171:

"'Transfer' is defined to be not only the sale of property, but 'every other mode of disposing of or parting with property.' All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished,—a preference enabling a creditor to obtain a greater percentage of his debt than any other creditors of the same class."

And this section (60a) was also construed in *Wilson v. Nelson*, 193 U. S. —, 22 Sup. Ct. 74, 46 L. Ed. —, 7 Am. Bankr. Rep. 142, in which Mr. Justice Gray discusses the proper construction of this statute, and discriminates between the bankrupt law of 1898 and the previous bankruptcy acts, and specifically holds that it is not necessary that the bankrupt should intend to give a preference; it is sufficient

if the effect of the enforcement of the transfer will be to enable any one of the bankrupt's creditors to obtain a greater percentage of his debt than any other of his creditors of the same class; and he expressly declines to follow *Wilson v. Bank*, 17 Wall. 473, 21 L. Ed. 723, *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568, and *Bank v. Warren*, 96 U. S. 539, 24 L. Ed. 640, which, in effect, held that intent to prefer was necessary under the bankrupt act of 1867, because, he says, they have no application under section 60a of the bankrupt act of 1898. It is clear to my mind, therefore, that the transaction between Alphin and Wright operated as a preference to Alphin, and that his claim cannot be probated against the estate until the preference is surrendered; that is to say, he must surrender his mortgage in order to become a general creditor.

The action of the referee in this case is affirmed, and an order will be entered to the effect that if the said A. L. Alphin shall surrender the deed of trust hereinbefore referred to within 10 days his claim be allowed for the full amount, \$3,880.62, and if he refuse to surrender the mortgage within the time above specified his claim be disallowed in toto.

KIBLER v. BROWN.

(Circuit Court, W. D. Missouri, C. D. March 21, 1902.)

No. 2,251.

BILL BY ASSIGNEE—ALLEGATIONS AS TO ASSIGNMENT—VARIANCE.

A bill averring that "E. G. Church & Co." sold to plaintiff all their right of action, claim, and demand against third parties was not supported by an assignment executed by E. G. Church alone.

James T. Montgomery, for complainant.

William S. Shirk, for defendant.

PHILIPS, District Judge. The theory of the complainant's bill in this case is that, as the assignee of E. G. Church & Co., he is entitled to an accounting against the defendant, receiver of the First National Bank of Sedalia, Mo., on account of certain tax bills pledged by Church & Co. to said bank as security for moneys to be advanced to Church & Co. to prosecute and carry out their contract with the city of Sedalia for paving certain streets. It is not alleged what amount of money was thus advanced by the bank to Church & Co. under this agreement, but it is alleged that the aggregate amount of such tax bills so turned over to the bank was \$62,718.91, face value. It is quite inferable from the bill itself, as well as from the evidence in the case and the conduct of the parties themselves, that it was understood that the pledgee was authorized to collect and use the tax bills in payment of the indebtedness of the pledgor to the bank. The bill contains this allegation:

"And he charges and avers that the said defendant now has in his possession a large sum of money, besides many tax bills in process of collection, arising out of the collection of said tax bills, over and above the amount required to pay off and discharge all sums of money and the interest thereon.

advanced to the said E. G. Church & Co. as aforesaid, to wit, the sum of eight thousand dollars."

The prayer of the bill is:

"That the defendant pay over to this plaintiff all sums of money, and for whatever sum may be found due, owing, and not paid to the said E. G. Church & Co., and that he may have a further judgment that the said Deweese [who has been succeeded in the receivership of said bank by the above defendant, Brown] deliver to this plaintiff all tax bills in his hands remaining yet uncollected, and received by him as receiver of such bank, and for all sums of money which may have been received by the said W. A. Latimer [who was the receiver prior to Deweese, and prior to July or August, 1898] and the defendant on account of said tax bills since the same came into his hands."

The bill, as showing a right of action in this complainant, alleges that:

"On the 28th day of September, 1900, the said E. G. Church & Co., for a valuable consideration, transferred, set over, and sold to this plaintiff all their right of action, claim, and demand against the First National Bank, and against the receiver thereof, for whatever sum might be due, owing, and unpaid them by said bank by said Latimer, or by Deweese as receiver, and also whatever tax bills which they, or either of them, had received, and yet remained uncollected."

This allegation was denied by the answer. To support the right of action in this complainant, he offered and read in evidence the following instrument of writing:

"For value received, I hereby sell, assign, and transfer to Louis Kibler, of Sedalia, Missouri, all the special Third and Seventh and Fifth street paving tax bills remaining in the hands of the receiver of the First National Bank of Sedalia, Missouri, after paying all indebtedness due said bank from Church and Company on account of said paving.

"[Signed]

E. G. Church.

"Signed and dated at Tatahulcapa, Republic of Mexico, this 28th day of Sept., 1900."

This proof does not support the allegation of the bill that the complainant is the assignee of E. G. Church & Co. It is only an assignment by E. G. Church, and would only have, as between the parties litigant, the effect of vesting in the complainant the individual interest of E. G. Church. It is nowhere alleged in the bill that E. G. Church & Co. was composed solely of E. G. Church. It is true that the witness Meyers, on the part of the complainant, in response to the question as to who he represented in his conversations with the cashier of the bank and the receivers, and by whose authority he went to see those parties, testified that when he went to see Mr. Thompson, the cashier, and Mr. Latimer, the receiver, of the bank, he represented E. G. Church & Co., at their request, and that in his other visits to Mr. Latimer and to Mr. Deweese, receivers, he went at the request of Mr. Kibler, the complainant; and he then volunteered the statement that the contracts for paving the streets were let by the city to E. G. Church, J. Peavey, and E. A. Berry, and that, before the work was completed, Peavey and Berry sold out their interest in the contracts to Church, who was authorized by them to continue the business of the firm of E. G. Church & Co. But Peavey and Berry, the admitted members of

the firm of E. G. Church & Co., are not parties to this suit, and are not before this court, and would not be concluded by any decree this court might make in this suit. There is nothing on the face of the bill to conclude them, and nothing to prevent Peavey and Berry from asserting their interest and rights in the contract in question. In other words, under the written assignment, which is the muniment of the complainant's right, and which is a clear departure from the allegations of the bill, he represents nothing but the individual interest of E. G. Church in the contract and tax bills. The court could give him no decree turning over to him any tax bills pledged by E. G. Church & Co., without splitting up the cause of action, and undertaking, in the absence of the other members of the firm of E. G. Church & Co., to determine what aliquot proportion the complainant, as an assignee of Church alone, has in the entire property. It is evident, therefore, that there is an entire failure of proof under the allegations of the bill to entitle this complainant to the relief sought.

For this reason the bill will be dismissed without prejudice.

BLOOMINGDALE v. EMPIRE RUBBER MFG. CO.

(District Court, E. D. New York. February 18, 1902.)

BANKRUPTCY—GOODS OBTAINED BY FRAUD.

One from whom a bankrupt obtains goods on time, on false representation that they were to fill an order, when the bankrupt had no order, the goods being turned over to secure a bondsman of the bankrupt in another matter, and being secreted, is entitled thereto, the whole transaction being a fraud.

Hamilton Anderson, for trustee.

Lyon & Smith, for respondent.

THOMAS, District Judge. The bankrupt bought of the Empire Rubber Manufacturing Company, respondent, rubber hose, usable for fire purposes, invoiced at \$2,950, and procured credit for 60 days, upon the representation that it was to fill a bid "with a corporation that requires sixty days"; that he had "succeeded in getting contract on the basis of your [respondent's] samples." This was about the middle of March, 1900. Before the hose was delivered, the bankrupt, or his authorized agent, advised respondent over the telephone that the hose was for the department of parks. In fact the bankrupt had made no bid, had received no contract, and there is no competent evidence that any person in association with him had. On the other hand, the bankrupt turned the hose over to secure a bondsman in another matter, and thereafter it was kept secreted from every person, until the respondent, at much expense, succeeded in unearthing it. Even the bankrupt's schedules, filed in proceedings begun May 28, 1900, made no mention of it. The whole transaction was a palpable fraud, by which the bankrupt's creditors may not and should not profit. The hose belongs to the respondent

in law and equity. The trustee was right in pursuing the matter, ascertaining the facts and laying them before the court, but the history revealed demands that the property should remain with the respondent.

MEMORANDUM DECISIONS.

THE BARNSTABLE. (Circuit Court of Appeals. First Circuit. April 22, 1902.) No. 423. Appeal from the District Court of the United States for the District of Massachusetts. John L. Thorndike (Charles T. Russell and Arthur H. Russell, on the brief), for appellant. J. Parker Kirlin, for appellee Northern Transport, Limited. Eugene P. Carver and Edward E. Blodgett, for appellees A. G. Hall and others. Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This is the same case reported in 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954. In accordance with the order there found on page 473, 181 U. S., page 688, 21 Sup. Ct., 45 L. Ed. 954, the opinion was made a part of the mandate to the district court. Therefore every part of that opinion was conclusive on the district court, and is conclusive on us. After the mandate came down, the Boston Fruit Company undertook in the district court, by a petition, and by an amendment to its answer referred to in 181 U. S. 465, 21 Sup. Ct. 685, 45 L. Ed. 954, to introduce certain new propositions, based on a claim that the Turret Steamshipping Company had in fact secured policies covering some, if not all, of the risks explained in the opinion of the supreme court. The new matter thus offered by it was not accepted by the district court, and the amendment was refused, on the ground that, under the mandate of the supreme court, that court had no power in reference thereto. Thereupon an appeal was taken to us. It is not necessary that we should state at length the new matter which was thus sought to be introduced. We ought to observe, in view of the fact that the decrees of the district court and of this court, which were reversed, by the supreme court, were in favor of the Boston Fruit Company, that it cannot be charged with laches with reference to any matter now pending before us; and therefore, while we are of the opinion that the decree of the district court now appealed from must be affirmed, we rest our conclusion on the single proposition that, according to our understanding of the mandate from the supreme court, no substantial question was reserved therein except as to the effect of some payment that might have been actually made by underwriters with reference to the losses involved in the case. Inasmuch as the new matter now offered by the Boston Fruit Company is substantial, and yet is not based on any claim of any payment actually made by underwriters, we conceive that the mandate precludes its consideration, and for that reason the decree now appealed from must stand. The decree of the district court is affirmed, with interest, and the Northern Transport, Limited, will recover against the Boston Fruit Company the costs of this appeal.

BIERING v. SONNENTHAL. (Circuit Court of Appeals, Fifth Circuit. April 22, 1902.) No. 1,119. Appeal from the District Court of the United States for the Eastern District of Texas. Wm. T. Austin, for appellant. Maco Stewart, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The motion of appellant to set aside the sales made in the bankruptcy of E. J. Bierung does not state sufficient facts to warrant the

vacation of said sales, in that it is not alleged that there was any fraud, accident, or mistake, nor sufficiently alleged that the property was sold at such an inferior price that injury to the estate of the bankrupt or to the creditors can be predicated thereon. The demurrer to said motion was properly sustained, and the decree appealed from is affirmed.

CENTRAL OHIO R. CO. et al. v. MAHONEY. (Circuit Court of Appeals, Sixth Circuit. April 8, 1902.) No. 765. In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio. For former opinion, see 114 Fed. 732. J. H. Collins, for plaintiff in error. Emmett Tompkins and Thomas Steele, for defendant in error. Before LURTON and DAY, Circuit Judges, and CLARK, District Judge.

PER CURIAM. There arises in this case a question of law upon which this court desires the instruction of the supreme court for its proper decision. It is therefore ordered that the statement and question here following be certified to the supreme court, as provided by the sixth section of the act of March 3, 1891: The plaintiff, a citizen of the state of Ohio, brought suit in a common pleas court of the state of Ohio to recover damages for a personal injury sustained by him against the Central Ohio Railroad Company, as reorganized, a corporation of the state of Ohio, and against John K. Cowen and Oscar G. Murrey, as receivers for the Baltimore & Ohio Railroad Company, a corporation of the state of Maryland. The petition averred that the injuries suffered by him were sustained in consequence of his wrongful and violent ejection from a moving passenger train, which he had boarded for the purpose of becoming a passenger thereon. The petition avers that the railroad owned by the defendant the Central Ohio Railroad Company had been long under a lease to the Baltimore & Ohio Railroad Company; that said Cowen and Murrey had been appointed receivers of the property of the Baltimore & Ohio Railroad Company and as such placed in possession of same, including its leasehold interest in said Central Ohio Railroad Company, under a decree of the United States circuit court. The train from which the plaintiff was so ejected was a train operated by the said receivers on the railroad of the said Central Ohio Railroad Company. The joint liability of the said Central Ohio Railroad Company, as reorganized, and the said receivers, to the plaintiff, is based upon section 3305 of the Revised Statutes of Ohio, which provides that "the company to whom any railroad is leased if a corporation of any other state, shall be subject to all the restrictions, disabilities, and duties of a railroad company incorporated within this state; and notwithstanding such lease the corporation of this state, lessor therein, shall remain liable as if it operated the road itself, and both the lessor and lessee shall be jointly liable upon all rights of action accruing to any person for any negligence or default growing out of the operation and maintenance of such railroad, or in anywise connected therewith, and may be jointly sued in any of the courts of this state of proper jurisdiction, and prosecuted to final judgment therein as in other cases of joint liability; and provided that service may be had upon said companies, or either of them, by the service of process upon any officer or agent of either of said companies." The ad damnum clause of the petition laid the damage sustained at \$20,000. Upon the petition of the said receivers alone, the said suit was seasonably removed into the circuit court of the United States for the proper district. The petition, as ground for removal, averred that "this cause is a suit of a civil nature, between Daniel J. Mahoney, as plaintiff, who was at the time of the institution of this suit, and still is, a citizen of the state of Ohio, residing at —, and your petitioners, John K. Cowen and Oscar G. Murrey, as receivers of the Baltimore & Ohio Railroad Company, and the Central Ohio Railroad Company, as reorganized, as defendants, but the defendant herein, the Central Ohio Railroad Company, as reorganized, has no interest or liability jointly with the said receivers of the Baltimore & Ohio Railroad Company; that the said John K. Cowen and Oscar G. Murrey, as such receivers, were at the time of the institution of this suit, and still are, citizens

of the state of Maryland, residing at Baltimore city, in said state." The Central Ohio Railroad Company, as reorganized, did not join in this petition for removal, and there was no averment or facts showing any separable controversy wholly between the said receivers and the said plaintiff; but, upon the contrary, the suit was against the Central Ohio Railroad Company and the receivers as jointly liable for the tort by which the plaintiff had suffered. The defendant in error entered a motion in the circuit court to remove the cause to the circuit court for want of jurisdiction, but this motion was never acted upon. There was a jury, and verdict, and a joint judgment against the said Central Ohio Railroad Company, as reorganized, and the said Cowen and Murrey, as receivers of the Baltimore & Ohio Railroad Company for \$4,500. Errors were assigned going to the merits of the case, but none in respect to the jurisdiction of the court. Upon the argument of the case in this court the plaintiffs in error raised the point that the suit had been improperly removed from the state court, and moved this court to reverse the judgment and direct that the cause be remanded to the state court, as improperly removed. The court, entertaining grave doubt as to the jurisdiction of the circuit court, certifies to the supreme court for its instruction this question: "(1) Is a suit removable from a state court to a United States court upon the petition of the receivers alone, when the action is against receivers, appointed by a United States court and also against a corporation created under the laws of the state of which the plaintiff is a citizen, when the action is a single action against both defendants for a joint tort."

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. GIBSON. (Circuit Court of Appeals, Fifth Circuit. April 22, 1902.) No. 1,080. In Error to the Circuit Court of the United States for the Southern District of Mississippi. W. E. Baskin, for plaintiff in error. W. N. Etheridge and John W. Fewell for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. There was no error in sustaining the demurrer of the plaintiff to the defendant's second plea, in which said plea the defendant set up that at the time of the alleged injury complained of in the declaration it had been and was enjoined from operating and repairing its plant and poles and wires, because said plea does not aver that at the time of the alleged injury the defendant was not in fact operating and managing said plant, poles, and wires. We find no error in the rulings of the court, in the admissions of evidence, nor in the instructions to the jury as to the measure of damages. The judgment is affirmed.

ERIE R. CO. v. KEYSTONE COAL CO. (Circuit Court of Appeals, Third Circuit. March 4, 1902.) No. 3. Appeal from the District Court of the United States for the Western District of Pennsylvania. E. N. Willard, for appellant. S. J. Strauss, for appellee. Case dismissed, at cost of appellant.

FRICK CO. v. BLISS. (Circuit Court of Appeals, Third Circuit. March 4, 1902.) No. 1. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. J. H. Whitaker, for appellant. Case dismissed, at cost of appellant.

HASTORF v. HUDSON RIVER STONE SUPPLY CO. et al. (Circuit Court of Appeals, Second Circuit. April 22, 1902.) No. 141. Appeal from the District Court of the United States for the Southern District of New

York. L. B. Adams, for appellant. A. J. Rose, for appellees. Before WAL-LACE and LACOMBE, Circuit Judges.

PER CURIAM. The decree in this case is affirmed upon the opinion of the district judge (110 Fed. 669) who decided the case in the court below. We fully agree with his findings of fact and law as therein expressed, and are satisfied that the decree was in all respects correct. Affirmed, with costs.

In re MAINS. (Circuit Court of Appeals, Ninth Circuit. March 7, 1902.) No. 804. Application for writ of habeas corpus was docketed on the 7th day of March, 1902. Application denied.

In re MAINS. (Circuit Court of Appeals, Ninth Circuit. March 12, 1902.) No. 805. Application for a writ of certiorari and habeas corpus was docketed on the 10th day of March, 1902. Application denied.

MATTHEWS v. McCALLUM et al. (Circuit Court of Appeals. Third Circuit. March 4, 1902.) No. 5. Appeal from the District Court of the United States for the Eastern District of Pennsylvania. Alex Simpson, Jr., for appellant. J. G. Johnson, for appellees. Case dismissed, at cost of appellant.

MOORE, Collector of Internal Revenue, v. RUCKGAHER. (Circuit Court of Appeals, Second Circuit. April 25, 1902.) No. 143. In Error to the Circuit Court of the United States for the Southern District of New York. For opinion below, see 104 Fed. 947. George H. Pettitt, U. S. Atty., for plaintiff in error. A. E. Henrichs, for defendant in error. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Judgment of circuit court affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. EWING et al. (Circuit Court of Appeals. Fifth Circuit. February 25, 1902.) No. 1,080. In Error to the Circuit Court of the United States for the Northern District of Texas. John L. Henry (W. T. Henry, on the brief), for plaintiff in error. Frank P. Poston, for defendant in error Southern Ry. Co. Rhodes S. Baker, W. A. Rhea, Jr., and George H. Plowman, for defendants in error Ewing. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the judges are of opinion that there is no reversible error in the record, and the judgment of the circuit court is therefore affirmed.

PARDEE, Circuit Judge (dissenting). This case shows that prior to removal and after taking nonsuit in the state court, the plaintiffs below so amended their petition as to conform strictly to the contract of transportation as embodied in the ticket signed by Mrs. L. S. Ewing, changing their declaration from one against all the defendants upon a joint obligation to transport over the entire distance from Dallas, Texas, to La Grange, Tennessee, to a declaration against each of the defendants separately for a violation of contract of transportation over the respective lines of each.

It seems to be settled general law that, unless a carrier whose line constitutes a portion of the entire route contracts otherwise, its obligation for transportation and its liability for damage extends only to its own line. Myrick v. Railroad Co., 107 U. S. 102, 107, 1 Sup. Ct. 425, 27 L. Ed. 325; Railroad Co. v. Jones, 155 U. S. 839, 15 Sup. Ct. 136, 39 L. Ed. 176. This rule has been

recognized and declared in the supreme court of Texas in *McCarn v. Railway Co.*, 84 Tex. 352, 19 S. W. 547, 16 L. R. A. 80, 31 Am. St. Rep. 51; *Railway Co. v. Looney*, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. Rep. 787.

Therefore, in my opinion, the court below committed reversible error in overruling the exception of the St. Louis, Iron Mountain & Southern Railway Company to the fourth original petition of the plaintiff, which excepted to the said petition on account of a misjoinder of parties defendant and causes of action apparent upon the face thereof; and the court below also committed reversible error in instructing the jury over the objections of the plaintiff in error that the plaintiff below was a passenger on the line of the St. Louis, Iron Mountain & Southern Railway Company from the time she entered its custody at Fair Oaks until she was delivered by it to the Southern Railway Company at Memphis. This instruction gives the jury to understand that the St. Louis, Iron Mountain & Southern Railway Company was under an obligation to deliver the plaintiff below to the Southern Railway Company at Memphis, whereas the real contract between the parties sued on was to deliver the plaintiff at Memphis. This error becomes particularly important when it is considered that most of the damages suffered by the plaintiff were after the delivery at Memphis and before the plaintiff actually entered in the cars of the Southern Railway.

This statement sufficiently indicates the grounds why I cannot agree to the affirmance of the judgment below.

BROOKFIELD et al. v. HECKER et al. (Circuit Court, S. D. New York. February 17, 1902.) Motion for preliminary injunction. William V. Rowe, for the motion. Hamilton Wallis, opposed.

LACOMBE, Circuit Judge. The court, on the argument, gathered the impression that, as to the use of the trade-name "Can't be Beat," defendants conceded that they had no right to use it and agreed to desist. As to all other relief now asked for, application for injunction in advance of final hearing must be denied.

CORTELYOU et al. v. LOWE et al. (Circuit Court, S. D. New York. February 6, 1902.) In Equity. Samuel Owen Edmonds, for plaintiffs. Joab H. Banton, for defendants.

WHEELER, District Judge. This demurrer to the bill cannot be sustained without disregarding the decision of Judge Thomas granting a preliminary injunction thereon, and that of the circuit court of appeals affirming the same. 49 C. C. A. 871, 111 Fed. 1005. Demurrer overruled; defendants to answer order by March rule day.

GEORGE FROST CO. v. FRANKENSTEIN et al. (Circuit Court, S. D. New York. February 17, 1902.) A. D. Salinger and Charles Neave, for the motion. Edmund Wetmore, opposed.

LACOMBE, Circuit Judge. The defendants have satisfactorily explained the presence of the patent mark on the metal work of some of their goods. Having brought all of these into court, the bits of metal may be removed from the supporters and kept in the clerk's office, to be disposed of at final hearing. Following Judge Cox's decision (112 Fed. 1009), preliminary injunction may issue.

GEORGE FROST CO. v. STEIN et al. (Circuit Court, S. D. New York. February 17, 1902.) A. D. Salinger and Charles Neave, for the motion. Edmund Wetmore, opposed.

LACOMBE, Circuit Judge. Preliminary injunction may issue, following decision of Judge Cox. 112 Fed. 1009.

GILLESPIE BROS. v. UNITED STATES. (Circuit Court, S. D. New York. February 3, 1902.) No. 2,847. Appeal by the importers from a decision of the board of general appraisers, which sustained the assessment of duty by the collector of customs upon the merchandise in question. W. Wickham Smith, for importers. D. Frank Lloyd, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question comprises certain shooks imported into the port of New York, and claimed to be free of duty under the provisions of paragraph 463 of the act of 1897. The board of general appraisers held that the shooks were dutiable, on the ground that the treasury regulations had not been complied with. Subsequently, however, under order of court, evidence was introduced by the importers, showing that they had complied in every essential particular with the regulations of the treasury relating to such matters, but that this evidence had not been presented to the board when it made its original finding. The decision of the board of general appraisers is reversed.

ITHACA WALL PAPER MILLS v. POTTER WALL PAPER MILLS. (Circuit Court, S. D. New York. April 30, 1902.) Walter D. Edmunds, for the motion. William W. Ewing, opposed.

LACOMBE, Circuit Judge. Complainant may take a preliminary injunction, as prayed, against paper of the patterns originally offered for sale,—side wall, ceiling, and border. As to the substituted side wall paper, the question of infringement is reserved for final hearing.

LAMB v. MUTUAL RESERVE FUND ASS'N. (Circuit Court. E. D. Pennsylvania. May 8, 1902.) No. 53. George Thorn Hunsicker, for plaintiff. John G. Johnson, for defendant.

DALLAS, Circuit Judge. If the policies to which this bill of complaint relates are in force, as is alleged, I perceive no reason for supposing that they might not be adjudged to be so, and any sums due upon them be recovered, in a common-law action; and the argument which has been submitted on behalf of the complainant, apparently on the assumption that this is a suit for the reformation of a contract, is without pertinence. The bill contains no specific prayer for reformation of a contract, and if such relief should in any case be granted upon a prayer for general relief, which is at least doubtful, it could not be granted in this instance, because the case stated in the bill would not justify it. Story, Eq. 42; Fulton v. Colwell, 50 C. C. A. 537, 112 Fed. 831; Baldwin v. Fence Co. (C. C.) 67 Fed. 858. The defendant's demurrer is allowed, and the bill of complaint is dismissed, with costs.

MARVEL CO. v. PEARL et al. (Circuit Court, S. D. New York. March 15, 1902.) Bryan & Edwards, for the motion. Henry B. Brownell, opposed.

LACOMBE, Circuit Judge. The injunction heretofore granted in this action has been disobeyed, but a sufficient punishment for the defendants will be a denial of the motion to withdraw general appearance.

MIERS v. COLUMBIA MUT. BUILDING & LOAN ASS'N. (Circuit Court. S. D. New York. April 29, 1902.) Application for Decree and Appointment of Receiver. Wm. H. Russell, for the motion. F. J. Molssen, opposed.

LACOMBE, Circuit Judge. That this court has jurisdiction to marshal the assets and administer the estate of this insolvent corporation, when requi-

site diversity of citizenship exists, is clear. Inasmuch as the answer admits all the allegations of the complaint, and no opposition is suggested, save from two stockholders, who have given notice of withdrawal, a decree will be entered in the usual form, appointing John Hanson Kennard, Esq., and John J. Townsend, Esq., receivers of the estate of defendant, with instructions to proceed to marshal the assets, pay the creditors, and administer the same. Intervention on the part of any stockholders seems unnecessary; but notice of the investigation and passing of receivers' accounts must be given to all counsel who appeared on the hearing. Arthur H. Masten, Esq., one of the standing masters of this court, is designated to take testimony and report as to any disputed claims, and as to said receivers' accounts, when the same may be presented.

MULLER v. HAAS et al. (Circuit Court, S. D. New York. April 8, 1902.) Motion for Preliminary Injunction. Arthur v. Briesen, for the motion. Allan D. Kenyon, opposed.

LACOMBE, Circuit Judge. Conceding that the additional prior patents introduced in evidence in this case make it necessary to restrict the patent closely to the details of cut shown in the specifications, nevertheless the first claim seems to be infringed. Whatever may be the patterns according to which defendants generally make riding habits, the particular habit produced here, when taken apart, shows so close a resemblance to the parts A and D of the patent as to warrant issue of preliminary injunction.

PAYNE v. L. H. PARKE & CO. (Circuit Court, E. D. Pennsylvania. May 6, 1902.) No. 60. C. H. Edmunds and John Sparhawk, Jr., for plaintiff. Samuel M. Clement, Jr., and P. F. Rothermel, Jr., for defendant.

DALLAS, Circuit Judge. The only controversy in this case was upon a question of fact, as to which the evidence was conflicting. It was therefore rightly submitted to the jury. I do not think that the communication in writing which the jurors made to the court disclosed that they failed to consider any part of the evidence, and it is certain that both in the general charge and by the reply which was made to that communication they were distinctly instructed that it was their duty to consider the whole of it. The defendant's rule for new trial is discharged.

RICORDI et al. v. JOHN CHURCH CO. et al. (Circuit Court, S. D. New York. April 8, 1902.) Motion for Preliminary Injunction. Irving Dittenhoefer, for the motion. Bryan & Edwards, opposed.

LACOMBE, Circuit Judge. I cannot see that the law as to jurisdiction is any better settled than it was when this court decided National Button Works v. Wade (C. C.) 72 Fed. 298. Whatever qualification of the broad statements of the opinion in Re Hohorst, 150 U. S. 659, 14 Sup. Ct. 221, 37 L. Ed. 1211, was supposed to be found in Railroad Co. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, cannot any longer be accepted as settled, since in re Keasbey & Mattison Co., 160 U. S. 229, 16 Sup. Ct. 273, 40 L. Ed. 402. Within the language of the Hohorst opinion, this court has jurisdiction. Motion for preliminary injunction is granted.

ROBERT RECKER CO. v. WINDSOR MUSIC CO. (Circuit Court, S. D. New York. February 24, 1902.) J. Lohman, for the motion. Strahl & Dreyer, opposed.

LACOMBE, Circuit Judge. The bars in defendant's chorus which it is contended were taken from complainant's constitute so small a portion of the complete song and chorus that a preliminary injunction against the entire musical composition of defendant should not be granted, especially in view of the total dissimilarity of words and title and the delay in making this application. What measure of relief, if any, complainant may be entitled to touching these two or three bars may be best determined at final hearing, when the question of originality may be more fully inquired into and the respective equities of the parties better ascertained.

END OF CASES IN VOL. 114

